

THE OBLIGATION TO SET ASIDE  
AND SECURE LANDS FOR THE  
"HALF-BREED" POPULATION  
PURSUANT TO SECTION 31 OF  
THE MANITOBA ACT, 1870

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Paul Luc Chartrand

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## ABSTRACT

The object of this inquiry is to consider the nature and the scope of the governmental obligations to set apart land for the "Half-Breed" people in Manitoba pursuant to s.31 of the Manitoba Act, 1870.

The ambit of the obligation is described by examining, not only the text of s.31, but also the contextual background and the constitutional status of the provision.

The purported implementation of the land distribution scheme is considered for purposes of elaborating the scope of the obligation, by relating the social circumstances of implementation, and the social effects of particular constructions, to the earlier observations made respecting the construction of the text.

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I dedicate this work à mon défunt père,  
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## I. INTRODUCTION AND INTERPRETIVE PRINCIPLES

### A. OBJECTS AND SIGNIFICANCE OF THIS INQUIRY

The object of this inquiry is to consider the nature and scope of the governmental obligations to set apart lands for the "Half-Breed"<sup>1</sup> people in Manitoba pursuant to s. 31 of the Manitoba Act, 1870<sup>2</sup>:

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

Since s. 31 imposes certain obligations on the government; it also confers a corresponding right on the beneficiaries.<sup>3</sup> In addition to the positive obligations of government required by s. 31, it also imposes a negative duty on everyone not to infringe the rights conferred by the section.<sup>4</sup> Section 31 is part of the Constitution, and

the rights it confers are fundamental rights.<sup>5</sup> Both Parliament and the Legislature have a power to legislate in matters of fundamental rights in the areas of their respective competence,<sup>6</sup> and it is the responsibility of the legislatures to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements.<sup>7</sup>

The declaration in the preamble that the lands are appropriated "for the benefit of the families", and the provision in the enactment for grants to the children of "Half-Breed" heads of families created an ambiguity which lies at the heart of the interpretation of s. 31.

The "Half-Breed" beneficiaries apparently took the view in the early 1870's that the lands granted to the children were for the benefit of the families,<sup>8</sup> whereas the federal government implemented the section by making free, alienable grants of lands to the children only. Perceiving that this manner of dealing with the Indian title of the beneficiaries did not provide any benefit for family members other than the children defined by its implementing legislation, the Dominion enacted supplemental legislation to provide for the extinguishment of the Indian title of the heads of families by a separate issue of land grants and scrip.<sup>9</sup> The striking anomaly of the situation whereby the government of Canada at once recognized a need and a duty to compensate all the members of the "Half-Breed" families for the loss of their aboriginal use and occupancy

of the public lands in the province, and, on the other hand, construed the constitutional provision which entrenched the rights of the "Half-Breed" population to receive compensation for such Indian title as not being applicable to all members of the family groups, is but one aspect of the implementation of s. 31 which raises the need to examine its true construction. The other aspect is the fact that, as the government minister responsible for the enactment of s. 31 admitted in 1885,<sup>10</sup> the implementation of the section did not provide a benefit for the "Half-Breed" people by securing them on a land base in the face of the massive immigration which was anticipated at the enactment of the Act of 1870, but rather, served to promote the economic interests of the immigrant population to the detriment of the "Half-Breed" population.

In 1881 the Province held an inquiry into the alleged abuses surrounding the traffic in the "infant lands", that is, the lands provided for the "Half-Breed" people by s. 31. In his testimony, William Leggo, the Master in Chancery, stated in relation to court practices: "I never suspected for a moment that a system which turned out to be so vicious could possibly exist in any civilised country."<sup>11</sup>

Recent research has indicated that by 1890, virtually all of the claims to the 1.4 million acres of land provided by s. 31 had been disposed of. Nearly 6000 individual patents had been issued but less than 15 per cent of the

patentees emerged as owners of their land once it was granted from the Crown.<sup>12</sup> By 1885 over 80 per cent of the Métif population of the Northwest Territories had come from Manitoba and,

. . . [T]he overwhelming majority-- nearly 1000 families distributed in 22 different settlements -- was from Manitoba, with the largest concentration of migrants at the forks of the Saskatchewan River, at the Métis colony of St. Laurent and at the native English community of Prince Albert.<sup>13</sup>

It was in this area that the Métif resistance to Canada's encroachment in their land turned to armed conflict and British-Canadian soldiers defeated a handful of Métif patriots at Batoche. According to some historians, the defeat at Batoche marked the end of the Métif nation.<sup>14</sup> To this day the descendants of this historic nation born in what is now western Canada suffer, as a group, a sub-standard existence within the general Canadian population.<sup>15</sup>

In Manitoba the Métif are a people with no reserved land base, scattered in urban centres and villages in which there is nothing to do to earn a living. Seventy-four year old Adelard Belhumeur expressed the feeling of many Manitoba Métif when, in an interview with a national news magazine in 1985, he stated: "A Métis is nothing. He hasn't got a country."<sup>16</sup>

Section 31 was enacted as part of the Act which established the Province of Manitoba; it is part of the.

confederation pact between the people of Red River Colony and Canada, and is declared to be part of the Constitution of Canada.<sup>17</sup> A consideration of the nature and scope of the obligations contained in s. 31, and therefore, of the corresponding rights for those entitled to its benefits, is essential to determine whether there remain outstanding obligations and rights derived from the section. A contribution to that question has historical and contemporary significance. As a historical issue, even a rough sense of justice would awaken a concern whether the obligations to secure and provide land for the "Half-Breed" population had been properly carried out, given the historical and contemporary circumstances related above. As a constitutional issue, all Canadians have an interest in the protection of their rights by the judicial enforcement of governmental obligations. Recent research undertaken by the Manitoba Métis Federation has concluded that federal enactments in purported implementation of section 31 were constitutionally invalid because they were alterations to the Act.<sup>18</sup> Other research has concluded that "provincial legislation and politics played a major role in both the timing and the manner in which the Métis lost their land."<sup>19</sup>

The legal significance of the question whether the government obligations to set apart lands for the "Half-Breed" people remain outstanding was recently highlighted

in the Supreme Court of Canada in a case which dealt with the role of the courts in enforcing governmental obligations that are set out in the Manitoba Act.<sup>20</sup> At issue was s. 23 of the Act which required that the Acts of the Legislature be printed and published in both French and English. The Court held that s. 23 established a constitutional duty on the Manitoba Legislature with respect to the manner and form of enactment of its legislation. This duty, said the Court, "protects the substantive rights of all Manitobans to equal access to the law in either the French or the English language."<sup>21</sup> Describing s. 23 as "the culmination of many years of co-existence and struggle between the English, the French, and the Métis in Red River Colony"<sup>22</sup>, the Court went on to comment about its role in the protection of rights that flow from the Act:

The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution. We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation.<sup>23</sup>

. . . .

The constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the Constitution Act, 1982 declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws



of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.<sup>24</sup>

The Court ordered compliance with the Constitution by requiring the government to conform with the mandatory provision of s. 23.<sup>25</sup> If, in the case of s. 23, the Court was prepared to enforce a duty of the Legislature respecting the manner and form of enactment of its legislation for the purpose of protecting the rights of all citizens to French and English texts, a fortiori the Court will be prepared to perform its duty to protect any outstanding, enforceable land rights that may exist, by requiring the executive branch of government to perform the obligations it undertook as the basis for the making of part of the Confederation pact. Furthermore, it was recently stated in the Supreme Court of Canada that the Parliament has a constitutional duty to safeguard interests protected by the Constitution:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements . . . .<sup>26</sup>

On this basis, Parliament and the Legislature had a constitutional obligation to act for the protection of the rights granted by s. 31.

An amendment to the Constitution in 1982 may have doubly entrenched the provisions of s. 31 of the Act of 1870. The original s. 35 of the Constitution Act, 1982

provided:

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.<sup>27</sup>

A 1984 amendment to s. 35 added subs. (3):

For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.<sup>28</sup>

The history of the Act of 1870 reveals that s. 31 was introduced as a result of land claims that were pressed upon the representatives of Canada by Abbé Ritchot who negotiated the terms of the Act as the special representative of the Métif people.<sup>29</sup> On that basis the rights contained in s. 31 are rights that existed in 1882, and they are rights derived from a land claims agreement.

It is notorious that s. 37 of the Constitution Act, 1982 failed to produce a substantive constitutional provision for aboriginal rights. If there are to be further endeavours to entrench land rights for Aboriginal peoples in the Constitution, it is significant to consider whether s. 31, in the Act of 1870, already contains outstanding obligations respecting the provision of lands for the Métis,<sup>30</sup> or whether demands for a land base need to be based on considerations wholly external to the existing Constitution. This is part of the broader issue of where the Native peoples of Canada fit within the various schemes

of things in this country.

A recent study which addressed this issue commented:

. . . [T]he native peoples simply do not fit. Attempts to make them fit have failed constantly but still they continue. An indisputable fact of Canadian life is that about one citizen in twenty has almost no place in that life. What is even more tragic is that the native peoples are the direct descendants of those who settled the land ages before the "ethnic" groups and even the two "charter" groups arrived. They are at the same time Canada's original people and her national shame, one that has not gone unnoticed in the court of world opinion.<sup>31</sup>

The principle that the terms of Canada's Constitution are to be interpreted as a pact between two "founding peoples" has been judicially accepted.<sup>32</sup> The outstanding question is whether the courts will be willing to extend the application of that principle to the pact of the Métis with Canada in the interpretation of the terms of the Manitoba Act, 1870. The Supreme Court of Canada opened the door to that possibility when it said recently,

. . . [S]ection 23 of the Manitoba Act, 1870 was the culmination of many years of co-existence and struggle between the English, the French, and the Métis in Red River Colony  
 . . . .<sup>33</sup>

The interpretation of s. 31 did not attract much attention until recently. Canada purported to repeal the section in its 1886 consolidation of federal statutes<sup>34</sup> but did so only "so far as the same are within the legislative authority of the Parliament of Canada".<sup>35</sup> The 1886 statute further provided that the "repeal" shall not affect any

right existing at the time of the repeal and that any such right,

. . . shall remain and continue as if no such repeal had taken place, and . . . may . . . be continued, prosecuted, enforced and proceeded with . . . as if no such repeal had taken place.<sup>36</sup>

Consequently, allotments were made to individuals, purportedly under a s. 31 entitlement, after 1886.<sup>37</sup>

In 1930, by the Natural Resources Transfer Agreement, which was entrenched in the Constitution Act, 1930, Canada acted to modify the provisions of the Manitoba Act, 1870 and transferred the entire interest of the Crown in the public lands to the Province of Manitoba, as well as the obligations to perform every obligation of Canada arising by virtue of any statute or order or regulation in respect of the public lands.<sup>38</sup>

In recent years, historians have devoted attention to various aspects of the dispossession of the "Métis"<sup>39</sup> of Manitoba.<sup>40</sup> No examination has been made, however, of the text and background of s. 31 for the purpose of attempting to discern its true intention. The general language of s. 31 does not permit, by itself, an elaboration of the required mode of implementation. It appears very much like framework legislation which grants large discretion to the government respecting proper performance. If s. 31, by its inclusion in the Manitoba Act, receives the constitutional protection and status of an entrenched provision, however,

it may be separated in a most significant way from ordinary enabling legislation, the implementation of which is subject only to the principles of administrative law.<sup>41</sup> As previously noted, recent cases show that positive obligations of government in the Constitution are judicially enforceable.<sup>42</sup>

Section 31 requires positive governmental action for implementation, and may be subject to judicial enforcement if it is shown that the performance required by its provisions is outstanding. The necessary first step is elaboration of the requirements of the section. The requirements may be properly elaborated by reference to the fictitious "intention of Parliament", that is, a revelation of the constitutional purposes of s. 31. These purposes may be found by reference not only to the text but to the historical background of the Act, including statutes in pari materia, and to the social context in which s. 31 was meant to operate. The purposes thus revealed should determine what comprises sufficient implementation for the purpose of meeting the objects of Parliament in enacting s. 31.

It is beyond the scope of this task to consider the law applicable to the judicial enforcement of constitutional provisions, or the law applicable to judicial control respecting the exercise of government (Crown) discretion. Furthermore, it is not possible to

include an analysis of the nature of the special (perhaps fiduciary) obligation which might exist between the Crown and the intended beneficiaries of s. 31.<sup>43</sup> The intended contribution of this work is to elaborate the objects of s. 31 against which the purported implementation might be tested for compliance. Consequently, a section is included which considers, by way of a general overview, the purported implementation of s. 31. If words have no inherent meaning, then their potential meaning must be assessed in the light of social facts, and it is necessary to elaborate enough of both the social background and the purported implementation to present a coherent view of the scheme designed by Parliament. Because there is no useful case law respecting the interpretation of s. 31,<sup>44</sup> its construction must proceed as a matter of first impression; it must seek to argue the applicability of general objects to the specific details necessary to implement the scheme revealed by the text. These limitations demand that conclusions be made more or less tentatively. Finally, given the great public interest in making a fair and appropriate determination of the place of the rights of Aboriginal peoples in the Constitution of Canada, emphasis will be placed on arguments which favour the position of the "Half-Breed" people the subject of s. 31, without any conscious attempt to ignore the presence and the weight of contrary arguments.

It will be argued that s. 31 provided for a land settlement scheme for the "Half-Breed" population on the basis of the model in the Indian settlement legislation enacted by the colonies and Canada from the mid-nineteenth century until the Dominion legislation of 1869. The Crown, according to this established legislative policy, undertook responsibility to compensate Aboriginal peoples in respect of the loss of their use and occupancy of the public lands desired by the Crown for settlement purposes. As a part of its responsibility, the Crown undertook to locate the group on lands set aside for their exclusive use, and there to secure them from the designs of speculative settlers by preventing alienations. The policy included supervised schemes designed to win individuals over to the settler life style, gradually, over generations, with ultimate free grants of lands to individuals considered by the Crown to be in a position to protect their interests. The policy had its roots in the long history of relationships between the Crown and Aboriginal peoples, and the Crown's intention to serve the public interest by preventing the frauds and abuses which attended the availability of the lands held by Aboriginal peoples in the public market. Section 31 was a "fast-track" version of the individual enfranchisement provisions of Indian legislation. It was enacted as a response to the unique circumstances of an Aboriginal people which, although it still made extensive, group use

of the public lands, was also partially accommodated, in its life-style, to the ways of the settler people from whom the "Half-Breed" population was partly descended. Those of Indian descent who chose not to accept the imposition of the reserve system implemented by the treaties were granted compensation to finally settle any possible claims to Indian title in order to clear the Crown title to the public lands and to serve the purposes of the Dominion.

## B. ORGANIZATION

The remaining portion of this introductory section will serve to review certain interpretive principles which guide the exegesis of s. 31 throughout this work.

Part II will consider the constitutional status of s. 31 and the powers of implementation for the section. It is important to consider the distinction between powers of amendment and implementation, and to address the significance of the textual requirement that implementation be regulated by the Executive. The history of the purported implementation shows that both statutes and Orders in Council were made, and the question arises whether these enactments complied with the constitutional nature of s. 31.

Part III elaborates enough of the historical background, including statutes in pari materia, and the social context in which s. 31 was meant to operate, to



permit a discernment of the objects of s. 31 which are to guide its construction.

Part IV addresses the construction of s. 31. It elaborates the ambit of governmental obligations as revealed by the text in light of the purposes discerned from Part III.

Part V considers the government's attempts to implement s. 31 and measures that performance against the ambit described in the previous part.

The last part deals with observations and tentative conclusions drawn from the study.

## C. INTERPRETIVE PRINCIPLES

### 1. Introduction

When the Canadian Parliament drafted the Act which was to constitute the new Province of Manitoba, it arrogated to its governmental authorities the control and jurisdiction of the public lands in the Province. This arrangement, which was designed to further the expansionary ambitions of the Dominion, had to be constrained to meet the obligations of Canada to respect the various existing interests in the lands. Clause 14 of the agreement under which Canada undertook jurisdiction over the territories out of which the province was formed already provided for Canada's obligation to deal with the land claims of the Indian peoples, and s. 32 of the Act of 1870 provided for

the rights of private individuals derived from Crown grant under the regime of the Hudson's Bay Company.<sup>45</sup> Section 31 provided for an appropriation of 1.4 million acres of public lands for the benefit of the families of the "Half-Breed" residents in Manitoba in 1870. The appropriation was declared to be "towards the extinguishment of the Indian title to the lands in the Province." Towards that object, s. 31 enacted a scheme of land distribution among the "Half-Breed" families which contemplated eventual grants of lands conditional upon federal regulations designed to promote "settlement" of the families the beneficiaries of the appropriation.

The text of s. 31 is untidy and ambiguous; it intended an equitable response to the unique circumstances of "indigenous settlers"<sup>46</sup> who were able to assert certain demands for the protection of their interests in the Union with Canada.<sup>47</sup> If the ambiguity of the section is admitted,<sup>48</sup> it is appropriate to begin with a general consideration of the approaches the courts have developed to guide the exegesis of ambiguous provisions in a statute which establishes the constitutional status of a new Canadian political entity, in the light of the historical background of the enactment of s. 31.

## 2. Interpretation of Rights in the Constitution

The Act of 1870 is part of the Constitution of

Canada.<sup>49</sup> Any terms which are part of the Constitution of Canada demand a broad, liberal interpretation.

That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words.<sup>50</sup>

Similarly;

There are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony.<sup>51</sup>

and,

No enactment is ever passed for the sake of its details; it is passed in an attempt to realize a social purpose.<sup>52</sup>

Recent Supreme Court decisions have established that the terms of the Constitution are to be interpreted in the light of its purposes or objects.<sup>53</sup> The subject matter of this analysis concerns certain rights which are provisions of the Constitution. The recent enactment of the Charter of Rights and Freedoms<sup>54</sup> has provided the Supreme Court with the opportunity to expound on the interpretive approach that it considers appropriate in the case of rights found in the Constitution:

. . . [A] constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character", and that as such, a constitution incorporating a Bill of Rights calls for:

. . . [A] general interpretation avoiding

what has been called "the austerity of tabulated legalism, suitable to give individuals the full measure of the fundamental rights and freedoms referred to.

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction . . . .<sup>55</sup>

The "Half-Breed" rights, the subject of this inquiry, depend upon the performance of certain duties on the part of government. Recently the Supreme Court dealt with positive obligations of the Legislature arising from s. 23 of the Act of 1870. The Court considered the purpose of the enactment and was eloquent in describing the judicial duty to protect the rights correlative to the duties:

Section 23 of the Manitoba Act, 1870 is a specific manifestation of the general right of Franco-Manitobans to use their own language . . . .

The constitutional entrenchment of a duty on the Manitoba Legislature . . . confers upon the judiciary the responsibility of protecting the correlative language rights of all Manitobans including the Franco-Manitoban minority. The judiciary is the institution charged with the duty of ensuring that the government complies with the Constitution.<sup>56</sup>

The Court performed this duty not only by enforcing the performance of the duty but also by adopting the well-established approach of a broad, purposive analysis. In deciding that constitutional provisions did not require the adoption of a particular general doctrine of statutory interpretation, the Court refused to be swayed by the

argument that the Court's preferred interpretation should be avoided because it might lead to inconvenience or even chaos.<sup>57</sup>

In deciding upon the particular object or purpose of a constitutional provision, the Court has found it necessary first, to decide upon the nature of the interests to be protected.<sup>58</sup>

There are few positive obligations of government in the Constitution. The terms of s. 31 contain such obligations. These obligations protect corresponding rights of citizens. The Charter decisions show that the constitutional protection of citizens' rights that depend on the performance of governmental obligations require a broad, liberal interpretation which seeks to promote the social purpose of the enactment. In this sense, s. 31 can be likened to a "Half-Breed" Charter of Rights. The proper approach to its interpretation is to construe the words in light of the purposes revealed by an examination of the nature of the interests of the "Half-Breed" people the enactments were meant to protect.

Whyte and Lederman<sup>59</sup> have argued that the "large, liberal and comprehensive" approach to interpretation of the Constitution entails two intellectual processes:

First,

The process . . . ought to include a search for the basic principles, purposes and policies of the constitution.<sup>60</sup>

Second,

. . . the phrase could be thought to suggest that judges in applying the words of the Act ought to measure the understandings and expectations of ordinary people about the current issues and ought to resolve ambiguities in meaning in favour of dominant community values.<sup>61</sup>

Furthermore, the same learned writers contend;

The principles of the constitution have to be discerned from the text as precisely as possible and the proposed interpretation must be measured to ensure that it vindicates, and does not confound, these principles.<sup>62</sup>

This process requires that the proposed interpretation be tested in the factual, social context in which it was meant to operate.<sup>63</sup> In order to assess which of two or more alternative constructions will best carry out "what appears from the general scope of the legislation and the surrounding circumstances" to be the objects of the Act, the Courts have examined the "probable" effect, or hypothetical effects of the alternatives.<sup>64</sup> In this study the true interpretation of the legislation can be tested against the historical effects.

In order to construe the law as enacted by the words of an act, it is necessary to read the words in their proper context, which includes other enacting provisions of the same statute and other statutes in pari materia.<sup>65</sup> It is on this basis that the Indian settlement statutes are relevant<sup>66</sup> but s. 31 is part of the Constitution of Canada, and its provisions have to be read in the context of the

Constitution Acts, including the Constitution Act, 1982.<sup>67</sup>

Section 31 provides for certain rights of the "Half-Breed" people, and its construction can be aided by reference to the provisions of the Act of 1982 which provide for the rights of the Aboriginal peoples of Canada. Section 35 provides:

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

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

Section 35 is an affirmation of the doctrine of Aboriginal or Indian title provided for in s. 31 of the Act of 1870 and must be relevant to the application of established principles respecting its extinguishment, whether or not the Indian title dealt with by the earlier provision remained as an "existing" right on April 17, 1982, or not. Further constitutional recognition of Aboriginal rights is provided by s. 25 of the Act of 1982. That section shields from the effect of the Charter rights, "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."<sup>68</sup> (emphasis added) Even if the rights of the "Half-Breed" people in s. 31 of the Act of 1870 were not in the category of rights referred to in s. 35 of the Act of 1982, they are accorded, by s. 25 of the same Act, a constitutional value greater than the Charter rights. When the objects of s. 31 are

considered in light of the historical background of its enactment, it is observed that they are the same as the objects declared for the protection of the lands of the Indian peoples in the Royal Proclamation of October 7, 1763. On the basis of the interpretive canon expressed as "noscitur a sociis" it is appropriate to include the rights contained in s. 31 in the category of those contemplated by s. 25 of the Act of 1982, because Indian title is synonymous with Aboriginal title and 'title' connotes a right. On this basis, the construction of s. 31 must proceed on a basis which recognizes the high constitutional value placed upon the rights of citizens contained within the section.

In deciding upon the true construction of legislation the courts will have regard to the "public interest"<sup>69</sup> A proper respect for Aboriginal rights to land has long been expressed as being in the public interest, as evidenced by the provisions of the Royal Proclamation of October 7, 1763<sup>70</sup> and the judicial decision of the Supreme Court in Guerin v. R. recently.<sup>71</sup>

The Indian Act, the Constitution, the pre-Confederation laws of the colonies in British North America, and the Royal Proclamation of 1763 all reflect a strong sense of awareness of the community interest in protecting the rights of the native population in those lands to which they had a longstanding connection.

In respect of "Half-Breed" people, the public interest basis for urging land settlement schemes was



clearly expressed in an Order in Council in 1900.

. . . a measure of public policy for the purpose of satisfying a class of the community who have certain aboriginal rights which it is in the general interest that class should recognize as having been properly and fully extinguished.<sup>72</sup>

Section 31, then, must be interpreted so as to promote the constitutional principle which recognizes the community interest basis for the protection of the rights of the Native population in those lands to which they had a long standing connection. This is one of the important principles of the constitution which, on the basis of the analysis of Whyte and Lederman introduced earlier,<sup>73</sup> is discernible in the text of s. 31 (the object declared is the extinguishment of the Indian title) and against which a proposed interpretation must be measured (the land settlement scheme), so that it vindicates, and does not confound, the constitutional principle. The reason is, as recently stated by the Canadian Supreme Court,

The constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental.<sup>74</sup>

### 3. Interpretation as a Political Pact Designed to Protect Local Interests

The annexation of the western territories to Canada had been formally proposed by the Canadian Parliament in a resolution to the British government in 1867.<sup>75</sup> The object.

of the contemplated annexation was expressed to serve the purposes of Canada and Imperial Britain.<sup>76</sup>

That it would promote the prosperity of the Canadian people, and conduce to the advantage of the whole Empire, if the Dominion of Canada . . . were extended westward to the shores of the Pacific Ocean.

In June of 1869, in anticipation of the annexation, Canada had passed An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada<sup>77</sup> which provided for the administration of local government by an official appointed and instructed by the federal government.<sup>78</sup> The local population, led by the Métif and the statesmanship of the young Louis Riel, resisted the initial Canadian attempt to impose its rule upon the Red River population<sup>79</sup> and made known its concerns regarding the protection of local interests from the Dominion's anticipated imperialistic grab.<sup>80</sup> These expressed concerns had to do essentially with two factors: the protection of property rights and the survival of the Métif people in the face of prospects of a massive immigration from Ontario.<sup>81</sup> The history of events of 1869-1870 indicate that the local population forced Canada to shift its purpose in drafting the Manitoba Act, and in particular, s. 31. Section 31 reveals the object of protection for rights of property and cultural survival, and represents the intention of Parliament to provide for local interests as a result of the 1869-1870 Resistance<sup>82</sup>.

Recently the Supreme Court stated that the Manitoba Act was "the culmination of many years of co-existence and struggle between the English, the French, and the Métis in Red River Colony", and acknowledged the attempts of the provisional government to unite the various political segments of the colony.<sup>83</sup>

Since the Temporary Government of Rupert's Land Act, 1869<sup>84</sup> would have left control of the lands and government in the hands of a Lieutenant-Governor and Council appointed by the federal government in Ottawa, the Act of 1870 must be interpreted as a response to local interests. The Act of 1870 was manifestly enacted to secure constitutional protection for the rights of the existing population of Red River in 1870.

A proper interpretation of its terms then, necessarily requires attention to the nature of the particular interests of the local population as expressed by it during the reign of the Provisional Government. This approach is demanded by the terms of the long title of the Act of 1870, which was expressly enacted "to amend (emphasis added) and continue the Act 32 and 33 Victoria, c. 3, and to establish and provide for the Government of the Province of Manitoba.

It is convenient to consider first the matter of rights of property. On the 15th of March, 1870, the Council of the Provisional Government passed this motion:

1st. That we, the representatives of the inhabitants of the North-West consider that the Imperial Government, the Hudson's Bay Company, and the Canadian Government, in stipulating for the transfer of the government to the Dominion Government, without first consulting, or even notifying, the people of such transfer, have entirely ignored our rights as people of the North-West Territory.

2nd. That notwithstanding the insults and sufferings borne by the people of the North-West heretofore; which sufferings they still endure -- the loyalty of the people of the North-West towards the Crown of England remains the same, provided the rights, properties, usages and customs of the people be respected; and we feel assured that as British subjects such rights, properties, usages and customs will undoubtedly be respected.<sup>85</sup>

Among the "peremptory" articles of the delegates'

List of Rights, article 5 provided:

That all properties, rights and privileges enjoyed by the people of this province, up to the date of our entering into the Confederation, be respected . . . .<sup>86</sup>

The language of article 5 was closely reminiscent of the language used by Canada in its solicitation to the British authorities to permit it to take over the area including Red River upon its agreement to "provide that the legal rights of any corporation, company, or individual within the same shall be respected . . . ."<sup>87</sup>

Indian title is a legal right in Canadian law.<sup>88</sup> The interpretation of a statutory provision for Indian title is properly addressed with the approach appropriate for statutes which protect property rights.<sup>89</sup> In interpreting such legislation the courts have always

favoured an interpretation for the citizen: "If an Act give away the property of a subject it ought not to be countenanced."<sup>90</sup> In Entick v. Carrington<sup>91</sup> in 1765 Lord Camden expounded on the community values which this judicial approach to interpretation reflects:

The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.

The principle was recently re-affirmed by Canada's Supreme Court.<sup>92</sup> It is thus in the public interest that the rights of citizens be protected by a judicial approach which construes statutes which protect the rights of citizens in favour of citizens; a fortiori the principle should apply in the case of a protective provision which is not vulnerable to encroachment by legislative action in the same way as common law rights, because it is entrenched in the Constitution.<sup>93</sup>

#### 4. Interpretation to Promote the Survival of a People

As to the concern of the Métif for their survival as a separate people, the historian, W.L. Morton, stated that, in demanding that the North-West should enter into Canada as a province, Louis Riel's

. . . aim was to make such terms with Canada as would enable the people of the North-West to control its local government in

the early days of settlement, and would allow them to possess themselves, as individuals and as a people, enough of the lands of the North-West to survive as a people . . . .<sup>94</sup>

Similarly, in a recent decision on the interpretation of the Manitoba Act it was said that the population of Red River Colony "viewed the prospects of massive immigration from Ontario as a threat to their culture and way of life, indeed to their very survival as a people . . . ."<sup>95</sup> According to these views, the need for a land base was a critical requirement to serve the purpose of promoting the survival of the Métif as a people, and the relation between the two factors must be a factor relevant to the interpretation of the Act's provisions for a land base.

The primordial constitutional principle which must guide constitutional interpretation must be the survival and enhancement of the people for whom the Constitution is drafted; the Constitution is, in Canada, a statement of the will of the people.<sup>96</sup> In the same way that s. 23 of the Manitoba Act has been interpreted for the benefit of all the people of Manitoba because that section was meant to confer a privilege on the entire population<sup>97</sup> s. 31 must be interpreted for the benefit of the particular segment of the population whom it was intended to benefit.

An interpretive approach that takes into consideration a people's right to survival receives support from the precepts of international law. First, it is necessary to accept the characterization of the right of

existence of human groups as a human right.

Human rights have always existed with the human being. They existed independently of, and before, the State . . . .

. . . [P]rovisions of constitutions of some countries characterize fundamental human rights and freedoms as "inalienable", "sacred", "eternal", "inviolable", etc. Therefore, the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance . . . .<sup>98</sup>

Judicially, the following principle of construction has been applied:

. . . [E]very statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law.<sup>99</sup>

The principle may apply only in respect of international obligations that are clearly established.<sup>100</sup> Although the purpose of legislation is characterized at the time of its enactment, the scope of the legislation may be interpreted in accordance with contemporary "appreciations" and "re-assessments."<sup>101</sup> If the above propositions represent the proper approach to the interpretation of the Act of 1870, it is necessary to inquire whether the right of survival of a people was 'established' as an obligation of States in 1870, so that Parliament is to be taken as having intended, so far as the words permit, not to have an application or effect that is inconsistent with the international rule.

Judge Tanaka stated the following about the matter in the International Court of Justice:

The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a state; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element . . .<sup>102</sup>

If human rights exist with humans, and they exist independently of, and before, the State, these rights were "established" in 1870. Principles which assert the right of peoples to continued existence are, according to a ruling of the Court, recognized as binding by "civilized nations", even without any conventional obligation.<sup>103</sup> On this basis, the principle that the Métif people have a human right of continued existence as a people was established in 1870 because it is based on principles which are recognized as binding upon States, even without the establishment of a convention. The principle should be applied to formulate the intention of Parliament regarding the purpose of s. 31 in 1870.

## 5. Relevance of Oral Promises made by Crown Ministers to Red River Delegates

### (a) Principles for the Interpretation of the Rights of Aboriginal People

A number of promises were made to Abbé Ritchot, the



principal negotiator for the local population, and special representative of the Métif, by Crown officials during the course of negotiations leading to the enactment of the Manitoba Act.<sup>104</sup> The issue addressed here is whether the written or oral promises made by Canadian government officials have any relevance for the interpretation of s. 31. It will be submitted that promises which form a part of the agreement reached between Canada and the delegates are relevant on two bases. First, because they were relied upon for acceptance of the Act of 1870 by the population of Red River, and by the Métif in particular, they have the same relevance for interpretation as oral promises have for the interpretation of Indian treaties. Second, any promises by Crown officials which form a part of the agreement are relevant because the Act of 1870 is in its nature a constitutional document which evidences a political pact between the population of Manitoba and the rest of Canada; all portions of that agreement are relevant to the interpretation of the formal document which evidences the broader, political pact.

It is convenient to consider first, the argument that the principles for the interpretation of Indian treaties are relevant. In a letter dated May 23, 1870, George-Etienne Cartier promised the Red River delegates Ritchot and Scott that, in respect to s. 31,

The regulations to be established from time to time by the Governor General in Council, respecting that

reserve, will be of a nature to meet the wishes of the half-breed (sic) residents . . . .<sup>105</sup>

Other promises are recorded concerning the interpretation and application of s. 31.<sup>106</sup>

It appears that the promises of Canada were a factor which led to the acceptance of the Act. The Métif, in reliance on the promises, discontinued their temporary rule over Red River and accepted a public form of government. The Métif had, in 1869, stopped the attempts of Canada to take over Red River.<sup>107</sup> When they were in a position of political strength, the Métif were induced by the government's promises to change their legal position. If this represents the historical facts, the promises of Canada can not be permitted to be ignored to the detriment of the Métif whenever their rights entrenched in the Act are interfered with.<sup>108</sup> The principle advanced is the same as that which has been proposed as the basis for the existence of a general inchoate fiduciary relationship between the Crown and Indian people in respect of all dealings between the two parties.<sup>109</sup> The making of promises by officials involves the honour of the Crown, and a proper interpretive approach requires these promises to be considered.<sup>110</sup> This approach is consistent with a political philosophy which gives the judicial branch a role of supervising the actions of the Crown respecting its obligations to citizens, in contrast to a polity wherein political minorities must have resort to the exercise of

bare political power in seeking redress for the Crown's failure to perform its constitutional obligations. This modern judicial approach was applied in the Manitoba Language Rights Reference.<sup>111</sup>

Indian treaties were entered into for essentially the same purpose as that declared as the object of s. 31, viz., to extinguish the Indian title.<sup>112</sup> The object is to draw parallels between the policy considerations for developing and applying the interpretive approach for Indian treaties and constitutional "treaties" on the one hand, and the Act of 1870, on the other hand. If the policy considerations are the same, justice demands a similar approach to the interpretation of the Manitoba Act provisions.<sup>113</sup>

It is convenient, first, to describe the approach to Indian treaty interpretation and then to consider the background policies upon which it is based. The interpretation of a treaty requires that the court consider evidence of the understanding of the parties to the treaty respecting its terms, which may include oral promises made by representatives of the Crown. Because the honour of the Crown is always involved in approaching the terms of a treaty and no appearance of "sharp dealings" should be sanctioned.<sup>114</sup> The importance of parol or outside evidence as an interpretive aid for treaties was expressed in R. v. Taylor and Williams.<sup>115</sup>

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of

importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of events, new grievances.

It may be noted that MacKinnon, J. considers the approach to be applicable broadly, to Indian or aboriginal rights cases. Section 31 expressly provides for Indian title rights. Further, the learned judge's remarks follow the approach in R. v. Big M Drug Mart<sup>116</sup> whereby the contemporary public interest can properly be considered in determining the scope of past legislation. As to the type of outside evidence relied upon, the courts have frequently referred to the reports of the Commissioners who negotiated the treaties.<sup>117</sup> The journal entries of Abbé Ritchot at the negotiations leading to the enactment of s. 31 would have the same type of interpretive value, as would the evidence given to the Select Committee hearings in 1874.<sup>118</sup>

The surrounding circumstances at the time of the treaty and other historical facts (past or contemporaneous) may be considered in treaty interpretation,<sup>119</sup> as may be the history and oral traditions of the tribes concerned.<sup>120</sup> In Dreaver v. The King<sup>121</sup> the Exchequer Court admitted oral evidence of an observer to the treaty negotiations and signing. Treaties should be interpreted liberally and

ambiguities should be resolved against the drafters and not to the prejudice of the Indian people concerned.<sup>122</sup> In Nowegijick v. R.<sup>123</sup> Dickson, C.J. for the Supreme Court, stated:

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemptions that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.

In Jones v. Meehan it was held that . . . Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.<sup>124</sup>

Here the Court applied the interpretive approach to legislation, as well as treaties. It is worth emphasizing, at this point, the understanding of the "Half-Breed" beneficiaries of s. 31, as expressed by the Chief Justice of the Province of Manitoba, at a government inquiry in 1881:

. . . [F]rom 1870 to 1874 [the average half-breed head of a family in Manitoba] . . . became accustomed to look upon this 1,400,000 acres as "appropriated for the benefit of the families of the half-breed resident" in Manitoba; and that impression still clings to his mind to this day, notwithstanding scrip in lieu of land has been given him . . . you cannot disabuse him of the notion that he, along with his children, has a natural right to share with them in the lands granted to his children. In no other way can I account for

the persistency with which they cling to the idea that the lands granted to the children are "for the benefit of the family".<sup>125</sup>

The policy considerations in the interpretive approach to the treaties has been described as follows:

The special relationship between the Crown and the Indian people -- the Crown gained by providing for the release of the burden of Indian title from its radical title to the land to permit Crown grants for settlement of the country; those who signed the treaties trusted the Crown's representatives and were in a position to place reliance on their promises respecting the operation of the treaty. The Indian people gave up their rights to the land based on this reliance. In these circumstances the solemn promises of the Crown's representatives respecting the operation of the treaty must be upheld and both the treaties and subsequent acts of Parliament which bear upon the question of rights under the treaties must be construed "in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured the Indians and their posterity by treaty."<sup>126</sup>

On the basis that the historical background of s. 31 reveals the same considerations, it is submitted that the approach to the interpretation of treaties and statutes related to Aboriginal rights considered here, are applicable to the interpretation of s. 31.

Section 35 of the Constitution Act, 1982 protects the "Aboriginal and treaty rights" of the Métis. The constitutional definition of 'treaty' in s. 35 need not be limited to "Indian treaties"; subs. (3) provides an expanded definition which includes land claims agreements.

If the term includes the land claims agreement provisions of the Manitoba Act, s. 35 provides another basis for the adoption of the particular approach to construction that has been developed in respect of treaties with other Aboriginal peoples of Canada. The interpretive approaches discussed above are examples of the process of searching for the basic principles, purposes and policies of the constitution.<sup>127</sup>

(b) Approach to the Interpretation of a Political Pact to Join the Canadian Federation

The second argument is that the broad liberal approach for the interpretation of a political pact which forms the basis for agreement to join the Canadian federation is appropriate in the case of s. 31. In this context, the constitutional provisions which evidence the political agreement, have been considered as a political "treaty". At the 1950 Constitutional Conference of Federal and Provincial Governments, Premier Maurice Duplessis of Quebec said the British North America Act did not create rights, but only confirmed and reasserted the rights of the people of Quebec.<sup>128</sup> He viewed the Constitution as a "sacred covenant between two great races."<sup>129</sup>

There are some who, for what seems to us to be excellent reasons, think that the British North America Act is a treaty of union between two great races; others are of the opinion that it is only a law. I firmly believe that Confederation is a treaty of

union between two great races. Irrespective of these differences, the fact remains and cannot be reasonably denied that Confederation is the result of an agreement between four provinces which was ratified by Westminster. Without agreement on the Resolutions there would never have been the Act of Westminster, there would never have been Confederation. The fact is undeniable that the Canadian constitution is founded essentially and fundamentally upon the agreement of the four pioneer provinces. Lord Carnarvon, in the House of the Lords, and Mr. Adderley, in the House of Commons, when introducing the Act at Westminster, declared it to be a treaty of union.

. . . [T]his opinion is not a personal one, it is not only the opinion of the Province of Quebec; it is the considered opinion of very many Canadian and English statesmen and jurists.<sup>130</sup>

Similarly, the terms of the Act of 1870 are a 'treaty' in the sense that they are founded on agreement. Like the Indian treaties, an agreement respecting rights which are expected to endure, is involved. As in the case of the original B.N.A. Act described above, the Parliament at Westminster would have refused to ratify the Act of 1870, as it did in 1871, if the Act had not been accepted by the people of Red River.<sup>131</sup> Similarly, Louis Riel, the president of the Provisional Government in 1869-1870, viewed the outcome of the negotiations between that government's delegates and Canada as a political 'treaty' whose terms bound the parties.<sup>132</sup> The principle appears to be that terms of the Constitution of Canada, when they represent the pact between different peoples for agreeing to unite, are a political 'treaty' whose terms are intended



for the protection of the cultural group or 'people'. The Indian and Inuit nations have been ignored and now seek to "close the circle" of Confederation by a constitutional amendment which defines their place within the Canadian polity.<sup>133</sup> For the Métis, the Act of 1870 stands out as a constitutional 'treaty' whose land provisions are available as the basis for making a place in the scheme of things.

6. A Broad, Liberal Approach that Favours the Beneficiaries

As a final point concerning the approach to the interpretation of s. 31, it is appropriate to emphasize the requirement of a broad, liberal approach that favours the beneficiaries. The terms of the Manitoba Act were arrived at as a result of a political compromise between Canada and the delegates of the Red River population. The terms of the Act must be regarded as intended for the benefit of Canada and Manitoba. Where provisions deal with the particular rights of the "Half-Breed" population, as s. 31 expressly does, then the terms must be regarded, and interpreted, as terms intended for the benefit of the "Half-Breed" people.

The judicial approach that statutes should be expounded liberally for the subject can be traced as far back as 1648.<sup>134</sup> The application of the judicial approach has been described as follows:

In the first place, this is a remedial beneficial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially . . . . This means, of course, not that the true signification of the provision should be strained or exceeded, but it should be construed so as to give the fullest relief which the fair meaning of its language will allow.<sup>135</sup>

It is appropriate to end this consideration of the proper principles of interpretation with a quotation from a man of religion who was not a lawyer but who appreciated the circumstances of the Manitoba Act because he was one of the Red River delegates. In his address to the Assembly of the Provisional Government which succeeded in winning approval for the Act, Father Noël J. Ritchot, stated:

Wherever there is a doubt as to the meaning of the Act in this respect, it is to be interpreted in our favour (Cheers). This is only just, as manifestly, any law of this kind ought to be interpreted in favour of the people for whom it is made.<sup>136</sup>

## ENDNOTES

### CHAPTER I

1. The term "half-breed", without proper capitalization, is used in the nineteenth century legislation. (On proper capitalization in English, see V. Shaffer & H. Shaw, Handbook of English 2d ed., New York: McGraw Hill, 1960, Chapter 21, esp. at 154. Although many people in Canada today happily identify themselves as "Half-Breeds", the term has a definite pejorative connotation, and it is generally avoided in the contemporary literature. Throughout this study, the word 'Métif', which reflects a spelling sometimes used around 1870 and which comes closer than 'Métis' to indicate the pronunciation 'Michif' or 'Michiss' used by the people designated by the term, is used to indicate the "French-Half-Breed" component of the generic term "Half-Breed". The term "Half-Breed" is capitalized and bracketed to indicate its 19th century use and connotation. Occasionally it is necessary to refer to the contemporary connotation of the word 'Metis' (usually pronounced MAY-TEE in deference to the English speakers in Canada) and in such cases the spelling 'Metis' is used. For a discussion of the meaning of the term at different times, see Jennifer S.H. Brown, "Metis" in 2 The Canadian Encyclopedia, Edmonton: Hurtig, 1985 at 1126.
2. The Manitoba Act, S.C. 1870, c. 3 in R.S.C. 1970, App. II, no. 8, 247 at 254-255.
3. Montreal v. Macdonald, [1986] 1 S.C.R. 460 at 486; (1986), 27 D.L.R. (4th) 321 at 340-341; (1986), 67 N.R. 1 at 30 per Beetz, J., 1 S.C.R. 460 at 514; 27 D.L.R. (4th) 321 at 362; 67 N.R. 1 at 65, per Wilson, J. (diss'g).
4. Montreal v. Macdonald, [1986] 1 S.C.R. 460 at 486; (1986), 27 D.L.R. (4th) 321 at 341; (1986), 67 N.R. 1 at 30.
5. Nissan Auto Co. (Can.) Ltd. v. Pelletier (1978), 77 D.L.R. (3rd) 646 (Qué. Sup. Ct.).
6. Protestant School Bd. of Montreal v. Minister of Education (1978), 83 D.L.R. (3d) 645 at 674 (Qué. Sup. Ct.); Nissan Auto Co. (Can.) Ltd. v. Pelletier (1978), 77 D.L.R. (3d) 646 at 664, per Deschênes, C.J.S.C. (Qué. Sup. Ct.).

7. Per curiam in Hunter v. Southam, [1984] 2 S.C.R. 145 at 169, sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 121; (1984), 11 D.L.R. (4th) 641 at 659; [1984] 6 W.W.R. 577 at 597.
8. E.B. Wood, "History of Half-Breed Infants' Claims", Exhibit "A" filed with the Commission to investigate the Administration of Justice in the Province of Manitoba (Wpg., Man., Nov. 9, 1881 -- F. McKenzie and T.A. Bernier, Commissioners): P.A.M. R.G. 7 B1 Box 12, file 3. [hereinafter cited as Wood].
9. An Act respecting the appropriation of certain Dominion Lands in Manitoba, S.C. 1869, c. 20.
10. John A. Macdonald, H. of C. Deb., July 6, 1885, p. 3117.
11. Wood, supra, note 8.
12. D.N. Sprague, "Statement of Facts in the matter of the M.M.F. v. Manitoba", unpublished, 1980 at 30 and Appendix E, item 21. [hereinafter cited as Sprague]
13. P.R. Mailhot & D.N. Sprague, "Persistent Settlers: The Dispersal and Resettlement of the Red River Métis, 1870-1885" (1985), 7 Canadian Ethnic Studies 1 at 7. [hereinafter cited as Mailhot & Sprague]
14. M. Giraud, 2 The Métis in the Canadian West, trans. George Woodcock, Edmonton: U. of Alberta Press, 1986 at Part Six [hereinafter cited as Giraud]. In George Stanley, Louis Riel 5th ed., Toronto: The Ryerson Press, 1963 at 339, Stanley wrote, that as the Regina prison gates closed behind Riel, "they closed, for the last time, on the hopes and aspirations of the New Nation."
15. See the statistical profile in Canada, Perspectives Canada III, Minister of Supply and Services, 1980 at 173-182. That government report observes, "neither native nor non-native society has yet been able to clearly come to grips with what role Canadian natives will occupy in the Canadian mosaic. How this latter question is resolved will greatly influence what measures might be employed to alleviate tensions and imbalances between native and non-native societies," Ibid., at 173.

16. Andrew Nikiforuk, "A people in search of salvation," Maclean's, May 20, 1985, 15.
17. Constitution Act, 1982, s. 52 and Schedule, Item 2.
18. The function of the Manitoba Metis Federation is considered in Joe Sawchuk, The Metis of Manitoba: Reformulation of an Ethnic Identity, Toronto: Peter Martin Associates Ltd., 1975; and by Emile Pelletier, "A glimpse of the Manitoba Metis Federation" in 2 The Other Natives: The Metis, ed. A.S. Lussier & D.B. Sealey, Winnipeg: Manitoba Metis Federation Press, 1987 at 155. The findings of the M.M.F.'s research into land claims are in D.N. Sprague, Final Report of the Manitoba Metis Land Commission For The Fiscal Year 1979-80, submitted to the Canadian Joint Committee of Cabinet on Metis and Non-Status Indian Land Claims (Wpg., 18 April 1980).
19. Gerhard Ens, "Metis Lands in Manitoba" (1983), 5 Manitoba History 2 at 3.
20. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385.
21. Ibid., [1985] 1 S.C.R. 721 at 744; 19 D.L.R. (4th) 1 at 19; 35 Man. R. (2d) 83 at 106-107; 59 N.R. 321 at 344-345; [1985] 4 W.W.R. 385 at 404.
22. Ibid., [1985] 1 S.C.R. 721 at 731; 19 D.L.R. (4th) 1 at 9; 35 Man. R. (2d) 83 at 90; 59 N.R. 321 at 328; [1985] 4 W.W.R. 385 at 393.
23. Ibid., [1985] 1 S.C.R. 721 at 745; 19 D.L.R. (4th) 1 at 19; 35 Man. R. (2d) 83 at 107; 59 N.R. 321 at 345; [1985] 4 W.W.R. 385 at 404.
24. Ibid., [1985] 1 S.C.R. 721 at 745; 19 D.L.R. (4th) 1 at 19; 35 Man. R. (2d) 83 at 107-108; 59 N.R. 321 at 345-346; [1985] 4 W.W.R. 385 at 404-405.
25. Ibid.
26. Hunter v. Southam, [1984] 2 S.C.R. 145 at 169, sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 121; (1984), 11 D.L.R. (4th) 641 at 659; [1984] 6 W.W.R. 577 at 597..
27. Constitution Act, 1982, s. 35.

28. Ibid., s. 35(3).
29. N.J. Ritchot, "Le Journal de l'Abbé N.J. Ritchot-1870" (1964), 17 Revue d'Histoire de l'Amérique Française No. 4, 537 at 564, ; W.L. Morton, ed., 1 Manitoba: The Birth of a Province, Winnipeg: Man. Record Society Publications, 1984 at 131. [hereinafter cited as Morton, Ed. 1984]
30. Supra, note 1.
31. Ronald Wardhaugh, Language and Nationhood: the Canadian Experience, Vancouver: New Star Books, 1983 at 219.
32. See, for example, MacDonald v. Montréal, [1986] 1 S.C.R. 460 at 496; (1986), 27 D.L.R. (4th) 321 at 348; (1986), 67 N.R. 1 at 43, per Beetz, J.: "[A] constitutional minimum which resulted from an historical compromise arrived at by the founding people who agreed upon the terms of the federal union."
33. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1 at 9; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385. The extracted opinion nevertheless appears to give secondary status to the Métis by naming them last, whereas they were the largest and most politically dominant group in Red River in the events of 1869-70 leading to the enactment of the Manitoba Act. See G.F.G. Stanley, The Birth of Western Canada, Toronto: U. of Toronto Press, 1936. [hereinafter cited as Stanley 1936]
34. An Act Respecting the Revised Statutes of Canada, R.S.C. 1886, c. 4, s. 5 and Schedule A, p. 2280.
35. An Act Respecting the Revised Statutes of Canada, R.S.C. 1886, c. 4, s. 5.
36. Ibid., s. 7.
37. e.g. P.C. No. 2567, dated Nov. 26, 1898, in N.O. Côté, Orders in Council Respecting Claims of the Half-Breeds 1871-1925, Ottawa: Dept. of the Interior, 1929 at 120. [hereinafter cited as Côté]
38. The Manitoba Natural Resources Act, S.C. 1930, c. 29. See the preamble and ss. 1, 2, 3, 4 of the Memorandum of Agreement, Schedule, pp. 1-4.

39. See, supra, note 1.
40. See, for example, D.N. Sprague, "The Manitoba Land Question" (1980), 40 Journal of Canadian Studies, No. 3, 74 [hereinafter cited as Sprague 1980]; D.N. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980), 10 Man. L.J. 415; Gerhard Ens, "Metis Lands in Manitoba" (1983), 5 Manitoba History 2 at 3; P.R. Mailhot & D.N. Sprague, "Persistent Settlers: The Dispersal and Resettlement of the Red River Métis, 1870-1885" (1985), 7 Canadian Ethnic Studies 1 at 7; Phillipe Mailhot, "Ritchot's Resistance: St. Norbert and the Creation and Transformation of Manitoba", Ph.D. thesis, University of Manitoba, unpublished, 1986 [hereinafter cited as Mailhot].
41. See generally, David Jones & Anne de Villars, Principles of Administrative Law, Toronto: The Carswell Co. Ltd., 1985; J.M. Evans, et al; Administrative Law 2d ed., Toronto: Emond Montgomery Publications Ltd., 1984. It may be noted, parenthetically, that the executive branch of government bears a general duty to act in accordance with the requirements of the Constitution: Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441; (1985), 12 Admin. L.R. 16; (1985), 13 C.R.R. 287; (1985), 18 D.L.R. (4th) 481; (1985), 59 N.R. 1.
42. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385.
43. W.R. McMurtry and & Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective", [1986] 3 C.N.L.R. 19.
44. In Re Mathers (1891), 7 Man. R. 434; 1 W.L.T. 235; 3 C.N.L.C. 149, the Manitoba Court of Queen's Bench, en banc, decided that the children to whom lands were allotted in pursuance of s. 31 have, after the allotment and before patent, a property or interest in the lands which it was competent for the provincial legislature to make liable to taxation. The court held that after allotment, while the legal estate remained vested in the Crown, the beneficial interest in the land belonged to the allottee. The court relied on clause 7 of the Order in Council of April 25, 1871 (infra, Chapter V, note 38 at 157) which provided: "recorded claims, when the claimant

dies before being entitled by arriving at the age of 18 to receive a patent, shall be deemed real estate, and shall descend according to the laws from time to time in force in the Province of Manitoba", to detect the intention of Parliament that the lands should become the property of those to whom they were allotted as soon as they were finally entered in the register of claims.

The court did not consider the nature of the obligations imposed by s. 31 in respect of the distribution and protection of the lands. The central issue in that respect, is whether the Crown's obligation permitted Parliament to make unconditional grants which had the effect of granting taxable interests to the beneficiaries.

45. Rupert's Land and North-Western Territory Order, June 23, 1870 (U.K.), in R.S.C. 1970, Appendix II, No. 9, (Schedule C) at 274. Article 14 provided: "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."

Section 32 of the Manitoba Act 1870, provided: "For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:

1. All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

2. All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same on such terms and conditions as



may be determined by the Governor in Council.

5. The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

46. W.L. Morton, "Introduction" to Eden Colville's Letters 1849-1852, London: XIX Hudson's Bay Record Society, 1956 at (xvii) "The Red River métis were, so to speak, indigenous colonists."
47. See generally, G.F.G. Stanley, The Birth of Western Canada, Toronto: Univ. of Toronto Press, 1936. [hereinafter cited as Stanley]
48. The ambiguity arising from the apparent inconsistency between the declarations in the preamble and the enacting clause was considered by Lieutenant Governor Archibald who was responsible for implementing s. 31, and also by the Chief Justice of Manitoba in submitting his views on s. 31 to a provincial Commission of Enquiry in 1881. See Sprague, supra, note 12, at Appendix D4.2 and Wood, supra, note 8, respectively.
49. Constitution Act, 1982, s. 52 and Schedule.
50. Edwards v. A.G. Canada, [1930] A.C. 124 at 137, [1930] 1 D.L.R. 98; [1929] 3 W.W.R. 479, citing a statement of counsel in St. Catherine's Milling and Lumber v. R. (1888), 14 A.C. 46 at 50; 4 Cart. B.N.A. 107 at 112; 2 C.N.L.C. 541 at 545; J.D. Whyte & W.R. Lederman, Canadian Constitutional Law 2d ed., Toronto: Butterworth's, 1977 at 4-5. [hereinafter cited as Whyte]
51. Clement's Canadian Constitution 3d ed., at 347, quoted with approval in Edwards v. A.G. Canada, [1930] A.C. 124 at 137; [1930] 1 D.L.R. 98; [1929] 3 W.W.R. 479.
52. Corry, J.A., "The Interpretation of Statutes" in E.A. Driedger, Construction of Statutes 2d ed., Toronto: Butterworth's, 1983 at 255.

53. Birks v. Montreal, [1955] S.C.R. 799; (1955), 113 C.C.C. 135; [1955] 5 D.L.R. 321; Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 197, sub. nom. Churchill Falls Labrador Corp. Ltd. v. A.G. of Nfld. (1984), 8 D.L.R. (4th) 1; (1984), 53 N.R. 268; Re British North America Act and the Federal Senate (1980), 30 N.R. 271; Hunter v. Southam, [1984] 2 S.C.R. 145 sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97; (1984), 11 D.L.R. (4th) 641; [1984] 6 W.W.R. 577; Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385.
54. The Charter comprises Part I of the Constitution Act, 1982.
55. Per curiam in Hunter v. Southam, [1984] 2 S.C.R. 145 at 156, sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 111; (1984), 11 D.L.R. (4th) 641 at 650; [1984] 6 W.W.R. 577 at 586-587.
56. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721 at 744-745; (1985), 19 D.L.R. (4th) 1 at 19; (1985), 35 Man. R. (2d) 83 at 107; (1985), 59 N.R. 321 at 345; [1985] 4 W.W.R. 385 at 404.
57. Ibid.
58. Hunter v. Southam, [1984] 2 S.C.R. 145 at 157; sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 112; (1984), 11 D.L.R. (4th) 641 at 650-651; [1984] 6 W.W.R. 577 at 587.
59. Whyte, supra, note 50.
60. Ibid., at 4-6.
61. Loc. cit.
62. Loc. cit.
63. Loc. cit.
64. A.G. for Alta. v. A.G. for Canada, [1939] A.C. 117 at 131, sub. nom. Reference re Alberta Legislation, [1938] 4 D.L.R. 433 at 439; [1938] 3 W.W.R. 337 at

- 344 (The Alberta Banking Case); Brophy v. A.G. Man., [1895] A.C. 202 at 217-218; (1897), 5 Cart. B.N.A. 156 at 175-176.
65. A.G. for Alta. v. A.G. for Canada, [1939] A.C. 117, sub. nom. Reference Re Alberta Legislation, [1938] 4 D.L.R. 433; [1938] 3 W.W.R. 337 (The Alberta Banking Case); and Brophy v. A.G. for Man., [1895] A.C. 202 at 217; (1897), 5 Cart. B.N.A. 156 at 174-175; Attorney-General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436 at 461 (The Prince Augustus Case).
  66. The Indian settlement legislation is considered, infra, Ch. 3, notes 118 to 187, inclusive.
  67. It is assumed that s. 31 granted certain rights which are protected as part of the Constitution notwithstanding the purported repeal of s. 31 by federal legislation in 1886; see supra, note 34. Because of s. 6 of the Constitution Act, 1871, Parliament had no power to repeal s. 31, and a statute is not repealed by obsolescence: Grand Trunk v. Robertson, [1909] A.C. 325.
  68. Constitution Act, 1982, s. 25 provides: "25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
  69. Heydon's Case (1584), 3 Co. Rep. 7a; 76 E.R. 637.
  70. R.S.C. 1970, Appendix II, No. 1, p. 123.
  71. Guerin v. R., [1984] 2 S.C.R. 335 at 392; [1985] 1 C.N.L.R. 120 at 142; (1985), 13 D.L.R. (4th) 321 at 346; (1986), 20 E.T.R. 6 at 57; (1985), 55 N.R. 161 at 192; (1985), 36 R.P.R. 1 at 54; [1984] 6 W.W.R. 481 at 507.
  72. Canada Gazette, (Vol. 33, No. 46) 12 May, 1900. (P.C. No. 438 dated March 2, 1900).
  73. Whyte, supra, note 50, at 4-5.

74. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721 at 745; (1985), 19 D.L.R. (4th) 1 at 19; (1985), 35 Man. R. (2d) 83 at 107; (1985), 59 N.R. 321 at 345; [1985] 4 W.W.R. 385 at 404-405.
75. See Rupert's Land and North-Western Territory Order, June 23, 1870 (U.K.), in R.S.C. 1970, Appendix II, No. 9, Schedule (A), pp. 264-265.
76. Ibid., at 264.
77. An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada, S.C. 1869, c. 3, in R.S.C. 1970, Appendix II, No. 7, pp. 243-245.
78. Ibid., s. 3.
79. See Stanley 1936, supra, note 33.
80. Ibid., passim. See also "Resolutions of the Council of the Provisional Government, Mar. 15, 1870" in 2 The Canadian North-West: Its Early Development and Legislative Records, ed. Prof. E.H. Oliver, Ottawa: Government Printing Bureau, 1915, Item 20 at 915, and the List of Rights presented to the Dominion government, Ibid., Item 21, at 915-918. See also, "Declaration of the People of Rupert's Land and the North-West" Dec. 12, 1869, in 1 The Collected Writings of Louis Riel, ed. R. Huel, Edmonton: The University of Alberta Press, 1985 at 42-45, and the other pertinent writings of Riel collected in that volume. For a discussion of Canada's imperialistic role, see Chester Martin, "The Colonial Policy of the Dominion" (1922), Trans. R.S.C. section II, 35 at 47.
81. R. v. Forest, (1977), 34 C.C.C. (2d) 108 at 119; (1977), 74 D.L.R. (3d) 704 at 715; [1977] 1 W.W.R. 363 at 374-375 (Man. Co. Ct.).
82. Chester Martin, "The Natural Resources Question": The Historical Basis of Provincial Claims, Winnipeg: University of Manitoba, 1980 at 44.
83. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721 at 731; (1985), 19 D.L.R. (4th) 1 at 9; (1985), 35 Man. R. (2d) 83 at 91; (1985), 59 N.R. 321 at 329; [1985] 4 W.W.R. 393.

84. An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada, S.C. 1869, c. 3, ss. 3, 4.
85. See "Resolutions of the Council of the Provisional Government, Mar. 15, 1870", in 2 The Canadian North-West: Its Early Development and Legislative Records, ed. Prof. E.H. Oliver, Ottawa: Government Printing Bureau, 1915, Item 20 at 915.
86. Ibid., at 916.
87. See Rupert's Land and North-Western Territory Order, June 23, 1870 (U.K.), in R.S.C. 1970, Appendix II, No. 9, Schedule (A) p. 264.
88. Guerin v. R., [1984] 2 S.C.R. 335 at 382; [1985] 1 C.N.L.R. 120 at 136; 13 D.L.R. (4th) 321 at 339; (1986), 20 E.T.R. 6 at 29; 55 N.R. 161 at 174; 36 R.P.R. 1 at 26; [1984] 6 W.W.R. 481 at 499, per Dickson, J. (as he then was).
89. Ibid. This is so whether or not the interest amounts to a beneficial ownership.
90. City of London v. Wood (1701), 12 Mod. 669; 88 E.R. 1592 (K.B.), per Holt, C.J.
91. Entick v. Carrington (1765), 19 St. Tr. 1029 at 1066, 1 Wils. K.B. 175.
92. Per curiam in Hunter v. Southam, [1984] 2 S.C.R. 145 at 158, sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 112; (1984), 11 D.L.R. (4th) 641 at 651; [1984] 6 W.W.R. 577 at 588.
93. Ibid., [1984] 2 S.C.R. 145 at 158; 41 C.R. (3d) 97 at 113; 11 D.L.R. (4th) 641 at 651; [1984] 6 W.W.R. 577 at 588.
94. Morton, ed., supra, note 29, at (xvi).
95. R. v. Forest, (1977), 34 C.C.C. (2d) 108 at 119; (1977), 74 D.L.R. (3d) 704 at 715; [1977] 1 W.W.R. 363 at 374-375 (Man. Co. Ct.).
96. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721 at 745; (1985), 19 D.L.R. (4th) 1 at 19; (1985), 35 Man. R. (2d) 83 at 107; (1985), 59 N.R. 321 at 345; [1985] 4 W.W.R. 385 at 404-405.

97. Ibid.
98. Dissenting opinion of Judge Tanaka, in the South-West Africa Cases Second Phase, 1966 (Ethiopia v. South Africa; Liberia v. South Africa), Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1966 at 284-316.
99. Bloxam v. Favre (1883), 8 P.D. 101 at 107; Salomon v. Comm. of Customs and Excise, [1966] 3 All E.R. 871; [1967] 2 Q.B. 116; Colquhoun v. Brooks (1888), 21 Q.B.D. 52; (1888), 57 L.J.Q.B. 439; (1888), 36 W.R. 657; (1888), 4 T.L.R. 494 (C.A.), aff'd. (1889), 14 A.C. 493, [1886-90] All E.R. 1063; (1889), 5 T.L.R. 728; Corocraft v. Pan Am Airways, Inc., [1969] 1 All E.R. 82; [1969] 1 Q.B. 641; [1968] 3 W.L.R. 1273 (C.A.); The Jumbunna Coal Mine No Liability v. The Victorian Coal Miners' Assoc. (1908), 6 C.L.R. 309 at 363; (1908), 14 A.L.R. 701 at 720. (Aust. H.C.).
100. Bradley v. Commonwealth of Australia (1973), 1 A.L.R. 241 at 260.
101. R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 335; (1985), 60 A.R. 161 at 187; (1985), 37 Alta L.R. (2d) 97 at 129; (1985), 18 C.C.C. (3d) 385 at 416-417; (1985), 18 D.L.R. (4th) 321 at 352-353; (1985), 58 N.R. 81 at 107; [1985] 3 W.W.R. 481 at 516-517.
102. Dissenting opinion of Judge Tanaka, in the South-West Africa Cases Second Phase, 1966 (Ethiopia v. South Africa; Liberia v. South Africa), Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1966 at 284-316.
103. Reservations to the Genocide Convention Case 1 C.J. Reports 1951, 23.
104. (1964), 17 Revue d'Histoire de l'Amérique Française No. 4, 537 at 564; Morton, ed., supra, note 29.
105. Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70 (Canada Sessional Papers 1874), Appendix (No. 5) at 74.
106. See, for example, D.N. Sprague, "The Manitoba Land Question" (1980), 40 Journal of Canadian Studies, No. 3, 74; D.N. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980), 10 Man. L.J. 415; Gerhard Ens, "Metis Lands in Manitoba" (1983), 5 Manitoba History 2 at 3; P.R.

- Mailhot & D.N. Sprague, "Persistent Settlers: The Dispersal and Resettlement of the Red River Métis, 1870-1885" (1985), 7 Canadian Ethnic Studies 1 at 7. Phillipe Mailhot, Ritchot's Resistance: St. Norbert and the Creation and Transformation of Manitoba, Ph.D. thesis, University of Manitoba, unpublished, 1986. For discussions of the oral promises made by J.A. Macdonald and G.E. Cartier to the delegates, see also D.N. Sprague, Sir John A. Macdonald and the Metis: A Critical Assessment, University of Manitoba, unpublished manuscript, 1985.
107. See generally, Stanley 1936, supra, note 33, passim.
  108. W.R. McMurtry & Alan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective", [1986] 3 C.N.L.R. 19 at 31.
  109. Ibid.
  110. R. v. George, [1966] S.C.R. 267 at 279; [1966] 3 C.C.C. 137 at 149; (1966), 47 C.R. 382 at 393; (1966) 55 D.L.R. (2d) 386 at 396; Calder v. R., [1960] S.C.R. 892; 129 C.C.C. 202; R. v. Taylor and Williams (1981), 34 O.R. (2d) 360; 62 C.C.C. (2d) 227; [1981] 3 C.N.L.R. 114 (Ont. C.A.), leave to appeal by the Crown refused by S.C.C., [1982] 1 C.N.L.R. 183.
  111. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385.
  112. Calder v. A.G.B.C., [1973] S.C.R. 313 at 385-386; (1973), 34 D.L.R. (3d) 145 at 197; [1973] 4 W.W.R. 1 at 57-58, per Hall, J. (diss'g).
  113. In R. v. St. Catherines Milling Co. (1885), 10 O.R. 196 at 109-110; 4 Cart. B. N.A. 214 at 218-219; 2 C.N.L.C. 374 at 387-388, Chancellor Boyd stated that s. 31 was an example of general parliamentary recognition of the principles of Indian title.
  114. R. v. George, [1966] S.C.R. 267 at 279; [1966] 3 C.C.C. 137 at 149; (1966), 47 C.R. 382 at 393; (1966), 55 D.L.R. (2d) 386 at 396; Calder v. R., [1960] S.C.R. 892; (1960), 129 C.C.C. 202; R. v. Taylor and Williams (1981), 34 O.R. (2d) 360; 62 C.C.C. (2d) 227; [1981] 3 C.N.L.R. 114 (C.A.), leave to appeal by the Crown refused by S.C.C., [1982] 1

- C.N.L.R. 183.
115. R. v. Taylor and Williams (1981), 34 O.R. (2d) 360; 62 C.C.C. (2d) 227; [1981] 3 C.N.L.R. 114 (Ont. C.A.), leave to appeal by the Crown refused by S.C.C., [1982] 1 C.N.L.R. 183.
  116. R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 335; (1985), 60 A.R. 161 at 187; (1985), 37 Alta L.R. (2d) 97 at 129; (1985), 18 C.C.C. (3d) 385 at 416-417; (1985), 18 D.L.R. (4th) 321 at 352-353; (1985), 58 N.R. 81 at 107; [1985] 3 W.W.R. 481 at 516-517.
  117. Regina v. Sikyea, [1964] 2 C.C.C. 325 at 329; (1964), 43 C.R. 83 at 85-86; (1964), 43 D.L.R. (2d) 150 at 153, 46 W.W.R. 65 at 67-68 (N.W.T.C.A.).
  118. Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70 (Canada Sessional Papers 1874), Appendix (No. 5).
  119. P.A. Cumming & N.H. Mickenberg, Native Rights in Canada 2d ed. Toronto: The Indian-Eskimo Association of Canada in association with General Publishing Co. Ltd., 1972 at 62; see also, cases cited in note 65.
  120. R. v. Taylor and Williams (1981), 34 O.R. (2d) 360; 62 C.C.C. (2d) 227; [1981] 3 C.N.L.R. 114 (C.A.), leave to appeal by the Crown refused by S.C.C., [1982] 1 C.N.L.R. 183.
  121. Dreaver v. R., (Exchequer Court of Canada) April 10, 1935, Doc. No. 15186. (unreported)
  122. R. v. White and Bob (1965), 50 D.L.R. (2d) 613 at 652; (1965), 52 W.W.R. 193 at 236 (B.C.C.A.), aff'd., (1965), 52 D.L.R. (2d) 481 (S.C.C.), applied in R. v. Taylor and Williams (1981), 34 O.R. (2d) 360; 62 C.C.C. (2d) 227; [1981] 3 C.N.L.R. 114 (C.A.), leave to appeal by the Crown refused by S.C.C., [1982] 1 C.N.L.R. 183.
  123. Nowegijick v. R., [1983] 1 S.C.R. 29; [1983] 2 C.N.L.R. 89; 144 D.L.R. (3d) 193; [1983], 37 D.T.C. 5041; 46 N.R. 41.
  124. Ibid., [1983] 1 S.C.R. 29 at 36; 2 C.N.L.R. 89 at 94; 144 D.L.R. (3d) 193 at 198; 37 D.T.C. 5041 at 5044; 46 N.R. 41 at 48.
  125. Wood, supra, note 8.



126. R. v. White and Bob (1965), 50 D.L.R. (2d) 613 at 652; (1965), 52 W.W.R. 193 at 236 (B.C.C.A.), aff'd., (1965), 52 D.L.R. (2d) 481 (S.C.C.), applied in R. v. Taylor and Williams (1981), 34 O.R. (2d) 360; 62 C.C.C. (2d) 227; [1981] 3 C.N.L.R. 114 (C.A.), leave to appeal by the Crown refused by S.C.C., [1982] 1 C.N.L.R. 183.
127. Whyte, supra, note 50, at 4-6.
128. Proceedings of the Constitutional Conference of Federal and Provincial Governments (Ottawa January 10-12, 1950) at 16.
129. Ibid.
130. Ibid.
131. H. Bowsfield, ed., 2 The James Wickes Taylor Correspondence 1859-1870, Winnipeg: Man. Record Society Publications, 1968 at 169-170.
132. 1 The Collected Writings of Louis Riel, ed. R. Huel, Edmonton: The University of Alberta Press, 1985 at 362-363.
133. Although the process provided by s. 37 of the Constitution Act, 1982 failed to secure an amendment, Aboriginal peoples are still anxious to have the issue addressed, and the Prime Minister has stated his willingness to hold further conferences if he thinks progress can be made.
134. A.G. v. Turner (1648), Hardr. 185 at 157; 145 E.R. 443 (Ex. Ct.).
135. Isaacs, J. (as he then was) in Bull v. A.G. New South Wales (1913), 17 C.L.R. 370 at 384.
136. Mailhot, supra, note 40, at 169.

## II. THE CONSTITUTIONAL STATUS OF SECTION 31, AND THE POWERS OF IMPLEMENTATION

### A. CONFIRMATION BY THE CONSTITUTION ACT, 1871 AND POWERS OF PARLIAMENT GRANTED THEREIN

The provisions of the Act of 1870 were initially passed into law by the Canadian Parliament, purportedly in accordance with the powers in s. 146 of the Constitution Act, 1867 and the Rupert's Land Act, 1868 (U.K.). The Act was subsequently "confirmed" by the Constitution Act, 1871.<sup>1</sup> This confirmation by the Imperial Parliament gave the Act the character of an Imperial statute.<sup>2</sup>

An explanation for the need to confirm was given by Stuart, J.A., in Rex v. Ulmer,<sup>3</sup> a case stated for the opinion of the Appellate Division of the Supreme Court of Alberta:

. . . [T]he Act of 1867 [the Constitution Act, formerly the British North America Act] had provided that the Queen might by order in council admit these territories "into the union" on terms to be mentioned and that the provisions of any order in council in that behalf should have the effect of a statute . . .

On June 23, 1870, an Order in Council was accordingly passed providing for the admission of the territories "into the union" as of July 15, 1870, and declaring that the Parliament of

Canada should have power to make laws for the peace, order and good government of the territories so to be admitted. This latter declaration had the effect of a statute, as already stated.

On May 12, 1870, the Parliament of Canada, assuming to act under the powers thus given, passed, in anticipation, The Manitoba Act, by which it erected the new Province of Manitoba. The Act was only to come into force on the date to be fixed by the Queen's Order in Council for the admission of the territories.

Now doubts were soon expressed as to the validity of this Act, one doubt being whether the general power of legislating for the peace, order and good government of the Territories given by the Order in Council before-mentioned would include the power of erecting a province. Therefore to remove these doubts the Parliament of Great Britain in 1871 passed an Act entitled The British North America Act, 1871<sup>4</sup> which, after referring to the doubts as to the validity of The Manitoba Act, proceeded in s. 5 to ratify the Act in toto without modification.<sup>5</sup>

By s. 4 of the Act of 1871, the Canadian Parliament was empowered to make provision for the administration, peace, order and good government of any territory not for the time being included in any province. This has been established to mean a comprehensive power to legislate: Riel v. R.,<sup>6</sup> Reference Re s. 17 of The Alberta Act.<sup>7</sup> The power was never exercisable in respect of territory which comprised the original Province of Manitoba because the Province was established at the same time as the territories involved became part of the Union.<sup>8</sup>

Section 2 of the Act of 1871 grants power to the Parliament to establish new provinces:

The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.<sup>9</sup>

It is established that Parliament may, pursuant to this power, at the time of the establishment of new provinces, provide for the constitution of such provinces and define and regulate the legislative powers to be possessed by the new provinces.<sup>10</sup> Viscount Simon said, in giving the opinion of the Judicial Committee in A.G. Sask. v. C.P.R.,

There was no complete equality of powers between the four original provinces, and the Manitoba Act, 1870 shows that an Act constituting a province might depart from the strict 1867 pattern.<sup>11</sup>

**B. LIMITS ON PARLIAMENT'S POWER TO LEGISLATE IN RESPECT OF ESTABLISHED PROVINCES PURSUANT TO S. 6 OF THE CONSTITUTION ACT, 1871.**

Notwithstanding the broad power it gave to Parliament to erect new provinces with new constitutions, the Act of 1871 placed a limitation on Parliament's power to legislate in respect of an established province. Section 6 provided:

Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament

in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing New Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province.

The exception to the limitation on power to alter the Act in s. 3 reads:

The Parliament of Canada, may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

Under "such terms and conditions" the Dominion and the Province have agreed, inter alia, in adding new territory to Manitoba, to incorporate all Dominion legislation which had been since the creation of Manitoba made applicable to it, and further, to subject the new territory to "all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof."<sup>12</sup> As suggested by the above agreement, the objects of s. 3 might include agreements between the Dominion and the Province respecting the application and operation of existing and future legislation in the added territory. Although this might include extending the territorial area over which

rights may be exercised (or limited) there appears to be no reason to suppose that the power of Parliament referred to in s. 3 could be used to abrogate or derogate from existing rights such as those in s. 31 of the Act. The cases that have dealt with the section certainly give no indication this could be so.<sup>13</sup>

A number of cases have dealt with the interpretation of s. 6. In Bertrand v. Dussault; Bertrand v. Lavoie, a 1909 case in the County Court of Saint-Boniface, Prud'homme, Co. Ct. J. had to decide upon the constitutional validity of "An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba".<sup>14</sup> Before deciding upon the question whether the legislature of Manitoba could amend s. 23 of the Manitoba Act, as it purported to do under the statute in question, the judge opined that,

. . . there cannot be any doubt that the federal Parliament could not alter the provisions of the Manitoba Act. Section 6 of the B.N.A. Act, 1871 leaves no room for any doubt."<sup>15</sup>

In Rex ex/rel. Brooks v. Ulmer<sup>16</sup> the Supreme Court of Alberta, Appellate Division, had to decide whether, in exercising the authority to establish new provinces given it by the Act of 1871, Parliament had power to enact s. 17 of The Alberta Act with its protective provisions restricting full legislative power as to education, notwithstanding that those provisions were a modification

of s. 93 of the Constitution Act, 1867. In deciding that Parliament had such power the Court examined the meaning of s. 6 of the Act of 1871. Stuart, J.A., speaking for two of the three justices who decided the case, said,

Then in section 6 it was provided in effect that the Parliament of Canada could not by any later Act alter the Manitoba Act or any Act establishing another new province and giving it a constitution. Thus, the "constitution" of the province once granted became fixed so far as the federal Parliament was concerned. That Parliament at least could not alter it.<sup>17</sup>

At page 16 the learned judge repeated:

. . . [T]he Act of 1871 validated and confirmed The Manitoba Act, 1870, and not only that, but prohibited its amendment by the Parliament of Canada. So that substantially The Manitoba Act itself became an Imperial Act and was itself made part of The B.N.A. Acts.

In the Reference Re s. 17 of The Alberta Act<sup>18</sup> the Supreme Court noted that s. 6 declared "that it should not be competent to the Parliament of Canada to alter the provisions of [the Act]", and the Court did not see fit to expand on the plain meaning of the section.<sup>19</sup> The Judicial Committee of the Privy Council considered the Constitution Act, 1871 in A.G. Sask. v. C.P.R.<sup>20</sup> but did not comment on the effect of s. 6. In 1958 the Supreme Court of Canada again considered the Act of 1871 in A.G. for Man. v. C.P.R.<sup>21</sup> Rand, J., speaking for five of the six justices who decided the case, expounded on the meaning of s. 6 as follows:<sup>22</sup>

Section 6 declares Parliament to be

incompetent, except as provided by the third section, to alter the provisions of the Manitoba Act . . . reserving to Manitoba certain powers of modification of the Manitoba Act not pertinent here. The effect of section 6 is to give to any Act constituting a province the character of an Imperial statute.

In 1981 the Alberta Court of Appeal decided the Reference Concerning Tax on Natural Gas<sup>23</sup> and said<sup>24</sup> (per curiam):

Section 6 [of Constitution Act, 1871] then provided that Parliament, having created a province, could not thereafter change the Act by which it was created.

The interpretation of s. 6 of the Act of 1871 attracted the attention of the courts in the recent case of Forest whereby the Province of Manitoba's power to amend s. 23 of the Manitoba Act was challenged. When the case was in the Manitoba County Court, Dureault Co. Ct. J. considered that the Act of 1871,

. . . went beyond mere validation: subsections 3 and 6 imposed substantial constraints on the amending powers of both the Canadian Parliament and the legislature in regards to the Manitoba Act . . . .<sup>25</sup>

The Supreme Court of Canada gave a unanimous judgment when the case was decided on appeal.<sup>26</sup> The Court had to decide on the power of the province to abrogate the provisions of s. 23 of the Manitoba Act. In doing so, the Court looked, inter alia, to the Act itself for an amending power, and explained, at 763:

If, on the other hand, the Manitoba Act is taken by itself it must be observed that this is a federal statute which means that, unless



otherwise provided, it is subject to amendment by the parliament that enacted it and no other. It is, however, otherwise provided in section 6 of the B.N.A. Act, 1871. This section denies any amending power to the federal Parliament and the only amending power it allows to the legislature of Manitoba is "to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province.

Given the weight of the above judicial pronouncements over a span of time exceeding seventy years, it is difficult to dispute the view that the effect of s. 6 of the Act of 1871 is to prohibit amendment or repeal of the Act by the federal Parliament. Extra-judicially, the same view has been expressed. Edward Blake expressed it in Parliament during debates on federal legislation in apparent amendment of s. 32 in 1875<sup>27</sup> and counsel for Manitoba expressed it again in 1929 during submissions made to the Natural Resources Commission.<sup>28</sup>

It is submitted, on the basis of the above authorities, that there is no power of Parliament to amend or repeal any terms of the Act of 1870. The power granted by the terms of the Act itself to permit the implementation of governmental obligations will be considered below.<sup>29</sup>

Although the limitation on power in s. 6 is expressed to be limited by extending only "insofar as it [the Manitoba Act] relates to the Province of Manitoba" there appears to be no good reason to suggest the qualification is to be read so as to permit amendment or repeal of any

provisions of the Act. If the Act were so construed, the effect would be to destroy the constitutional status of the rights granted in s. 31. It can not have been in the contemplation of the Imperial Parliament that the rights protected in those sections would be placed at the discretion of Parliament to respect or to destroy. In fact, it has been noted that Parliament withheld power to legislate for Rupert's Land from Canada until provision was made for the protection of the rights of British subjects in the territories.<sup>30</sup> On the other hand, the text of the Act suggests that the qualification in s. 6 is intended to refer to Manitoba in its geographic, not juristic, entity. This view was taken by Canada when it provided that the 'royalties' belonged to it in the territory added to the province in 1912.<sup>31</sup> Further, the Act of 1870 makes provisions not only for government institutions and other matters within the geographic limits of the province, it also provides, in ss. 35 and 36, for the government of the North-West Territories, the name given by s. 35 to the combined North-Western Territory and Rupert's Land territories. Section 36 extends the Canadian Rupert's Land Act of 1869<sup>32</sup> which provides for the government of that region by the exercise of federal legislative power. Finally, s. 6 prohibits alteration of the provisions of the Act, subject to the qualification, "or of any other Act hereafter establishing new Provinces in the said Dominion".

This is consistent with the view expressed in the cases reviewed above, that the Parliament was incompetent to alter any part of the entire Act establishing a province. There is no reason to suppose that the exception "in so far as it relates to the Province of Manitoba" was intended to provide less protection from federal legislative interference for Manitobans than for residents of other provinces. It is concluded that the qualification in s. 6 relates to the provisions of the Act of 1870 which do not have to do with the Province of Manitoba, and does not in any way permit federal legislative interference with any land provisions of the Act.

**C. PROVINCIAL AMENDING POWER IN RESPECT OF THE MANITOBA ACT, 1870**

**1. Governing Legislation in the Constitution**

The Manitoba Act, 1870 was enacted by the Canadian Parliament but its validity was "confirmed" by the Imperial Parliament. This confirmation gave the Act the character of an Imperial statute. On the basis of the principle that an enactment is subject to amendment or repeal only by its enacting legislature, it is only the Imperial Parliament that would have power to amend or repeal the Act. This general principle would be subject to the provisions of the Act itself or of any other statute which validly extended to it. On the basis of the former proposition it was

concluded above, that s. 6 of the Act of 1871 prohibited amendment or repeal of the Act of 1870 by the Parliament. (The issue of a legislative power of implementation has not yet been addressed.)

The second proposition requires a consideration of the Colonial Laws Validity Act, 1865<sup>33</sup> (the C.L.V.A.), an Imperial Act which provided for recognition of the validity of laws enacted by colonial legislatures, which included legislatures of the Dominion of Canada and its constituent provinces.

Section 2 of the C.L.V.A. provided:

Any colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such an Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.<sup>34</sup>

In looking for provincial powers of amendment or repeal of the Act, then, it is necessary to examine the provisions of the Act itself because the C.L.V.A. prohibits alteration of such acts except to the extent such alteration is not repugnant to the terms of "any Act of Parliament extending to the Colony to which such Law may relate . . ." Examination is required, by the same provision, of other Imperial legislation that is related to the Act of 1870.

There is no provision in the Act which expressly grants the Legislature of the province a power to amend or repeal any provisions of the Act. Section 2, however, makes certain provisions of the Constitution Act, 1867 applicable to the province:

On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the Constitution Act, 1867 shall, except those parts thereof which are in terms made or, by reasonable intendment, may be held to be specially applicable to or only to affect one or more, but not the whole, of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act.

Because of s. 2 it is necessary to read the Act of 1870 with the Constitution Act, 1867. This statutory requirement is consistent with the judicial approach of examining the provisions of statutes in pari materia as part of the same context.<sup>35</sup>

A legislative power of amendment in favour of the province appeared in s. 92(1) of the Act of 1867.<sup>36</sup>

92. In each Province the Legislature may exclusively make Laws in relation to matters coming within the Classes of Subject next hereinafter enumerated; that is to say, --

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the province, except as regards the office of Lieutenant Governor.

The power of Canadian provinces to alter their own

constitution is also dealt with by s. 5 of the C.L.V.A., 1865 (U.K.) which provides, inter alia:

. . . [A]nd every Representative Legislature shall, in respect of the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, [etc.] or Colonial Law for the Time being in force in the said Colony.

Section 92(1) does not seem to add much, if anything at all, to s. 5 of the C.L.V.A. because in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the sovereign is a part of the Legislature and thus the character of his position would exclude his office from the power conferred on the provincial legislature to amend the constitution of the province.<sup>37</sup>

To determine whether the power of the provincial legislature to amend its constitution includes, in the case of Manitoba, a power to amend or repeal s. 31 of the Act, it is necessary to define "constitution of the province" as it is used in the C.L.V.A., 1865 (U.K.) and the Act of 1867 [s. 92(1)]. It is convenient now to review the cases that have dealt with this issue.

2. What is the "Constitution of the Province"? Case Review

In Pellant v. Hebert, Prud'homme J. decided that Manitoba's Official Language Act S.M. 1890, c. 14, was unconstitutional<sup>38</sup> because it conflicted with s. 23 of the Act of 1870. It was necessary to consider whether the legislature could amend s. 23 pursuant to the s. 92(1) power.<sup>39</sup> Prud'homme J.'s analysis is extracted at length because of the importance it will assume in the analysis of legislative powers of implementation for s. 31 below:<sup>40</sup>

There cannot be any doubt that the federal Parliament could not alter the provisions of the Manitoba Act. Section 6 of the B.N.A. Act, 1871, leaves no room for any doubt. The question now is whether the legislature of Manitoba is vested with such a right.

. . .

. . . [C]ould the legislature amend s. 23? There is but one clause that could possibly be taken as favouring the provincial jurisdiction; it is s. 92.

. . .

Now, what is the meaning of these words, 'Constitution of the Province'? What are they intended for? What chapter of the Act do they refer to? In other words, does the use of the French language and English language as guaranteed by s. 23 of the Act, substituted, as we have already seen, from s. 133 of the B.N.A. Act, form part of the classes referring to the "Constitution of the Province, or not?

In reading over the B.N.A. Act one must not lose sight of the great distinction existing between the creation of an organized power and the delegation of authority to the same. In the first instance the legislative power is created and constituted so as to be

adopted to the object in view. In the second operation, the legislative power is vested with certain defined powers, privileges and responsibilities. The B.N.A. Act contains a number of dispositions providing for the organization of the different legislative bodies and they come under the heading of Pt. V: "Provincial Constitutions".

Then a distinct and different Part defines the power to be respectively enjoyed and exercised by them; it is entitled VI: "Distribution of Legislative Powers".

In this last Part is found the power to amend the constitution of the province. The reference in Pt. VI to the "Constitution of the Province" is to my mind clearly intended for the group of provisions coming under Pt. V. The words in s. 92, Pt. VI, "Constitution of the Province", and in the heading of Pt. V, "Provincial Constitutions", have the same meaning and could very well be substituted one for the other.

What is the effect of this heading, "Provincial Constitutions"? Headings are a modern kind of preamble and generally serve to construe or explain the sections which follow them more effectually than mere preambles.

. . . .

. . . . [T]he heading "Provincial Constitutions" is connected with the clauses which it heads and it should be read as incorporated with and heading each section to which it is prefixed, to wit, from s. 58 to s. 90, both inclusively.

Section 133 of the B.N.A. Act or its equivalent, s. 23 of the Manitoba Act, does not come within that group or classes of clauses governed by the heading "Provincial Constitutions", to which s. 92 refers, and consequently the provincial legislatures are not authorized to make any law conflicting with s. 133.

. . . .

In mentioning "Constitution of the



Province", s. 92 evidently meant to refer and did refer to the group of subjects headed by a similar expression "Provincial Constitutions", connected together by a separate heading and figure, V, indicating a distinct Part, the different sections of which are all tied down together so as to form one set or class of clauses or subjects.

Another guide in the construction of s. 92 is the exception made as to the office of the Lieutenant Governor.

The first five sections of Pt. V. are devoted to the Lieutenant Governor, his appointment, tenure of office, etc. . . .

Section 23 is an organized provision of the Manitoba constitution. There is no authority given in the Manitoba Act to touch it in any way. It is only by reference to the B.N.A. Act, which is incorporated to it, that any discussion is opened. That is the reason why I have analyzed the parts of this last Act at some length, to see if defendant could be more successful in invoking the same. I cannot come to the conclusion that he can derive any benefit from it. The fathers of Confederation, wishing to settle that vexed question once for all, have advisedly placed it dehors the control or legislative power of provincial legislatures. The same privilege as to their language is conceded to the French minority of Manitoba as to the English minority of Quebec by provisions which the legislatures of these provinces cannot alter in any shape or form.

In 1919 the Judicial Committee of the Privy Council also expressed the view that the constitution of the provinces was established by Part V of the Act of 1867, and appears to have considered that the power granted by s. 92(1) extended only to matters within that Part.<sup>41</sup>

In Rex v. Ulmer<sup>42</sup> the Appellate Division of the Alberta Supreme Court had to consider whether The School Attendance Act was constitutionally invalid and dealt with

the defendant's contention that s. 17 of the Alberta Act was beyond Parliament's power to enact pursuant to s. 2 of the Act of 1871. The relevant phrase permits Parliament to "make provision for the constitution and administration of any such Province". Stuart J.A., speaking for two of the three justices who decided the case, considered that 'constitution' in s. 2 of the Act of 1871 had a broader meaning than "Constitution of the province" in s. 92(1) of the Act of 1867, and did empower Parliament to enact s. 17 of the Alberta Act. On the view of the majority, protective provisions such as s. 22 of the Manitoba Act, s. 17 of the Alberta Act, and s. 93 of the Constitution Act, 1867 establish no general legislative power in Parliament, and this fact does not prevent these protective provisions being properly considered part of the "constitution" of the province within the meaning of the Act of 1871.<sup>43</sup> On the other hand, the term "Constitution of the province" in s. 92(1) has a narrower meaning and the Province of Alberta was not competent to amend its protective provision, namely s. 17.<sup>44</sup> The third member of the court, Beck, J.A., expressed himself to be in accord "for the most part", but added the following observations, which essentially is the same analysis propounded by Prud'homme, J. earlier respecting the meaning of "Constitution of the province" in s. 92(1) of the Act of 1867:<sup>45</sup>

The B.N.A. Act is divided into a number of parts or articles which are preceded by

numbers and captions. The first is:

"1. -- Preliminary;" then follow three captions all relating to Canada as a whole. The fifth article is headed: "V. -- Provincial Constitutions;" and this article is further subdivided under the following subcaptions: "Executive Power;" "Legislative Power;" further subdivided under the headings: "1. -- Ontario;" "2. -- Quebec;" "3. -- Ontario and Quebec;" "4. -- Nova Scotia and New Brunswick;" "5.-- Ontario, Quebec and Nova Scotia;" "6. -- The Four Provinces," under which it is enacted that the "Provisions of this Act respecting the Parliament of Canada, namely, -- the Provisions relating to appropriation and Tax Bills, the Recommendation of Money Votes, the Assent of Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, -- shall extend and apply to the Legislatures of the several Provinces: Mutatis mutandis."

The caption "Legislative Power" clearly means the constitution of the provincial Legislatures and their powers using this word as meaning something quite different and distinct from the subject-matters in respect of which, as between the Dominion and the provinces, the provincial Legislatures may exercise their powers and jurisdiction, a subject which is dealt with as a different and distinct subject-matter under the next caption, "VI. -- Distribution of Legislative Powers." This last caption immediately precedes and covers secs. 91 to 95. Sec. 91 has the subtitle: "Powers of Parliament;" sec. 92, "Exclusive Powers of Provincial Legislatures;" sec. 93, "Education" (under which provincial Legislatures are given exclusive jurisdiction subject to certain restrictions); sec. 94, "Uniformity of Laws in Ontario, Nova Scotia and New Brunswick;" sec. 95, "Agriculture and Immigration".

This distribution of legislative powers in the sense of fixing the subject-matters over which the Dominion Parliament and the provincial Legislatures respectively have jurisdiction, obviously cannot be changed or affected by either of these legislative bodies, or otherwise than by the same

legislative authority as enacted the B.N.A. Act. And it is equally obvious that the legislative power of a provincial Legislature, in the sense of jurisdiction, in relation to education, is as definitely fixed as it is in relation to the various subjects enumerated in sec. 92 of which it might well have formed a subsection. And it is also equally obvious that this distribution of legislative powers, is incapable of being changed, under the power conferred upon provincial Legislatures by sec. 92, clause 1, to amend the constitution of the province except as regards the office of Lieutenant-Governor. Thus it seems to me reasonably clear that the power to change the constitution can only be exercised in relation to those matters which are treated under Part V. and captioned "Provincial Constitutions".

In Blaikie v. A.G. Quebec<sup>46</sup> Deschênes, C.J.S.C., had to decide whether a provincial Legislature could amend unilaterally s. 133 of the Act of 1867. He held that the s. 92(1) power is limited by the provisions of c. V, entitled "Provincial Constitutions" of the Act of 1867, comprising ss. 58 to 90. Section 133 is found outside that part and therefore, on the learned judge's reasoning, is beyond the amending power of provinces. On appeal the Supreme Court did not directly decide the issue because it found it unnecessary to answer the appellant's contention that s. 128 of the Constitution Act, 1867, which stands outside Part V, was part of the Constitution of the Province and amendable as such under s. 92(1).<sup>47</sup> The Court preferred to rely on Deschênes, J.'s reasoning that s. 133 can not be unilaterally amended by Quebec as it is not part of the Constitution of the Province because it is part of the Constitution of Canada and of Quebec in an indivisible

sense.<sup>48</sup>

The Supreme Court gave its decision in A.G. Manitoba v. Forest<sup>49</sup> on the same day as the Blaikie decision. At issue was Manitoba's power to amend s. 23 of the Act of 1870. The Court held that the "Constitution of the province" does not extend to the whole of the Act, referring to the earlier Privy Council decisions of Winnipeg v. Barrett<sup>50</sup> and Brophy v. A.G. Man.<sup>51</sup> as determinative that s. 22 of the Act of 1870 is entrenched. Given the very close similarity between s. 133 at issue in Blaikie's case, and s. 23 at issue in Forest, the Court held that for the same reasons as in the former case, s. 92(1) does not reach language rights.<sup>52</sup> The Court, however, added a few comments respecting the operation of s. 92(1) on the Manitoba Act. The Court commented that the Act of 1867 "is divided into parts, Pt. V being entitled "Provincial Constitutions". Section 133 is not under that heading, but rather in Pt. IX, "Miscellaneous Provisions". The Court did not disapprove of this technique of limiting the application of s. 92(1).<sup>53</sup> The Court then considered the effect of the phrase "notwithstanding anything in this Act" which appears in s. 92(1) and commented;

Therefore, in order to claim some authority under that provision, Manitoba must take it as it is and accept that it refers only to such provisions as would fall within its scope if included in the B.N.A. Act, 1867.

If, on the other hand the Manitoba Act is taken by itself it must be observed that this

is a federal statute which means that, unless otherwise provided, it is subject to amendment by the parliament that enacted it and no other. It is, however, otherwise provided in s. 6 of the B.N.A. Act, 1871. This section denies any amending power to the federal Parliament and the only amending power it allows to the legislature of Manitoba is "to alter from time to time the provisions of any law respecting the qualification of electors," etc. . . .<sup>54</sup>

The Court did not find it necessary to consider whether s. 6 implies a restriction on the s. 92(1) power by virtue of s. 2 of the Act of 1870. The issue has become moot since the enactment of the amending formula in the Constitution Act, 1982. Section 6 of the Act of 1871 helps to interpret the scope of the constitution of the province in s. 92(1) because it indicates that, in the legislative scheme of which the Act of 1870 forms a part, when Parliament intends to grant an amending power to the Legislature in respect of matters that do not fall within Part V. of the Constitution Act, 1867 in accordance, at least, with the analytical approach judicially expounded and reviewed, above, it does so expressly.

### 3. Conclusion

The cases reviewed above have demonstrated that the weight of judicial opinion favours the view that the only matters which come within the scope of the provincial amending power in the former s. 92(1) comprise those matters listed in Part V. of the Act of 1867, excepting the provisions relating to the Office of Lieutenant-Governor.

Section 31 is in the Act of 1870. It is not in Part V. of the Act of 1867, and on the analytical approach favoured by the courts, they would not be subject to the amending power of s. 92(1). It is to be noted, however, that it is not necessary to define the scope of "Constitution of the province" in order to determine whether the section can be amended or repealed by the province. It need only be shown that the Legislature has no such power in respect of s. 31. The analysis which follows attempts to demonstrate this proposition.

#### D. POWER TO IMPLEMENT S. 31

##### 1. Power to Implement by Delegated Authority and Power to Amend Distinguished

Section 31 appears to contemplate a delegation to the Executive of a federal power of implementation. In A.G. Man. v. Forest<sup>55</sup> the Supreme Court of Canada stated,

If . . . the Manitoba Act is taken by itself it must be observed that this is a federal statute which means that, unless otherwise provided, it is subject to amendment by the parliament that enacted it and no other. It is, however, otherwise provided in s. 6 of the B.N.A. Act, 1871. This section denies any amending power to the federal Parliament . . .

On this view, the Act of 1871 denies any amending power in respect of s. 31 but the language of delegation used in the sections implies the existence of a legislative

power in the enacting Parliament. The result must be that there is a legislative power in Parliament to implement the sections.

In Forest v. A.G. Manitoba<sup>56</sup> the Manitoba Court of Appeal discussed the existence of a legislative power to implement s. 23 of the Manitoba Act in the absence of a provincial power to amend the section. After concluding that s. 23,

. . . embodies a constitutionally based right to the use by any person of English or French in the courts of Manitoba, and that right cannot be unilaterally abrogated by the legislature of the province of Manitoba.<sup>57</sup>

Freedman C.J.M. stated,

I do not think it can be said that section 23 of the Manitoba Act takes away the power of the Manitoba legislature to enact laws in relation to the subject matter of section 23. Indeed, I do not see how the rights set out in that section can be made effective without legislation or regulation in relation to them . . . how that provision will work in practice must depend on legislative provisions or on Court rules, which in Manitoba have the force of statutes . . . I think it is obvious that there is a need for regulatory legislation on language rights in Manitoba, in order to make section 23 effective.<sup>58</sup>

## 2. Federal Power to Legislate in Respect of Public Property Generally

Section 31 appropriates, or requires the appropriation of public lands, and the section requires federal regulation of land grants. In the Canadian system federal rights of property are subject to the legislative



control of Parliament, and it is expressly so provided in the case of "the public debt and property": s. 91(1)<sup>59</sup> Whether or not s. 31 attracts the exercise of the federal power under the former s. 91(1) depends on whether the "Half-Breed" lands are appropriated for the benefit of the families by force of the Act and thereby removed from the character of "public lands" or whether the lands remain as public lands until a final allotment is made by way of an unconditional Crown grant. Because of the effect of s. 2 of the Act of 1870, the issue need not be addressed.

The provisions of the Act of 1867 are applicable to Manitoba "so far as may be varied by this Act". It follows, therefore, that the limitations on the amending power of Parliament in respect of the Act of 1870 effected by s. 6 of the Act of 1871 operate to vary the plenary powers granted to Parliament in s. 91 by limiting their application to a power of implementation in respect of s. 31. It is apparent that the provisions of s. 31 operate as a fetter on the powers of the Government of Canada to administer the public lands "for the purposes of Canada", granted by s. 30. If this power of administration is complemented by the legislative powers listed in s. 91(1), then those legislative powers must also be restricted. That construction flows from the words of the sections and it is required by s. 6 of the Act of 1871.

3. Federal Power to Legislate in Respect of Public Lands in Manitoba

Section 30 provided as follows:

All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purpose of the Dominion, subject to, and except and so far as the same may be affected by, the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty.

The effect of the section may be illustrated by comparing it with s. 109 of the Constitution Act, 1867, which applied in respect of the original provinces, and provides, in part; "109. All Lands, Mines, Minerals, and Royalties . . . shall belong to the several Provinces . . ." It is apparent from the comparison and the effect of s. 2 of the Act of 1870 that Canada did not retain all the sources of revenue of the Crown. This is consistent with the Canadian objective of gaining control only over the public lands for the purposes of deriving the territorial revenues therefrom for building the transcontinental railway and making the lands available for immigrant settlement.<sup>60</sup> Essentially, by the terms of s. 30 Canada retained the right to appropriate the territorial revenues from the Crown lands, and not its interests in revenues arising from the prerogative rights of the Crown: A.G. B.C. v. A.G. Canada.<sup>61</sup> These Crown lands would remain "public property" within the meaning of s. 91(1) of the

Constitution Act, 1867 until alienation from the Crown, and as such would be under the exclusive legislative authority of Parliament: Burrard Power Co. Ltd., v. The King.<sup>62</sup>

Whenever Crown lands are alienated, the interest of the federal Crown comes to an end; the land then ceases to be public land, and reverts to the jurisdiction of the province under s. 92(13): A.G. B.C. v. A.G. Canada (1889), 14 A.C. 295, 302 (P.C.). It is important to consider this effect, because s. 31 gives an obligation to make grants subject to conditions determined from time to time, and consequently, a complete alienation of the Crown interest would frustrate this purpose.

There is a close analogy in the Constitution to the effect described of s. 31 upon the powers derived from s. 30. Section 22 of the Act of 1870 varied s. 93 of the Constitution Act, 1867 by providing specific limitations on the general, exclusive power of the Legislature to make laws in relation to education.

#### 4. Constitutional Entrenchment Indicates Intention to Shield s. 31 Rights from General Federal Powers Respecting Public Lands

The fact that provisions for a land settlement scheme were placed in the Constitution evidences the intention to protect the rights to the benefit of the scheme from ordinary legislative interference. The majority of

electors were "Half-Breed" people in Manitoba in 1870 and, in the absence of special historical circumstances, it would be difficult to show why a grant of lands to individuals could not be provided for in ordinary legislation. In Calgary Board of Education v. A.G. Alberta<sup>63</sup> the Court considered s. 93 of the Constitution Act, 1867 had the intention to protect the minority because the majority's rights can be left to the ballot box. The special, historical background of s. 31 suggests two very good reasons for shielding the land settlement scheme from legislative amendment. First, s. 31 could protect the local majority in the province from the exercise of federal regulatory interference because of the powers granted by s. 30 in respect of the public lands in the province. Second, s. 31 was intended to protect the Métif of future generations in the occupation of their lands, from the speculative designs of the large immigrant influx anticipated in 1870, to follow from annexation.<sup>64</sup>

##### 5. Federal Power Respecting "Indians and Lands Reserved for the Indians

The declaration in the preamble of s. 31 that the extinguishment of the Indian title is an object of the provision raises the question whether the implementation might attract Parliament's exclusive legislative power to legislate with respect to "Indians and lands reserved for

the Indians". Because the "Half-Breed" population, including the Métif people, were distinct from the "Indians", it is thought that they are not within the constitutional meaning of "Indians". The question has been fully addressed by Chartier<sup>65</sup> and Schwartz.<sup>66</sup> It might be argued that, since the 1.4 million acres are to be set aside towards the extinguishment of the Indian title, the lands so appropriated are "Lands reserved for the Indians". In support of this argument, it can be noted that the lands are set aside as compensation for aboriginal collective use of the public lands within the province.<sup>67</sup> In reply, the lands are not appropriated for constitutional Indians, and s. 91(24) is intended to grant power respecting matters having to do with Indians only. It is not necessary to rely on these tentative arguments because, for the same reasons elaborated in respect of s. 91(1), namely, the effect of s. 2 of the Act of 1870 combined with s. 6 of the Act of 1871, is to restrict any power of Parliament under the Constitution Act, 1867 to a power of implementation directed towards the objects of s. 31, with a prohibition against amendment inconsistent with those objects.

#### 6. Executive Regulatory Powers in Respect of s. 31, and Parliament's Power of Implementation

There is another question respecting the powers to implement s. 31; it concerns the apparent exclusivity of

the regulatory powers which the language of the Act appears to give the Executive. In s. 31 power is given the Governor-General in Council to make regulations "from time to time" respecting the selection and division of lands, and also to determine, "from time to time" the mode and the conditions of the grants to be made. That should provide sufficient elaboration of the powers of implementation, but s. 33 adds another provision which can arguably apply to s. 31:

The Governor General in Council shall from time to time settle and appoint the mode and form of Grants of Land from the Crown, and any Order in Council for that purpose when published in the Canada Gazette, shall have the same force and effect as if it were a portion of this Act.

If s. 33 does apply to govern the implementation of s. 31, the question is whether the last phrase in s. 33 means that Orders, once made, are irrevocably entrenched. It is thought that s. 33 was meant to apply only to s. 32 grants, because of the place which s. 33 occupies in the Act in relation to both s. 32 and 31, and because s. 33 appears to be an unnecessary addition to the provisions of s. 31. Section 33 refers only to Orders, whereas both regulations and Orders would appear to be appropriate mechanisms for implementing s. 31. The argument that s. 33 does not permit a change to a duly published Order relies on the narrow literal construction that gives such an order the same constitutional status as the Act of 1870: an

entrenched Order can not be amended because of the effect of s. 6 of the Act of 1871. On this view s. 33 is a manner and form provision respecting the making of legislation to implement s. 31. It is akin to the manner and form provision of the earlier s. 23. It is not necessary to remove the supervisory powers of Parliament in order to protect the rights of the people in s. 31 because Parliament has a constitutional duty to protect those rights.<sup>68</sup> The history of the enactment of the Act of 1870 suggests that the regulatory language of s. 33 sits well in a federal statute; it sits awkwardly in an Imperial enactment not generally subject to amendment by Parliament, which was the effect given to s. 33 by the confirmation of the Manitoba Act by the Constitution Act, 1871.

Since the federal Parliament and the federal Executive retain no powers in respect of lands that have been alienated from the Crown, the only apparent reason for requiring, by s. 33, that all Crown grants be made by the federal Executive might be to permit Canada to supervise the exact ambit of the lands over which it retained jurisdiction, that is, the "ungranted or waste lands". In other words, s. 33 introduces a scheme which permits the federal Executive to know what lands are public lands by being involved in the formal recognition of all lands that fall outside the designation of public lands by virtue of their character as lands alienated from the Crown. Section

33, on this view, aids in the formal recognition of the ambit of the lands administration power granted by s. 30.<sup>69</sup>

But, in reply, it is noted that the language of s. 31. is general and ambiguous; it requires the provision of administrative details. The purpose of extinguishing the Indian title of the "Half-Breed" population should be promoted by a system of administration which permits review of its implementation, as s. 31 requires, "from time to time". A system of administration which is not subject to the irrevocable nature of entrenched provisions would more likely have the flexibility required to permit implementation.

If the true construction of s. 33 is that it merely declares that the regulatory power of Parliament may be exercised by the Governor General in Council, then the phrase "shall have the same force and effect as if it were a portion of this Act" means the regulations in a duly published order have the force of law; it does not mean such an Order is put beyond the amending power of Parliament. The limitation imposed by s. 6 of the Act of 1871 requires only that any new Order not amend or repeal the substantive requirements of s. 31. The validity of any particular order, on this view, will be tested by reference to the requirements of those sections. And similarly, the validity of any enabling legislation will be so tested.

Canada had contemplated the annexation of a



substantial part of the continent of North America as something more or less in the nature of a real estate deal. The Red River government of Louis Riel thwarted Canada's unconstitutional attempt to assert for itself an imperialistic role vis-a-vis subordinate colonial territories. Canada, according to the original B.N.A. Act was not a landed entity but contemplated a transfer of lands which included one of the largest areas of ungranted Crown lands in the British Empire.<sup>70</sup> Riel's government forced Canada to put in the Act of 1870 constitutional rights for the protection of the "Half-Breed" population. If any significance is to be given to the inclusion of those land rights within the Constitution, protection from abrogation by Parliament must be assumed. Furthermore, Parliament has a duty to enact legislation to safeguard the rights conferred by s. 31, and similarly, the provincial Legislature has the same duty within its field of legislative competence.<sup>71</sup>

## ENDNOTES

### CHAPTER II

1. Formerly The British North America Act, 1871, in R.S.C. 1970, App. II, No. 11, p. 289.
2. A.G. Man. v. C.P.R. (1958), [1958] S.C.R. 744 at 751; 77 C.R.T.C. 268 at 272; 15 D.L.R. (2d) 449 at 453.
3. R. v. Ulmer (1922), 19 Alta. L.R. 12; 38 C.C.C. 207; [1923] 1 D.L.R. 304; [1923] 1 W.W.R. 1 (C.A.).
4. Now the Constitution Act, 1871: Constitution Act, 1982, s. 52 and Schedule.
5. R. v. Ulmer (1922), 19 Alta. L.R. 12 at 18-19; 38 C.C.C. 207 at 211-212; [1923] 1 D.L.R. 304 at 308-309; [1923] 1 W.W.R. 1 at 6-8 (C.A.).
6. (1885) 10 App. Cas. 675, 678-679.
7. [1927] S.C.R. 364, 371, 372. See also R. v. Burah, (1878) 3 A.C. 889 at 903-905; Hodge v. R., (1883) 9 A.C. 117 at 131-132; Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437 at 441-443.
8. Manitoba Act, 1870, s. 1 in R.S.C. 1970, App. II, No. 8, p. 247, and Rupert's Land and North-Western Territory Order, June 23, 1870 (U.K.), in R.S.C. 1970, App. II, No. 9, p. 257 at 260.
9. Constitution Act, 1871, in R.S.C. 1970, App. II, No. 11, p. 289.
10. Reference Re. s. 17 of The Alberta Act, [1927] S.C.R. 364 at 373; [1927] 2 D.L.R. 993 at 1000; A.G. Sask. v. C.P.R., [1953] A.C. 594; [1953] 3 D.L.R. 785, [1953] C.T.C. 281; R. v. Burah (1878), 3 A.C. 889 at 903-905; Hodge v. R. (1883), 9 A.C. 117 at 131-132; Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437 at 441-443.
11. A.G. Sask. v. C.P.R., [1953] A.C. 594 at 614-615; [1953] 3 D.L.R. 785 at 792; [1953] C.T.C. 281 at 289.

12. An Act respecting the Province of Manitoba, S.C. 1886, c. 47, s. 2.
13. North Cypress v. C.P.R. (1905), 35 S.C.R. 550; Reference re Effect and Validity of Amendments to the Constitution of Canada sought in the Proposed Resolution for a joint Address to Her Majesty the Queen Respecting the Constitution of Canada (1981), 82 A.P.R. 503, sub. nom. Reference Re Amendment to the Constitution of Canada (No. 2) (1981), 29 Nfld. & P.E.I.R. 503 (Nfld. C.A.).
14. R.S.M. 1902, c. 26. The case is reported in Forest v. Registrar of Man. Ct. of Appeal (1977), 35 C.C.C. (2d) 497 at 510; (1977), 77 D.L.R. (3d) 445 at 458; [1977] 5 W.W.R. 347 at 361 (Man. C.A.).
15. Ibid.
16. [1923] 1 W.W.R. 1.
17. R. v. Ulmer (1922), 19 Alta. L.R. 12 at 19-20; 38 C.C.C. 207 at 212; [1923] 1 D.L.R. 304 at 310; [1923] 1 W.W.R. 1 at 8 (C.A.).
18. [1927] S.C.R. 364.
19. Reference re s. 17 of The Alberta Act, [1927] S.C.R. 364 at 367; [1927] 2 D.L.R. 993 at 995 per Newcombe, J., for the Court.
20. [1953] A.C. 594; [1953] C.T.C. 281.
21. [1958] S.C.R. 745.
22. A.G. Man. v. C.P.R., [1958] S.C.R. 744 at 750-751; 77 C.R.T.C. 268 at 272; 15 D.L.R. (2d) 449 at 453.
23. [1981] 3 W.W.R. 408.
24. Reference Concerning Tax on Natural Gas (1981), 28 A.R. 11 at 25, sub. nom. Reference Re Questions Set Out in O.C. 179/80, Concerning Tax Proposed by Parliament of Canada on Exported Natural Gas, [1981] 3 W.W.R. 408 at 422 (C.A.).
25. Regina v. Forest (1977), 34 C.C.C. (2d) 108 at 114; (1977), 74 D.L.R. (3d) 704 at 709; [1977] 1 W.W.R. 363 at 368 (Man. Co. Ct.).

26. A.G. Man. v. Forest, [1979] 2 S.C.R. 1032; (1980), 2 Man. R. (2d) 109; 49 C.C.C. (2d) 353; (1980), 101 D.L.R. (3d) 385; 30 N.R. 213; [1980] 2 W.W.R. 758.
27. H. of C. Deb., March 27, 1875, pp. 931-932.
28. Royal Commission on Manitoba's Natural Resources Hearings (Ottawa Feb. 12-15, 1929) at E-2.
29. Infra, pp. 77-87.
30. Infra, Chapter III, note 258.
31. The Manitoba Boundaries Extension Act, S.C. 1912, c. 32, s. 6.
32. Rupert's Land Act, S.C. 1869, c. 3.
33. (U.K.) 28-29 Vic., c. 63.
34. An Act to Remove Doubts as to the Validity of Colonial Laws, 28-29 Vic., 1865, c. 63 (U.K.).
35. A.G. for Alta. v. A.G. for Canada, [1939] A.C. 117, sub. nom. Reference re Alberta Legislation, [1938] 4 D.L.R. 433; [1938] 3 W.W.R. 337 (The Alberta Banking Case); and Brophy v. A.G. for Man., [1895] A.C. 202 at 217 (1897), 5 Cart. B.N.A. 156 at 175; Attorney-General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436 at 461 (The Prince Augustus Case).
36. This provision was repealed by s. 53 (Schedule, Item 1, Column II (4)) of the Constitution Act, 1982. Section 45 of the same Act now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of the Act also authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada. For a discussion of the definition of 'constitution of the province', see Margaret A. Banks, "Defining Constitution of the province -- The Crux of the Manitoba Language Controversy" (1986), 31 McGill L.J. 466.
37. In Re the Initiative and Referendum Act, [1919] A.C. 935 at 943; (1919), 48 D.L.R. 18 at 23-24; [1919] 3 W.W.R. 1 at 6.
38. The report of the case, from Le Manitoba, is published in (1981), 12 R.G.D. 242.

39. The learned judge's reasons, as they appear in the French language in Professor Magnet's article are essentially the same reasons that were published, in English in the 1909 case of Bertrand v. Dussault; Bertrand V. Lavoie and the following extracts are from the latter publication: Forest v. Registrar of Court of Appeal of Manitoba (1977), 35 C.C.C. (2d) 497 at 510-514; (1977) 77 D.L.R. (3d) 445 at 458-462; [1977] 5 W.W.R. 347 at 361-366 (Man. C.A.).
40. See supra, note 29.
41. In re the Initiative and Referendum Act, [1919] A.C. 935 at 941-944; (1919), 48 D.L.R. 18 at 21-25; [1919] 3 W.W.R. 1 at 4-7. Cf., the view of Stuart, J.A. in R. v. Ulmer, (1922), 19 Alta. L.R. 12 at 23; 38 C.C.C. 207 at 215; [1923] 1 D.L.R. 304 at 313; [1923] 1 W.W.R. 1 at 11 (C.A.).
42. [1923] 1 W.W.R. 1.
43. R. v. Ulmer (1922), 19 Alta. L.R. 12 at 31; 38 C.C.C. 207 at 222; [1923] 1 D.L.R. 304 at 320; [1923] 1 W.W.R. 1 at 18 (C.A.).
44. Ibid., 19 Alta. L.R. 12 at 32; 38 C.C.C. 207 at 223; 1 D.L.R. 304 at 321; 1 W.W.R. 1 at 19.
45. Ibid., 19 Alta. L.R. 12 at 39-40; 38 C.C.C. 207 at 229-230; 1 D.L.R. 304 at 326-327; 1 W.W.R. 1 at 24-25.
46. (1978), 85 D.L.R. (3d) 253.
47. A.G. Québec v. Blaikie, [1979] 2 S.C.R. 1016, sub. nom. A.G. Québec v. Laurier (1980), 49 C.C.C. (2d) 359; (1980), 101 D.L.R. (3d) 394.
48. Ibid., [1979] 2 S.C.R. 1016 at 1025; 49 C.C.C. (2d) 359 at 365; 101 D.L.R. (3d) 394 at 400.
49. [1980] 2 W.W.R. 758.
50. [1892] A.C. 445.
51. [1895] A.C. 202.
52. A.G. Man. v. Forest, [1979] 2 S.C.R. 1032 at 1038-1039; 2 Man. R. (2d) 109 at 114; 49 C.C.C. (2d) 353 at 357-358; 101 D.L.R. (3d) 385 at 389-390; 30 N.R. 213 at 218; [1980] 2 W.W.R. 758 at 762-763.

53. Ibid., [1979] 2 S.C.R. 1032 at 1037; 2 Man. R. (2d) 109 at 112; 49 C.C.C. (2d) 353 at 356; 101 D.L.R. (3d) 385 at 388; 30 N.R. 213 at 216; [1979] 2 W.W.R. 758 at 761.
54. Ibid., [1979] 2 S.C.R. 1032 at 1039; 2 Man. R. (2d) 109 at 114; 49 C.C.C. (2d) 353 at 358; 101 D.L.R. (3d) 385 at 390; 30 N.R. 213 at 218; [1979] 2 W.W.R. 758 at 762-763.
55. [1980] 2 W.W.R. 758, 763.
56. [1979] 4 W.W.R. 229.
57. p. 245.
58. At pp. 247-248.
59. Reference re Saskatchewan Natural Resources, [1931] S.C.R. 263 at 275; [1931] 1 D.L.R. 865 at 876, aff'd. [1932] A.C. 28; [1931] 4 D.L.R. 712; [1931] 3 W.W.R. 488.
60. Chester Martin, "Dominion Lands" Policy, ed. Lewis H. Thomas, Toronto: McClelland & Stewart Ltd., 1969.
61. (1889), 14 A.C. 295, 303 (P.C.).
62. [1911] A.C. 87, 95 (P.C.).
63. [1981] 4 W.W.R. 187 Alberta Court of Appeal.
64. Infra, Chapter III, note 198.
65. Clem Chartier, "Indian: An Analysis of the Term as used in Section 91(24) of the British North America Act, 1867" (1978-79), 43 Sask. Law Rev. 37.
66. Bryan Schwartz, First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform And Canadian Statecraft, Montreal: The Institute for Research on Public Policy, 1986 at 213-248.
67. Infra, Chapter III, notes 55-117.
68. Per curiam in Hunter v. Southam, [1984] 2 S.C.R. 145 at 169, sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 121; (1984), 11 D.L.R. (4th) 641 at 659; [1984] 6 W.W.R. 577 at 597.

69. See the clause to this effect in the Natural Resources Transfer Agreement: Manitoba Natural Resources Act, S.C. 1930, c. 29, Memorandum of Agreement, Schedule, clause 23.
70. Chester Martin, "The Colonial Policy of The Dominion" in Transactions of the Royal Society of Canada, Toronto: 1922 at 35.
71. Nissan Auto (Can.) Ltd. v. Pelletier (1978), 77 D.L.R. (3d) 646 at 664; Hunter v. Southam, [1984] 2 S.C.R. 145 at 169, sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 121; (1984), 11 D.L.R. (4th) 641 at 659; [1984] 6 W.W.R. 577 at 597.

### III. BACKGROUND OF SECTION 31

#### A. INDIAN TITLE AND THE OCCUPATION OF LANDS BY THE "HALF-BREED" POPULATION OF THE RED RIVER AREA, 1870

##### 1. Indian Title, and the Policy Objects Served by its Extinguishment

###### (a) Nature of Indian Title

The expressed purpose to grant lands "towards the extinguishment of the Indian Title to the lands in the Province" may be properly elaborated by reference to the policies adopted with reference to such extinguishment up to the time of enactment, and to the state of the law in 1870.<sup>1</sup> Section 31 establishes duties of government to grant lands for the benefit of the "Half-Breed" residents "towards" the extinguishment of the Indian title; it must, then, protect the corresponding rights of the "Half-Breed" residents to receive the benefit of the land scheme contemplated by the provisions of the section. Such a provision in the Constitution, which protects rights, is to be interpreted by reference to the nature of those rights.<sup>2</sup>

It appears that the principles of Indian title have been developed as an equitable response to the particular circumstances which attended the relationships between the



Crown and the Aboriginal peoples upon the occasion of the Crown's establishment of the colonial settler system on the lands of Aboriginal peoples. Sections 31 and 32 were cited as an example of established doctrine respecting the Indian title, by Chancellor Boyd in R. v. St. Catherines Milling.<sup>3</sup> In Kanatewat v. James Bay<sup>4</sup> Malouf, J. considered "the manner in which the Government of Canada recognized the Indian title to the land" by reference to legislation,<sup>5</sup> including s. 31, to which he referred as providing

. . . that the extinguishment of the Indian Title to the lands in the Province would be obtained by distributing a large portion of the ungranted lands . . . to the Indians residing therein.

His Honour then said,

The . . . Legislation referred to, all clearly show that the authorities therein mentioned recognized that the Indians had a right and title to the land.<sup>6</sup>

Upon the occasion of assuming jurisdiction over the western territories Canada had undertaken the obligation to deal equitably with the land rights of the Indian peoples, in article 14 of the Imperial Order in Council of June 23, 1870.<sup>7</sup> Section 31 was the particular provision adopted to meet the obligations of Canada respecting the "Half-Breed" families within the new province.

The doctrine of Indian title reconciles the existing use and occupation of lands by Aboriginal peoples who are accorded the rights of British subjects by the British colonial system, with the English law doctrines which

conceive the Crown as the lord paramount of all lands within the realm and the sole source of title to the land. Aboriginal title is a possessory title recognized in the English law of property system which generally conceives private land rights as derived from grant from the Crown.<sup>8</sup>

Although the origins of the doctrine of Aboriginal title ( the terms "Aboriginal title" and "Native title" are synonymous with "Indian title"<sup>9</sup>), have been debated by legal writers, the view that it derives from generally recognized principles of property relations seems to accord with the approach generally adopted by Canadian courts.<sup>10</sup> On this basis, Indian title is a particular recognition of the property relations within Aboriginal society. Indian title is one of the aspects of intra-Aboriginal relations that English-Canadian law has recognized as giving rise to recognizable rights within the English-Canadian legal system. In another area of intra-Aboriginal relations, marriages validly contracted under the local Aboriginal system, it has been judicially held,<sup>11</sup> are not dissolved by the introduction of the new legal system, notwithstanding their failure to conform to the new legal system.<sup>12</sup> With respect to the assumption that Aboriginal property relations would be necessarily abrogated by the introduction of English law, a learned writer has commented, "It would be monstrous to hold that (upon the introduction of English law) the total population of a country became squatters in

their own dwellings, and trespassers in their own gardens.<sup>13</sup>

Because Aboriginal title has its source outside the common law of real property, the courts cannot describe its incidents with the terminology applicable to common law property titles. In Calder's case, Judson, J. explained Indian title in these words:

[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their fore-fathers had done for centuries. This is what Indian title means.<sup>14</sup>

The reference to societal organization indicates the group nature of the Indian title interest; it inheres in an identifiable group of Aboriginal people.<sup>15</sup>

In a recent Supreme Court case, the Chief Justice referred to the courts' difficulty in describing the nature of Indian title:

. . . 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. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.<sup>16</sup>

On the facts of that case, the view of the majority was that a duty of a fiduciary nature existed as an incident of the Indian title; the interest of the Aboriginal people was described as follows:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest

does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. 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.<sup>17</sup>

The fact that the doctrine of Aboriginal title arises "from the need to make some legal sense of the often contradictory historical patterns of Crown practice regarding Aboriginal peoples",<sup>18</sup> has resulted in the exercise of judicial caution in the elaboration of general principles. It may be that the principles expounded in the majority decision in Guerin require a consideration that the Crown's fiduciary obligation to Aboriginal peoples is in fact not a single obligation but "a range of obligations varying with the circumstances and rooted in the historical, political and legal relationship between them."<sup>19</sup>

Respecting the proof of an Aboriginal title claim by Indian people, the Supreme Court has cautioned:

. . . [C]laims to aboriginal title are woven with history legend, politics and moral obligations. If the claim of any band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that band to that land, not on any global basis.<sup>20</sup>

History shows that the ambit of the obligations undertaken by the Crown in respect of Aboriginal peoples whose title to occupied lands is surrendered comes to depend partly upon the circumstances peculiar to that surrender. The continuing obligations of the Crown have been based upon treaty, statute, policy, and the requirements of colonial law.<sup>21</sup> In the case of the "Half-Breed" families of Manitoba, the Crown obligations are found in a constitutional enactment gained at the price of forceful opposition to Canadian annexation.

Section 35 of the Constitution Act, 1982 in its recognition and affirmation of "existing Aboriginal rights" represents an official endorsement of the basic tenets of the doctrine of Aboriginal title.<sup>22</sup> These principles had been judicially expounded for many years before Manitoba's constitution was enacted.<sup>23</sup>

(b) Policy Objects of Indian Title Extinguishment

It is convenient to begin with the useful summary provided by Strong, J. in the St. Catherines Milling case when that well-known case was decided in the Supreme Court of Canada:<sup>24</sup>

In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.

These principles, stated Strong, J., were those,

. . . upon which the crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnston was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible directly to the crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867 . . . .<sup>25</sup>

Mr. Justice Strong then referred to the reasons behind the British rules of policy:

To ascribe it [the system of rules] to motives of humane consideration for the Aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took rise. Its true origin was, I take it, the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies.<sup>26</sup>

The public interest basis for dealing fairly with

Indian title was re-affirmed in the Guerin decision<sup>27</sup> in the Supreme Court of Canada. In respect of "Half-Breed" people, the public interest was generally associated with the reasons for satisfying their claims to Indian title, and for providing a feasible method of inducing them to adopt the ways of the settler population.<sup>28</sup>

Having recognized the title of the Indian occupants and accorded it protection by prohibiting alienations to private parties, the Crown adopted the practice of extinguishing the Indian title by purchase before making any grants of lands to the incoming settler population.<sup>29</sup> In St. Catherines Milling, Boyd, C. referred to descriptions of the policy from Reports contained in the Journals of the Legislative Council of Canada, 1844-1845 and 1847 from which the following extracts are taken:

For a considerable time after the conquest of Canada, the whole of the western part of the Upper Province, with the exception of a few military posts on the frontier, and a great extent of the eastern part, was in their [the Indians'] occupation. As the settlement of the country advanced, and the land was required for new occupants, . . . the British Government made successive agreements with them for the surrender of portions of their land . . . .

. . . .

These agreements . . . sometimes contain certain reservations of a part of the land surrendered for the future occupation of the tribe. In other cases separate agreements for such reservations have been established by their being omitted from the surrender . . .<sup>30</sup>

The nature and form of the Crown's undertaking to set

apart lands for the benefit of the Aboriginal peoples who surrendered their Indian title varied with the circumstances. Strong, J. refers to different treaty agreements. Chapter 14 of the Consolidated Statutes of Lower Canada (1861) provides an example of an appropriation of public lands for the benefit of the Indian population of Lower Canada, to be effected as directed by Order in Council. The object of that provision was judicially described as:

. . . [I]ntended to remedy the condition of many tribes whose occupation of lands had been disturbed, without compensation being made therefor, and to provide them a means of living in return for what they had thus been deprived of.<sup>31</sup>

In its nature, Aboriginal title is a group or collective interest; that interest cannot be alienated except by surrender to the Crown.<sup>32</sup> The policy of requiring extinguishment of Indian title by purchase by the Crown only, was based on the object of the Crown of preventing frauds and abuses by private parties which accompanied the availability of the proceeds of ungranted lands occupied by Aboriginal peoples in the public market.

The policy reserving purchases of Indian title by the Crown was designed to promote the public interest as well as the protection of the Aboriginal peoples.<sup>33</sup> The essence of that policy was declared as follows in the Royal Proclamation of October 1763:

And whereas great frauds and abuses have



been committed in the purchasing lands of the Indians, to the great prejudice of our interests and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, . . . strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement . . . .<sup>34</sup>

Having recognized the possessory title of Aboriginal occupants, and having set aside inalienable lands for their exclusive use, the Crown did not then terminate its relationship with the Aboriginal peoples on the "reserved" lands. In fact, the Crown continued to exercise a supervisory and protective role. The pre-Confederation situation was described by Chancellor Boyd in R. v. St. Catherine's Milling<sup>35</sup> in the Ontario Chancery:

. . . [T]he native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration and protect both red and white subjects so that their contact in the interior might not become collision. A modus vivendi had to be adjusted. The course of civilized colonization in the North-West at this day presents, in its essential features, a counterpart of what was going on in the now thickly-populated parts of Upper Canada at the beginning of the century.

. . . [T]he inevitable problem in view of the necessary territorial constriction of the Indian occupants of those vast expanses over which they and their forefathers have fished and hunted and trapped from time immemorial was and is this: how best to subserve the welfare of the whole community and the state,

how best to protect and encourage the individual settlers, and how best to train and restrain the Indian so that being delivered by degrees from dependency and pupillage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship. These three considerations, mainly, have shaped the policy of the Government in the past as in the present.

Later on in his judgment, Boyd C. emphasizes that the relations between the Government and the Indians change upon the establishment of reserves.<sup>36</sup> The policy revealed by the history of the reserves indicates, according to Boyd, C., that the Indians on the reserves are no longer regarded "as in a wild and primitive state, but as in a condition of transition from barbarism to civilization".<sup>37</sup> The essence of the "transition policy" was already well established by 1870. Chancellor Boyd refers to Lord Glenelg's instructions to Sir Francis Bond Head in 1838 as the keynote to the description of established practice.<sup>38</sup> One of the essential features of the policy involved gaining the Indians over to a settled life by inducing in them a sense of permanency in the territorial locations assigned to them. ". . . [T]hey should be attached to the soil by being taught to regard it as reserved for them and their children by the strongest securities." (Emphasis added) Further, the policy was to group the Aboriginal peoples within exclusive, circumscribed limits, and "those limits were almost invariably allocated at their usual centres of settlement, and within the ambit of their respective hunting ranges as recognized among

themselves."<sup>39</sup>

Chancellor Boyd contrasted the policy followed in the United States, "where the main object has been to mass all the Indian nations and tribes in one vast district . . . ."<sup>40</sup> In Canada, the policy has been to encourage the transition "to an agricultural or pastoral life, and thus to acquire ideas of separate property, and of the value of individual rights [to such property]."<sup>41</sup> With the establishment of the Dominion in 1867, Indian policy came to be administered by the federal Crown exclusively, pursuant to the powers granted by s. 91(24) of the Constitution Act, 1867.

## 2. Identification of the "Half-Breed" Population

The object of this section is to identify the part of the population in Manitoba in 1870 that was being referred to by the expression "the [H]alfbreed residents".

By 1870, the bulk of the population resident within the boundaries established for the Province of Manitoba was descended from Indian and non-Indian parentage. The local Indian peoples were mostly Saulteaux and Swampy Cree, but the "mixed" population derived its Indian ancestry from a variety of Indian peoples. W.L. Morton described the Red River Settlement, the main population centre at the junction of the Red and Assiniboine Rivers below Lake Winnipeg, as,

. . . [A]n Anglo-French colony, united by  
a substratum of Indian blood drawn from the

fur trade. As it was dual in composition, so had it been dual in origin. Its English half, Scots and Orcadian, sprang from the officers and servants of the Hudson's Bay Company, and the Selkirk colonists direct from the British Isles. Its French half sprang from the engages -- rarely from the bourgeois of the North-West Company direct from lower Canada.<sup>42</sup>

According to Archer Martin, there had been "Half-Breed" people scattered throughout the North-West for at least a generation before 1818,<sup>43</sup> but the existence of a separate group consciousness among the "French Half-Breeds" also attracted early attention from outsiders. In 1818, an observer remarked that "the 'Half-Breeds' under the denominations of bois-brûlés and metifs have formed a separate and distinct tribe of Indians for a considerable time back."<sup>44</sup>

Commentators who passed through the Red River region before 1870 referred to the differences in the ways of the "French half-breeds" and "English half-breeds". Ross,<sup>45</sup> as well as Alexander Begg<sup>46</sup> and others, also identified portions of the Red River population according to particular cultural characteristics and so sometimes lumped Native and non-Native together as "French".<sup>47</sup>

All these people of French extraction are of the Roman Catholic religion; and the vernacular of both Canadians and half-breeds is a provincial jargon of French and Indian mixed up together.<sup>48</sup>

Morton describes the Métif sense of community and its position in Red River as follows:

The nation metisse has never lost this

original sense of identity (as a "new nation") and even after being reconciled to the colony of which it had been the scourge, and to the Company that its old bourgeoisie had fought, the 'new nation' of the half-breeds (sic) remained a community apart in the larger community of Red River. This sense of community had been kept alive by the great annual buffalo hunts the all but exclusive occupation of the métis, and the recurrent conflicts with the Sioux. It had been kept alive by Canadian leaders, amongst whom the elder Riel may be noted, and by the conflict with the Company over fur trade in 1844-1849. After the reconciliation with the Company which followed 1849, it was confirmed by the use of the métis as the bulwark of the colony against the Sioux, and their consequent realization that they were, in the absence of regular troops after 1861, the one organized armed force in the settlement.<sup>49</sup>

Notwithstanding the recognized differences between the two cultural groups, general usage in 1870 had established the term "Half-Breed" as a racial connotation which could apply either to the Métif or "French Half-Breeds", or to the "English Half-Breeds".<sup>50</sup> In 1870, the bulk of the population within the boundaries of the Province was "Half-Breed". The 1870 census undertaken by Canada<sup>51</sup> listed, of a total population of 11,960 persons, 5,720 "French-Half-Breeds" and 4,080 "English Half-Breeds".<sup>52</sup> This large "Half-Breed" population was not generally considered part of the "white" population, but rather, part of the "Native" population.<sup>53</sup>

Although the "Half-Breed" people were regarded as a Native or Aboriginal people, they were distinguished from the Ojibway and Cree, who were known as "Indians".<sup>54</sup>

3. The Use and Occupation of Lands by the "Half-Breed" Population related to Indian Title

If a recognition and extinguishment of Indian title is an equitable response by the Crown to the circumstances of Aboriginal use and occupancy of lands claimed by the Crown for settlement, it is necessary to consider the use and occupation of the public lands by the "Half-Breed" population for which s. 31 provided. In the area of land that was to become the Province of Manitoba, great changes took place from about 1763 to 1870, which involved transformations of both the population and the economy of the region. The development of a large "Half-Breed" population by 1870 is related to both changes.

The "Half-Breed" population was closely associated with the economic changes occasioned by the expansion of the fur trade. That process was described by A.J. Ray:

. . . [D]uring the period from 1763 to 1821, the declining fur resources and the increasing levels of competition between rival trading groups led to a rapid spatial expansion of the fur trade in Western Canada. (sc. what later became Western Canada.) This expansion created great logistical problems for the fur companies which had to maintain transportation routes which continued to grow in length. To cope with these difficulties trading houses were established in the parklands to draw upon the bison resource. At strategic transportation points supply depots were constructed to receive and store the pemmican, dried meat, and grease coming from the above posts. . . The stocks of food which accumulated in these depots was (sic) to provision the canoe brigades which were engaged in the transportation of furs and trade goods.<sup>55</sup>

The purpose of the H.B.C. establishment at Red River was to prepare and despatch the boat brigades.<sup>56</sup> The Red River settlement, by the mid-nineteenth century, comprised a number of distinct communities, among them the Scottish colony of Kildonan, the French and Métis colonies of the Upper Settlement and the White Horse Plains, the Scottish and Orcadian "Half-Breed" colony of the Middle Settlement, or St. Paul's, and of the Lower Settlement, or St. Andrew's. Above the delta of the Red River were the Swampy Cree and Saulteaux at Baie St. Paul up the Assiniboine.<sup>57</sup> According to the historian W.L. Morton, Red River Settlement was dominated by the fur trade;<sup>58</sup> the majority of the residents were hunters, tripmen or traders. Nevertheless the bulk of the population lived by a subsistence, riverine agriculture supplemented by the buffalo hunt.

Morton described the economic pursuits of the various community groups. The "Indian" peoples he described as "settlers or colonists who had renounced a nomadic for a sedentary existence."<sup>59</sup> The Métif he described as "indigenous colonists":

. . . [T]he union of French and Indian blood was reflected in the indifferent practice of a subsistence agriculture coupled with an eager pursuit of the buffalo hunt and an addiction to the seasonal labour of the voyageur or tripman.<sup>60</sup>

The chief occupations of the Métis at St. Francois Xavier (White Horse Plain) were the buffalo hunt and the

fishery at Lake Manitoba. There were other Métif settlements like Saint-Laurent, Oak Point, and Duck Bay, where winter fishing through the ice was carried on.<sup>61</sup>

Morton describes the Métif community of Red River as distinct because of its Catholicism and nomadism,<sup>62</sup> that is, it is primarily the Métif who were the buffalo hunters. The Scots-Orcadian "Half-Breeds" lived differently. They were the children of H.B.C. retired officers and servants with means so their children did not have to hunt. "In consequence", according to Morton,

. . . [T]he Lower Settlement, though one of a mixed-blood population, was a stable agricultural society some of whose members were landed gentry, comparatively speaking, but nearly all of whom were definitely farmers. Only a few became hunters, tripmen or petty traders.<sup>63</sup>

Morton compared the occupation of lands by the Indian and Métif people in the following terms:<sup>64</sup>

As the Indians erected their winter wigwams in wooded ravines, the metis built their cabins in the wooded fringe of the river front for the sake of shelter and fuel. From the river itself they drew water and fish. On the silted river banks and 'dry points' and in openings in the woods, they sowed their patches of potatoes and barley. On the plain behind the women and old men cut the rank prairie hay . . . Like their Indian ancestors, what they desired was an extensive and seasonal use of the land, a use not confined to agriculture, and with it the right to move freely where they would. The river-front settlements of the metis, then, much like those of the Scots and the half-breeds (sic), were an organic part of a complex way of life which varied with the seasons and rested at once on the agriculture of the riverside and the use of the plains for haying, grazing and



hunting.

To the latter occupation, Morton attached particular significance for the Métif:

. . . [T]hought of themselves as a "nation" and the majority of them lived by the buffalo hunt. The hunt became, as it were, the institutional framework of the community.<sup>65</sup>

It is pertinent, in view of this singular importance of the hunt to the Métif nation, to further consider the use of the public lands occasioned by this particular activity.

#### 4. Buffalo-Hunting as a Use of Lands

Marcel Giraud wrote that,

. . . [T]he years from 1827 to 1870 were the period of the great expeditions which regularly led almost the entire Métis population to vacate the colony [Red River].<sup>66</sup>

Giraud, as did Morton, describes the buffalo hunting expeditions as essentially a Métif endeavour:

The hunting expeditions drained almost the whole colored population out of the settlements that lay along the Red River and Assiniboine. Only a few families remained in the Indian missions and in the colony, the old people incapable of participating in the exodus of the Bois-Brules stayed on the plots of ground that the Métis had seeded in the spring.<sup>67</sup>

The hunting expeditions ranged far to the south and west of the boundaries established for the Province by the Act of 1870. By the year 1859 the buffalo frontier was at the Cypress Hills, but it was not until 1874 that the last Red

River hunt left for the plains.<sup>68</sup>

All of the Métif buffalo-hunting was not confined to the great summer expeditions that left from Fort Garry and St. Francois Xavier.<sup>69</sup> Groups of varying sizes would form to hunt buffalo, or fur-bearing animals during the winter months, in the more productive areas.<sup>70</sup> Sometimes families would devote themselves in isolation to such activities. This custom of "wintering" persisted until well after 1870.<sup>71</sup> Giraud was impressed with the similarities of the Indian and Métif ways of life; both of which, he stated, centred around the buffalo-hunting economy.<sup>72</sup> The historian described life in the "wintering" communities, where the Métif constructed houses of logs; sometimes up to two hundred families would congregate, and in such places, "the Indians and the Métis lived in harmony, enjoying abundance or dearth according to the luck of the hunt; but usually well provided with food."<sup>73</sup> The hunting life style, according to Giraud, "encouraged among the Métis a behaviour and an attitude that hardly favored their conversion to the agrarian life."<sup>74</sup> The hunting expeditions took the residents of the Red River area away from their waterside homes for extended periods of time; when spring came many hunters and fishermen returned to the colony but others remained absent for years on end.<sup>75</sup>

##### 5. Agriculture as a Use of Land

The riverine subsistence agriculture of the Métif was

subordinated to the hunt or the trip,<sup>76</sup> and in its nature it compared to the similar use of land made by the Saulteaux and Swampy Cree Indians whose Indian title was extinguished, within the boundaries of the Province, by Treaty No. 1.<sup>77</sup> According to recent research, the Indians of the Manitoba parklands took to cultivating the soil at the beginning of the nineteenth century.<sup>78</sup> None of the Indian peoples became predominantly agriculturalists; their small garden plots served mainly to supplement a subsistence economy that remained based upon hunting and gathering.<sup>79</sup> There were, of course, other Indian peoples in other places, who were agriculturalists prior to European contact.<sup>80</sup> Indeed, recent archeological research has suggested that Indian agriculture occurred prehistorically in the Red River valley as far north as present Lockport, Manitoba.<sup>81</sup> Ottawa people first planted at the Indian village of Netley Creek near the Junction of the Red River in 1805, and from there, agriculture spread among the neighboring Ojibway.<sup>82</sup> Neither the Ottawa nor the Ojibway were living in the Red River valley at the time of European contact but beginning in the 1780's, they began, according to Moodie and Kaye, to replace the Cree and Assiniboine.<sup>83</sup> The Ottawa themselves were newcomers to the area from the Upper Great Lakes region.<sup>84</sup> In 1808, Peter Fidler observed that four or five Indian families had built wooden houses at Netley Creek and several acres of land were planted with Indian corn,

potatoes and "other garden stuff".<sup>85</sup> In 1815 a small Indian garden village was established on the Assiniboine River midway between Brandon House and Portage la Prairie, and in 1816 Indian gardens were reported along the Whitemud River at the southern end of Lake Manitoba.<sup>86</sup> The Reverend John West, in crossing the area between Lakes Manitoba and Winnipeg in 1822, noted that a group of Indian people was raising potatoes and pumpkins on the shores of Lake Manitoba.<sup>87</sup> Agriculture persisted into the treaty period.<sup>88</sup> Although both Indian and "Half-Breed" people practiced a subsistence agriculture for a long time before 1870, it appears that some residents within the boundaries of the Province did not include garden vegetables as a major part of their diet before that time. In the Interlake area, fish, bannock and pemmican appear to have been the diet staples.<sup>89</sup>

W.L. Morton has considered the relationship between the hunt and agriculture in the Red River area, and his analysis contributes to an appreciation of the limitations imposed upon land use by the conditions which prevailed in 1870.<sup>90</sup>

Neither hunt nor agriculture could displace the other, and each depressed the price of the other's produce in a limited local market. From the fatal check of this internal equipoise of the farming and hunting economy, only the development of an export market for agricultural produce could have freed Red River. To that development both an export staple and transportation were necessary, and neither came into being before the old order

in Red River was shattered.

. . . [Red River agriculture] was a riparian agriculture, bound closely to the borders of the Red and Assiniboine and their tributaries. That the first agricultural settlements should have been on the river side was natural and inevitable. The need of a supply of fresh water and of easy summer and winter communication determined the adoption of the river lot system of Lower Canada . . .

There was no settlement away from the water front. Moreover, with few exceptions there was no cultivation beyond probably half a mile, and certainly not beyond a mile, from the river banks.

. . . Alexander Begg noted when the Red River Settlement had been absorbed in Manitoba that "it was generally supposed that settlement could not be successful on the prairie at any distance over a mile from the river".

The primitive character of farm implements and the high cost of wood fencing helped prevent attempts to till large fields on the plains until after 1880.<sup>91</sup> Cattle roamed on the plain in summer, and crops had to be fenced. Fields were small; one of five acres was considered large.<sup>92</sup> According to Morton, as long

. . . as the Métis could make a precarious living by the hunt, or in the boat or cart brigades of the Company or free traders, they would not turn to the drudgery of the farm . . . .

The riparian agriculture of Red River . . . was an integral part of the hunting and farming economy . . . By 1870, the best farmers of Red River had shown little sign of being able to produce an export staple, or to farm away from the rivers.<sup>93</sup>

No one, in fact, did, until after 1880.<sup>94</sup>

## 6. Shifts in Aboriginal Local Populations, and the Sharing of Land Resources

The Métif population of Manitoba had, by 1870,, established itself as a participant in the communal use of the open spaces of the region, in common with other Aboriginal peoples. The Métif buffalo hunters participated in the great summer expeditions in large, well-organized groups.<sup>95</sup> On these expeditions, the Métif governed themselves by their own rules.<sup>96</sup> These expeditions, stated Morton, were "the institutional framework of the community".<sup>97</sup> The Métif considered themselves a 'new nation', a people separate from both their European ancestors and the local "Indian" peoples.<sup>98</sup> They considered themselves, and were considered, as "Natives" of the country, with rights as owners of the land.<sup>99</sup> In their hunting expeditions, they fought battles and made peace with the Indian peoples with whom they shared the land.<sup>100</sup> These claims were asserted on the eve of Manitoba's entry into Confederation. A.S. Morton records a meeting of the "Half-Breed" people at McKenney's Royal Hotel in 1868.<sup>101</sup> At that meeting the "Half-Breeds" asserted themselves to be Natives, and occupants of the soil with whom no satisfactory arrangement had ever been made. They feared both the claims of the Saulteaux and the designs of Canada.<sup>102</sup> The meeting noted that the Indians had long ago abandoned the region.<sup>103</sup>

A.J. Ray has indicated that between 1763 and 1821,

the Red River valley, the lower Assiniboine River, and the Manitoba Interlake regions were abandoned by the Assiniboine and Western Cree, and replaced by the Ojibway.<sup>104</sup> Moodie and Kay have stated, as noted above<sup>105</sup> that neither the Ottawa nor the Ojibway were living in the Red River area at the time of European contact. Like the "Half-Breed" population, these Indian groups were newcomers who came to share in the resources of the region.

Sharing of resources appears to have been a general phenomenon in what became Western Canada, and was never considered as a bar to the entitlement to Indian title when it became the interest of the Crown to introduce settlers to the Aboriginal lands.

Friesen noted recently that the Cree and Blackfoot of the west

. . . hunted across the plains without regard for territorial limits, pursuing the remnants of the buffalo herds, while the spectre of a white Canadian invasion was slowly translated into reality.<sup>106</sup>

Spry has emphasized the requirement of extensive land use to support the economy upon which the Red River and adjacent regions depended.<sup>107</sup>

A life based on free access to a variety of common resources scattered over a wide territory had involved continual movement from one base of operations to another according to the season, the migration of game, and traditional ceremonial meeting places. Such a life was highly space-intensive and required free access to wide areas and use of the resources on them.

In this Aboriginal world of shared resources, Spry includes Indian and "Half-Breed" groups.<sup>108</sup>

When it became in the Crown's interest to extinguish the Indian title in the West, there was no concern on the part of the Crown respecting the particular spaces that were in fact used and occupied by the Aboriginal inhabitants. The geographic boundaries of the lands which were yielded to the Crown were reckoned by the interests of the Crown. The concern was to extinguish the Indian title to particular lands, and provision was made to provide for compensation to all the Aboriginal inhabitants, regardless of 'national' membership or exclusivity of land use.

The clearest evidence of this policy is provided in the circumstances of the signing of Treaty No. 1. The Treaty was formally entered into between the Crown and

. . . the Chippewa and Swampy Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined.<sup>109</sup>

The object of the Treaty was "to obtain the consent of her Indian subjects inhabiting (emphasis added) the said tract and to make a treaty and arrangements with them."<sup>110</sup> When the interests of the Crown demanded a settlement of the Indian title, expediency and practicality governed. The Indian title to lands desired by the Crown was extinguished by providing for the residents of the particular area; the fact that the residents used other lands outside the ceded area did not operate as an additional claim.<sup>111</sup>



Furthermore, the Crown's concern was to deal with the Indian title of family groups, being found living in the ceded area, and not with the entire membership of a people or a nation as such.<sup>112</sup> The Crown did not impose a definition upon the Aboriginal peoples to govern membership of the indigenous groups with whom it dealt but left it to the heads of individual families to make the decision about membership. Thus, although s. 31 provided for the extinguishment of the Indian title of the "Half-Breed" residents, it was found that many of the "Half-Breed" residents opted to be treated as Indians and participated in Treaty No. 1.<sup>113</sup>

Section 31 represents the first equitable response to the fact of Aboriginal use and occupancy of lands by a people descended partly from European forebears, but who had, in its particular historical circumstances, evolved in advance of the establishment of "settled" colonies. The "Half-Breed" population phenomenon was possible because of the dominance of the fur trade to the exclusion of agricultural settlements after the European settlement of eastern British North America. Lysyk considered the extinguishment policy in the West in the following terms:

The territories known as Rupert's Land were granted to the Hudson's Bay Company by its incorporating Charter of 1670 and reconveyed by the Company to the Crown (in right of Canada) in 1870. During that period the Company had little occasion to concern itself with extinguishment of Indian title. The only object in obtaining surrenders from

the Indians would be to prepare the way of settlers, and the Company tended to be something less than enthusiastic in encouragement of settlement . . . .

Unless and until settlement was contemplated, negotiations for cession of Indian title were uncalled for.<sup>114</sup>

Acts of extinguishment accompanied each intrusion of settlement. The Selkirk settlement at Red River Colony was accomplished with the Treaty of 1817<sup>115</sup> and the preparations for Canadian settlement of Manitoba and the West included the provision for dealing with Indian land claims in the Imperial Order in Council of June 23, 1870, and ss. 31 and 32 of the Act of 1870.<sup>116</sup>

Clause 14 of the Imperial Order provided:

The claims to the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealing with the aborigines.

If the "Half-Breed" population was distinct from the "Indian" population, then, the Order may not apply to them. On the other hand, if the basis of Indian title and its rights of possession and compensation for deprivation thereof is the fact of use and occupancy prior to establishment of the settler system, there would appear to be a requirement to deal with the circumstances of the "Half-Breed" population.<sup>117</sup>

The requirement of a particular accommodation for the circumstances of the "Half-Breed" population in respect of

the extinguishment of the Indian title can be elaborated by reference to the policies inherent in the Indian settlement legislation which preceded the Act of 1870, and in the history of the negotiations which preceded its enactment. These considerations follow in the next part.

#### B. STATUTES IN PARI MATERIA

In order to construe the law of s. 31, it is appropriate to read the words of the section in their proper context, which includes other enacting provisions of the same statute and other statutes in pari materia.<sup>118</sup> Such statutes may relate to the same matter or subject, or have a common purpose.<sup>119</sup> Given the provision, in s. 31, of a scheme of land settlement for an Aboriginal people, in the context of the expressed purpose to extinguish the Indian title to the lands concerned, it is appropriate to consider the purposes which the Indian settlement legislation was aimed at, prior to and up to the time of the enactment of s. 31. The purposes of that Indian legislation appear to be similar to the purposes suggested by the historical circumstances of the "Half-Breed" population of Manitoba in 1870. Section 31 has been recognized, by judges and academic writers, as part of the scheme of legislation which comprised the government policy respecting the settlement of Aboriginal peoples following upon the extinguishment of the Indian title.<sup>120</sup>

The essence of that Indian settlement policy was to afford protection to the Indian peoples and their lands from abuse, fraud and imposition by non-Indian settlers until such time as, having learned to protect themselves, they could be granted free, alienable interests as individuals from the lands reserved for the group. The Indian settlement legislation enacted by Canada on the eve of the enactment of s. 31 is particularly relevant.<sup>121</sup> That legislation was designed by Canada

. . . for the Six Nations and other Indian people with long contact with Europeans and who were supposed to have received a rudimentary training in 'civilization' under earlier legislation and missionaries and was intended to provide further training in Euro-Canadian values.<sup>122</sup>

In his 1871 report the Deputy Superintendent of the Indian Branch in the Department of the Secretary of State for the Provinces, William Spragge, stated the purposes of the legislation framed in the years 1868 and 1869, as "designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life".<sup>123</sup> Another government publication has described the object of the 1869 legislation as the establishment of "a bond between an Indian and his property similar to that between a 'white' settler and his homestead".<sup>124</sup> On this basis, the homestead legislative policy of Canada will also be relevant to the elaboration of the purposes of the scheme of which s. 31 forms a part.

It is convenient to begin by considering the general policy of the homestead legislation, and next to elaborate the elements of the Indian settlement legislation which reveal its policy or purpose, doing so in chronological order ending with the 1869 legislation. The general policy of the homestead legislation was to grant, in the first instance, a license to occupy or enter upon, the lands, and to make a free grant subsequently upon the fulfillment of settlement conditions.

The Public Lands Act of 1853<sup>125</sup> provides the essential features of the policy. The general provision in s. 6 provided for the issue, in the first instance, of a licence of occupation to any person wishing to become a settler on any public land. Upon the fulfillment of the terms and conditions of his licence, the settler was entitled to a deed in fee for the land comprised in the licence. The Public Lands Act of 1859, 22 Vic., c. 22 continued the same practice. The public policy component of this homestead legislation would appear to be the promotion of general economic development of previously uncultivated public lands.

In places where public lands were not surveyed, a policy of granting homestead rights would require the recognition by the Crown of particular acts evidencing the intention to enter upon particular lands. The Council of Assiniboia had, since at least 1860, recognized a right of

preemption derived from acts of possession.<sup>126</sup> Within the boundaries of the Province in 1870, the customary mode of appropriation was staking or ploughing around the land.<sup>127</sup> Chapter 98 of the Consolidated Statutes of British Columbia, 1877, is an example of legislated recognition of the practice of staking lands claimed for homestead entry.<sup>128</sup>

The object of protection of Indian lands appears in the title of the 1839 statute of Upper Canada, 2 Vic., c. 15, "An Act of protection of the Lands of the Crown in this Province, from Trespass and Injury." The preamble recited the taking of possession of lands appropriated for the residence of "Indian Tribes" in the Province "by persons having no lawful right or authority to do so", and the enactment provided for the appointment of Commissioners to inquire into complaints concerning such illegal possessions, and to provide for the removal of the persons in unlawful possession by legal process.

By the Act of Union of 1840<sup>129</sup> it was provided that all laws, statutes and ordinances in force in the provinces of Upper and Lower Canada would remain in force until and as varied by acts of the Legislature of the United Province of Canada.<sup>130</sup> The 1850 statute, 13-14 Vic., c. 42, "An Act for the better protection of the Lands and Property of the Indians in Lower Canada", provided for the appointment of a Commissioner of Indian Lands for Lower Canada in whom all lands or property set apart for the use of Indian groups

would be vested in trust, and who would in law be held to be in the occupation and possession of any lands actually occupied or possessed by any groups in common. The Commissioner was by the Act given powers to deal with the lands subject to instructions from the Governor, and he was to be personally responsible to the Crown for all his acts.<sup>131</sup> The appointment of a Commissioner to provide protection for the grantees of s. 31 lands was recommended by counsel for the Province of Manitoba in 1881.<sup>132</sup>

In 1850 the Legislature also enacted 13-14 Vic., c. 74, "An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury." The preamble of the Act declared its purpose and the factual basis which the Act intended to remedy:

Whereas it is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use and occupation . . . .

The Act then enacted the prohibition of private land purchases from Indian people and made such purported purchases a misdemeanour. Section 4 legislated an exemption from taxes in respect of lands occupied by Indian people; including lands surrendered and set apart for the occupation of the Indian people. Section 8 of the Act protected

"presents" and annuities received by Indian persons from seizure, distress, sale or other legal process. The preamble to this provision declared the purpose of protection of such benefits, and revealed something of the nature and object of the "presents" and annuities; namely, that they are for the encouragement of "agriculture and other civilizing pursuits" among the Indian people, and are applied "to the common use and benefit" of the Indian recipients.

This statute<sup>133</sup> was judicially considered in Totten v. Watson.<sup>134</sup> It is useful to consider the policy of the Act as explained by the court because it addresses the condition of Indian people which was mirrored in the circumstances of the "Half-Breed" population of Manitoba in 1870. Further, it illustrates the established consistency of Crown policy respecting the object of protecting Aboriginal peoples from the designs of land speculators:

. . . [F]or they are a helpless race, much exposed, from their want of education and acquaintance with business, and the intemperate habits of many of them, to be taken advantage of in their dealings with white people.

. . . .

From the earliest period the Government has always endeavoured by proclamation and otherwise, to deter the white inhabitants from settling upon Indian lands, or from pretending to acquire them by purchase or lease; but it has never attempted to interfere with the disposition which any individual Indian has desired to make of land that had been granted to him in free and common socage by the



crown. Very few such grants have been made, and only to leading persons among the Indians, who, like the patentee in this case, . . . had been treated by the crown as officers in their service, and who, it might be assumed, had sufficient intelligence to take care of their property.<sup>135</sup>

This can be compared to the circumstances of the Métif expressed by Marcel Giraud:

. . . [I]n their contact with the Ontarians, they suffered the effects of their weakness of will and of their traditions of living, which, by attaching them to nomadism, had prevented them from appreciating the true value of the land and from adapting gradually to the economy that was destined hence forward to impose itself on the plains of the west.<sup>136</sup>

In 1881 the Province of Manitoba commissioned an inquiry into what were described by the Attorney-General's counsel as "monstrous"<sup>137</sup> abuses of the grantees of s. 31 lands. Counsel reviewed the evidence which contains conclusive historical evidence respecting the "liability to imposition" of the Métif families and described the Métif heads of families, in their relations with land speculators, as "stupid, improvident and illiterate".<sup>138</sup>

The Queen v. Hagar<sup>139</sup> also concerned the interpretation of the same Act.<sup>140</sup> The court referred to the purpose of the legislation and the policy reasons behind it in these terms:

The statute is designed to protect the Indians from all contracts made by them in respect to the lands set apart for their use, in consequence of their own improvidence and liability to imposition.<sup>141</sup>

The Aboriginal peoples of Manitoba's liability to

imposition in respect of their property continued well into the twentieth century. The matter was the subject of comment in the case of Sanderson v. Heap<sup>142</sup> in 1909, where the individual concerned was an Indian who had been granted lands within the boundaries of the old Settlement Belt. Mathers, J. considered it appropriate to make the general remark that it was

. . . a matter of common knowledge that Indians in their dealings with white men generally get the worst of the bargain. Indeed, a much stronger expression might be used to describe the ordinary transaction of this kind.<sup>143</sup>

That there was no significance in any particular case between an Indian or a "Half-Breed" in Manitoba is indicated by the case of R. v. Thomas<sup>144</sup> in which a "Half-Breed" participated in Treaty No. 1, subsequently withdrew, and participated in the distribution of scrip to "Half-Breeds".<sup>145</sup>

The distinction drawn in Totten v. Watson<sup>146</sup> between the group rights to the occupation of lands by Aboriginal peoples, in respect of which the Crown has always provided protection, and the unprotected, alienable rights of the individual Aboriginal as a British subject, are an important feature of Indian settlement legislation, and a feature which appears inherent in the provisions of s. 31. The distinction was referred to in Sanderson v. Heap<sup>147</sup> where Mathers, J. considered the elaboration of the established policy of the Crown by Robinson, C.J., in Totten

v. Watson.<sup>148</sup> The principle described was that

. . . the Indians of Canada are British subjects and entitled to all the rights and privileges of subjects, except in so far as these rights are restricted by statute.<sup>149</sup>

The Court referred to 13-14 Vic., c. 74 and decided cases.<sup>150</sup>

The same must apply to the "Half-Breed" population of Manitoba. Their rights of property were the same as those of everyone else who was a British subject in the Province, except to the extent those rights were modified by statute. The rights in s. 31 then, are properly construed as statutory additions or modifications to the rights of property that the "Half-Breed" families shared with all the residents of the province in 1870.

The next Indian settlement act, in chronological order, is the 1851 statute of the Province of Canada, 14-15 Vic., c. 106, entitled, "An Act to authorize the setting apart of lands for use of certain Indian Tribes in Lower Canada". This Act provided for the setting apart of 230,000 acres of lands for the use of "the several Indian Tribes" in Lower Canada, and vested the title and powers of management in the Commissioner of Lands. In the other colonies, legislation of Nova Scotia, New Brunswick and Prince Edward Island, enacted in the years 1851, 1854, and 1856,<sup>151</sup> respectively, provided protection for Indian lands by the appointment of commissioners.

The 1857 Act of Canada, 20 Vic., c. 26, set the.

pattern for the basic elements of Indian settlement legislation which was followed by the Dominion in 1869. The purpose of the 1857 Act is expressed both in the title and the preamble, and imports the distinction considered in Totten v. Watson<sup>152</sup> as well as the important consideration that a change from protected status to an owner of freely alienable lands is to be a gradual process. The title is An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the laws respecting Indians". The object suggested by the long title of the Act was elaborated in the preamble:

Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it by such Individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it . . . .

The terms of s. 31, as well as the social context in which it was intended to operate, suggest a similar object in respect of the "Half-Breed" population of Manitoba in 1870.<sup>153</sup>

The 1857 Act's definition of an 'Indian' imports the established practice of government to provide protection only in respect of persons residing on lands vested in the Crown.<sup>154</sup> Once an individual was exempted from the 'Indian laws' he became indistinct, in statute law, from other citizens. The object of the settlement scheme in the Act of

1857 is to carve out from the lands held for the common benefit of the group, individual lots which are, by gradual steps, vested in the individual in fee simple. The steps were as follows.

First, a lot of land was set apart for the use of the individual, who had to be a man of at least twenty-one years of age.<sup>155</sup> The Act's provisions indicate the type of characteristics it proposed to foster in the implementation of its "enfranchisement" process: each person was to be individually examined by an appointed Commissioner in respect of his ability to speak, read and write either the English or French language, his sufficient advancement in the elementary branches of education, and his good moral character and freedom from debt.<sup>156</sup> An individual assessed as possessing these characteristics was 'enfranchised', meaning that all distinction between the legal rights and liabilities of Indian persons and other subjects ceased.<sup>157</sup> There was provision also, for placing in a three-year state of probation, men over twenty-one years of age and not over forty, who, although unable to read or write, or not "instructed in the usual branches of school education", should be found to be

. . . able to speak readily either the English or the French language, of sober and industrious habits, free from debt and sufficiently intelligent to be capable of managing his own affairs.<sup>158</sup>

After the probationary term, it was competent for the

Commissioner to advise the Crown the individual should be enfranchised.<sup>159</sup> These provisions indicate that the matter of removing the protection generally offered to "on-reserve" Indian people was not taken lightly and administered generally; a subjective, considered decision was required in the case of each individual.

It is convenient to consider now the characteristics of the first step in the gradual land settlement scheme. The allotment was a life estate only.<sup>160</sup> The process of individual enfranchisement operated to enfranchise the wife, widow and lineal descendants.<sup>161</sup> These family members had a statutory right to occupy the allotted land.<sup>162</sup>

The second step in the gradual transitional, land settlement scheme occurred upon the death of the individual enfranchised grantee of a life estate. The land descended to his children or lineal descendants either by will or operation of provincial law, and the persons so benefitted received a fee simple state.<sup>163</sup> If a child or lineal descendant took the land and died leaving no lineal descendant and without having disposed of such land, it escheated to the Crown.<sup>164</sup>

The Crown continued to protect the lands within the family of the deceased enfranchised individual by providing that the Superintendent-General of Indians shall become the tutor of any child under the age of twenty-one years who inherited lands under the Act, in respect of his property.

and rights in the Province.<sup>165</sup>

The provisions of the 1857 Act were re-enacted in 1859.<sup>166</sup> There was a change, by way of adding the protective provision of the Act of Upper Canada, 13-14 Vic., c. 74, which prevented the taking of the lands of an enfranchised Indian in judgment or otherwise, for any debt or other security.<sup>167</sup> This provision did not apply to estates in fee simple valued from one hundred pounds or more, held by an individual Indian.<sup>168</sup>

In 1867 Canada acquired the exclusive power to make laws in respect of "Indians and lands reserved for the Indians".<sup>169</sup> A federal Act of 1868 provided for the organization of the Department of the Secretary of State for Canada, and for the management of Indian and Ordinance Lands.<sup>170</sup> This Act gave the Secretary of State, as Superintendent-General of Indian Affairs, control and management of Indian lands and property.<sup>171</sup> Section 6 contained the policy established by earlier legislation and law:

All lands reserved for Indians and for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provision; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.

The "settlement" provisions of the 1859 Act<sup>172</sup> were continued for Ontario and Quebec<sup>173</sup> and the repeal of

the Nova Scotia and New Brunswick "Indian statutes" was not to affect, it was also provided, the provisions of those acts which were not inconsistent with the federal statute.<sup>174</sup>

In 1869, a judge saw fit to comment upon the need for protective regulations in respect of Indian lands in Ontario. The remark serves to indicate that Parliament would have known, when it passed the Act of 1870, of the need for such protective regulation from its Ontario immigrants, for lands held by other indigenous persons liable to imposition. In Fegan v. McLean<sup>175</sup> the court deplored the prospect that Indian lands might be wasted by the lawful activities of Indian occupants who might not have "regard to the occupancy or use of the land for agriculture purposes."<sup>176</sup> The concern in the case was that cordwood could be cut and disposed of

. . . much below its value to any evil disposed person who may prompt and induce an Indian so to destroy the property belonging to the whole tribe. The consideration of this case discloses that the rights and interests of the Indians require to be further protected by such regulations, as would in future prevent the reserves being liable to be injured and destroyed.<sup>177</sup>

The parallel with the Manitoba situation is striking. Ontario immigrants moved there immediately after the 1870 Union and were soon to be found destroying the wood supplies along the river lands claimed by the Métif. The government of Canada, instead of making regulations pursuant to s. 31



to prevent such destruction, aided the immigrants through its land agents who directed the newcomers to the Métif lands.<sup>178</sup>

The final act passed to effect a gradual transition from group occupancy of reserved lands to individual ownership prior to the enactment of s. 31 was the Canadian statute of 1869, "An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42".<sup>179</sup> This Act altered somewhat the scheme established by the earlier legislation. All Indian individuals on lands which were surveyed were required to be issued a "location ticket" entitling the individual to lawful possession, but the land so possessed was not subject to seizure under legal process and was not alienable.<sup>180</sup> There was also an enfranchisement provision. A life estate could be granted to an individual

. . . who, from the degree of civilization to which he has attained, and the character for integrity and sobriety which he bears, appears to be a safe and suitable person for becoming a proprietor.<sup>181</sup>

Greater protection was provided than in the earlier legislation; the life estate was not alienable nor subject to seizure under any legal process.<sup>182</sup> In the case of lands held under location ticket, these descended to the children, but as an inalienable life estate not subject to seizure.<sup>183</sup> In the case of a life estate interest, that descended, by

will or intestacy legislation, to the children, who took the greater fee simple estate in the land.<sup>184</sup> Under the 1869 scheme, then, no alienable estate was ever granted directly; that was obtainable only by those of a generation removed from the grantee of a limited estate protected from seizure. As in the earlier legislation, children who received an estate from an enfranchised father were protected in their property by the guardianship of the Superintendent-General of Indian Affairs.<sup>185</sup>

Another provision in the 1869 Act provided for better security of the lands within the group: if an enfranchised individual holding a life estate died without leaving children, his estate escheated to the Crown for the benefit of his "tribe, band or body of Indians to which he," or his parents, belonged.<sup>186</sup> If there was a widow, the process occurred after the determination of a life estate she received, or upon her re-marriage.<sup>187</sup>

### C. THE SOCIAL CONTEXT IN WHICH THE ACT WAS MEANT TO OPERATE

#### 1. The Social and Economic Circumstances at Red River on the Eve of the Manitoba Act, 1870

The Act of 1870 was a response to a unique set of circumstances. The annexation of Manitoba represented the first formal contacts of Canada with the already established "Half-Breed" population. It was the first time in history

that a British Dominion was required to deal with the fact of an established Aboriginal people whose identity was based in part upon non-Aboriginal ancestry.<sup>188</sup> It was the first time in history that such an Aboriginal people was able to assert demands for a stake within the new economic order in circumstances where the economic base of people was largely tied to its relationship with a European fur trade company.<sup>189</sup> That economy was crumbling, and a new relationship with Canada was needed and demanded, to secure the place of the "new nation" within Canada. This part will consider the nature of the circumstances of the "Half-Breed" population which indicated a lack of security for their lands, and a liability to imposition by an expected inflow of immigration, both of which are factors which underlie the reasons for the protective regulations of the Indian settlement legislation in Canada at the same time.

It is convenient to begin with the observations of H.Y. Hind in his 1856 Report; they indicate the nature of changes which persisted until years after 1870:<sup>190</sup>

. . . [I]t is . . . much to be regretted that, from the singular necessities of their position, many of them are fast subsiding into the primitive Indian state; naturally improvident, and perhaps indolent, they prefer the wild life of the prairies to the tamer duties of a settled home; this is the character of many, but it belongs more to those of French descent than of Scotch or English origin.

About the 15th of June they start for their summer hunt of the buffalo. There are now two distinct bands of buffalo hunters, one

being those of Red River, the other of the White Horse Plains, on the Assiniboine . . . The Red River hunters go to the Coteau de Missouri, and even as far as the Yellow Stone River; the White Horse Plain settlers generally hunt west of the Souris River, and between the branches of the Saskatchewan, but also over the same grounds as their Red River brethren.<sup>191</sup>

As the buffalo diminish and go farther away towards the Rocky Mountains, the "Half-Breeds" are compelled to travel much greater distances in search of them, and consume more time in the hunt; it necessarily follows that they have less time to devote to farming . . .

There are several hundred "Half-Breeds" who, like their ancestors, pass their lives on the prairies, visiting the settlements occasionally, according as they may be in want of ammunition and clothing. It is impossible to arrive at an accurate estimate of their numbers, but there is no doubt that collectively they form a numerous and influential body . . . .<sup>192</sup>

Hind remarks upon the power of the "Half-Breed" population:

The "Half-Breed" hunters, with their splendid organization when on the prairies, their matchless power of providing themselves with all necessary wants . . . ; their perfect knowledge of the country . . . would render them a very formidable enemy in case of disturbance or open rebellion against constituted authorities . . . .<sup>193</sup>

It was Hind's considered opinion that,

. . . [I]n the event of an organic change occurring in the Government of the country, the "native" or half-breed (sic) population should not be neglected, or thrust on one side.<sup>194</sup>

On the same subject matter, W.L. Morton has remarked:

. . . [B]y 1859 the buffalo frontier had been pushed back to the Cypress Hills. The hunters' occupation was passing, and Red River agriculture, long coupled with the hunt and

bound to the river side, was incapable of filling the place of the hunt. The old order in Red River was breaking down of its own inherent weakness even as the frontiers of the outside world were moving up to overwhelm it. What wonder the Métis, ever the first to suffer in the recurrent shortages of the Red River economy, faced with foreboding a future other men, men of the plough and the written deed to land, would dominate as they had dominated the past of Red River? The traders, the white farmers, the Métis middle class, might make the transition to the new order as they had never submitted to the old. Not, however, the buffalo-hunter and the squatter farmer.<sup>195</sup>

The circumstances did not alter by 1870. In that year the newly appointed Lieutenant-Governor of the Province advised the federal government that if it wished to impose restraints upon alienation of the s. 31 lands, it

. . . should retain unappropriated portions of the lands reserved for the half-breeds (sic), and grant them, only when the applicant had brought himself within the condition of settlement, which by the Act is impliedly intended, as preliminary to his right. If this course were taken, a great many of the half-breeds (sic) would never apply at all. One thousand of them are at this moment living on the Prairies. They are hunters by profession, not farmers. Where the buffalo go, they go. They could not bear the restraints which cultivation of a farm implies. They would rather forfeit their lots, then settle on them, if by settlement was meant some degree of cultivation and improvement of the Lots.<sup>196</sup>

In fact, the social background of the Act of 1870, and the statutes in pari materia, suggest, on the contrary, that settlement conditions should not be imposed upon the present generation but only upon those individuals considered sufficiently capable of protecting their property. That

policy is also the one, it will be recalled, adopted in respect of the participants in Treaty One, many of whom were "Half-Breed" people in accordance with the racial connotation of the term in 1870.<sup>197</sup> During the negotiations leading to the enactment of s. 31, J.W. Taylor offered some observations which support the view that the imposition of settlement duties upon the present generation would not provide a benefit for the families of the "Half-Breed" residents:

A sudden large influx of imigrants (sic) however is for the present not favoured by the Catholic Clergy as it would result in virtually expatriating a very large number of their parishioners. For a majority of the french half-breeds (sic), although the chase becomes yearly less remunerative, the buffaloes greatly diminishing in number and receding farther and farther west, devote still the greater portion of their time to hunting on the plains and have contracted the improvident, uneconomical habits of that mode of life, and it will require some years before the influence of their priests and the diminishing profits of the chase will make of them an exclusively farming population and imbue them with that attachment to the soil and that money-saving quality characteristic of agriculturalists. If therefore before their mode of life and habits have been changed a large immigration sets in inoculating them with new expensive wants of older communities and introducing along with public improvements of the country increased taxation . . . it is to be feared that the farms of many of them would soon pass by voluntary sale and otherwise into the hands of the immigrants and that a large portion of the halfbreeds (sic) would have to resort to the plains. By good judges, Canadians, natives and Americans, who have travelled last summer through Upper Canada the number of immigrants to be expected next summer from that quarter is estimated at from 6000 to 10,000. That

this immigration will be exclusively protestant (sic) does not make it more palatable to the Catholic Clergy . . . .<sup>198</sup>

The liability to imposition of the Métif population was increased by the general absence of written proof of title to lands. In April 1871, Lieutenant Governor Archibald reported that, "It must be recollected there are no title deeds here . . . . Many have nothing to show but possession."<sup>199</sup> W.L. Morton considered the security of land titles in Red River in 1869 to be of major historical significance:

Underlying all the Red River Resistance was the question of title to land. Fur had been the source of livelihood and wealth under the old order. But the new order that was coming was agricultural, and in it by definition, the source of livelihood and wealth would be land . . . . All too evidently the success of the newcomer, the security of the old settler, and the very survival of the French and metis community, unready as it was for a new order it would no longer dominate, depended upon security of land titles, or at least upon new grants sanctioned by the government and Parliament of Canada.<sup>200</sup>

Hind had reported, in 1857, on the general absence of a lease of a kind reported to him as having been granted by the Company, a copy of which he had seen in the hands of a clergyman:

. . . [I]n no single instance could I find any half-breed (sic), in possession of a farm, acquainted with its existence. In very many instances the settlers did not know the number of their lots, and had no paper or document of any kind to show that they held possession of their land from the Company, or any other authority . . . .

As a matter of fact it would appear that in the great majority of cases no formal conveyance of any kind was given, only in those where it was asked for it is likely that it was granted, and the great bulk of the early settlers being in the humblest walks of life and very illiterate they would not be sufficiently alive to their own interests to demand what they were justly entitled to; in fact the writer has been assured by many old settlers that such was the case.<sup>201</sup>

The liability to imposition occasioned by the absence of deeds was furthered by the character of the men from Canada who generated no confidence in the Métif population in respect of their integrity in land transactions. A party of men known as the "Canadian" party, did not hesitate to say that the "Half-Breed" people would soon be driven out of the country, or kept as cart-drivers.<sup>202</sup> The local people were very concerned about the surveying of lands ostensibly for the purpose of settlement at locations known as the property of the "Half-Breed" people. According to the evidence of Archbishop Taché,

It was said that the work of surveying was instituted by the Government with the view of relieving the general distress existing. But the people placed no reliance on this statement because the provisions of the Canadian government were sold at a higher rate than similar provisions were sold in other shops in the country.<sup>203</sup>

. . . [P]eople here believe in the existence of an organized plan prepared without the knowledge of the Government (but which it ought to have foreseen and known), with the object of driving out of the country, or at least of reducing to a species of servitude within it, the French Canadian half-breeds (sic) of the Red River and of the whole



North-West. It is this idea that exasperates the people.<sup>204</sup>

This was written in March 1870, on the eve of the enactment of the Manitoba Act.<sup>205</sup> According to the evidence of J.S. Dennis at the Select Committee hearings in 1874,

Dr. Schultz and Mr. Snow had staked out and bought from the Indians, lands at St. Anne's, Point de Chine (sic), a mile square, which the French half-breeds (sic) laid claim to in some way.<sup>206</sup>

Further, according to Dennis, there

. . . were claims also staked out by Canadians and others on the Common in the vicinity of Winnipeg, claimed by the Hudson's Bay Company, and in the rear of the Village of Winnipeg on the Prairie . . . .<sup>207</sup>

The local population was, at this time, aware that the law did not permit extinguishment of the Indian title by private individuals, although settlers might have obtained possession and claimed a right of pre-emption from the government afterward.<sup>208</sup> It was also understood that the "French Métis" claimed the land on the basis of Indian title, that is, by birth, residence and occupation.<sup>209</sup>

The apprehension of the local population concerning the activities of the newcomers, and the anticipated immigration was expressed in the statement, "This is the kind of men who will be sent to rule over the country."<sup>210</sup> They were right, of course, Dr. Schultz became the first M.P. for Lisgar and Lieutenant-Governor of the Province.<sup>211</sup>

Louis Riel had expressed the concerns of the people respecting their ability to protect their interests against

the expected Canadian immigrants when he appeared before the Council of Assiniboia, on the 25th of October 1869.<sup>212</sup> There he is recorded as having stated that the Métif "were uneducated and only half-civilized, and felt that if a large immigration were to take place they would probably be crowded out of a country which they claimed as their own . . .<sup>213</sup> According to Sprague and Mailhot, the people who took up arms on the side of the insurgents, "were likely to be the hunters and tripmen without title".<sup>214</sup>

It is pertinent to recall Giraud's assessment that;

. . . in their contact with the Ontarians, they suffered the effects of their weakness of will and of their traditions of living which, by attaching them to nomadism, had prevented them from appreciating the true value of the land and from adapting gradually to the economy that was destined henceforward to impose itself on the plains of the West.<sup>215</sup>

The anticipated displacement of the disadvantaged Métif came true. Giraud explains that during the winter months the Métif at Red River left the colony to hunt fur-bearing animals or big game.<sup>216</sup> Despite dwindling bison herds, the practice continued for years after 1870.<sup>217</sup> The Métif would leave the colony "at the very moment when the speculators were preparing to take advantage of their absence in order to plunder them."<sup>218</sup> Free-trading also continued after 1870, but, due to the requirement of increasing capital investments, was confined to the more wealthy.<sup>219</sup> "These semi-nomadic elements, in obstinate revolt against agricultural toil, were incapable of saving their plots of

land from the greed of immigrants."<sup>220</sup> From 1871 onwards, relates Giraud, the winterers, displaced by new settlers, ceased to come back to the fields to which in the past they had been in the habit of returning periodically.<sup>221</sup> The missionary point of view was expressed by Father Le Floch: "These are people over whom civilization has no hold."<sup>222</sup> By 1875 the shores of the Red River, for a distance of thirty miles north of the frontier, contained no more than four Métif families. The original population had been replaced by English-language settlers.<sup>223</sup> In an interesting side-note to this issue, the Hudson's Bay Company also took advantage of the Métif absence from Red River to promote its own ends. It is recorded that;

In the autumn of 1869, many of the Métis from the Red River and St. Francis Xavier found their way to the region of Battleford, where the herds were exceptionally abundant, and there they passed the winter in tents or hastily built huts: anxious to prevent them from joining the insurrection on the Red River, the Company (H.B.C.) went to the trouble of organizing diversions that would make their stay in the region more agreeable.<sup>224</sup>

The impact of Canadian immigration upon the local "Half-Breed" population was repeated, again and again, as Canadian settlement expanded westward. The circumstances of the "Half-Breed" were the same as in Manitoba in 1870. They were liable to imposition and suffered a lack of protection. Because these circumstances of the western Métif were the same, they are relevant to the social context in which s. 31

was meant to operate. It will be useful, then, to relate the features of three government-sponsored settlement schemes designed for the western Métis; it will be observed that these schemes all provide for the grant of inalienable interests in lands which are to be safeguarded within the "Half-Breed" families, after the pattern established by the pre-1870 Indian settlement legislation.<sup>225</sup>

## 2. The Dennis Report, 1878

In 1878, J.S. Dennis, in a confidential memorandum to John A. Macdonald, rejected the idea of giving absolute grants of land to parents and children as a means of benefitting the "Half-Breed" population of the North-West Territories.<sup>226</sup> Dennis distinguished two "classes" of "Half-Breed" people, based on their economic activity: (1) the Half-Breeds of the Plains, and, (2) those who while spending part of the year in hunting buffalo possess settled homes." His elaboration is as follows:

(1) The class first alluded to differ but little, excepting in name, from the Indians. They have the tastes, habits and instincts of the Indian, and the only respect in which they differ from him consists in their occasionally building huts or shanties to winter in. Even these, however, they usually abandon the following spring.

Class 1 "Half-Breeds" are found in bands of a number of families together, and usually frequent the neighbourhood of the Wood Mountains or the Cypress Hills . . . their only subsistence is the chase; their movements . . . being principally governed by the migrations of the buffalo . . . .

(2) The second class may be illustrated by reference to those Half-Breeds who are found at Edmonton, St. Albert, St. Anns, St. Laurent, . . . etc. who have habitable -- and in some cases good -- houses where they reside and cultivate the soil to a greater or less extent; but, still, mainly depend for their means of living upon the buffalo. The subsistence afforded to the Half-Breeds by the buffalo is . . . in addition to the daily food supply, other necessities of life, such as are obtained from traders in exchange for pemmican and robes.<sup>227</sup>

Similar circumstances, it will be recalled, existed in the case of the "Half-Breed" population of Manitoba in 1870.<sup>228</sup> Dennis ruled out the first alternative, reasoning that the "Half-Breeds" were not Indians and would not be likely to consent to it in any event. Alternative two he also ruled out, because,

. . . the Half-Breed having no idea whatever of thrift or of the necessity for making provision for the future by locating his scrip and securing the land for the benefit of his family, would as our experience in Manitoba proves beyond all doubt, sell the scrip for whatever he could get for it . . . the result . . . on the extinction of the buffalo . . . we should find ourselves face to face with a formidable, nomadic, semi-savage element . . . which . . . would prove a standing menace to the peace and prosperity of the Territories.<sup>229</sup>

Dennis is in fact arguing that it is in the public interest that an appropriate settlement scheme for the "Half-Breed" population be undertaken. Dennis then asserts. there are three possible alternatives for the government of Canada:<sup>230</sup>

1. Treat them as wards of the Government -- in effect, make a treaty with them, as with

the Indians, and look forward to their remaining for many years in their present semi-barbarous state.

2. Give an absolute issue of scrip . . . to each individual and then let them take their chances of living or starving in the future.

3. To offer them certain inducements to settle on land, and learn to farm--especially to raise cattle.

Dennis proposes adoption of some form of the third alternative, stating that it receives support among the "Half-Breed" population, citing the case of a petition by the people of the Cypress Hills which was signed by 272 persons and addressed to the Governor and Council of the North-West Territories.<sup>231</sup> The Council sent this resolution to Ottawa:

Whereas this council has had under consideration a petition of certain half-breeds (sic) who usually frequent the neighbourhood of Cypress Hills

And whereas it is not in the power of this council to grant lands, assistance to procure such, or any such like advantages, resolved therefore that the Lieutenant Governor be requested to forward a petition to the Dominion Government together with the following suggestions which they respectfully and strongly urge may receive the early and earnest attention of His Excellency the Governor General: . . . .<sup>232</sup>

It is worth elaborating the details of the scheme proposed by the Council because of the similarity it bears to the pre-1870 Indian settlement legislation, and because it represents the view of government officials respecting the proper policy to adopt in order to promote both the public.

interest and the benefit of the "Half-Breed" population, in the context of circumstances similar to those in Manitoba in 1870. The resolution proposed that a consideration given in exchange for the Indian title,

. . . would most tend to the advantage of the half-breeds (sic) were it given in the form of a non-transferable location ticket, for say, 160 acres for each half-breed (sic) head of a family, and each half-breed (sic) child of parents resident in the said territories at the time of the transfer thereof to Canada, the ticket to be issued immediately to any half-breed (sic) eighteen years of age or over, on furnishing evidence of claim, and to every child on arriving at that age and furnishing the necessary evidence.

4. That each half-breed (sic) holding such a location ticket, should be allowed to locate it upon any unoccupied Dominion lands, but the title of the land so entered should remain in the Crown for ten years; and if, at the expiration of three years after such entry, the half-breed (sic) locatee has made no improvements on the land, his claim thereto shall be subject to forfeiture.

5. To induce those half-breeds (sic) who now procure their livelihood by hunting on the plains to abandon their present mode of life and settle on their locations, by which course it alone appears possible to avert the great destitution with which they are threatened owing to the imminent early extinction of the buffalo, that aid in agricultural implements and seeds be allowed them for three years, but only once for each family that may settle within that time. . . .<sup>233</sup>

The recommendations of the Council of the North-West Territories emphasizes the following principles, which are in accord with the text of s. 31, namely:

1. Appropriation for actual settlement by "Half-

Breed" families, initially on the basis of a licence to occupy (the usual form was the "location ticket")

2. Conditional grants of land to the children. The conditions would have to require the performance of "settlement" duties and upon failure to perform, the land reverts to the Crown for the use of the group.

3. The conditions attached to the grant to the children should include appropriate restrictions on alienation.

The original Cypress Hills petition had also requested a 50 by 150 miles reserve for 2500 people, perpetual exemption from taxation, or at least until they might be readily paid, and the following other arrangements; namely, schools and teachers; churches and priests; instructors in various trades; and five years provision of seed grain. Dennis recommended the adoption of these and additional "encouragement" for the "Half-Breeds" to "become settlers". He suggested the option of block settlement ought to be permitted and recommended appropriate legislation be drafted.<sup>234</sup>

### 3. The Burgess Report, 1885

In 1885, A.M. Burgess wrote a report to D.L. Macpherson<sup>235</sup> which he entitled, "History of the Half-Breed Question in the North-West".<sup>236</sup> In it he reported the reaction of the Canadian government to the request of the



Council of the North-West Territories referred to in the Dennis Report<sup>237</sup> which was to "consult with prominent people in the North-West as to the best means of dealing with the ['Half-Breed' people]." The five views recorded all favoured aid to the "Half-Breed" population for the purpose of effecting a transition to an agricultural economic base. The two Anglican Bishops consulted suggested instruction and encouragement to settle on the land. The Catholic Bishop opined that each resident should receive 160 acres of land to be entailed until at least the third generation, but preferably they should be entirely inalienable. The Lieutenant Governor thought alienations should be restricted only for a period of two to three years and teachers should be appointed to "Instruct the ('Half-Breeds') in raising stock and in practical agriculture." Colonel Richardson, Stipendiary Magistrate, thought that in making grants of land at least a long term of years should be allowed before the issue of a patent, and then only in cases where farms had been established and cultivated.

These opinions, which repeat, essentially, the Indian settlement schemes, were proposed in the context of conditions similar to those that Parliament must have anticipated when it passed s. 31 as part of the Manitoba Act, in 1870. Burgess described the conditions of poverty and threat of famine of the western "Half-Breed" people; stating the

. . . people have been accustomed to obtain their living partly by hunting and partly by freighting and trading in a small way. Of the first mentioned mode of obtaining their daily bread, they were deprived by the disappearance of the buffalo, and almost at the same time their second and last resource was greatly crippled, indeed almost annihilated, by the construction of the Canadian Pacific Railway, and the competition of the white settlers.<sup>238</sup>

#### 4. St. Paul Des Métis

In 1895 a federal Order in Council, enacted pursuant to sub-clause (h) of s. 90 of the Dominion Lands Act provided for the establishment of an industrial school and a reservation of land of a tract of four townships in Alberta, "with a view to the betterment of the present destitute condition of the majority of the Half-Breed population of Manitoba and the North-West Territories".<sup>239</sup> The provisions of this particular "Half-Breed" settlement scheme are substantially the same as those provided in the Indian settlement legislation of 1869.<sup>240</sup> It is instructive to consider the characteristics of the proposal for the kinds of protective measures considered to be appropriate for the settlement of "Half-Breeds" in circumstances similar to those in Manitoba in 1870. These measures, it may be emphasized, were adopted by Canada upon an admission that its past, purported implementation of s. 31 by giving unconditional grants of land did not benefit the "Half-Breeds" and did not meet the purposes of s. 31 of the Act of

1870. The Order in Council of 28 December, 1895, shifted some of the Crown's obligations to the Church authorities. Lands leased by Canada to the Church authorities could be sub-leased to

. . . destitute half-breed (sic) families as may be placed thereon and assisted to become self-supporting by the lessees or their duly appointed agents, under regulations to be made by the lessees from time to time in that behalf, which shall be subject, before becoming operative, to approval by the Minister of the Interior.<sup>241</sup>

It is remarkable that the language used is substantially in the terms of s. 31 of the Act of 1870. The provisions of that section imply a scheme of regulation over time, and, indeed, the requirement of a regulated scheme for a long period of time was emphasized by the proponents of the St. Paul des Métis scheme, Father Lacombe and A.M. Burgess.<sup>242</sup> "It should be borne in mind," Burgess cautioned in his recommendations,<sup>243</sup> "that the process by which it is proposed to reclaim the (Half-Breeds)" and bring them within the operation of the proposed scheme will necessarily be gradual and slow . . . ." And the reasons why a scheme designed to accommodate a people to a new economic order should take time and therefore require periodic review, were discussed by Burgess, in the language appropriate to his jaundiced views. He related his solicitation of advice from missionaries and "other people intimately acquainted with the habits and inclinations of the ('Half-Breeds')" regarding the prospects for the future of the "Half-Breeds"

once there was little freighting to be done, the answers to which question led him to conclude there was no satisfactory solution respecting the fate of the present generation:

No doubt, said some, a large number of them will turn to farming; but in this occupation it is to be feared, judging from their history and training, that those who have been brought up as freighters or traders would not, during the present generation at least, be very successful. Neither would the existing generation, as a rule, make satisfactory labourers or domestic servants. They are not accustomed to the subjection and control to which they would have to submit in those capacities, and experience had proved that they do not take kindly to such employment.<sup>244</sup>

In fact, the scheme established by the Order of 1890 was for a duration of 21 years, and subject to review at the end of that period. Burgess had reported that everyone consulted had agreed that outright grants of scrip were only temporary solutions.<sup>245</sup> Lacombe's plan proposed that the lands occupied by the "Half-Breed" 'settlers' not be alienable and that they be made available for settlement only:

But in order that these "Half-Breeds" may never be able to sell or barter the 40 acre lot rented to each family and to be utilized by them as long as they stay on it, it is proposed and conceded, that the head of family accepting the said 40 acres for his own use, and his heirs and successors, shall promise and sign a contract by which the title to the said land shall not be sold or alienated, but remain for ever vested in the Crown.<sup>246</sup>

The plan does not describe any particulars in this respect, but it declares its object to remedy the

circumstance whereby destitute "Half-Breeds" "who still have lands and homes of their own will be obliged to abandon thee same, all their property being mortgaged."<sup>247</sup> It is appropriate to recall that the Indian legislation of 1869 kept 'transition lands' free from liability to seizure by legal process.<sup>248</sup> Lacombe's plan also called for the prohibition of liquor sales or settlement by "white people",<sup>249</sup> and the establishment of an Industrial school.

#### D. THE IMMEDIATE BACKGROUND: THE NEGOTIATIONS LEADING TO THE ENACTMENT OF SECTION 31

The circumstances leading to the sending of a delegation of the people of Red River to negotiate the region's entry into a political union with Canada are well known; it is not necessary to relate them here.<sup>250</sup> It is appropriate, however, to recall a few points which will be relevant to the elaboration of the intention of Parliament in the enactment of s. 31 of the Manitoba Act, 1870.

The Provisional government issued a "Declaration of the People of Rupert's Land" on the eighth day of December 1869<sup>251</sup> alleging, as a reason for assuming authority, that the Hudson's Bay Company had surrendered the government of the country in March, 1869.<sup>252</sup> Canada had not succeeded to any jurisdiction in the region<sup>253</sup> and the Provisional government, representing the people, demanded the protection of the British constitution from the designs of Canada to

take over the government without consulting the local population.<sup>254</sup> The British government recognized Riel's Provisional government; the Right Honorable Wm. Monsell, Under-Secretary for the Colonial Department, contended in the House of Commons on May 20 that "peace and order now prevailed in the Red River country."<sup>255</sup> Protests came from the U.S.A. against Canada's unwarrantable interference with the principle of self-government.<sup>256</sup> Although the establishment of an organized opposition to Canadian invasion was perpetrated mostly by the Métif, the English, and Scottish "Half-Breed" people were unwilling to take up arms against Riel because of Canada's error in not consulting the population.<sup>257</sup> Britain demanded amicable agreement with the Red River population as a condition precedent to an assumption of jurisdiction, and delegates were invited to Ottawa.<sup>258</sup> The delegates were sent to convey the wishes of the population arrived at by means of the deliberations of a convention of delegates held at Fort Garry for a fifteen-day session.<sup>259</sup> In the Parliament of Canada, Sir George-Etienne Cartier remarked that the debates of the Fort Garry Convention were not inferior to those of the Québec Conference which framed the draft of the British North America Act.<sup>260</sup> No lesser status can be accorded to the negotiations between the Convention's delegates and the Canadian ministers for the interpretation of the Manitoba Act.<sup>261</sup> W.L. Morton expressed this view of the objects of

the Métif in this endeavour:

. . . to make such terms with Canada as would enable the people of the North West to control its local government in the early days of settlement, and as would allow them to possess themselves, as individuals and as a people (emphasis added) enough of the lands of the North West to survive as a people, and to benefit by the enhancement of the wealth of the North West that settlement would cause.<sup>262</sup>

The story of the negotiations and the passage of the Manitoba Bill through Parliament may be followed in the records of the debates in the House of Commons, along with a record of the discussions between John A. Macdonald and G.E. Cartier and the Red River delegates. The principal negotiator turned out to be Abbé Noël Joseph Ritchot, who kept a diary of his discussions with the Canadian representatives.<sup>263</sup> The Red River delegates carried with them a list of conditions with which they were authorized to negotiate terms of entry into Confederation.<sup>264</sup> Clause 11 of the List of Rights demanded local control over the public lands of the province.<sup>265</sup> There was no specific reference to the Indian title. Canada's negotiators considered it impossible to accept provincial control of the public lands to which it was replied that compensation or conditions amounting, for the present population, to actual control of the lands, must be given.<sup>266</sup> This initial discussion resulted in the following offers by the government side, which the delegates accepted:<sup>267</sup>

1. Free possession of all lands in respect of which

possession is held by contract or informal agreement with the Company, whether the lands are paid for or not.

2. Free possession of all lands of the Company where possession is held without contract or agreement with the Company, and free possession of all lands possessed outside the boundaries of Company lands. This reference would appear to refer to the area along the river ceded by the Selkirk treaty, as opposed to the surveyed lands only within that belt.

3. The rights of common.<sup>268</sup>

The rights of using the open plains and woodlands for harvesting the produce of the land, in common with other Aboriginal peoples, are in their nature, rights of common, although different in their origin from common law rights.<sup>269</sup> There were also in the Red River settlement, "commons" reserved for cutting hay.<sup>270</sup>

The delegates had not come as representatives of the Indian population, but, after the discussion of the above conditions ensued a debate on the rights of the Métif, which throws light on the purposes of s. 31 respecting the extinguishment of the Indian title. The substance of the discussion is not recorded in Ritchot's diary, but, in light of the subsequent remarks made by him, it appears that a claim for the Indian title of the Métif part of the population must have been made. Ritchot recorded that Canada objected to claims by the settlers of Red River to be



accorded the "privileges" granted to Indians.<sup>271</sup> In response, Ritchot distinguished those of the Red River population who had Indian rights that were not shared by the entire population. Referring to Canada's objection, he explained that because the settlers of Red River ask for the same rights as the inhabitants of other provinces in respect of their government, that request is not to be taken as denying the particular "personal or national" (i.e. Aboriginal) rights of those among them who are entitled. The English translation is as follows:

From another side the settlers of the North-West in asking a form of government similar to those of the provinces of other subjects of Her Majesty do not propose by that to deprive of their rights any one among them who possesses rights either personal or national, and because these settlers wish to be treated like other subjects of Her Majesty does it follow that those among them who have a right as descendants of Indians should be obliged to lose those rights. I don't believe it; thus in asking control of the lands of their province, they have no intention of causing the loss of the rights that the Métis of the North West have as descendants of Indians. They wish only to have the rights common to the other provinces of Confederation, and to my mind nothing is more just, and I repeat that we cannot yield those rights without compensation, as said above.<sup>272</sup>

Essentially, Ritchot's argument is that Canada should protect two kinds of rights; the rights of settlers to the lands held by them, and the Indian title rights of the Métif.

The Canadian ministers persisted in claiming control of the public lands and made an offer of 100,000 acres of

land to be given the children of the Métif.<sup>273</sup> After "serious reflection" the Red River delegation proposed the following as conditions for federal control of the public lands:

1. All the settlers presently established in the country, men and women, could take where they wish in a single parcel or in several each 200 acres of land and have them free.

2. Each of their children, born or to be born, and each of their descendants from this date -- until the year -- e.g. period which could be fixed at not less than \_\_\_\_\_, [this blank appears in the diary] would also have the right to have 200 acres of land -- upon attaining the age of 16 years (with protective legislation to keep the lands within the families.<sup>274</sup> [The parentheses appear in the diary at this place.]

Ritchot records the Canadian response as successive increases in their previous land offer to the children in the amounts of 150,000, then 200,000 acres.<sup>275</sup> That was refused. At the next discussion of the land question, Cartier is reported to have asked Ritchot what he wished, to which he replied a minimum period of 50-75 years in respect of the time which would fix the period of entitlement to lands for children to be born. Judge Black considered this period too long, thereby implicitly approving the substance of the proposition.<sup>276</sup> Ritchot's diary then records

Cartier's question, "How many acres of land, then, do you want, to be taken where you choose?"<sup>277</sup> After some discussion, Cartier agreed to try to get his colleagues to agree to 1 million acres.<sup>278</sup> On Monday, May 2, both Macdonald and Cartier attended a meeting at which agreement was reached respecting the land matter. The ministers offered 1,200,000 acres of land to be distributed to the children of the Métif.<sup>279</sup> The form or manner of distribution of these lands was again discussed. The delegates continued to claim 1,500,000 acres and agreement was reached on the mode of distribution as follows.

The lands shall be chosen throughout the province in single and several lots, and in different places, if it is considered appropriate by the local legislature which shall itself distribute these lots of land to the heads of families in proportion to the number of children existing at the time of the distribution of the lands; these lands be then distributed to the children by the parents or guardians, always under the supervision of the above local Legislature which could pass laws to ensure the retention of these lands within the Métif families.

To iterate, the delegates received agreement from Canada that lands should be set aside for the benefit of the Métif families, that the benefit should enure to the heads of families upon the initial distribution, that the lands would eventually go to the children of the Métif, and that

protective legislation would ensure that the lands would remain with the Métif families. All of this is consistent with the provisions of s. 31. The only provision which Canada reneged on was local control -- it was the federal government that, by the terms of s. 31, was given the duty to enact protective legislation, "on such conditions as to settlement and otherwise as the Governor General in Council may from time to time determine."<sup>280</sup>

That same day Macdonald explained to the House that the object of the Bill was the quiet and peaceable acceptance of the new state of things by the mass of the people there and the speedy settlement of the country by "hardy emigrants from all parts of the civilized world."<sup>281</sup> The Prime Minister reminded the House that it was obviously in the interests of the people of Canada to settle the territory as quietly as possible and that it would be "a most unwise policy for a new Government to create any difficulties as to the rights of property . . . ."<sup>282</sup> Macdonald then explained the object of s. 31 to provide lands for the occupation of both heads of families and their children:

There shall . . . be a reservation for the purpose of extinguishing the Indian title, of 1,200,000 acres. That land is to be appropriated as a reservation for the purpose of settlement by "Half-Breeds" and their children of whatever origin on very much the same principle as lands were appropriated to U.E. Loyalists for purposes of settlement by their children.<sup>283</sup>

Given Macdonald's propensity for prevarication, his statements respecting the objects of s. 31 are most valuable when they can be tested against the agreement reached with the delegates. Sir Stafford Northcote, the Governor of the Hudson's Bay Company, who was in Ottawa at the time, commented as follows about Macdonald's reference to the Loyalists:

His mode of introducing the vexed question of the land reserved for the half-breeds (sic) was ingenious. He treated the land (1,200,000 acres) as being reserved simply for the purpose of extinguishing the Indian claims, and he threw in the suggestion that the grants to the people who might be entitled to them were to be made in much the same way as the old grants to the U.E. Loyalists, a reference very acceptable to the Ontario men.<sup>284</sup>

In any case, there are the following listed similarities between the settlement scheme adopted for the Loyalists and the type of settlement scheme later proposed for the "Half-Breed" population of the west, and their features are consistent with the language of s. 31.

1. Lands were made available only to persons who agreed to settle on them.<sup>285</sup>

2. The Indian Loyalists, the members of the Six Nations, were permitted a choice respecting the location of their settlements.<sup>286</sup>

3. The alienation of settlement lands was restricted, to prevent speculation.<sup>287</sup>

4. In the initial phase of settlement, a leasehold estate for 30 years only was granted.<sup>288</sup>

5. Settlement locations were established on the basis of religion.<sup>289</sup>

6. Lots unfit for cultivation were to be left unoccupied.<sup>290</sup>

7. The settlement of loyal subjects gave the Crown the advantage of a protective buffer against the United States neighbours.<sup>291</sup>

8. Individual lots within allocated areas were distributed by drawn lots to prevent the opportunity of individuals picking choice locations.<sup>292</sup>

After having introduced s. 31 as a scheme for settlement of the "Half-Breed" population, Macdonald indicated that the purpose of s. 31 was to promote the objects of the Act by "extinguishing the Indian title and all claims upon the lands within the limits of the Province."<sup>293</sup> On this view, then, s. 31 has quite the same object as s. 32, to permit the quieting of titles; and it promotes the Act's purpose of peaceful possession of the Province by Canada. The Government, according to Macdonald, is not so much concerned with the basis of rights as with the satisfaction of claims. Section 31 might on this basis, be construed as a quit claim provision in respect of Indian title. Cartier added his own words to reinforce Macdonald's interpretation of s. 31, stating the lands were

. . . held for the purpose of extinguishing the claims of the "Half-Breeds" which it was desirous not to leave unsettled, as they had been the first settlers, and made

the Territory. These lands were not to be dealt with as the Indian reserves, but were to be given to the heads of families to settle their children.<sup>294</sup> (emphasis added)

No printed form of the Bill was made available until the second reading,<sup>295</sup> but a draft is to be found in the Macdonald papers.<sup>296</sup> The only respect in which it differs from the enacted provision concerns provincial control over the implementation of the land distribution and it is entirely consistent with the agreement reached between the Canadian Ministers and the delegates, as recorded by Ritchot.

That in order to compensate the claims of the half-breed (sic) population, as partly inheriting the Indian rights, there shall be placed at the disposal of the local legislature one million and a half acres of land to be selected any where in the territory of the Province of Manitoba, by the said legislature, in separate or joint lots, having regard to the usages and customs of the country, out of all the lands not now possessed, to be distributed as soon as practicable amongst the different heads of half-breed (sic) families, according to the number of children of both sexes then existing in each family, under such legislative enactments which may be found advisable to secure the transmission and holding of the said lands amongst the half-breed (sic) families to extinguish Indian claims.<sup>297</sup>

The delegates were displeased with the Bill, which did not provide for local control over the distribution of the s. 31 lands,<sup>298</sup> but at this point it appears that the government had made up its mind not to change the provisions of the Bill any further in response to the delegates' demands. They felt they had bargained and conceded as much

as possible in order to get the Bill passed through Parliament.<sup>299</sup>

Ritchot's diary records a visit to Cartier on May 9 to inquire about the meaning of certain wording of clause 27, which became s. 31 of the Act. The only term elaborated has to do with the 'residence' requirement. Cartier is recorded as having said that the government knows that a number of Métif are nomads and they are regarded as residents of the Province. The families entitled, according to the record of Cartier's elaboration, included all the Métif winterers or 'voyageurs' who had not left the country to establish themselves elsewhere, but who, in spending a large part of their lives on trips or in wintering, or almost all their lives away (au large) consider Red River settlement as their homeland. At the end of Ritchot's diary appear remarks on twenty-six clauses of the proposed draft bill, dated April 28 and 29, 1870, and some of these appear to represent Ritchot's views respecting control and distribution of the public lands.<sup>300</sup> The only point not already considered which appears in these notes is the explanation that grants of common lands to individuals and "public bodies" (corporate persons?) in each locality is an absolute necessity given the exceptional conditions of the country. Ritchot explains that a large part of the soil of the province is not "of great value" (for agricultural purposes, presumably) and that large commons are necessary



for the maintenance of each group of the population.<sup>301</sup>

Morton's evaluation of this passage is as follows:

Ritchot is attempting to devise a land system suited to the combined intense use of lands in the homesteads and the extensive use of the plains which had been worked out in the fifty years of Red River settlement. Only the development of short season, drought resistant wheat and soil practices kept him from being entirely right.<sup>302</sup>

For purposes of interpretation of the section, it will be the experience of fifty years in Red River that will be relevant, and not the subsequent agricultural developments.

## ENDNOTES

### CHAPTER III

1. St. Catharines Milling and Lumber Company v. R. (1887), 13 S.C.R. 577; 4 Cart. B.N.A. 127; 2 C.N.L.C. 441, aff'd., sub. nom. St. Catherine's Milling and Lumber Company v. R. (1889), 14 A.C. 46; (1889) 58 L.J.P.C. 54; (1889), 60 L.T. 197; 5 T.L.R. 125; 4 Cart. B.N.A. 107; 2 C.N.L.C. 541.
2. Hunter v. Southam, [1984] 2 S.C.R. 145 at 169, sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97 at 121; (1984), 11 D.L.R. (4th) 641 at 659-660; [1984] 6 W.W.R. 577 at 597.
3. R. v. St. Catharines Milling and Lumber Company (1886), 10 O.R. 196 at 210; (1897), 4 Cart. B.N.A. 214 at 219; 2 C.N.L.C. 374 at 388 (Ont. Ch. Ct.); see also, per Hagarty, C.J.O. in Regina v. St. Catharines Milling (1886), 13 O.A.R. 148 at 153; 4 Cart. B.N.A. 192 at 196; 2 C.N.L.C. 414 at 420.
4. Kanatewat v. James Bay, (Qué. Sup. Ct.) Nov. 15, 1973, Doc. No. 05-04841-72 (unreported), Malouf, J.
5. Ibid., at 25.
6. Ibid., at 27.
7. Rupert's Land and North-Western Territory Order, June 23, 1870 (U.K.) in R.S.C. 1970, App. II, No. 9.
8. B. Slattery, Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title, Saskatoon: U. of Saskatchewan Native Law Centre, 1983 at 15; "[The doctrine] has sprung not simply from the necessity of fitting aboriginal land rights into the common law scheme, but also from the need to make some legal sense of the often contradictory historical patterns of Crown practice regarding aboriginal peoples, particularly in North America . . . The relations between the Crown and the native inhabitants of British colonies are governed, at least partially, by principles of law, and not merely by policy and expediency. Those principles form part of a large set of rules governing the colonies, which derive in turn from basic precepts of the common law proper and the established colonial practice of the Crown, as recognized and affirmed by the courts." Ibid., at

40. [hereinafter cited as Slattery]
9. Guerin v. R., [1984] 2 S.C.R. 335 at 349; [1985] 1 C.N.L.R. 120 at 151; 13 D.L.R. (4th) 321 at 356; (1986), 20 E.T.R. 6 at 44-45; 55 N.R. 161 at 183-184; (1985), 36 R.P.R. 1 at 41; [1984] 6 W.W.R. 481 at 517-518, per Wilson, J.
  10. See generally, J.C. Smith, "The Concept of Native Title" (1974), 24 U. of T.L.J. 1 at 9.
  11. Connolly v. Woolrich (1867), 17 R.J.R.Q. 75; (1867), 11 L.C. Jur. 197; 1 C.N.L.C. 70 (Que. Sup. Ct.).
  12. Ibid.
  13. Slattery, supra, note 8, at 9.
  14. Calder v. A.G. B.C. (1973), [1974] S.C.R. 313 at 328; 34 D.L.R. (3d) 145 at 156; [1973] 4 W.W.R. 1 at 11.
  15. See R.H. Bartlett, "Aboriginal Land Claims at Common Law", [1984] 1 C.N.L.R. 1, at 16-24, for consideration of the law respecting the requirement of group occupation for proof of Indian title at common law [hereinafter cited as Bartlett].
  16. Dickson, C.J. in Guerin v. R., [1984] 2 S.C.R. 335 at 382; [1985] 1 C.N.L.R. 120 at 135-136; (1985), 13 D.L.R. (4th) 321 at 339; 20 E.T.R. 6 at 29; 55 N.R. 161 at 174; 36 R.P.R. 1 at 26; [1984] 6 W.W.R. 481 at 499.
  17. Ibid., [1984] 2 S.C.R. 335 at 382; [1985] 1 C.N.L.R. 120 at 136; (1985), 13 D.L.R. (4th) 321 at 339; 20 E.T.R. 6 at 29-30; 55 N.R. 161 at 174; 36 R.P.R. 1 at 26; [1984] 6 W.W.R. 481 at 499-500.
  18. Slattery, supra, note 8, at 40.
  19. Wm. R. McMurtry, Q.C. & Alan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective", [1986] 3 C.N.L.R. 19.
  20. Per curiam, Kruger and Manuel v. R. (1977), [1978] 1 S.C.R. 104 at 109; 34 C.C.C. (2d) 377 at 380; (1977), 75 D.L.R. (3d) 434 at 437; (1977), 15 N.R. 495 at 499; [1977] 4 W.W.R. 300 at 303.
  21. See generally, Slattery, supra, note 8.

22. Slattery, supra, note 8, at 45.
23. The pre-confederation principles expounded by American cases, are reviewed in Calder v. A.G.B.C., [1973] S.C.R. 313; (1973), 34 D.L.R. (3d) 145; [1973] 4 W.W.R. 1, and in Guerin v. R., [1984] 2 S.C.R. 335; [1985] 1 C.N.L.R. 120; 13 D.L.R. (4th) 321; 20 E.T.R. 6; 55 N.R. 161; (1985), 36 R.P.R. 1; [1984] 6 W.W.R. 481. The principles expounded in the early American cases by Chief Justice Marshall were adopted in Canada at least as early as 1867: Connolly v. Woolrich (1867), 17 R.J.R.Q. 75; (1867), 11 L.C. Jur. 197 at 205; 1 C.N.L.C. 70 at 79 (Que. Sup. Ct.).
24. St. Catharines Milling and Lumber Company v. R. (1887), 13 S.C.R. 577 at 608; (1897), 4 Cart. B.N.A. 127 at 135-136; 2 C.N.L.C. 441 at 472.
25. Ibid., 13 S.C.R. 577 at 608; 4 Cart. B.N.A. 127 at 136; 2 C.N.L.C. 441 at 472. In R. v. Symonds, a native title case from New Zealand decided in 1847, it was said that the governmental practice of extinguishing Native title by fair purchase was over two hundred years old, [1870-1932] N.Z.P.C.C. 387 at 390, per Chapman, J. (N.Z.S.C.).
26. St. Catharines Milling and Lumber Company v. R. (1887), 13 S.C.R. 577 at 609; 4 Cart. B.N.A. 127 at 136; 2 C.N.L.C. 441 at 473.
27. Guerin v. R., [1984] 2 S.C.R. 335 at 382; [1985] 1 C.N.L.R. 120 at 135-136; 13 D.L.R. (4th) 321 at 339; 20 E.T.R. 6 at 29-30; 55 N.R. 161 at 174; 36 R.P.R. 1 at 26; [1984] 6 W.W.R. 481 at 499-500.
28. P.C. No. 3723, Dec. 28, 1895 (Annex B) p. 6, N.O. Côté, Orders in Council Respecting Claims of the Half-Breeds 1871-1925, Ottawa: Dept. of the Interior, 1929 at 112.
29. Church v. Fenton (1878), 28 U.C.C.P. 384 at 388; (1897), 1 Cart. B.N.A. 831; 2 C.N.L.C. 53 at 57 per Gwynne, J.
30. R. v. St. Catharines Milling and Lumber Company (1886), 10 O.R. 196 at 212-213; 4 Cart. B.N.A. 214 at 221-222; 2 C.N.L.C. 374 at 390-391 (Ont. Ch. Ct.).
31. Ibid., 10 O.R. 196 at 223; 4 Cart. B.N.A. 214 at 230; 2 C.N.L.C. 374 at 401.

32. The Royal Proclamation of 1763, and colonial statutes prohibited the alienation, but recently it has been stated that inalienability was a characteristic of the Indian title: Guerin v. R., [1984] 2 S.C.R. 335 at 382; [1985] 1 C.N.L.R. 120 at 136; 13 D.L.R. (4th) 321 at 339; 20 E.T.R. 6 at 29-30; 55 N.R. 161 at 174; 36 R.P.R. 1 at 26; [1984] 6 W.W.R. 481 at 500 per Dickson, J. (as he then was).
33. St. Catharines Milling and Lumber Company v. R. (1887), 13 S.C.R. 577 at 609; (1897), 4 Cart. B.N.A. 127 at 136; 2 C.N.L.C. 441 at 473.
34. Ibid., 13 S.C.R. 577 at 625-626; 4 Cart. B.N.A. 127 at 149-150; 2 C.N.L.C. 441 at 489-490.
35. R. v. St. Catharines Milling and Lumber Company (1886), 10 O.R. 196 at 211; (1897), 4 Cart. B.N.A. 214 at 220; 2 C.N.L.C. 374 at 389 (Ont. Ch. Ct.).
36. Ibid., 10 O.R. 196 at 229; 4 Cart. B.N.A. 214 at 236; 2 C.N.L.C. 374 at 407.
37. Ibid., 10 O.R. 196 at 228; 4 Cart. B.N.A. 214 at 235; 2 C.N.L.C. 374 at 406.
38. Ibid., 10 O.R. 196 at 228-229; 4 Cart. B.N.A. 214 at 235; 2 C.N.L.C. 374 at 406-407.
39. Ibid., 10 O.R. 196 at 229; 4 Cart. B.N.A. 214 at 235; 2 C.N.L.C. 374 at 407.
40. Ibid.
41. Ibid., 10 O.R. 196 at 229; 4 Cart. B.N.A. 214 at 235-236; 2 C.N.L.C. 374 at 407.
42. W.L. Morton, ed., Alexander Begg's Red River Journal and Other Papers Relative to the Red River Resistance of 1869-70, Toronto: The Champlain Society, 1956 at 14-15. [hereinafter cited as Morton, ed. 1956]
43. Archer Martin, The Hudson's Bay Company's Land Tenures and the occupation of Assiniboia by Lord Selkirk's Settlers, London: William Clowes and Sons, Ltd., 1898 at 27, [hereinafter cited as Martin].
44. Jennifer S.H. Brown, "Metis" (1985), 2 The Canadian Encyclopedia, 1124 at 1126.

45. Alexander Ross, The Red River Settlement, Its Rise, Progress and Present State, Edmonton: Hurtig, 1852 (Reprint 1972). [hereinafter cited as Ross]
46. Morton, ed. 1956 supra, note 42.
47. Ross, supra, note 45, at 200.
48. Ibid.
49. W.L. Morton, "Introduction" to Alexander Begg's Red River Journal, ed. W.L. Morton, Toronto: The Champlain Society, 1956 at 15-16.
50. E.H. Oliver, ed., 2 The Canadian North-West: Its Early Development and Legislative Records, Ottawa: Government Printing Bureau, 1915 [hereinafter cited as Oliver]. Can. Archives, No. 9, Ottawa at 882, 885, 884, 921, 927. Ross, supra, note 45, at 232.
51. Canada Sessional Paper No. 20, 1871, Despatch No. 63.
52. Ibid., Despatch No. 80.
53. The 1870 census, for example, lists 1600 "White" persons, in addition to the recorded "Half-Breed" population. Supra, note 52; and see the comments of H.Y. Hind, in 1 Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858, London: 1860 at 172-191.
54. The 1870 census lists 560 Indian householders, in addition to the "white" and "Half-Breed" population. Supra, note 51.
55. Arthur J. Ray, Jr., Indian Exploitation of the Forest-Grassland Transition Zone in Western Canada, 1650-1860: A Geographical View of Two Centuries of Change, Ph.D. Thesis, University of Wisconsin, 1971 at 159-161. [hereinafter cited as Ray]
56. W.L. Morton, "Introduction" to Eden Colville's Letters 1849-50, London: XIX Hudson's Bay Record Society, 1956 at (xiii). [hereinafter cited as Morton 1956]
57. Ibid., at (xiv)-(xx).
58. Ibid., at (xiv).

59. Ibid., at (xiv).
60. Ibid., at (xvii).
61. Giraud, supra, Chapter I, note 14, at 157. The latter community was outside the boundaries of the 1870 province.
62. Morton 1956, supra, note 56, at (xvii).
63. Ibid., at (xviii).
64. Ibid., at (xxv).
65. Ibid., at (xxxvi).
66. Giraud, supra, Ch. 1, note 14, at 139.
67. Ibid., at 140.
68. W.L. Morton, "Agriculture in the Red River Colony" (1949) 30 Canadian Historical Review, No. 4, December, 305 at 320. [hereinafter cited as Morton 1949]
69. Giraud, supra, Ch. 1, note 14, at 139.
70. Ibid., at 139-140.
71. Ibid., at 388.
72. Ibid., at 151.
73. Ibid., at 155.
74. Ibid., at 152.
75. Ibid., at 157.
76. Morton 1949, supra, note 68, at 316, 320.
77. Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Toronto: Coles, Reprint 1970 (originally published in 1880) at 314. [hereinafter cited as Morris]
78. D.W. Moodie & Barry Kaye, "Indian Agriculture in the Fur Trade NorthWest" (1987), 11 Prairie Forum No. 2, 171. [hereinafter cited as Moodie]
79. Ibid., at 171.
80. Ibid., at 172.

81. Ibid.
82. Ibid., at 173.
83. Ibid.
84. Ibid.
85. Ibid., at 174.
86. Ibid., at 175. See also the observations of R.M. Ballantyne in 1841, in Morton 1956, supra, note 56, at (xxii).
87. Ibid., at 175.
88. Ibid., at 179.
89. Mulvihill, G, "Historical Notes on the Mission of St. Laurent, Manitoba, from 1858 to December, 1895" Archives de la Société Historique de Saint-Boniface, at 3. (A.S.H.S.B.)
90. Morton 1949, supra, note 68, at 316-318.
91. Ibid., at 320.
92. Ibid.
93. Ibid., at 321.
94. Ibid.
95. Giraud, supra, Chapter I, note 14, at 140 ff.
96. Ibid.
97. Morton 1956, supra, note 56, at (xxxvi).
98. A.S. Morton, "The New Nation, The Métis", in The Other Natives: The Métis, ed. A.S. Lussier & D.B. Sealey, Winnipeg: Manitoba Metis Federation Press, 1978 at 27.
99. A.S. Morton, A History of the Canadian West to 1870-71 2d ed., ed. Lewis H. Thomas, Toronto: University of Toronto Press, 1973 at 856. The meeting took place in mid-March. [hereinafter cited as Morton]
100. W.L. Morton, "The Battle at the Grand Coteau", 1 The Other Natives: The Métis, Winnipeg: Manitoba Metis Federation Press, 1978 at 47; Irene Spry, infra,



note 107, at 205; Giraud, supra, Chapter I, note 14, at 162-163.

101. Morton, supra, note 99.
102. Ibid.
103. Ibid.
104. Ray, supra, note 55, at 141.
105. Moodie, supra, note 78, at 173.
106. Gerald Friesen, The Canadian Prairies: A History, Toronto: University of Toronto Press, 1984 at 133.
107. I.M. Spry, "The Tragedy of the Loss of the Commons in Western Canada" in A.L. Getty & A.S. Lussier, ed., As Long As the Sun Shines and Water Flows: A Reader in Canadian Native Studies, Vancouver: University of British Columbia Press, 1983, 203 at 216.
108. Ibid., at 203-228.
109. Morris, supra, note 77, at 314.
110. Ibid., at 313.
111. Ibid., at 43.
112. Ibid., at 37 and passim.
113. Ibid., at 41.
114. K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar. Rev. 450 at 455-456. [hereinafter cited as Lysyk]
115. The treaty, and the circumstances of its signing, are accounted in Morris, supra, note 77, at 299-300.
116. Lysyk, supra, note 114, at 456.
117. See Slattery, supra, note 8, at 273 for a discussion of the basis for a right to compensation.
118. A.G. for Alta, v. A.G. for Canada, [1939] A.C. 117, sub. nom. Reference Re Alberta Legislation, [1938] 4 D.L.R. 433; [1938] 3 W.W.R. 337 (The Alberta Banking Case); and Brophy v. A.G. for Man., [1895] A.C. 207 at 217; 5 Cart. B.N.A. 156 at 174-175.

119. Undercofler v. L.C. Robinson & Sons Inc. 111 Ga. App. 411 at 413; 141 S.E. 2d. 847 at 849.
120. R. v. St. Catherines Milling Co. (1885), 10 O.R. 196 at 109-110; 4 Cart. B.N.A. 214 at 218-219; 2 C.N.L.C. 374 at 387-388; Lysyk, supra, note 114.
121. An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6.
122. J.L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" (1976) The Western Canadian Journal of Anthropology, Special Issue Vol. 6, No. 2, 13 at 17.
123. Canada Sessional Paper No. 23 (1871) Annual Report for 1870 of the Indian Branch of the Department of the Secretary of State for the Provinces, p. 4.
124. The Historical Development of the Indian Act, Ottawa: Treaties and Historical Research Centre, D.I.A.N.D., 1978 at 53.
125. 16 Vic., c. 59.
126. Oliver, supra, note 50, Vol. I at 455.
127. P.A.M. M.G. 12A 1 Adams G. Archibald Papers, Lt. Gov. of Man. 1870-1872, 164A, 1-20 at 5, 6.
128. Consolidated Statutes of B.C., 1877, c. 98, s. 5.
129. Act of Union, 1840, 3 & 4 Vic., c. 35 (U.K.)
130. Section 46.
131. An Act for the better protection of the Lands and Property of the Indians in Lower Canada, S.C. 1850, c. 42, ss. 2-3.
132. P.A.M. R.G. 7 B1 Box 12, file 3 in "Re Commission of Inquiry into Administration of Justice as to Infants' Lands and Estates" in Report of Counsel Appointed by the Hon. The Attorney-General to assist the Commissioners (December 20, 1881).
133. 13-14 Vic., c. 74.
134. Totten v. Watson (1858), 15 U.C.Q.B. 392; 1 C.N.L.C. 471.

135. Totten v. Watson (1858), 15 U.C.Q.B. 392 at 395-396; 1 C.N.L.C. 471 at 474-475. The judge confuses intelligence with learning; presumably the judge's intelligence would not be attacked were he to demonstrate an inability to cope with the life ways of the Indian people involved in the case.
136. Giraud, supra, Chapter I, note 14, at 380.
137. Supra, note 132.
138. Ibid.
139. R. v. Hagar (1857), 7 U.C.C.P. 380, (1763-1869), 1 C.N.L.C. 393; 4 U.C.L.J. 208.
140. 13 and 14 Vic., c. 74.
141. Ibid... 7 U.C.C.P. 380 at 382; 1 C.N.L.C. 393 at 395; 4 U.C.L.J. 208 at 208-209.
142. Sanderson v. Heap (1909), 19 Man. R. 122, 3 C.N.L.C. 631; 11 W.L.R. 238 (Q.B.).
143. Ibid., 19 Man. R. 122 at 128; 3 C.N.L.C. 631 at 635; 11 W.L.R. 238 at 242.
144. R. v. Thomas (1891), 2 Ex.C.R. 246; 3 C.N.L.C. 607; 2 W.L.T. 159.
145. Ibid., 2 Ex.C.R. 246 at 249; 3 C.N.L.C. 607 at 610; 2 W.L.T. 159 at 160.
146. Totten v. Watson (1858), 15 U.C.Q.B. 392; 1 C.N.L.C. 471.
147. Sanderson v. Heap (1909), 19 Man. R. 122 at 126; 3 C.N.L.C. 631 at 633-634; 1 W.L.R. 238 at 240-241.
148. Ibid., 19 Man. R. 122 at 126; 3 C.N.L.C. 631 at 633; 11 W.L.R. 238 at 240.
149. Ibid., 19 Man. R. 122 at 125; 3 C.N.L.C. 631 at 633; 1 W.L.R. 238 at 240.
150. Ibid., 19 Man. R. 122 at 125-126; 3 C.N.L.C. 631 at 633-634; 1 W.L.R. 238 at 240-241.
151. An Act of Crown Lands, R.S.N.S. 1851, c. 28; An Act of Indian Reserves, R.S.N.B. 1854, Title xiii, and An Act Relating to the Indigus of Prince Edward Island, R.S.P.E.I. 1856, c. 10. These statutes are

- referred to in R. v. St. Catherines Milling Co. (1885), 10 O.R. 196 at 221-222; 4 Cart. B.N.A. 214 at 229-230; 2 C.N.L.C. 374 at 399-400.
152. Totten v. Watson (1858), 15 U.C.Q.B. 392 at 395-396; 1 C.N.L.C. 471 at 474-475.
  153. Infra, notes 188-249.
  154. An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws Respecting Indians, S.C. 1857, c. 26, s. 1.
  155. Ibid., ss. 3, 4.
  156. Ibid., s. 3.
  157. Ibid., s. 3.
  158. Ibid., s. 4.
  159. Ibid., s. 4.
  160. Ibid., s. 10.
  161. Ibid., s. 8.
  162. Ibid., ss. 10, 11.
  163. Ibid., s. 10.
  164. Ibid., s. 10.
  165. Ibid., s. 11.
  166. An Act respecting Civilization and Enfranchisement of certain Indians, R.S.C. 1859, c. 9.
  167. Ibid., s. 2.
  168. Ibid.
  169. Constitution Act, 1867, s. 91(24).
  170. An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, R.S.C. 1868, c. 42.
  171. Ibid., s. 5.

172. An Act respecting Civilization and Enfranchisement of certain Indians, R.S.C. 1859, c. 9.
173. An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, S.C. 1868, c. 42, s. 33.
174. Ibid.
175. Fegan v. McLean (1869), 29 U.C.Q.B. 202; 1 C.N.L.C. 253.
176. Ibid., 29 U.C.Q.B. 202 at 205-206; 1 C.N.L.C. 253 at 257-258.
177. Ibid., 29 U.C.Q.B. 202 at 206; 1 C.N.L.C. 253 at 258.
178. See infra, Chapter V, notes 64, 65.
179. An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6.
180. Ibid., s. 1.
181. Ibid., s. 13.
182. Ibid., s. 20.
183. Ibid., s. 9.
184. Ibid., s. 13.
185. Ibid., s. 18.
186. Ibid., s. 14.
187. Ibid., s. 14.
188. Cf. Alvin Kienetz, "The Rise and Decline of Hybrid (Métis) Societies on the Frontier of Western Canada and Southern Africa" (1983), 3 The Canadian Journal of Native Studies, No. 1, 3.
189. See generally, Stanley 1936, supra, Chapter I, note 33.
190. H.Y. Hind, 1 Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858,

- London: 1860 at 172-191.
191. Ibid., at 179-180.
  192. Ibid., at 180-181.
  193. Ibid.
  194. Ibid., at 181.
  195. Morton, supra, note 68, at 315.
  196. P.A.C. R.G. 15, Vol. 229, Adams G. Archibald to the Secretary of State, 27th December 1870; Sprague, supra, Chapter I, note 12, App. D., item 4 at 6.
  197. Morris, supra, note 77, at 41.
  198. H. Bowsfield, The James Wickes Taylor Correspondence 1859-1870, Winnipeg: Man. Record Society, 1968 at 171-172. [hereinafter cited as Bowsfield]
  199. P.A.C. R.G. 15, Vol. 229, file 1437. Archibald to Secretary of State, dated April 9, 1871; Sprague, supra, Chapter I, note 12, App. D 6-9.
  200. W.L. Morton, ed., Manitoba: The Birth of a Province (Winnipeg: Manitoba Record Society, 1984 at (xv). [hereinafter cited as Morton, ed. 1984]
  201. Martin, supra, note 43, at 32-33.
  202. Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70. (Canada Sessional Papers 1874) Appendix (No. 5), at 11.
  203. Ibid., at 12, 13.
  204. Ibid., at 22.
  205. Ibid., at 21 on the 11th of March.
  206. Ibid., at 187.
  207. Ibid., at 187.
  208. Ibid., at 115.
  209. Ibid., at 115, per Thomas Bunn.

210. Ibid., at 12.
211. There was a saying in Red River country:  
"To John Schultz,  
Honor and money, plenty;  
To friend fools,  
Scaffolds, or pockets empty." Select Committee Report, supra, note 198, at 50.
212. Select Committee Report, supra, note 202, at 98-99.
213. Ibid., at 98.
214. P.R. Mailhot & D.N. Sprague, "Persistent Settlers: The Dispersal and Resettlement of the Red River Métis, 1870-1885" (1985), 17 Canadian Ethnic Studies 1 at 3.
215. Giraud, supra, Chapter I, note 14, at 380.
216. Ibid., at 385.
217. Ibid., at 386.
218. Ibid., at 385.
219. Ibid., at 386.
220. Ibid., at 387.
221. Ibid., at 388.
222. Ibid.
223. Ibid.
224. Giraud, supra, Chapter I, note 14, at 156.
225. Supra, notes 118-187 inclusive.
226. P.A.C. Macdonald Papers M.G. 26A, Vol. 304, at 138984-138987.
227. Ibid., at 138984.
228. Supra, notes 55-94 inclusive.
229. P.A.C. Macdonald Papers M.G. 26A, Vol. 304, at 138984.
230. Ibid., at 138985.

231. P.A.C. Macdonald Papers M.G. 26A, Vol. 104, at 42067-42070.
232. Ibid.
233. Ibid.
234. Supra, note 229, at 138987. On the 1st February of 1878, another petition from the St. Laurent settlers, including Gabriel Dumont, had requested s. 31 benefits, P.A.C. Macdonald Papers, M.G. 26A, Vol. 104, at 42053-42055, and explained the purpose of government intervention as being directed to "the sudden transition from prairie to agricultural life necessitated by the rapid disappearance of the buffalo: P.A.C. at 42055. In 1884, T.E. Jackson presented his views concerning the best method of dealing with the "Half-Breed" population of the territories: (In a letter to Hector Langevin, P.A.C. Macdonald Papers, M.G. 26A, Vol. 105, at 42202-42207. T.E. Jackson was the elder brother of W.H., the secretary of the Settlers' Union in Prince Albert. Their father, T.G., came to Prince Albert and farmed and ran an agricultural implements business, after living in Toronto and Wingham: 5 The Collected Writings of Louis Riel, ed. G.F.G. Stanley, Edmonton: U. of Alberta Press, 1985 at 273) Jackson's suggestions were: (1) In no case should scrip to land be given. (2) Each "Half-Breed" who would have been entitled to participate in the allotment made to extinguish the Half-Breed claim in the Province of Manitoba and who has not so participated . . . be granted 160 acres of land. (3) Land should be "in a block". (4) Not transferable allotment tickets, patent after three years, provided land not sold for arrears in taxes. (5) Claims to land already occupied should be settled immediately.
235. The Deputy Minister of the Interior, Canada.
236. P.A.C. Macdonald Papers M.G. 26A, Vol. 209 at 42338-42348. A.M. Burgess to D.L. Macpherson, dated 18 April, 1885; Sprague, supra, Chapter I, note 12, App. D.
237. Supra, note 226.
238. Supra, note 236. Burgess then provides a graphic description of the extermination of the plains' bison: "The completion of the Northern Pacific Railway south of the 49th parallel prevented the usual northward movement of the herds of buffalo



during the summer, and hemmed the remainder of these animals into a narrow space, where they were slaughtered . . . As an evidence of how completely the buffalo has been exterminated, I may mention that while in 1883, about 150,000 skins were disposed of in the St. Paul market, the supply did not exceed 300 last year, and I doubt if in the whole North West country, Canadian and American, there are three hundred head left living today."

239. P.C. No. 3723 dated 28 December, 1895 in N.O. Côté, Orders in Council Respecting Claims of The Half-Breeds. 1871 to 1925, Ottawa: Dept. of the Interior, 1929 at 112.
240. An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6.
241. Côté, supra, note 239.
242. In the documents annexed to the Order in Council No. 3723, supra, note 239.
243. Côté, supra, note 239, Annex 'A', at 4.
244. Ibid., Annex 'C', at 9. Burgess' observation is sensible. Men accustomed to wide travel and free enterprise activities are not likely to take kindly to supervised labour. There are no records to indicate that many people like Burgess and Lacombe happily made such a transition in their life styles, either.
245. Ibid.
246. Ibid., Annex 'B', at 6.
247. Ibid.,. See also clause 7, at 7.
248. An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6, s. 1.
249. Côté, supra, note 239, Annex 'B', clause 10, at 7.
250. See, for example, G.F.G. Stanley, The Birth of Western Canada, Toronto: U. of Toronto Press, 1936; W.L. Morton, Manitoba: A History 2d ed., Toronto: U. of Toronto Press, 1970.

251. Bowsfield, supra, note 198, at 168.
252. On the 24th March, 1869, by the stockholders' acceptance of the Earl of Granville's proposition. Quare whether this was the surrender contemplated by the Rupert's Land Act, 1868.
253. Bowsfield, supra, note 198.
254. Ibid., at 169.
255. Ibid., at 165-166.
256. Ibid., at 166.
257. Ibid.
258. Ibid., at 169-170.
259. Ibid., at 170.
260. Ibid.
261. Infra, note 263.
262. Morton, ed. 1984, supra, note 200 at (xvi).
263. Ritchot's Journal is published in French in (1964), 17 Revue d'Histoire de l'Amerique Francaise No. 4, 537 at 564 "Le Journal de l'Abbé N.J. Ritchot-1870" [hereinafter cited as Revue], and in English in Morton, Ed. 1984, supra, note 200 at 131. The English translation by Morton should be read in comparison with the French text; it contains errors. For example, "l'octroi des terres communales aux individus" is translated as "The grant of lands in common to individuals" (p. 563 of Revue and p. 159 of Morton, ed. 1984 supra, respectively); on p. 159 of the latter "lands ought to extend not to individuals actually in possession" appears as the translation for "des terres possedees doit s'entendre non seulement aux individus en possession . . . ." (p. 563). In the diary, Ritchot claims that another delegate, Judge Black had complimented him on his major role in the negotiations. This comment illustrates another faulty translation in the Morton text: "La convention l'a surtout charge des affaires des Metis Anglais et moi des Canadiens francais" (p. 557 Revue) becomes, "The convention had charged him with the business of the English metis (sic) and me with the French Canadians." The compliment is in the following, substantially correct terms, literally

translated: "Without me, he said, we should not have had the half of what we had. The people of Red River, English and French, as also Canada owed me a great deal, etc." (p. 153 of Morton, ed. 1984, supra). The error in translation gives a serious, and wrong impression that each delegate spoke for a different group, whereas the French text merely suggests that Black was asked to deal especially as representative of the English-speaking population. If the Morton translation were correct, it would be reasonable to argue that, if Ritchot negotiated for s. 31 then those lands are provided only for the Metis.

264. Morton, ed. 1984, supra, note 200 at 248.
265. Ibid., at 249.
266. Morton, ed. 1984, supra, note 200, at 140; Revue, supra, note 263, at 546.
267. Morton, ed. 1984, supra, note 200, at 140-141; Revue, supra, note 263, at 547.
268. Ibid.
269. The nature, and the origins of the rights of common are discussed in K.E. Digby, An Introduction to the History of the Law of Real Property 5th ed., Oxford: The Clarendon Press, 1891 at 192-203.
270. Martin, supra, note 43, at 90.
271. Presumably the "privileges" are a reference to the rights of Indian title.
272. Morton, ed., supra, note 200, at 141-142. The French text in Revue, supra, note 263, at 547-548, is as follows: "D'un autre cote-les habitants du Nord-Ouest en demandant une forme de Gouvernement semblable a celles des provinces des autres sujets de Sa Majeste ne pretendent pas par la priver de leurs droits aux qui parmi eux ont quelques droits personnels ou nationaux, et parce que ces habitants veulent etre traites comme les autres sujets de Sa Majeste s'en suit-il que ceux qui parmi eut ont un droit comme descendants d'Indiens soient obliges de perdre ces droits? Je ne le crois pas; aussi en demandant le controle des terres de leur province ils n'ont pas intention de faire perdre les droits que peuvent avoir comme descendants d'Indiens les Mitis (Here Ritchot's spelling more closely resembles the Metis pronunciation of their word for self-

identification, which varies through time and place but is generally quite close to the sounds represented by Michif and Michis) du Nord-Ouest. Ils ne veulent avoir que les droits communs aux autres provinces de la Confederation, et selon moi rien n'est plus juste, et je repete nous ne pouvons ceder ces droits sans compensation, comme dit plus haut."

273. Revue, supra, note 263, at 548; Morton, ed. 1984, supra, note 200, at 142.
274. Ibid.
275. Revue, supra, note 263, at 548.
276. Ibid., at 549.
277. Ibid. "Combien donc voulez-vous avoir d'acres de terre à prendre au vous voudrez?" Morton, ed. 1984, supra, note 200, at 143, translates this as, "How many acres of land now would you wish that one might chose (sic) where one wishes?"
278. Revue, supra, note 263, at 549.
279. Ibid., at 549; Morton, ed. 1984, supra, note 200, at 143. The translation is the writer's.
280. W.L. Morton only saw fit to refer to Canada's failure to abide by this promise, a failure which spelled the dramatic dispossession of substantially the entire Métif population of the province, in the following condescending footnote reference: "This of course was never done and the good priest's hope of anchoring the metis on land perpetually theirs was not realized," Morton, ed. 1984, supra, note 200, at 143, n. 36.
281. Morton, ed. 1984, supra, note 200, at 170, Revue, supra, note 263, at 549.
282. Ibid., at 169.
283. Ibid., at 168. "U.E. Loyalists" refers to the United Empire Loyalists; see E.A. Cruikshank, trans. & ed., The Settlement of the United Empire Loyalists on the Upper St. Lawrence and Bay of Quinte in 1784: A Documentary Record, Toronto: Ontario Historical Society, 1934 [hereinafter cited as Cruikshank]. The grant of 1,200,000 acres was increased, at second

reading, to take into consideration the increased population and size consequent upon the decision at that interval of time to expand the boundaries of the province to include Portage la Prairie: Morton, ed. 1984, supra, note 200, at 144, 200-202, Revue, at 549-550.

284. Morton, ed. 1984, supra, note 200, at 168.
285. Cruikshank, supra, note 283, at (v.).
286. Ibid., at 3.
287. Ibid., at 7 (Letter of Haldimand to Sir John Johnson, 1783).
288. Ibid., at 87.
289. Ibid., at 87.
290. Ibid., at 117.
291. Ibid., at 3.
292. Ibid., at 9.
293. Morton, ed. 1984, supra, note 200, at 169.
294. Ibid., at 176.
295. Ibid., at 59 (Letters of J.W. Taylor from Ottawa, April 19 to May 5, 1870).
296. P.A.C. M.G. 26A, Vol. 101B at 40641-40642, dated April 1870.
297. Ibid.
298. Morton, ed. 1984, supra, note 200, at 147; Revue, supra, note 263 at 552.
299. Revue, supra, note 263, at 553.
300. Morton, ed. 1984, supra, note 200, at 157-160; Revue, supra, note 263, at 561-564.
301. Ibid., Revue at 563; Morton, ed. 1984, at 159.
302. Morton, ed. 1984, supra, note 200, at 159.

#### IV. THE TEXT AND THE AMBIT OF THE OBLIGATION

##### A. A GRADUAL, REGULATED SETTLEMENT SCHEME: ITS OUTLINE

The text of s. 31, its background, the objects of statutes in pari materia, and the social context in which the section was meant to operate, support the construction that the intention of Parliament was the provision of a gradual, regulated land settlement scheme for the benefit of the "Half-Breed" residents of the Province. Such a settlement scheme was in 1870, the established mode of response to compensate for the loss of the use and occupation of lands which, upon the assumption of Canadian jurisdiction, became public or Crown lands to be thrown open to settler immigration. Such settlement schemes aimed at protecting the Aboriginal peoples whose land use was displaced by the immigrants; the schemes provided security in lands reserved for the use of the Aboriginal peoples by locating them at or nearby their usual centres of habitation, and by preventing improvident alienations to speculators in order to keep the lands within the Aboriginal families for so long a time as, in the considered judgment of the Crown, individuals were in a

position to receive free grants of lands and assume the same relationship to their lot as the homestead settler had to his land.

It is particularly useful, in order to provide clarity to the following analysis, to begin with a brief description of the contours of the scheme that is perceived as intended by s. 31.

If the preamble "is to be regarded as something other than a repository for empty platitudes,"<sup>1</sup> it declares the "larger object" which must guide the construction of s. 31,<sup>2</sup> that is, the extinguishment of the Indian title by the provision of a benefit to the families of the "Half-Breed" residents of the province, in the form of an appropriation of public lands. Section 31 does not authorize grants by the Crown of lands the subject of private rights or interests.

The contours of a settlement scheme on the model of the Indian settlement, legislation Parliament had before it when it passed s. 31, are apparent by paying strict attention to two features of the text. The first feature recognizes the need to read the mandate in the enacting clause to make "grants" of land to the children of the heads of families in light of the purpose declared in the preamble to provide a benefit to the families. The entitlement of all family members to a benefit from an appropriation of lands must be read consistently with

grants of the same appropriated lands to the children only. It is the failure to reconcile the text of the enacting clause with the objects declared in the preamble which has occasioned confusion about the meaning of s. 31.<sup>3</sup>

It is appropriate to refer to the declarations in the preamble to discern the objects of legislation. In Reference Re Alberta Statutes<sup>4</sup> the Chief Justice said,

. . . [W]e think it is important to have before us the language selected by the Legislature itself to describe the purpose of the legislation and the general nature and functions of the machinery which is to be put into operation.

These remarks are applicable to s. 31. The declarations in the preamble point to a general scheme of legislation to which s. 31 belongs, and permits an ascertainment of the object and effect of legislation passed in furtherance of the general design of the related statutes.<sup>5</sup> In the case of constitutional documents, the Supreme Court of Canada has inferred Constitutional principles from the preambles to the Constitution Acts.<sup>6</sup> In the case of s. 31, the preamble declares the statutory implementation of a scheme to extinguish the Indian title. That declaration links the scheme to the legislative policies of other statutes passed in furtherance of the same object. In the Indian enfranchisement and settlement schemes there is no inconsistency between a benefit to the families and grants to the children. The Indian settlement legislation indicates that the benefit to the families is derived from



their right to use and occupy the lands, but without receiving a grant of an estate in the land. They only receive a licence of occupation. It is the children only who will, in time, receive grants of an estate in the land. The licence of occupation which provides the benefit to all the members of the families of "Half-Breed" residents must not conflict with the children's entitlement to grants of estates. Similarly, the grants of an estate to the children must not conflict with the right of all the members of the "families" to use the lands. It is not possible to make unconditional grants of fee simple interests to the children and comply with the requirements of s. 31; a provision which affirms the rights of occupancy of the other members of the families must be one of the necessary conditions required by the section to be attached to the children's grants. Again, the Indian settlement legislation provides the model which accomplishes this object, and the text of s. 31 contains the words necessary to achieve it.

There are two distinct phases in the implementation of s. 31, and they require a span of time for accommodation. In the first instance, the federal Executive is required to make regulations to direct the selection and division of the lands by the Lieutenant-Governor. In the second phase of the scheme, the Lieutenant-Governor has no role; the federal Executive is

to regulate the grants of interests in the lands to the children. It is convenient to restate these two separate portions, for the convenience of the reader. The first phase is as follows:

. . . [T]hat, under regulations to be from time to time made by the Governor General in Council, the Lieutenant Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, . . . .

The second phase provision follows immediately after the above extract in the text:

. . . 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.

There are two obligations in the first phase which the Lieutenant-Governor is to perform. He is to select the lands and he is to divide them. These two obligations are to be directed by regulations made from time to time by the federal government. There is, however, one aspect of the selection of lands with respect to which s. 31 gives no regulatory power to the federal government. That has to do with the location of the lots or tracts. These are directed by the terms of s. 31 to be selected "in such parts of the Province as he [namely, the Lieutenant-Governor] may deem expedient." The two obligations of the Lieutenant-Governor in the first phase are to be distinguished from the one obligation in the second phase.

The latter is an obligation of the Crown in right of Canada because s. 30 vests the control of public lands in the Dominion. The obligation is to give lands for the purpose of settlement only. The government is required to make the grants subject to such conditions as will accomplish the purposes of the enactment. The expression "as the Governor in Council may from time to time determine" indicates that the implementation of the settlement scheme for the benefit of the "Half-Breed" residents will take time. The background to the Act of 1870 indicates that it would require more than one generation in time, to accomplish the aim of settling buffalo-hunting, subsistence farmers on lands appropriated for agricultural purposes. The scheme would require, like the Indian settlement legislation, protective measures to keep the lands within the families by restricting their alienation in the public market.

If s. 31 is intended to benefit the "Half-Breed" residents by conferring positive obligations on the government, the section must protect the corresponding rights of the "Half-Breed" people. The Supreme Court of Canada has recently stated that Parliament has a duty to enact legislation to protect rights secured in the Constitution.<sup>7</sup> Thus, the regulation of the settlement scheme must be implemented in a manner which will accomplish its purpose. The continuing regulatory exercise of jurisdiction by the federal Crown will maintain the s.

31 lands under federal control until such time as they are granted by way of unconditional fee simple. Section 31, as its language reveals, can not contemplate both free grants which relieve lands from federal jurisdiction, and the continuing exercise of federal control. Finally, it is to be noted that s. 32 provides for the private property interests of all individuals, whether Indian, "Half-Breed", or European. All Aboriginal people are, by s. 32, protected in their enjoyment of property interests acquired under the British-Canadian system. Section 31, then, must be supplementary to that. The background of the negotiations indicates that s. 31 rights were gained subsequent to agreement for the security of all private rights of property in the Province.<sup>8</sup> It is established in Canadian law that an entitlement to share in lands reserved in extinguishment of Indian title does not operate to bar private interests in any particular Aboriginal person.<sup>9</sup> Indian and "Half-Breed" persons have always been British subjects in law, and always entitled to the benefits and subject to the liabilities of all citizens, except to the extent specifically provided for. On this basis, s. 31 rights are to be construed as supplementary to the rights of individuals derived from s. 32 and from the common law and equity.

Because it is expressly given to extinguish the Indian title, it is appropriate to construe s. 31 in

accordance with the principles applicable to settlement schemes established in the process of extinguishing Indian title. Section 31 must contemplate the provision of compensation to the "Half-Breed" population of the Province in respect of their use and occupancy of the "public" lands, in common with the other Aboriginal peoples. Section 31 is a provision in respect of a group right, the Indian title, and it is not concerned with the rights of property that individual "Half-Breed" persons might have as settlers.<sup>10</sup>

It is convenient now to elaborate the arguments which lead to the construction which has been adumbrated here. Given the form of s. 31 and the need to read its text in its broader context, it is difficult to interpret particular words and expressions in isolation. For the sake of an attempt at a reasonable presentation of the arguments, the analysis which follows will focus, in turn, on three aspects of the section. First, it will be considered who was entitled to participate in the appropriation of lands. In particular, it will have to be determined who were the "Half-Breed" residents, and among them, who were the heads of families, and who were the children? The consideration of these issues will require some references to the two aspects of the enactments which will follow. These will be the two "phases" perceived in the settlement scheme, and distinguished by the

implementation provisions preceding the actual grants, and, second, the making of conditional grants.

**B. IDENTIFICATION OF THE PERSONS ENTITLED TO PARTICIPATE  
IN THE APPROPRIATION OF LANDS**

**1. "Half-Breed"**

The term, according to its usage in 1870, had a 'racial' connotation and referred to the part-Indian population. In turn, the "Half-Breed" population was comprised of two main groups based on European parentage, either "French" or "English".<sup>11</sup> This historical fact raises the issue whether the term was intended, in s. 31, to refer to one only, or both groups. A definition of the term must be purposive; it must accord with the intended objects of s. 31.<sup>12</sup> There are some bases for arguing that s. 31 was intended only for the "French Half-Breeds", that is, the Métif people. This view would emphasize the purpose of extinguishing the Indian title and would suggest that the nature of the Indian title interest indicates that the extinguishment was meant to provide compensation for the group use and occupancy of the public lands, for residents of the province. If it was the Métif who exclusively made such use of lands, in common with other Aboriginal peoples, the social context indicates the intention to benefit that particular group.<sup>13</sup> If the Métif were the group most vulnerable, in the province, to the

changes expected to accompany union with Canada, that provides a basis for presuming the intention of Parliament to enact a protective land settlement scheme.<sup>14</sup> Furthermore, it was the special representative of the Métif, Abbé Ritchot, who, the historical background of the negotiations reveals, made the plea to the Canadian ministers for a special provision for the Métif who, according to Ritchot, had rights "either personal or national . . . as descendants of Indians."<sup>15</sup> The "Half-Breed" people, that is, the English speaking descendants of Indians, were mostly settlers who did not participate in the group hunts of the Métif.<sup>16</sup> If an Indian title can be lost by abandonment,<sup>17</sup> it may be suggested the non-Métif "Half-Breed" people had, as a group, abandoned their entitlement by renouncing their participation in Aboriginal use and occupation of lands in the province.

The other argument relies mainly on the racial connotation of the term "Half-Breed" in 1870, and emphasizes the object of securing for the Crown in right of Canada, a title to the public lands that was freed from any possible claims to Indian title. On this view, the generic expression "Half-Breed" must be interpreted liberally, as is appropriate for remedial legislation<sup>18</sup> to include members of both "Half-Breed" groups. If Parliament had intended a benefit for the Métif only, it would have used a restrictive term to indicate that intention. As for the

second aspect of the argument, it proposes that the intended policy was to provide a quid pro quo as a sort of quit claim provision in circumstances where the legal basis for the assertion of an Indian title enuring to the entire "Half-Breed" population of Manitoba was contentious. It is useful to elaborate the bases for each aspect of the argument, in turn.

The use of the generic term "Half-Breed" with its racial connotation, may reflect the contemporary appreciation of Parliament respecting the law of Indian, or Aboriginal title. It was common knowledge in 1870, that Aboriginal occupants had a legal title to their lands, and that no private purchases were possible; only the Crown could purchase the title of the group.<sup>19</sup> Lieutenant-Governor Archibald elaborated the basis of Indian title as the actual use of particular lands by family groups,<sup>20</sup> but, because he considered the "Half-Breed" people to be entitled on the basis of their genetic inheritance from "Indian" people, he thought the Red River "Half-Breeds" would not, in law, be entitled. He failed to consider that the basis of a "Half-Breed" Indian title might comprise the same Aboriginal use and occupancy by "Half-Breed" families. On the basis of his view of Indian title, Archibald thought s. 31 intended to confer,

. . . a boon upon the mixed race any person, with a mixture of Indian blood in his veins, no matter how derived . . . would come within the class of persons for whom the boon



was intended.<sup>21</sup>

Similarly, when he introduced the Bill in Parliament, Prime Minister Macdonald explained the object of s. 31 as an appropriation of land "as a reservation for the purpose of settlement by "Half-Breeds" and their children of whatever origin . . . .<sup>22</sup> These considerations from the "background" of the enactment, if they can not be used judicially to construe the meaning of "Half-Breed", nevertheless aid to detect the intention to benefit the broader group designated by the racial term whose connotation can be derived from contemporary usage.

As for the second aspect of the argument, that which considers s. 31 as a sort of quit claim provision, there is support from the internal context of the enactment. A provision for a voluntary settlement scheme can reasonably be implemented by including anyone who can show entitlement by virtue of part-Indian ancestry and by willingness to actually settle upon land and comply with "conditions as to settlement and otherwise" that might be provided by the regulatory scheme. This approach is a liberal approach which holds that if a person falls within the general scope of the designated expression, "Half-Breed", he ought not to be excluded. In particular, the liberal approach opts for a broad construction which is consistent with a policy of finally settling any possible claims against the public lands in the province, and thereby promotes the public

interest. In this sense s. 31 has the same object, respecting the rights derived from Indian title, that s. 32 declares for itself in respect of private property rights: -- it seeks to quiet the titles. This public policy consideration appears, it is submitted, to shift the balance in favour of the construction that "Half-Breed" refers to all persons of part-Indian ancestry. If the policy is inherent in s. 31, it is the same policy that was adopted for Manitoba lands in respect of the occupation of the public lands by the Swampy Cree, Saulteaux, and all the other Indian residents of the province.<sup>23</sup> All Indian families were included in the treaties extinguishing their Indian title, without regard to the tests for specificity of boundaries and exclusiveness of occupation which developed later in Canadian jurisprudence when the Crown interest did not demand an expedient and liberal policy of providing compensation for the Indian title.<sup>24</sup> The generic term, it must be emphasized, includes the particular group, the "French Half-Breed" or Métif. The background of s. 31 supports the view that the intention of Parliament included, as one of its larger constitutional objects, the cultural survival of the Métif people, notwithstanding its policy of providing lands for all whom the racial term "Half-Breed" might connote.

2. Residents (at the time of the transfer to Canada)

The lands appropriated by s. 31 are declared, in the preamble, to be for the benefit of the families "of the 'Half-Breed' residents". It is enacted that the lands are to be divided among the children of the "Half-Breed" heads of families "residing in the Province at the time of the said transfer to Canada, . . . ." How is a "Half-Breed" resident of the province at the relevant time to be identified for the purpose of s. 31? That is the issue considered in this part. To construe the words of a statute, reference can be made to the ordinary definition of words in dictionaries. In Smith v. R.<sup>25</sup> the Supreme Court of Canada referred to The Shorter Oxford English Dictionary (1959) to determine the meaning of the term "usufruct" as used in a decision of the Judicial Committee of the Privy Council nearly one century earlier.<sup>26</sup> But words may have many meanings. Dictionaries usually list first the common, popular, or primary meaning of a word, and yet there may be different ordinary meanings of a word for different subject matters. It is then, the ordinary meaning as applied to the subject matter that will require consideration.<sup>27</sup>

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.<sup>28</sup>

Since there appears to be no "official" dictionary, reference may be made to English and American, as well as Canadian, dictionaries.<sup>29</sup>

Although a residence can refer either to a place of abode, a dwelling, or, on the other hand, a period of abode<sup>30</sup> a resident is ordinarily defined according to his relationship to a place over a period of time.<sup>31</sup> In other words, mere bodily presence in a dwelling does not make one a resident of the dwelling. To be a resident of a place, a person needs to establish a relationship over a period of time with the place of residence. A place of residence is one's home, where one carries on the activities of life. Whether a person is a resident of a particular place will, then, be a question of fact, but the facts sufficient to establish the necessary connection between the place and time on the one hand, and the individual, on the other, must depend on the social context. The manner of carrying on the business of life varies, and so must a sufficient definition of "resident". The social and economic background of the "Half-Breed" people of Manitoba in 1870 indicates that, although the bulk of the population inhabited permanent dwellings from which they carried on their economic activities, and in which they could habitually be found except during the great summer hunts, others did not maintain a relation with a permanent dwelling place that might ordinarily be considered connoted

by the term "resident". These were the "winterers" who, according to Giraud, spent the winter away from the established permanent settlements of the province, but returned there in the spring.<sup>32</sup> Others remained absent for years on end, but considered the Red River region their homeland.<sup>33</sup> The unique circumstances of these Métif people were a matter of common knowledge. Molyneux St. John, the Clerk of the Council who prepared a report for Lieutenant-Governor Archibald outlining land usage in the province, in January 1871, mentioned that a

. . . number of those who will share in the grant provided by the Manitoba Act cannot be called, in the ordinary acceptation of the term "Residents of Manitoba". These men follow their usual avocations beyond the limits of the Province.<sup>34</sup>

The background of negotiations suggests that winterers were meant to be included as residents for the purpose of s. 31, and that intention is consistent with Crown policy of extinguishing the title of all those found within the area extinguished, regardless of the actual lands used and occupied. Ritchot's diary records a visit to Cartier on May 9 to inquire about the meaning of certain wording of clause 27, which became s. 31 of the Act. The only term elaborated has to do with the 'residence' requirement. Cartier is recorded as having said that the government knows that a number of Métif are nomads and they are regarded as residents of the province. The families entitled, according to the record of Cartier's elaboration,

included all the Métif winterers or 'voyageurs' who had not left the country to establish themselves elsewhere, but who, in spending a large part of their lives on trips or in wintering, or almost all their lives away (au large) consider Red River settlement as their homeland.<sup>35</sup> Accordingly, the Order in Council dated 25 April 1871,<sup>36</sup> provided for the distribution of s. 31 lands with the stipulation that, "The most liberal construction shall be put on the word resident."<sup>37</sup>

Before drawing any conclusions about the proper construction of the term "resident" it is necessary to recall the requirement that heads of families reside in the province "at the time of the said transfer to Canada". The only reference to a transfer in the earlier provisions of the Act occurs in the preamble, and therefore it must be this transfer that s. 31 refers to:

And whereas it is expedient to prepare for the transfer of Rupert's Land and the North-Western Territory to the Government of Canada at the time appointed by the Queen for such admission.

The preamble also recites the object of the Act to provide, inter alia, for the organization of part of the Territories as a province, and for the establishment of a government for the province. The transfer, then, is of legislative and executive jurisdiction over the territories. The transfer was effected, pursuant to an Order in Council of June 23, 1870, on the 15th of July

1870.<sup>38</sup> The relevant question, then, concerns the identification of a "Half-Breed" resident of the province on July 15, 1870. The term must be construed in light of the purposes of extinguishing the Indian title by the provision of a land settlement scheme. The facts relevant to determine the identity of any particular person must also be appropriate to promote the objects of s. 31. The ordinary connotations of the term require some bodily presence over a period of time on, or perhaps, before, the 15th of July 1870. The purpose of providing the entitled residents with lands subject to regulations as may be determined "from time to time" by Canada, however, require that residence be established by the additional factor of intending to continue an habitual physical relation with the land for an extended period of time. In the context of the settlement scheme apparently contemplated by Parliament, this intention would be evidenced by the acceptance of s. 31 lands which are subject to the continuing exercise of a federal regulatory power. This construction would involve the consequence that a "Half-Breed" who accepted s. 31 lands could not, thereafter, be entitled to compensation for the Indian title elsewhere. The test of residency carries a consequence which promotes the purpose of s. 31. It is as Cartier indicated to Ritchot; the persons are entitled who have "not left the country to establish themselves elsewhere . . . ."<sup>39</sup> The

construction thus suggested would mean that mere bodily presence in a place within Manitoba on July 15, 1870 would not be sufficient to establish the requisite residency. The temporal aspect is also relevant; it may be evidenced by an established dwelling, usual habitation, or an expressed intention to accept lands that are to be given only for actual settlement. If this is correct, and mere presence in the province is not sufficient to establish residence, then, conversely, the fact of bodily presence in Manitoba on July 15, 1870, can not, of itself, be determinative. The government, according to the construction of the term "resident" suggested by this analysis, could not legitimately require presence in the province on July 15, 1870, as a necessary condition or fact to determine a person's resident status for purposes of s. 31. The necessary and sufficient facts require to be based upon a bodily presence over a past period of time without evidence of establishment of residence elsewhere, or a bodily presence at least on the relevant date, together with evidence of an intention to continue residing in the province. The purpose of s. 31 supports the view that acceptance of lands subject to continued federal jurisdiction would constitute sufficient evidence of the requisite intention.



### 3. Families, Heads of Families, and Children

#### (a) Indian Title Extinguished by Reference to Families as the Unit to be Compensated

Section 31 appropriates lands for the benefit of the "families" of the "half-Breed" residents. The reference to families is consistent with the recognition of Indian title as a group right; it is based upon group use and occupancy of lands, and the family is the basic unit of the group.. Lieutenant-Governor Archibald observed that the source of the Indian title is group occupancy. He stated that each tribe is divided

. . . into families and each family considers as its own, in a certain sense of exclusiveness, though not in the absolute sense we attach to ownership, the particular parts of the Country where the family lives, and hunts, and roams.<sup>40</sup>

When Canada's treaty commissioners dealt with the extinguishment of the Indian title of the Saulteaux, Cree and other inhabitants of Manitoba, they concerned themselves with the title as inhering in the families.<sup>41</sup>

The ordinary meaning of the term "family" may include only the parents and children, a "set of relations", or a "group of related people," "a tribe".<sup>42</sup> The proper construction of the term must promote the objects of s. 31 as revealed by the entire context and in the context of a provision for the extinguishment of the Indian title a broad, inclusive connotation appears to be appropriate. If s. 31 aims at providing a final settlement of all

possible claims to the public lands of the province having their basis in the Indian title, that object is achieved by the provision of a benefit to all the members of the family, and is not accomplished if some family members receive no benefit. The proper construction of "benefit" will now be addressed.

(b) The Meaning of "Benefit" in s. 31

(i) Dictionary Meanings. In its ordinary meaning, "benefit" can refer to "anything for the good of a person or thing; an advantage:<sup>43</sup> Roget's College Thesaurus,<sup>44</sup> lists the following synonyms for the verb form: "Help, serve, assist, improve". The word "use" is referred to as having a similar meaning, and<sup>45</sup> the word 'use' is given, inter alia the following meanings; first, in its noun form: "disposal; consumption; usufruct . . .", and in its very form, the following: "make use of, utilize, employ, put to use, . . . avail oneself of, profit by . . . take advantage of . . . ."

If these ordinary meanings are adopted, s. 31 might provide for public lands to be set apart for the use of the families of the "Half-Breed" residents. The lands are to be at their disposal, for their consumption; they are to have the usufruct. Because they have the usufruct, they may profit by the land, avail themselves of it, and use it to their advantage.

In Smith<sup>46</sup> the Supreme Court said a dictionary definition of 'usufruct' was appropriate to describe the interest of Indian persons in lands set apart for them by a "grant of occupation" in 1783. The adopted definition was as follows:

Usufruct

1. Law. The right of temporary possession, use, or 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).

Usufructuary

1. Law. One who enjoys the usufruct of a property, etc.

(ii) Legal Meaning. "Benefit" also has particular, or 'technical' meanings in law. A 'beneficial owner' is the person who is entitled to the benefit of property: Osborn's Concise Law Dictionary.<sup>47</sup> In the law of contract, the sign and symbol of bargain has been described in terms of 'benefit'.<sup>48</sup>

When it is said that a valuable consideration for a promise may consist of a benefit to the promisor, "benefit" means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled.<sup>49</sup>

The ordinary meaning of the word 'benefit' suggests that s. 31 is intended to provide for the use and enjoyment of families 1.4 million acres of public lands in the province. The "technical" meanings of the term in law imports a particular entitlement to the enjoyment of proprietary

interests in the lands, and, furthermore, might import the concept that an entitlement is derived in exchange for something else. The context of the preamble indicates that the extinguishment of the Indian title is the quid pro quo for the benefit of use and enjoyment of the lands set apart for the families.

(iii) Purposive Definition. A purposive definition required for the interpretation of rights entrenched in the Constitution, then, requires the construction that the intention of Parliament, in using the word 'benefit', was to grant a right of use of the lands appropriated by s. 31, to all members of "Half-Breed" families. The right of use and occupation is derived from the meaning of "benefit" in light of the objects of the section to extinguish the Indian title, and the entitlement of all members of family groups follows from the purpose revealed by the background, of enacting the section to provide a final settlement to all claims of "Half-Breed" residents based on the Indian title derived from use and occupancy of the public lands.

(iv) Meaning from Statutes in Pari Materia. The construction now suggested accords, furthermore, with the nature of the interest generally granted to the members of Indian families in lands set apart for their use upon the

extinguishment of the Indian title. That interest, it was revealed by the earlier examination of the Indian settlement legislation, was given in the form of an occupation licence, and it was part of a scheme to effect a transition to individual ownership for Indian people.<sup>50</sup> The Indian settlement legislation aimed to establish the same relation between an Indian person and his 'lot' of land as the homesteader had to his homestead; in the latter case, the public lands legislation considered has demonstrated, the first step in obtaining a free grant of land was the entitlement to a licence of occupation.<sup>51</sup> The construction that s. 31 provides for an entitlement to use and occupy the appropriated lands for all the members of the "Half-Breed" families, is thus supported by the statutes in pari materia.

The legislated definitions respecting the Indian persons entitled to use and occupy lands appropriated for their exclusive benefit upon the extinguishment of the Indian title may cast some light on the construction of the term "families" in s. 31. These were generally broad definitions which included all members of Indian family groups actually residing on the lands set apart for their use.<sup>52</sup> The definitions included all persons "of Indian blood", whether Indians or not, and also persons intermarried with Indians.<sup>53</sup>

(v) Conclusion. On the basis of these various considerations, s. 31 may be construed as intending to benefit the entire "Half-Breed" population of the province. In the first phase of the settlement scheme, the lands are appropriated for the use of all members of the families of the "Half-Breed" residents. If this is the true construction, it will be possible to reconcile the division of lands among the children, in the first phase, and the making of conditional grants to the same children, in the second phase, with the object of providing a benefit to all members of the group.

(c) Division Among the Children in the First Phase

The lands are to be set apart, it is expressly provided, for the benefit of the families. Division among the children is the means adopted by Parliament to appropriate the lands to the particular families entitled to share in the distribution. An alternative way of effecting a division for the same purpose of benefitting the families would have been to divide among the heads of families. A third alternative, which was suggested by Lieutenant-Governor Archibald, was a division among all members of the group.<sup>54</sup> The second alternative appears in the draft bill,<sup>55</sup> and was tendered by Cartier<sup>56</sup> but did not make its way into the final draft passed by the Parliament.

The method of division chosen by Parliament will help

reveal the purpose of the section. The purposes of s. 31 are partly revealed when the specific mode of division selected by the draftsman is considered. If equality of treatment, in the sense of distributive justice, is a desirable end within the scheme contemplated by s. 31, an equal division among the heads would be appropriate only if all members of families attached to the heads were of equal number. If equal parcels of land are distributed to heads of families with different numbers of children, all members of the equally entitled families will not receive equal access to the benefit of the 1.4 million acres. Division among children must contemplate, on this view, fairness of distributive treatment by reference to the varying numbers of children who are attached (by way of definition) to the heads of families. On this basis of division, the families entitled will be treated fairly in the sense that lands will be allocated in accordance with the needs generated by the number of children in the family. This tentative conclusion leads to a consideration of the implementation of the second phase, in which the lots are to be the subject of conditional grants to the children.

(d) Grants to the Children in the Second Phase  
Reconciled with a Benefit to the Families

(i) Dictionary References. It is convenient to begin with a dictionary definition of "grant":

v. . . . (3) bestow or confer (a right, etc.) by formal act; transfer or convey (the ownership of property) especially by deed or writing.

n. 1 something granted, such as a privilege, right, sum of money, or tract of land.<sup>57</sup>

The context of s. 31 clearly requires that the 'technical' meaning of 'grant' in relation to interests in land, be considered.

Osborn's Dictionary<sup>58</sup> defines the term as follows:

(1) The assurance or transfer of the ownership of property, as distinguished from the delivery or transfer of the property itself . . . (2) The allocation of rights, powers, moneys, etc. by the Crown or other authority, to particular persons or for particular purposes.

Black's Law Dictionary<sup>59</sup> lists, inter alia the following:

A conveyance; i.e. transfer of title by deed or other instrument . . . as distinguished from a mere license, a grant passes some estate or interest, corporeal or incorporeal, in the lands which it embraces.  
(Emphasis added)

Because the literal context requires that the families derive a benefit from the lands, and also that the children within the families receive 'grants' of the same, it appears relevant to pursue the distinctions which are indicated by these definitions, in respect of the following two facts: (1) the distinction adverted to in Osborn's between delivery or transfer of the property and the grant of the ownerships of the property, and (2) the distinction between a grant of an estate or interest and a mere



licence. As to the first distinction, it may be thought that provision is made for transfer of the property to the children in the initial process of division, whereas the grant provides for a later, formal conveyance of an estate or interest in the land.

Black's<sup>60</sup> defines 'licence' as:

The permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort . . . . A license is not a contract between the state and the licensee, but is a mere personal permit . . . . Neither is it property or a property right . . . . License with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property.

Real Property. A license is ordinarily considered to be a mere personal or revocable privilege to perform an act or series of acts on the land of another . . . . A privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property.

A license is distinguished from an "easement", which implies an interest in the land, and a "lease", or right to take the profits of land. It may be, however, and often is, coupled with a grant of some interest in the land itself, or right to take the profits.

These definitions add to the logical basis of the apparent scheme of s. 31. The families may derive a benefit from the appropriated lands if they are licensees in respect of their use. The lands are divided among the children to serve the ends of justice and the purposes of the Act, and finally, grants are made to the children,

transferring particular estates or interests in the lands to them. The character of a licence, which grants no interest in the land, is consistent with a flexible land distribution scheme whereby reallocations are possible within the groups, in respect of the licenses to use, with a view to making adjustments towards eventual grants of estates. In the case of the early generation licensees among the "Half-Breed" families, there would be no proprietary interest to act as a fetter on the government's direction to regulate the whole scheme of selection, division and grant.

Osborn's definition of "license" is similar, and supports the above remarks:

An authority to do something which would otherwise be inoperative, wrongful, or illegal; e.g. to enter on land which would otherwise be a trespass. A license passes no interest, and a mere license is always revocable . . . .<sup>61</sup>

(ii) Occupation of Lands Without Settlement Conditions Promotes Benefit in the Present Generation.

Furthermore, a scheme which grants a licence of occupation without requiring conditions of settlement is appropriate for the benefit of those among the province's "Half-Breed" population who might fall into the category of buffalo hunters described as not inclined to favour a turn to a full-time, sedentary agricultural life-style.<sup>62</sup> The speeches by Canada's representative at the signing of

Treaty No. 1 indicate a policy of not forcing Aboriginal people to make abrupt transitions in their life-style.<sup>63</sup> This consideration is also evident in the pre-1870 Indian settlement legislation,<sup>64</sup> and it was the gist of the views of Canadian officials that the Métif would require more than one generation to make a transition to a settled life-style whereby they would be in a position to protect free lands from the imposition of speculators and derive a benefit therefrom.<sup>65</sup> If members other than the children derive no benefit, the object of extinguishing the Indian title of the families is not accomplished.

(iii) Two-Phase Scheme is Indicated by the Homestead Legislation Background of s. 31 and Social Circumstances of the Beneficiaries. The two-phase scheme is also analogous to the homestead scheme provided by the public lands legislation. The Indian settlement legislation after which s. 31 appears to have been patterned, was described as having the object of promoting the relation of the homesteader to his lot of land.<sup>66</sup> If it is correct that s. 31 contemplates "participation" by all members of the families, then, the application of the canon expressio unius est exclusio alterius suggests that the heads of families were entitled to 'participate' otherwise than by conveyance of a grant to them. It will be recalled that a licence to occupy and use land set aside

for them was the usual first step in the "Indian enfranchisement" legislation which Parliament itself had enacted just prior to the Manitoba Act.<sup>67</sup> In these Indian settlement schemes, grants of an estate in land were not given outright, but were first granted with restrictions on alienation and provisions for transmission to succeeding generations within the families. In time, when the 'transition' to the new order had been made, fee simple grants went to the children of those who had participated by occupying the lands and later by holding restricted interests. This type of scheme was the type promoted by Ritchot; it was the type actually expressed as the object of s. 31 by both Macdonald and Cartier.<sup>68</sup> Such a gradual settlement scheme, with a discretion to attach particular conditions, or to remove all conditions in individual cases, accords with the circumstances of the "Half-Breed" population of Red River.<sup>69</sup>

(e) Identification of the "Children": Textual Considerations

It is useful to note, at the beginning, that there are two separate references to "children" in the enacting clause. Following the construction that s. 31 provides two distinct phases for its implementation, it is enacted that, in the first phase, the Lieutenant-Governor is to divide lands among the children of the heads of families resident

in the Province in 1870, under federal regulations to be made from time to time. In the second phase it is enacted that the divided lands are to be the subject of conditional grants to "the said children respectively". The literal, ordinary meaning of this phrase indicates that the grants are to be made to the same individuals among whom the lands are initially divided. That construction will be considered later; the immediate concern is to determine the identity of the children entitled to participate in the division of the 1.4 million acres of public lands.

The first issue is whether the section intends to divide the lands among all the children of those individuals who are properly identified as heads of families, regardless of the date of birth, or whether a more restricted categorization is intended. Two possible limitations may arise from the text. First, the expression "heads of families residing in the Province at the time of the said transfer to Canada", (i.e. July 15, 1870) may be considered applicable to the children as well as the heads, thereby limiting the entitled children, for purposes of division, to those born on the relevant date. Against this construction, it can be argued that the construction of the text, in particular, the proximity of the expression "residing in the Province at the time . . . ." to the "heads of families" indicates that the residence requirement is intended to attach to the heads only. On

this view, the text suggests no limitation to children born by July 15, 1870. This view is suggested by a liberal approach to construction which is inclusive rather than exclusive. If the Parliament has selected a class for the grant of a benefit, the judiciary will seek not to exclude any individuals from the selected group.<sup>70</sup>

The second possible construction relies on the presumption that an act is always speaking and identifies the relevant children as those born of the entitled heads of families at the time of the distribution. This particular construction is supported by the draft bill which provided for distribution to the heads of families "according to the number of children of both sexes then existing in each family."<sup>71</sup>

There is a third and more liberal construction. It relies on the absence of express limitations in the Act to presume an all-inclusive category of all children who are born of an entitled head of family, at any time. This construction has support from different sources. It relies, as does the second suggested construction, on the presumption the Act is always speaking -- and the occasion which arises is the birth of the child instead of the division of lands, on the above construction. If the head of a family meets the residence requirement, all the children of that head of family are to be entitled to share in the division. Children will be born to heads of

families at different times -- that was a matter of common knowledge known to Parliament in 1870. It must be assumed that all the knowledge and information required for a proper understanding of a statute was possessed by Parliament.<sup>72</sup> Parliament did not see fit, in choosing words to fit the scheme of land distribution it contemplated in Manitoba, to stipulate that only some children of heads of families were to be entitled to a division, and that birth by any particular date was to be a condition precedent to entitlement. In the absence of limiting words, "children" should be construed liberally in favour of those for whom the Act was enacted, the families of the "Half-Breed" residents, without exclusion of particular members.<sup>73</sup>

A further consideration is the support given by the context of s. 31. The selection and division is to be made "under regulations to be from time to time made . . . ." This contemplates either or both of the following propositions, namely, that new regulations be added after initial regulations are in place or that the initial regulations be changed for new ones. Either proposition requires that Parliament, or rather, its designed delegate, in this case, the Governor General in Council, address, over time, the matter of the selection and division of lands among the children. Although the meaning is not compelling, it is possible that the regulation of the

selection and division among children includes consideration of the fluctuating numbers of entitled children. It was entirely within the prospects faced by Parliament at the time of enactment that some children who would initially qualify would die before the division to them was made; similarly, Parliament must have contemplated, and meant to provide for, children to be born after the initial regulatory scheme was enacted. This effect is consistent with, and, is in fact achieved, by providing, as s. 31 does, that regulations be made from time to time to govern the selection and division. On the basis of the ordinary meaning of the words used in the internal context of s. 31 alone, the children intended for division by the Act are those, whenever born, who are born to "Half-Breed heads" of families who meet the residence requirement. The construction that "children" includes all, whenever born, receives support from the background of negotiations. Ritchot asked for lands for the children whenever born<sup>74</sup> The third, all-inclusive construction is consistent with a proper implementation of the objects of s. 31. Its consequences in the social context in which it was meant to operate support it. Ritchot explained to the Canadian ministers the requirement for large areas of communal lands because of the circumstances of the country.<sup>75</sup> If large common areas were set aside for the "Half-Breed" group, it would be possible to accommodate,



in time, division among children of entitled heads who are born after the initial division and distribution. Section 31, it will be recalled, provides for the making of regulations pertaining to division, "from time to time".

The children identified for purposes of division, then, are all those born of the entitled heads of family, regardless of the date of birth, on the basis that the more liberal construction ought to be adopted which accords with the objects of the Act. If this is correct, and if the grants are required, on the basis of their ordinary meaning within the text of s. 31, to be made to the same children, it is necessary to remark upon a necessary requirement in respect of those grants. The grants must be made subject to conditions which will reach the purposes of s. 31. A minimum condition to be attached will be one which recognizes and protects the entitlement of other family members, apart from the children among whom the division is made, to receive a benefit from the lands by way of use and occupancy.

The implementation of s. 31 requires a fuller identification of the children. They can only be identified by reference to the identity of the heads of family.

(f) Identification of "Heads of Families", and  
Meaning of "Children" Further Elaborated

It is convenient to begin by assuming that the heads of family are to include all those who resided in the Province in July 1870. Section 31 does not expressly limit the heads to a category less than all the residents. The ordinary meaning of 'head' refers to the chief person or leader of a family.<sup>76</sup> It is the husband and father who was generally regarded as the head of family in the social context in which s. 31 was enacted. So, the historian W.L. Morton referred to the early "Half-Breed" families in the expression which follows: "Though the first heads of families were European, the wives when not Indian were half-breed." (sic)<sup>77</sup> Similarly, in the pre-1870 Indian settlement legislation, the enfranchisement scheme was effected by way of the father and husband, although all men over a specified age were also permitted entry into the scheme.<sup>78</sup> The pertinent point is that, insofar as the identification of "children" in these Indian settlement schemes is concerned, the "head" of the family would be the father of the children. A strict definition of the father as head would have the consequence of excluding from the division of lands, the children of deceased fathers, and perhaps the "illegitimate" children of fathers who did not reside with the child. On the basis that no individuals are to be presumably excluded from the intention of

Parliament to benefit the children, it might be suggested that mothers might, in the absence of a father in the household, be included as a head of family in accordance with the term's ordinary meaning.

The social context raises another factual issue which requires interpretation: are heads of family who are themselves Indian or "European" included within the category of "Half-Breed" heads of family? If they are, the part- Indian children of European or Indian heads of family would be entitled to share in the division of lands, and the grants of interests. If these Indian or European parents are excluded, and if the term 'heads' must include all such persons as are resident of the Province in 1870, then their children are excluded from the division. If, as considered above,<sup>79</sup> grants are to be made to the same individuals who receive lands in the division, then a certain proportion of families who might be "Half-Breed" residents of the Province would be excluded from participation in the appropriation. Such a consequence is avoided by the adoption of a broad definition of "family", one which includes a kinship group. On this construction, the children of Indian/European parents are entitled because they fall within the "racial" connotation of "Half-Breed" and they are members of the "families" identified by the section.

If emphasis is given to the object of providing lands

for the purpose of settlement only, the object which was stated as the intention of s. 31 by John A. Macdonald upon the introduction of the legislation, a rather different construction arises in respect of both "heads" and "children". The additional objective of s. 31 which supports the construction to be discussed is that of providing for a settlement of claims to the Indian title, as revealed by the background of the Act.<sup>80</sup> It may be submitted that s. 31 intended to provide lands for settlement only, for those persons of Indian ancestry<sup>81</sup> ("Half-Breed" has a racial connotation) who wished to make a claim to the public lands in the province, based on the Indian title; the object was to finally settle those claims. If 'heads' and 'children' are construed in light of these objects, it can be submitted that the families entitled to benefit from the appropriation are limited to those who actually claim the benefit of s. 31. Thus, it is not all the "Half-Breed" heads of families resident in the Province who are to determine the identity of the children, but only those heads of families who choose to take lands for actual settlement. On the basis of the settlement scheme models provided by the Indian legislation, all members of the "Half-Breed" group are entitled to occupy the lands; the "heads" are those occupants who take advantage of s. 31, and the "children" are all those descended from an occupant head of family. The first

generation occupants would benefit by way of occupancy licence only, the grants would go to the children only. If all members of the group are entitled to occupy the lands, there is no need to issue grants to the heads of families. The grant of lands to the "children" only, promotes the object inherent in the Indian settlement schemes, to give conditional grants only to persons descended from a head of family who had voluntarily agreed to "enfranchise".<sup>82</sup> Because grants of estates in lands are delayed by at least one generation, this scheme which follows from this construction is consistent with the object of maintaining the lands within the "Half-Breed" families.

It is difficult to reconcile this construction with the requirement which follows from the ordinary meaning of "the said children, respectively", of making grants to the children among whom the division was made. The construction could contemplate a selection of lands without division among the children for one generation. In other words, lands could be set apart for the occupation of members of the group without dividing lots among the children at the outset. Section 31 permits regulation from time to time for division, and lots or tracts could be allocated, in time, to the children born of heads of families in occupation of the reserved lands. On this construction, a head of family is a person who resided in the Province in 1870 and who either then, or subsequently,

became a head of family.

(g) Conclusion

Section 31 does not permit confident conclusions concerning the identity of the heads of families and children entitled to participate in its benefits. It is submitted that s. 31 permits a reasonable definition of the persons entitled which reaches the objective of providing a regulated settlement scheme for all members of the "Half-Breed" group. This section has considered some possible constructions which might achieve the objects of s. 31.

**C. THE FIRST PHASE OF IMPLEMENTATION: SELECTION AND  
DIVISION BY THE LIEUTENANT-GOVERNOR**

**1. Interpretation of s. 31 Must Serve the Object of  
Providing a Benefit for all Members of the Families**

The object of this part is to elaborate the construction of what appears, from the text and the background of s. 31, to be the first phase of implementation; namely, the selection and division of the lands appropriated by the Act.<sup>83</sup> In its preamble, s. 31 declares the method that is to be adopted to reach its objectives: there is to be an appropriation of public lands for the benefit of the families of the "Half-Breed" residents. The literal meaning of the word "appropriate" denotes the setting apart of certain lands, from among a

greater quantity of lands, for a particular purpose.<sup>84</sup> According to the literal meaning, then, the selection of the lands must be accomplished in such a way as to promote the objects of s. 31. The object to provide a benefit for the families is expressly declared. The implementation of s. 31 must provide a benefit for all members of the families, and not only the children designated for grants. The purposes of s. 31, as suggested by statutes in pari materia, and the background policy appropriate to the extinguishment of the Indian title, are to permit a gradual transition to a settler life-style upon the occasion of the Crown assuming control of the public lands for the general purposes of settlement.<sup>85</sup> When this object of the legislation is considered, the text of the section is construed as a provision for making lands available for the use and occupation of the families of the "Half-Breed" residents, with conditional grants being made to the children, so as to promote the security of the families in the holding of their lands. Further, it is only by providing a benefit for all the members of the families designated by s. 31 that the Indian title extinguishment can be accomplished.

2. Intention to Provide a Gradual Settlement Scheme for Families on the Model of the Indian Settlement Legislation is Indicated by the Different Modes for Implementation of the Two Phases of the Settlement Scheme in s. 31

The distinction between the modes of exercising governmental supervision in the two phases of the legislative scheme of s. 31 supports the general objects indicated by the Indian settlement legislation. Whereas "regulations" are prescribed for the first phase, the second phase merely requires conditional grants to be made by the Governor General in Council. The selection and division of the land by the local Crown officer, the Lieutenant-Governor, is to be performed under "regulations" made from time to time by the federal government. The second phase of the scheme, the actual grant of an estate in the land, is to be made to "the said children respectively", and in this case the making of regulations is not required as a manner of regulating the grants. As s. 33 indicates in another context, individual grants, even conditional grants, can be made by Order in Council. Regulation is "rule or order having force of law issued by executive authority of government."<sup>86</sup> A "rule" is "an established standard, guide, or regulation."<sup>87</sup> Regulations, then, appear to be provisions which establish uniformity of treatment. The federal executive is to make



regulatory provisions for the uniform treatment of the persons entitled under s. 31; it is to ensure distributive justice by equality of treatment, in selection and allocation by division. The Judicial Committee of the Privy Council has considered the rationale for providing, in the same statute, that some things be done by regulation and others by Order in Council.

Their Lordships can only suppose the explanation to be that a regulation normally (though perhaps not quite necessarily) applies uniform treatment to everyone, or to all members of some group or class. There is one and the same "rule" ("regula") for all. On the other hand there may be special cases which the rule did not contemplate . . . or to which owing to special circumstances it cannot apply without hardship, or without violating the spirit -- "the true intent" of the Act; and the object of the "order-making" power is to enable the Crown to make special and equitable provision ad hoc for such cases.<sup>88</sup>

This rationale provides a basis for the omission of a prescription for regulations in the second phase; that is, in the making of grants. If the "true intent" or the spirit of s. 31 involves ultimate grants to the "children" upon conditions that promote the objects of the section, then individual cases are required to attract individual treatment. There is no provision for uniform conditions attaching to grants generally. The conditions are to be made to promote the benefit of the grantee in each case. This rationale is consistent with the legislative policy of the Indian enfranchisement legislation, statutes in pari materia which required the Crown to make a determination in

each case, concerning the prospects of the individual grantee being able to protect his property interests in the public market.<sup>89</sup>

It appears, on the basis of the above considerations, that, in the process of selection and division, the distribution must benefit those entitled equally, whereas, in the process of granting estates in the land, not all grantees are to be treated the same.

There is additional support for the proposition that s. 31 contemplated initial distribution and occupation without grants of interest in the land, and eventual grants to the children at some future time. No grants of interests in the land in the province could be made pursuant to the provisions of s. 31 until such time as the lands, wherever their location, had been freed of all Indian title claims. Section 32 appears to confirm, implicitly, the extinguishment of the Indian title within the "Settlement Belt" purportedly effected by the Selkirk treaty,<sup>90</sup> but the public lands in the other parts of the province were not released of the Indian title until, in the case of the Cree, Saulteaux and other Indian peoples, the treaties of 1871, and, in the case of the "Half-Breed" population, the implementation of s. 31.<sup>91</sup> Section 31 must have contemplated appropriation of some public lands outside the Settlement Belt where Indian title was not extinguished, there was not 1.4 million acres of public

lands available therein.<sup>92</sup>

To review, the true intent, or spirit of the Act requires the object of providing for the claims requiring extinguishment of the Indian title to be dealt with by the provision of a benefit, by way of participation in the appropriation of lands, to all members of the families of the "Half-Breed" residents. The text of s. 31 must be construed in a manner consistent with these objects. In fact, the text can be construed in a manner which reflects the similar policy objects of the Indian settlement legislation. One way is to emphasize the distinction between the mode provided by Parliament for implementing the two phases of the settlement scheme in s. 31. "Regulations" are prescribed for uniform treatment of all beneficiaries in the initial distribution process (selection and division), whereas the prescription is omitted in the case of phase two. This permits the making of conditional grants to be made, not by way of uniform regulation, but by Orders which can comply with the need demonstrated by the social context, to consider whether any conditions need to be made in each case, and if so, which conditions are best suited to meet the purposes of securing the family of the individual grantee upon his lands.

### 3. Lands Available for Selection

The text requires the appropriation of public or

Crown lands. Such "ungranted" lands are those which are not the subject of private interests derived from Crown grant.<sup>93</sup> Since s. 32 provides for interests of private property, s. 31 lands are supplementary to 32 lands. While s. 32 confirmed the estates of those "Half-Breed" individuals who had them, s. 31 provided for a gradual settlement scheme designed to secure the "Half-Breed" as a people, and as individuals, on lands. Section 31 was designed to protect the "Half-Breed" population, as a people liable to imposition, from the designs of the settler speculators. To the extent a "Half-Breed" took lands as a holder of private interests under s. 32, he took on the same basis as any other holder. Section 31 lands could only be appropriated from the public lands. Those lands must have included all the Hudson Bay Company lands which were surrendered to the Imperial Crown<sup>94</sup> and transferred to the jurisdiction of the Crown in right of the Dominion. Presumably the price of £300,000 paid by Canada was compensation for the Company's private interest in those lands. Once surrendered to the Crown, the lands are in the category of "ungranted" lands unless and until they are appropriated for a particular purpose. Public lands available for appropriation were located, then, within, and without, the Settlement Belt. It has been noted that there were substantial Métif settlements outside the Settlement Belt, where the Indian title had not been

extinguished in 1870.<sup>95</sup>

By 1870, much of the land within the Settlement Belt was occupied by persons who derived interests pursuant to s. 32. However, one-third of the lands within the Belt lying south of Fort Garry along the Red River was not occupied.<sup>96</sup> These lands would have been included as lands available for appropriation under s.12. Section 32(4) provided for a right of pre-emption in respect of lands occupied outside the Belt.<sup>97</sup> In fact, that entitlement was, by an Order in Council dated 11 November 1877, augmented by the grant of a fee simple estate, on the basis that once the Indian title outside the Belt had been extinguished, there was nothing to warrant a lesser entitlement to s. 32(4) occupants than those for s. 32(3) occupants.<sup>98</sup> That right would have been available to be exercised subsequent to the proper surrender of the Indian title. There was no equivalent provision recognizing and affirming a right of pre-emption in respect of lands occupied within the Belt. If lands within the Belt came within the description of lands under s. 32, then they fell within the category of private lands. If they did not fall within that category, they were public lands. Persons in occupation of Hudson Bay Company lands which became public lands upon surrender could not rely on the provisions of s. 32 to assert a claim to a title to their lands. They would have to rely upon a general government

policy.<sup>99</sup> A "Half-Breed" occupant of public lands within the Belt was in a different situation. He could rely upon his entitlement to lands under s. 31 to assert a claim to the lands he occupied within the Belt. The principles which might support such an assertion of a claim are related to the interpretation of the requirements of the section based upon the principles which should guide the selection of particular grants for the benefit of individual families. These will now be examined.

#### 4. Choice of Location by the Beneficiaries

Section 31 gives the Lieutenant Governor a duty to select "such lots or tracts in such parts of the Province as he may deem expedient" to the extent of 1.4 million acres.<sup>100</sup> Although both this selection, as well as the division of the lands selected are to be implemented "under regulations to be from time to time" made by the federal government, the text is quite clear in establishing the actual duty of selection as one personal to the Lieutenant-Governor. The discretion of the Lieutenant-Governor, although it is expressed to be unfettered by federal regulation, is not to be construed as absolute. The discretion is to be exercised in such manner as may be reasonably said to promote the objects of s. 31. On this basis, the lands selected must be fit for their purpose; they must be of such characteristics, and in such

locations, as to be said to promote the objects designated by s. 31. The grant of a discretion to the Lieutenant-Governor to select the lands is consistent with the proposition that he is the federal official who is better informed as to local conditions. Since the implementation of s. 31 is required to be for the benefit of the "Half-Breed" families, the Lieutenant-Governor is bound by s. 31, to act for their benefit in selecting and dividing the lands. Similarly, federal regulations made for implementation must promote the same object. The Lieutenant-Governor is in the same position vis-a-vis the "Half-Breed" families as the Commissioners of Lands were vis-a-vis the Indian peoples in their role as trustees under the pre-1870 legislation.<sup>101</sup>

The meaning of statutory enactments can only be elaborated in relation to particular facts. The social context in which s. 31 was intended to operate raises an issue in relation to the ambit of the obligation of the Lieutenant-Governor to select lands for the benefit of the "Half-Breed" families. Was the Crown appointee required to consider the choice of the "Half-Breed" families in selecting the lands? The text itself makes no provision for such consideration. It empowers the Lieutenant-Governor to make the selection. The power must, however, be exercised only to promote the objects of the section; the discretion of the Lieutenant-Governor is constrained by

the requirement to select such lands as will promote the objects of the gradual settlement scheme. The lands must be in locations appropriate for securing the title in the families of the beneficiaries and promoting their settlement upon the lands. Lieutenant-Governor Archibald expressed the view that the fairest mode of proceeding was by adopting, as far as possible, the selection made by the "Half-Breeds" themselves. The limitation he considered was to conform with the township or sectional surveys.<sup>102</sup>

The text and the background provide some relevant considerations respecting the manner in which a selection could be made in such a way as to promote these objects. The lands to be selected are described in the text of s. 31 as "lots or tracts". The word "or" appears to be used in the conjunctive sense; the terms might be synonyms. In addressing the Indian people of Manitoba at the meetings for the signing of Treaty No. 1, the Canadian official used the term "lots" in reference to undefined parcels of lands.<sup>103</sup> Alternatively, 'tracts' may be used in reference to larger pieces of land than the 'lots'.<sup>104</sup> Such a distinction suggests that parcels of varying size might be selected for division among the children, and for granting "the same". If it is correct to assume that in providing for control of the selection of lands by general regulations, Parliament intended to benefit all entitled individuals equally, the distinction suggests that 'lots'



might be allocated to single persons or small groups, and larger 'tracts' might be allocated to larger groups of beneficiaries. The distinction could apply in respect to both selection and division.

The existence of an intended distinction is supported by the background of the negotiations. Abbé Ritchot had insisted on grants of "common" lands for the benefit of the families, to accommodate the exceptional circumstances of the country.<sup>105</sup> There is another connotation of the term "lot" which, in light of a purpose to promote the survival of the Métif, suggests that the selection of the lands ought to promote community cohesiveness by the appropriation of contiguous lots: a lot "is commonly one of several other contiguous parcels of land making up a block . . . ."<sup>106</sup> This construction of the s. 31 requirement was adopted by Lieutenant-Governor Archibald. He described the understanding of the Métif of the process of selection as, not a matter of business,

. . . but rather as one of race, and breed and language, and because they are unwilling that their people should form part of a mixed community, that they prefer having the lands to which they are entitled laid off in one block.<sup>107</sup>

The construction of s. 31 that permits selection both of small individual lots, which may be contiguous to others in a large block, and of larger tracts as "common" lands for families, on the basis of the above, is one that is consistent with the understanding of the people whom the

section was intended to benefit, and is, for that reason, to be preferred.<sup>108</sup> Furthermore, Ritchot recorded the agreement of the Canadian ministers that the lands to be appropriated could be selected in single and several lots.<sup>109</sup> This promise of Canada was relied upon by Ritchot who urged the Provincial government to accept the Act; and the promise ought not be considered irrelevant to the construction of the final enactment. The draft of s. 31 also provided for "separate or joint lots".<sup>110</sup>

The background of the negotiations and the draft of s. 31 both suggest the intention to permit individuals to choose the location of the lands they wished to occupy. During the negotiations, it is recorded that Cartier indicated the Métif could choose the location,<sup>111</sup> and the draft bill at first reading provided for the selection of the lands "having regard to the usages and customs of the country, . . . ."<sup>112</sup> There is evidence that the Council of Assiniboia had itself recognized a right of pre-emption arising out of occupation, at least from the year 1860,<sup>113</sup> but s. 31 had nothing to do with pre-emption rights, the usage and custom of Red River was relevant for the selection of free lands. There is reference to selection custom in the report of Molyneux St. John prepared for Lieutenant-Governor Archibald.<sup>114</sup> St. John reported that outside the "Selkirk purchase", that is, the area in which the Selkirk treaty extinguished the Indian title, the area

here referred to as the "settlement belt", "lands have been occupied and other kinds staked out as claims." St. John refers to the Oak Point (St. Anne) area settlement, the settlements on the east shore of Lake Manitoba and the extensive settlement at Portage la Prairie which was rapidly extending in the direction of White Mud River and Musk Rat Creek.<sup>115</sup> St. John describes the method of making a claim as consisting of ploughing around or "staking out" an area of land. Such claims were made, he states, in the vicinity of the town of Winnipeg and on Shoal Lake "and in other parts of the country".<sup>116</sup> The claimants were described as comprised of both recent immigrants and old settlers; and,

. . . many old settlers have staked out claims in parts of the country in which the Indian title has not been extinguished and a proportion of these settlers are men who will participate in the "Half-Breed" grants of land.<sup>117</sup>

Archbishop Taché vigorously argued that staking lands was the manner in which lands were "taken up" in accordance with the usage of the Colony, both in the spring of 1870 before the Manitoba Act was passed, and before.<sup>118</sup> The understanding of the people for whom s. 31 was intended is revealed by the facts related in the Order in Council dated 12 April 1880.<sup>119</sup>

. . . [I]n the spring of 1870, a large number of "Half-Breed" Natives of the country, residents of the Parishes of St. Boniface, St. Norbert and St. Vital, proceeded to stake out and mark their names severally on such stakes

or tracts of land upon and in the vicinity of Rat River, on the east side of the Red River, and laid claims to the lands so staked out, asserting the said proceedings to have been in accordance with the usage of the country previously in respect of taking up lands.

In fact, these people were led to believe that they could so claim the lands by Abbé Ritchot, the Métif negotiator of s. 31. According to Mailhot,<sup>120</sup> Ritchot told the Métif of St. Norbert upon his return from the negotiations in Ottawa that staked claims, even outside the Settlement Belt, had been promised recognition. Ritchot referred specifically to the lands along the Riviere aux Rats where the residents of St. Norbert, St. Vital and Ste. Agathe had the custom of wintering their stock and gathering building timber and fuel:<sup>121</sup>

Ritchot suggested the Métis secure possession of the territory in a definitive manner in order to preserve it from interlopers.

The next day, Ritchot led a party to the banks of the Riviere-aux-Rats south-east of St. Norbert. The men then staked 12 claim frontages along the tributary of the Red. As further evidence of occupation small garden plots were seeded. In the end, nearly sixty individuals carried out the time honored ritual of claiming land according to the "custom of the country".

Mailhot explains the motivation of the St. Norbert Métif:

. . . [T]hey sought to improve their material well being by relocating to less crowded but equally desirable locations near the older parishes. As was the custom under the old order, they sold their old claims for the price of the improvements and moved to the new acreages which they believed could still be had for the taking. If the Rat River speculation of

July 1870 can serve as an example, Ritchot encouraged such practices in an attempt to consolidate the traditional land base of the Métis south of the Assiniboine and Seine rivers.<sup>122</sup>

## 5. Summary

The identification of the persons entitled to the benefits of s. 31 has further developed the interpretation of the two-phase scheme outlined at the beginning of this part, but not completed it. In this section, the first phase has been more fully elaborated.

The interpretation of s. 31 must serve the object of providing a benefit for all members of the families of the "Half-Breed" residents. If an act identifies a group for benefits, a construction must be avoided which excludes some members of that group. The declared object of providing for the extinguishment of the Indian title is not achieved by a construction which excludes some members of the family groups, which are expressly declared to be the beneficiaries of the s. 31 provisions. When the Indian enfranchisement and settlement legislation is considered, it is observed that the settlement schemes provided therein, which have the same object as s. 31, to extinguish the Indian title, comprised a two-phase scheme which can be found also in s. 31.

One way of construing s. 31 on the model of the Indian legislation is to emphasize the distinction

indicated by the requirement for regulations in the first phase, and the absence of that requirement in the second phase. As a consequence, selection and division is a process which aims to treat everyone equally, whereas in the second phase, Orders can be made to attach particular conditions to the grants, as s. 31 requires, which are best designed to promote the security of the lands within the families of the beneficiaries. The consequences achieved by this construction were features of the Indian settlement legislation.

Lands are required to be appropriated from the public lands, those lands not burdened by any private interests derived from a Crown grant. Lands held through the Hudson's Bay Company were the subject of private interests, and were provided for in s. 32. If the lands held by the Hudson's Bay Company and surrendered to the Crown were public lands, then the 1.4 million acres could be appropriated both from the surrendered Hudson's Bay Company lands within the Settlement Belt, and from the ungranted lands outside the Belt, after the Indian title of the Cree and Saulteaux had been provided for. Members of the "Half-Breed" families were entitled, as all residents of the province, to the benefits of s. 32 based on their occupation of lands as individual settlers. As members of the group entitled to an Indian title grant, they were also entitled to lands appropriated from ungranted or Crown

lands.

The discretion of the Lieutenant-Governor in the selection of the lands resembles that of the Commissioner of Lands who was a trustee of Indian lands in the Indian settlement legislation. He must exercise his personal discretion in a manner to promote the general objects of s. 31. The lands chosen must be of such characteristics and in such locations, as to promote the settlement of the "Half-Breed" population and attach them to these lands by the strongest securities. The text and the background of s. 31 indicate that the selection must follow local custom or usage, and may provide for single lots or larger tracts held by several grantees. Local custom permitted individuals and groups to select their own lands, and the Lieutenant-Governor was then required to select according to this choice. The method of selecting contiguous lots by the "Half-Breed" families themselves is the proper construction of s. 31 promised by Canadian representatives and relied upon by Ritchot in urging the Provisional Government to accept the Act of 1870. It is the construction understood by the people whom it was intended to benefit, and it serves the object of promoting their cultural survival.

D. THE SECOND PHASE ELABORATED: A REGULATED SETTLEMENT SCHEME TO ACHIEVE THE PURPOSES OF S. 31

1. Overview of a Policy of Making Conditional Grants for Gradual Settlement of the "Half-Breed" Population

This section attempts to do what the last section did in respect of the first phase, that is, elaborate the construction of the second phase to the extent it has not already been addressed.

It is useful to begin by reviewing the policy objects which indicate the type of obligations s. 31 appears to impose upon the government.

The practices and policies of governments in respect of the extinguishment of the Indian title of Aboriginal peoples in British North America have indicated that the intention of s. 31 was the same as that of the treaties entered into with the "Indian" peoples, namely, to secure the people on a land base upon which they could, as a group, survive the transitions occasioned by the disappearance of their way of life and the introduction of Canadian settlement.<sup>123</sup> The land settlement scheme provided by s. 31 also had the same object as the Indian settlement legislation Parliament had passed on the eve of the enactment of the Manitoba Act, namely, to provide a scheme whereby individuals were granted lots upon which they were settled and protected from the imposition to which they were liable were their lots of land to be made



available in the public market.<sup>124</sup> The policy of protecting Aboriginal peoples from the frauds and abuses perpetrated by settler speculators goes as far back in time as the Royal Proclamation of October, 1763;<sup>125</sup> s. 31 has been judicially described as part of the legislative scheme by which the Indian title was extinguished in British North America<sup>126</sup> and there are no reasons to assume an intention to deviate, in respect of its objects, from those long established principles which offered Crown protection. These principles, which are implicitly included in the ambit of the obligations in s. 31 by the declarations in the preamble, indicate the kind of conditions, in the absence of express words, which the Crown was required to establish in order to achieve the purposes of the Act. A general object was to induce the people who gave up their Indian title to settle on lands set aside for them by providing the strongest securities.<sup>127</sup> The main features of provisions for security were restrictions upon alienation to keep the lands within the families of the beneficiaries of the policy.<sup>128</sup> The circumstances of the "Half-Breed" population in 1870, and the circumstances of the western Métif in the several decades after that date, indicate the social context in which s. 31 was intended to operate. These circumstances support the view that the purpose of s. 31 required the establishment of conditions "as to settlement and otherwise" which would keep the lands.

within the families.<sup>129</sup>

The draft bill of s. 31 expressed the object to pass laws "to secure the transmission and holding of the said lands amongst the half-breed (sic) families . . . ." John A. Macdonald admitted that the granting of free lands to the "Half-Breed" people of the west was "of no use to him whatever, . . . but of great use to the speculators . . . ."<sup>130</sup>

The objects of s. 31 revealed by its background and text, indicate, then, that conditions were required to be made to settle the beneficiaries on their lands and to protect them from the imposing designs of speculators by making the interests in lands inalienable until such a time, in the case of each individual,<sup>131</sup> the protection of the Crown was no longer required. The conditions were required to be attached to the grants to individuals, (the said children, respectively), and a determination had to be made in the case of each individual whether he/she was a safe candidate for a free grant.<sup>132</sup> As to the making of conditions of settlement, it is suggested by the social context that conditions of settlement such as appropriate for ordinary homestead legislation might not tend to promote the purposes of s. 31. It was generally considered that many among the "Half-Breed" population would not agree in 1870, to change their life-style to that required for the performance of the usual homestead settlement duties of

that time.<sup>133</sup>

The purposes of settling families on the lands would, then, require more than one generation, and the conditions of settlement would require to be attached only in the cases of individuals for whom the prospects of performance would be likely. These considerations support the view that all members of "Half-Breed" families were entitled to use and occupy the lands appropriated by s. 31 and that the grants were to be made later, in the second phase, and only in respect of "children" for whom the making of settlement conditions tended to promote the purpose of "Half-Breed" settlement.

The policy of offering encouragement to settle upon lands but without the general coercion of homestead settlement conditions was applied in Manitoba in respect of the people who participated in Treaty No. 1.<sup>134</sup> The intention of Parliament, as revealed by the pre-1870 legislation and the treaties, was to encourage a gradual transition to the holding of free grants to lands by individuals; that object was tempered by the necessity to delay settlement conditions and permit individuals to continue an existing way of life for as long as they wished.<sup>135</sup> Further, the making of lands available for the benefit of the group generally is consistent with the requirements of the geographical and economic conditions of 1870 -- the purpose of settling a group of people on lands

in Manitoba required, on the view of Abbé Ritchot, which was supported by W.L. Morton, a setting aside of large "common" areas.<sup>136</sup> History shows that those who were entitled to lands by the Act of 1870 could not possibly have successfully farmed on the public lands away from the waterfront until after 1880.<sup>137</sup> This is conclusive evidence that individual free grants of small lots on the available public lands in 1870 could not possibly have achieved the purpose of s. 31 to provide a benefit to the "Half-Breed" population. This fact also supports the view that only a regulated land settlement scheme over time (as indicated by the text -- "as the Governor General in Council may from time to time determine --") could have benefitted that population.

If the federal government retained a responsibility to supervise the land settlement scheme over time, it follows that the legislative jurisdiction to carry out that responsibility was intended by s. 31. It has been submitted that the effect of making conditional grants would be to keep the administration of the lands within the legislative competence of the Parliament.<sup>138</sup>

## 2. The "May/Shall" Dichotomy in the Second Phase

The lots or tracts that were, in the first phase divided among the families are required to be granted by the phrase, "the same shall be granted . . . ," whereas, in

respect of the further requirements in the making of those grants, it is provided, they shall be made,

. . . in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

The issue is whether the choice of "shall" and "may" in this context requires the construction that, although the requirement to make grants is imperative or mandatory, the requirements to determine the mode of the grants, and to establish conditions to the making of the grants, are permissive only. As used in its normal grammatical sense, the word "shall" is presumptively imperative,<sup>139</sup> and there is nothing utterly inconsistent with the context in which it is used which would render the section irrational or meaningless, and therefore require a permissive connotation.<sup>140</sup> Indeed, because s. 31 entrenches guaranteed rights that were conceded as a result of the local population's agreement to join the federation of Canada, it would render those guarantees meaningless and their entrenchment a futile exercise were they not obligatory.<sup>141</sup> The right of the "Half-Breed" families to receive the benefits of an appropriation of lands, granted by s. 31, creates an obligation in the government to make the grants, and also imposes a negative duty not to infringe the rights.<sup>142</sup>

That the government has a duty to make the grants and not to infringe on the rights to receive the grants should

not be contentious. The more interesting question concerns the effect of the choice of "may" respecting the power conferred on the government to determine both the mode and the nature of the conditions to be attached to the grants. It is clear that a distinction was intended, and a broad, purposive construction must respect the connotations that can reasonably be borne by the language used by Parliament. The French version of s. 31 also makes the distinction, using "ces lots seront concédés" in the first case, and "conditions que le gouverneur-général en conseil pourra de temps à autre fixer"<sup>143</sup>

The liberal, purposive approach must not, however, be abandoned for a strict, literal interpretation. That "may" was not intended to carry only a permissive connotation is indicated by the fact it is used in reference to the power to determine the mode of distribution as well as the conditions attaching to the grants. The obligation to implement s. 31 necessarily requires the government to determine a mode of distribution. In this context, the word "may" indicates the power of government to exercise a discretion to vary that mode from time to time.

But there is a more important reason to suggest that "may" does not permit the government to withhold conditions generally to the grants it makes. A purposive analysis requires a construction which shall promote the objects of the Act. In order to achieve the objects of securing the

lands within the families of the "Half-Breed" residents, the government will be required to positively exercise a discretion, from time to time, to determine what conditions, if any, are proper to fulfill the object. As the Indian settlement legislation indicates, the government must make a determination, in the case of each individual grantee, whether or not the grantee is a safe and suitable candidate to protect an alienable estate in the lands allotted to him. Section 31 requires, in this second phase, that grants of estates be made to individuals. It is not possible to comply with the general objective of s. 31 to secure the lands within the families without making such decisions in individual cases. The word "may" is deliberately used by Parliament to permit the exercise of a discretion in individual cases. It permits the making of conditions where required, and it permits also the making of alienable grants in appropriate cases. This type of treatment, suggested by the objects of statutes in pari materia, would not be possible if the imperative word "shall" had been used in reference to the power to attach conditions to individual grants. Furthermore, this particular construction of the second phase accords with the absence of the requirement to make general "regulations" applicable to all in the second phase.

If the "Half-Breed" children have a right to receive grants subject to conditions which are designed to secure

their families in the lands, the government has a corresponding duty to exercise its discretion in individual cases, in a manner to promote that security.

### 3. The Consequences of Defeasance

Another issue of construction raised by facts which were bound to arise in the implementation of s. 31 is the process required to be followed in cases where the conditions attached to a particular grant fail to be met. On the basis of the principle that all members of the "Half-Breed" families are intended to benefit at least by the right to use and occupy the lands, it would follow that a failure of an individual to meet settlement conditions could result only in the withholding of an alienable title -- it could not result in a forfeiture of the right to use and occupy the lands because that would be inconsistent with his right as a member of the group of beneficiaries. In the case of defeasance by death or abandonment, the legislative policy of the pre-1870 legislation supports the practice of reversion of the lands to the benefit of the group.<sup>144</sup> Such a practice is consistent with an appropriation of lands that must benefit a particular group -- an escheat to the Crown would defeat the purpose. The pre-1870 legislation established a trust obligation on a Crown officer to hold the lands for the benefit of the group -- these statutes suggest a similar intention in the



case of s. 31.

#### 4. Summary

The policy objectives derived from the background of s. 31 permit a construction of the process of making conditional grants, the substance of the second phase.

The use of the imperative "shall" in describing the requirement to make grants, and the contrasting use of the word "may" in describing the power of government to attach conditions to those grants, can be construed in a manner consistent with the objects indicated by the statutes in pari materia. Although it is necessary, and required, that grants be issued, a discretion is granted to attach such conditions as may achieve the objective of securing the lands within the families of the "Half-Breed" residents. Where a conditional grant fails because of unfulfilled conditions, consequence must not conflict with the right of the grantee to use and occupy the lands.

The scope of the rights of the beneficiaries of s. 31 determine the ambit of the corresponding positive obligations of government to implement its provisions, and also determine the ambit of the negative duty of both Parliament and the Legislature not to abrogate or derogate from those rights.

## ENDNOTES

### CHAPTER IV

1. Per Shapiro, Co. Ct. J. in Regina v. Thorpe (1973), 11 C.C.C. (2d) 502 at 510 (Ont. Co. Ct.).
2. Hunter v. Southam, [1984] 2 S.C.R. 145 at 156; sub. nom. Dir. of Investigation and Research, Combines Investigation Branch Branch v. Southam (1984), 41 C.R. (3d) 97 at 111; (1984), 11 D.L.R. (4th) 641 at 650; [1984] 6 W.W.R. 577 at 586-587.
3. Supra, Chapter I, notes 8, 9.
4. [1938] S.C.R. 100, 103.
5. The Indian settlement legislation is considered, supra, Ch. 3, note 118 to note 187, inclusive.
6. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 24 D.L.R. (4th) 1; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385.
7. Hunter v. Southam, [1984] 2 S.C.R. 145 at 169; sub. nom. Dir. of Investigation and Research, Combines Investigation Branch Branch v. Southam (1984), 41 C.R. (3d) 97 at 121; (1984), 11 D.L.R. (4th) 641 at 659; [1984] 6 W.W.R. 577 at 597.
8. Morton, ed. 1984, supra, Chapter III, note 200, at 141.
9. R. v. Thomas (1891), 2 Ex.C.R. 246; (1891-1910), 3 C.N.L.C. 607; 2 W.L.T. 159.  
Totten v. Watson (1858), 15 U.C.Q.B. 392; (1763-1869), 1 C.N.L.C. 471.  
Sanderson v. Heap (1909), Man. R. 122; (1891-1910), 3 C.N.L.C. 631; (1909), 1 W.L.R. 238 (Q.B.).
10. Section 32 provides for settlers' rights, see supra, Ch. 1, note 45.
11. Supra, Chapter III, notes 62, 63.
12. Birks v. Montreal, [1955] S.C.R. 799; (1955), 113 C.C.C. 135; [1955] 5 D.L.R. 321; Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 197, sub. nom. Churchill Falls Labrador Corp. Ltd. v.

- A.G. of Nfld. (1984), 8 D.L.R. (4th) 1; (1984), 53 N.R. 268; Re British North America Act and the Federal Senate (1980), 30 N.R. 271; Hunter v. Southam, [1984] 2 S.C.R. 145 sub. nom. Dir. of Investigation and Research, Combines Investigation Branch v. Southam (1984), 41 C.R. (3d) 97; (1984), 11 D.L.R. (4th) 641; [1984] 6 W.W.R. 577. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385.
13. Supra, Chapter III, notes 49, 62, 63, 65.
  14. Supra, Chapter III, notes 74, 195.
  15. Supra, Chapter III, note 272.
  16. Supra, Chapter III, note 63.
  17. If Indian title were a right of occupancy derived from occupancy, presumably such right could be abandoned by the group renouncing its occupancy.
  18. Isaacs, J. (as he then was) in Bull v. A.G. New South Wales (1913), 17 C.L.R. 370 at 384.
  19. e.g. supra, Chapter I, note 105, at 115, evidence of Thomas Quinn. In the Riel papers appears a memo in which is found this extract: "as these two miles long of land on the rear of our farms were on the indian (sic) land, no body could sell it. The government of Assiniboia could not sell them. (The people asked the Council of Assiniboia for rules) . . . .": 1 The Collected Writings of Louis Riel, ed. R. Huel, Edmonton: The University of Alberta Press at 229-230. The memo was written in 1872 by Louis Riel: Ibid.
  20. Sprague, supra, Chapter I, note 12, App. D 4.2.
  21. Ibid.
  22. Morton, ed. 1984, supra, Chapter III, note 200, at 168.
  23. Morris, supra, Chapter III, note 77, at 314-316.
  24. The test for proof of Indian title are considered in Bartlett, supra, Chapter III, note 15.

25. Smith v. R., [1983] 1 S.C.R. 554 at 569, sub. nom. Canada v. Smith, [1983] 3 C.N.L.R. 161 at 172; (1983), 147 D.L.R. (3d) 237 at 249-250; (1983), 47 N.R. 132 at 141.
26. The case was St. Catherines Milling and Lumber Co. v. R. (1889), 14 A.C. 46 at 54; 4 Cart. B.N.A. 107 at 118; 2 C.N.L.C. 541 at 549; (1889) 58 L.J.P.C. 54 at 57; (1889), 60 L.T. 197 at 200; 5 T.L.R. 125 at 127, per Lord Watson.
27. See the authorities cited in E.A. Driedger, Construction of Statutes 2d., Toronto: Butterworth's, 1983 at 6. [hereinafter cited as Driedger]
28. Victoria (City) v. Bishop of Vancouver Island, [1921] 2 A.C. 384 at 387; (1921), 59 D.L.R. 399 at 402; [1921] 3 W.W.R. 214 at 217.
29. Driedger, supra, note 27, at 7.
30. The International Webster New Encyclopedic Dictionary, New York: Tabor House, 1972 at 816.
31. Ibid.; Gage Canadian Dictionary, Toronto: Gage Publishing Ltd., 1983 at 958.
32. Giraud, supra, Chapter I, note 14, at 157.
33. Ibid.
34. Supra, Chapter III, note 127.
35. Morton, ed. 1984, supra, Chapter III, note 200, at 157-160; Revue, supra, Ch. III, note 263, at 561-564.
36. P.C. No. 874, N.O. Côté Orders in Council Respecting Claims of the Half-Breeds. 1871-1925, Ottawa: Dept. of the Interior, 1929 at 1.
37. Ibid., clause 2.
38. Rupert's Land and North-Western Territory Order, June 23, 1870 (U.K.), in R.S.C. 1970, App. II, No. 9, at 4.
39. Morton, ed. 1984, supra, Ch. III, note 200, at 157-160; Revue, supra, Ch. III, note 263, at 561-564.
40. Sprague, supra, Chapter I, note 12, App. D 4.2.

41. Morris, supra, Chapter III, note 77. The term 'band' was the colonial term for the extended family; Treaty Number 1 paid cash and land on the basis of a family unit of persons; at 34, 315.
42. Gage Canadian Dictionary, Toronto: Gage Publishing Ltd., 1983 at 428; The Concise Oxford Dictionary 6th ed. Oxford: The Clarendon Press, 1976 at 375.
43. Gage, supra, note 42, at 106.
44. Roget's College Thesaurus, New York: Grosset and Dunlap, 1958 at 36.
45. Ibid., at 387.
46. Smith v. R., [1983] 1 S.C.R. 554 at 569, sub. nom. Canada v. Smith, [1983] 3 C.N.L.R. 161 at 172; (1983), 147 D.L.R. (3d) 237 at 249-250; (1983), 47 N.R. 132 at 141.
47. Osborn's Concise Law Dictionary 6th ed., London: Sweet and Maxwell, 1976 at 49.
48. Cheshire & Fifoot, Law of Contract 4th Australian ed., ed. J.G. Starke and P.F.P. Higgins, Sydney: Butterworth's, 1981 at 62-64.
49. Black's Law Dictionary 5th ed., St. Paul, Minnesota: West Publishing, 1979 at 143.
50. Supra, Chapter III, notes 118-187.
51. e.g. The Public Lands Act (1853), c. 59, supra, Chapter III, notes 124-125.
52. e.g. An Act for the better protection of the Lands and Property of the Indians in Lower Canada, S.C. 1850, c. 42, s. 5; An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the laws respecting Indians, S.C. 1857, c. 26, s. 1.
53. Ibid.
54. Sprague, supra, Chapter I, note 12, App. D 4.3.
55. Supra, Chapter III, note 296.
56. Morton, ed., supra, Chapter III, note 200, at 176.

57. The Gage Canadian Dictionary, Toronto: Gage Publishing Ltd., 1983 at 510.
58. Osborn's Dictionary, 6th ed., London: Sweet and Maxwell, 1976 at 159.
59. Black's Law Dictionary 5th ed., St. Paul, Minnesota: West Publishing, 1979 at 629.
60. Ibid., at 829.
61. Osborn's, supra, note 58, at 204.
62. Supra, Chapter III, note 244.
63. Morris, supra, Chapter III, note 77, at 28.
64. Supra, Chapter III, notes 118-187.
65. See, supra, Chapter III, note 236, and especially, note 244.
66. See, supra, Chapter III, note 124.
67. An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6.
68. Morton, ed. 1984, supra, Chapter III, note 200, at 204, 223-224.
69. Supra, Chapter III, notes 188-205.
70. D.C. Pearce, Statutory Interpretation in Australia, Melbourne: Butterworth's, 1974 at 105.
71. Supra, Chapter III, note 296.
72. Rookes v. Barnard, [1964] A.C. 1129; [1964] 1 All E.R. 367.
73. D.C. Pearce, Statutory Interpretation in Australia, Melbourne: Butterworth's, 1974 at 105. Although it can not apply to the interpretation of the Act because it is part of the Constitution, the Interpretation Act in force in 1870 required that every Act of Parliament be deemed remedial and accordingly "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to their true

- intent, meaning and spirit," An Act respecting the Statutes of Canada, S.C. 1867, c. 1, ss. 7, 39.
74. Revue, supra, Chapter III, note 263, at 548.
  75. Revue, supra, Chapter III, note 263, at 563.
  76. Gage Canadian Dictionary, supra, note 42, at 538, (seventh meaning)
  77. Morton 1956, supra, Chapter III, note 56, at (xvii).
  78. e.g. An Act to encourage the gradual Civilization of the Indian Tribes in this Province and to amend the Laws respecting Indians, S.C. 1857, c. 26, ss. 3, 4; An Act for the gradual enfranchisement of Indians, to better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6, ss. 13, 16.
  79. Supra, notes 75-76.
  80. Supra, Chapter III, note 293.
  81. It appears to have been widely believed, at the time, that persons who were descendants of Indians might inherit a claim in that behalf; See Martin, supra, Chapter III, note 43, at 100.
  82. Supra, Chapter III, notes 161, 182-184.
  83. The relevant portion of the text provides: "... under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed (sic) heads of families residing in the Province at the time of the said transfer to Canada, . . . ."
  84. The International Webster New Encyclopedic Dictionary, New York: Tabor House, 1972 at 50; The Gage Canadian Dictionary, Toronto: Gage Publishing Ltd., 1983 at 55; Osborn's Concise Law Dictionary 6th ed. London: Sweet and Maxwell, 1976 at 31; Black's Law Dictionary, St. Paul, Minnesota: West Publishing Co. 1979 at 93; The Oxford Comparison to Law, Oxford: Clarendon Press, 1980 at 71.
  85. Supra, Chapter III, notes 29-41, and notes 118-187.

86. Black's Law Dictionary, supra, note 49, at 1156.
87. Ibid., at 1195.
88. Huggard Assets Ltd. v. A.G. Alberta, [1953] A.C. 420 at 447; [1953] 8 W.W.R. 561 at 575-576.
89. Supra, Ch. III, notes 156-160, 181.
90. The treaty is considered, and its terms are reproduced in Morris, supra, Chapter III, note 77, at 13-15.
91. If the implementation of s. 31 was not effected as required, quare whether the rights granted by the section are now entrenched by ss. 35 and 54 of the Constitution Act, 1982.
92. Lt. Gov. Archibald estimated the tract at 409,000 acres in extent: Sprague, supra, Chapter I, note 12, App. D 5.3.
93. Royal Commission on Manitoba's Natural Resources Hearings (Ottawa March 27, 1929) at 95.
94. Sprague, supra, Chapter I, note 12, App. D 5.9. Of an estimated 409,000 acres within the 'extinguishment belt', the Hudson's Bay Company had surveyed an area approximately 141,360 acres in extent; Ibid. There remained a large portion of unoccupied lands along the Red River south of the Assiniboine and near the southern third of the distance to the U.S.A. border; supra, Chapter III, note 126.
95. Supra, Chapter III, note 61.
96. Supra, Chapter III, note 127.
97. "32(4): All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council."
98. Order in Council dated Nov. 11, 1877, in Orders in Council Respecting Half-Breeds 1871-1925, Ottawa: Treaties and Historical Research Centre, D.I.A.N.D.
99. See, Archibald's Despatch dated December 20, 1870, in Sprague, supra, Chapter I, note 12, App. D 5, at 3.



100. The Manitoba Act, 1870, S.C. 1870, c. 3, s. 31 in R.S.C. 1970, App. II, No. 8.
101. Supra, Chapter III, notes 118-187.
102. P.A.C. R.G. 15, Vol. 230, file 167. Letter from Archibald to F. Royal, et al, dated 19 June 1871. In fact, according to Sprague, Archibald had come to an agreement with Archbishop Taché that the lands should be selected immediately behind the river lots to promote concentration of the people: Sprague, supra, Chapter I, note 40, at 75.
103. Morris, supra, Chapter III, note 77, at 28: "Your Great Mother, . . . will lay aside for you 'lots' of land to be used by you and your children forever."
104. Black's Law Dictionary, supra, note 49, at 1338.
105. Morton, ed. 1984, supra, Chapter III, note 200, at 157-160; Revue, supra, note 263, at 561-564.
106. Black's Law Dictionary, supra, note 49, at 853.
107. Ibid.
108. Supra, Chapter I, notes 114-124.
109. Supra, Chapter III, notes 279-280.
110. Supra, Chapter III, note 296.
111. Morton, ed. 1984, supra, Chapter III, note 200 at 143; Revue, supra, Chapter III, note 263, at 549.
112. Supra, Chapter III, note 296.
113. Oliver, supra, Chapter III, note 50, vol. I at 455. A resolution passed on the 27th of February 1860 provided: "That, in difficulties arising between persons who take land outside of the part of the colony already surveyed, or even that exceeding the limits of the Colony, the Magistrates be authorized to take for the principle that 12 chains shall be the limit of preemption right arising from occupation." The resolution was not included in the codification of the Council's enactments of April 8 and 11, 1862; as recorded in Oliver, at 485 ff. The Council could not have authorized the exercise of any right of pre-emption outside the area where the Indian title had been ceded to Selkirk. Cf. s. 32 of the Act of 1870.

114. Supra, Chapter III, note 127.
115. Ibid., at 6.
116. Ibid., at 6.
117. Ibid., at 7-8.
118. Sprague, supra, Chapter I, note 12, App. F 22.2, J.S. Dennis to Donald Codd, letter dated November 2, 1876.
119. N.O. Côté, Orders in Council Respecting Claims of the Half-Breeds 1871 to 1925, Ottawa: Dept. of the Interior, 1929 at 55.
120. Mailhot, supra, Chapter 1, note 40, at 225.
121. Ibid.
122. Ibid., at 225-226.
123. Supra, Chapter III, notes 35-41.
124. Supra, Chapter III, notes 175-187.
125. See B. Slattery, The Land Rights of Indigenous Canadian Peoples, D. Phil Thesis Oxford: University of Saskatchewan Native Law Centre, 1979 at 363.
126. R. v. St. Catherines Milling Co. (1885), 10 O.R. 196 at 209-210; 4 Cart. B.N.A. 214 at 218-219; 2 C.N.L.C. 374 at 387-388.
127. Supra, Chapter III, note 39.
128. e.g., supra, Chapter III, notes 135-141.
129. Supra, Chapter III, note 296.
130. H. of C. Deb., July 26, 1885, at 3117.
131. e.g., supra, Chapter III, notes 156, 181.
132. Ibid.
133. Supra, Chapter III, note 196, 198.
134. Morris, supra, Chapter III, note 77, at 28; see, supra, note 63.

135. It was in the interest of both the government and the people whose Indian title was being extinguished, to do so. The policy continued in the 1870's throughout western Canada: see J.L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) 44 Canadian Historical Review, No. 4, 519-548.
136. Supra, Chapter III, notes 301, 302.
137. Supra, Chapter III, notes 93, 94.
138. Supra, Chapter II, text following note 45.
139. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 13 D.L.R. (4th) 1; (1985), 35 Man. R. (2d) 83; (1985), 59 N.R. 321; [1985] 4 W.W.R. 385.
140. Ibid., [1985] 1 S.C.R. 721 at 737; 19 D.L.R. (4th) 1 at 14; 35 Man. R. (2d) 83 at 98; 59 N.R. 321 at 336; [1985] 4 W.W.R. 385 at 398.
141. Ibid., [1985] 1 S.C.R. 721 at 739; 19 D.L.R. (4th) 1 at 15; 35 Man. R. (2d) 83 at 100; 59 N.R. 321 at 338; [1985] 4 W.W.R. 385 at 400.
142. Montreal v. Macdonald, [1986] 1 S.C.R. 460 at 514; (1986), 25 C.C.C. (3d) 481 at 522; (1986), 27 D.L.R. (4th) 321 at 362; (1986), 67 N.R. 1 at 65, per Wilson, J., (diss'g).
143. The Manitoba Act, 1870, S.C. 1870, c. 3, in R.S.C. 1970, Appendix II, No. 8, at 255.
144. Supra, Chapter III, note 186.

**V. THE BREACH OF THE OBLIGATION; THE PURPORTED  
IMPLEMENTATION OF SECTION 31**

**A. INTRODUCTION**

If words have no intrinsic meaning, then their meaning is derived only in their relation to social facts. If that is accepted, the meaning of the words used in s. 31 will be developed by relating them to social circumstances; it is mainly upon implementation in a particular social context that issues requiring interpretation of the text will arise. This section will consider the purported implementation of s. 31. The exercise will better describe the scope of the obligation, by relating the social circumstances of implementation to the tentative observations made regarding the construction of the text in the previous section. In particular, the scope of the obligation will be further tested by examining the effects of particular constructions, in the social context in which they were meant to operate.

The section will reveal a pattern whereby those officials who were responsible for the implementation of s. 31 did so with the object of promoting a fluid market for lands in the province; the implementation of s. 31 was

characterized by the intention to distribute lands freely, without any conditions as to settlement or otherwise, and to permit their easy alienation to anybody. This pattern is directly opposed to the policy objects of all legislation previously enacted for the settlement of a people for whom provision for lands was made upon the extinguishment of the Indian title.

All the historical facts relating to the implementation of s. 31 are not gathered here. As much of the historical background has been introduced as necessary to explain the context of the implementation; other facts will undoubtedly raise further issues, or challenge the observations made on the basis of the facts exposed here.

#### B. ACCEPTANCE OF THE ACT BY THE PROVISIONAL GOVERNMENT, AND STAKING OF CLAIMS IN RELIANCE UPON IT

The Manitoba Act, 1870 was passed by Parliament on May 12, 1870, and it declared that its provisions would come into effect

. . . on, from and after the day upon which the Queen . . . under the authority of the 146th section of the Constitution Act, 1867, shall, by Order in Council in that behalf, admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, . . . .<sup>1</sup>

Abbé Ritchot, the Métif negotiator, came back to Red River with a particular understanding of the agreement reached in Ottawa respecting lands for the Métif.<sup>2</sup> The

Imperial authorities were notified by Canada that "negotiations with delegates closed satisfactorily",<sup>3</sup> and authority was given by Granville to send troops to Red River.<sup>4</sup> Ritchot, presumably on the basis of the oral promises made by Cartier,<sup>5</sup> urged the Métif of the Province to take possession of lands and start building or ploughing.<sup>6</sup> Ritchot appeared before the Legislative Assembly of the Provisional Government on June 24th.<sup>7</sup> According to Mailhot, his principal goal was "to win acceptance of the arrangements for which he had laboured so tenaciously".<sup>8</sup> "Ritchot felt that all hopes for a peaceful resolution of affairs rested on his ability to pacify the settlement before the arrival of the troops." The Assembly passed a motion by Louis Schmidt that the Assembly accept the Act in the name of the people.<sup>9</sup>

Meanwhile, in the spring of 1870, a number of people staked out claims to unoccupied lands, and were in peaceable possession of them on the 15th of July 1870.<sup>10</sup> Some of the Métif of the established parishes of St. Norbert, St. Vital and Ste. Agathe were led by Ritchot to take up claims along the Riviere aux Rats, a tributary of the Red where the Métif residents customarily "wintered" their stock and gathered building and fuel materials.<sup>11</sup> At public meetings of the Métif, Ritchot claimed that the people had been promised possession of all lands peaceably occupied at the time of the transfer<sup>12</sup> and urged the

selection of blocks of land.<sup>13</sup>

C. LIEUTENANT-GOVERNOR ARCHIBALD, AND IMPLEMENTATION FOR THE BENEFIT OF LAND SPECULATION, TO THE DETRIMENT OF THE "HALF-BREED" BENEFICIARIES OF S. 31

The first Lieutenant-Governor appointed by Canada, who was to be charged with duties to implement s. 31, was not a member of the "Half-Breed" local population. Indeed, Adams Archibald was not a Red River man but a Nova Scotia lawyer. Archibald was instructed, as Lieutenant-Governor, to carry out an enumeration of the "Half-Breed" heads of families residing in the Province at the time of the transfer, and of their children.<sup>14</sup> Archibald was also appointed "Administrator on behalf of the Governor of Canada of the ungranted or waste lands" in the Province, and in that behalf he was requested to report his opinion to the federal government respecting the regulations which should be made under s. 31 for the selection of lands and their division, "together with the mode and conditions, as to settlement and otherwise, which you may consider desirable to embody in such regulations."<sup>15</sup>

Archibald had, then, duties to perform in two different capacities. As Lieutenant-Governor, Archibald had the duty to make the selection of lands, pursuant to s. 31; the federal government could not exercise that function. His instructions expressly required him to make

an enumeration to help him make the selection. It is in pursuance of his authority as federal administrator of public lands that Archibald was instructed, on the other hand, to advise the government respecting the regulatory scheme that should be put into place to secure the Métif in their lands.

Molyneux St. John, former sheriff and later clerk of the Legislative Assembly of Manitoba, was requested by Archibald in October 1870, to advise the Lieutenant-Governor respecting the lands in the Province for the purpose of informing him on matters pertinent to the administration of the public lands and the appropriation of the s. 31 lands.<sup>16</sup> St. John's report, made in January 1870, cautioned the Lieutenant-Governor that, although allowing recipients of s. 31 lands to choose their own locations would be most calculated to suit their requirements, such a scheme would, "on the other hand, allow the possibility of the 1,400,000 acres being taken in the most desirable parts of the unoccupied lands of the Province."<sup>17</sup> Thus began the debate and activity of non-Métif agents of the government respecting the implementation of s. 31, the assertion of what constitutes the best means of promoting the benefit of the "Half-Breed" beneficiaries, coupled with a balancing of the interests of prospective new settlers and speculators.

This pattern was to characterize the entire attempt



at fulfilling the terms of s. 31. St. John referred to the determined attitude of the Métif south of Fort Garry to establish themselves on lands in such mode as would protect their communal interests against immigrants of a different culture who might have designs on the lands preferred by the Métif.

In connection with the unsold portions of land along the line of Red River between Fort Garry and Pembina and within the limits of the Selkirk purchase an alleged objection exists on the parts of the settlers in that district to allow English-speaking settlers to take up claims in that neighbourhood, and it is asserted that buildings of any description that might be raised would be at the present time in danger of being burnt by the French Halfbreeds (sic) in the vicinity. I am disposed to question the existence of such danger but if it should really exist it is probable that when the intentions of the government in respect to the lands shall have been promulgated by recognized authority and understood by the people the danger will disappear.<sup>18</sup>

There are many people in the Province who await the coming of Spring to enter upon Agricultural pursuits and these are in some doubt-lest-land which they may occupy should afterwards be included in the 1400,000 acres, apportioned to the inhabitants of mixed origin. They are desirous of knowing whether free grants will be made to bona fide settlers, or, if payment for the land is required what the price is likely to be, and also the probable acreage which each settler will be permitted to acquire by title from the Crown.<sup>19</sup>

When Archibald made his recommendations to the federal government late in 1870, he continued the approach of acknowledging the wishes of the "Half-Breed" population, and the Métif in particular, while at the same time

promoting advice for implementation which was based not on these wishes, but on views calculated to promote the efficiency of economic development of the country.<sup>20</sup> The Lieutenant-Governor advised the subversion of the interests of the people who forced the enactment of the Manitoba Act, which shifted the focus of national and imperial interests contained in the annexation plans of the Rupert's Land Act 1869<sup>21</sup> to those of the provincial population. On the basis of his interpretation that all of the 10,000 "Half-Breed" residents of the Province were entitled to s. 31 lands, Archibald recommended the allotment of 140 acres to each individual.<sup>22</sup> He advised the reservation of townships in the vicinity of the existing parishes in order to continue the established separation between "English" and "French" communities.<sup>23</sup> Archibald reported on the desire of the Métif people to locate their lands under s. 31 in large blocks;

. . . because the French half-breeds, (sic) and their leaders, treat the question, not as one of business, but rather as one of race, and breed and language, and because they are unwilling that their people should form part of a mixed community. . . .<sup>24</sup>

Here was being expressed the desire of the Métif to seize their entitlement gained from s. 31 to a community land base which would tend to promote their cultural survival in the face of an inflow of Protestant, English-speaking immigrants. Here was being claimed the entitlement derived from the federal principle that regional cultural

differences must be protected.<sup>25</sup>

The distinction between the Métif people and the English-Protestant "Half-Breed" population was reflected in Archibald's observation that;

As far as the English half-breeds (sic) are concerned, I think they would prefer to have the liberty of selecting their lands where they may think fit. Looking at the question from a business point of view, they are right.<sup>26</sup>

If membership in the group which is entitled to Indian title in respect of its group use of public lands is the proper criterion for entitlement to s. 31 lands, this factor might indicate that the "Half-Breed" population was not intended to benefit. Archibald elaborated the ideal of economic gain behind the object of locating "Half-Breed" lands in separate locations chosen by individuals:

Where a Half-breed (sic) Reserve is laid off in one block, and no neighbourhood is growing up, a lot in such a block is of course worth much less, than where it is surrounded by other lots in which improvements are going on, and where each particular lot is enhanced in value by the improvements on the others.<sup>27</sup>

The first requirement, for the benefit of the families of the Métif, then, was the allocation of family shares in community blocks adjacent to existing Métif communities. The second requirement addressed the object of securing the lands within the families:

. . . [T]he French, or their leaders wish the lands to be so tied up as to prevent them, at all events, for a generation from passing out of the family of the original grantee. Now of the Half-Breeds, more than 1/3 are under 10

years of age, 3/4 are under 20.

The effect, therefore, of any such arrangement as that suggested would be, to render absolutely inalienable, for a long period of time, a large portion of this Reserve.<sup>28</sup>

It is worth reproducing Archibald's explanation for his rejection of the Métif demand for restrictions on alienation of s. 31 lands because it contains the essential view which was promoted by the implementation of the section, and which denied the Métif the security of possession which had been a uniform feature of the Indian settlement schemes and of government policy since the beginnings of the British North American colonies.<sup>29</sup>

Take a neighbourhood where this Policy obtains. Much of the reserve is owned by children; nothing can be done till they come of age, even then they cannot sell. The land must descend to their children after them. It would not become alienable till the third generation. The effect would be to lock up a large portion of the land of the Country, and exclude it from the improvements going on in localities where land is unfettered. The whole tendency of Modern Legislation, not only on this side of the Atlantic, but beyond it, is to strike off the fetters which clog free traffic in land. There is no state in the Union, and no Province in the Confederation, so far as I know, that has not abolished "Estates Tail".

All the tendency of Modern Legislation is in the line of abandoning the feudal ideas respecting lands and bringing Real Estate more and more to the condition of personal property and abolishing restraints and impediments on its free use and transmission.

It does not seem to me that it would be wise in the case of Manitoba to reverse a Policy approved by the common sense of the

world, and in accord with the habits and thoughts of modern life.<sup>30</sup>

According to Archibald, the policy of entailing lands, a policy which controlled English society at one time when most of the land in that country was inalienable, should not be contemplated for the Métif society of Red River at its particular stage of economic and social dynamics.<sup>31</sup> In the same despatch, Archibald betrays his view that his advice is given contrary to the express intention of s. 31, to provide a benefit for the "Half-Breed" population. The Queen's representative advises the government to ignore the constitutional duties of s. 31 for the promotion, not of Métif values, but of Archibald's values; not of the Métif people, but of the state. He gives this advice in the face of his admission that it will likely bring ruin to a people, and will receive the vehement opposition of those whom he believes represent the Métif views:

So far as the advance and settlement of the Country is concerned, it would be infinitely better to give a Half-Breed a title in fee to his lot. He might make a bad use of it -- in many cases he would do so. He might sell it for a trifle. He might misuse the proceeds. Still the land would remain, and in passing from the hands of a man who did not know how to keep it, to those of one who had money to buy it, the probabilities are all in favor of the purchaser being the most thrifty and industrious of the two, and the most likely to turn the lands to valuable account. Suppose, therefore, the worst to happen that can happen -- suppose the men for whose benefit the land was intended should not know how to value the boon conferred, still the

land would find its way into the hands of other settlers. It would be cultivated and improved. One individual might take the place of another; thrift might come into the place of improvidence; but the country would be no loser by any number of such changes. It is by just such movements that a hamlet, or village, or town grows up, and if they were prevented by the interposition of artificial barriers, these would really operate as a premium on thriftlessness and negligence. My strong conviction, therefore, is that whatever is given under the half-breed (sic) clause should be given absolutely. Even then, you will have to tie it up for a long time. Three thousand five hundred of these half-breeds (sic) are under ten years of age: for eleven years to come you withdraw 490,000 acres from the market. One thousand five hundred more of them are under fifteen years of age: you have 250,000 more acres which cannot be disposed of for six years to come.

Is this not clog enough to impose upon the transfer of these lands? I am inclined to think it is. But I am bound to inform you that I apprehend my views will not be in unison with those of the leading men among the French half-breeds (sic) or their clergy.<sup>32</sup>

It is useful to recall that in introducing the clause of the Manitoba bill that was to become s. 31, John A. Macdonald had been reported as stating that "No land would be reserved for the benefit of white speculators, the land being given for the actual purpose of settlement."<sup>33</sup>

In his despatch, Archibald admitted that conditions of settlement were impliedly intended as preliminary to the right of a grantee under s. 31, and he urged the government that if it did decide to attach conditions, it should withhold a patent until the condition precedent is complied with.<sup>34</sup> Archibald also concluded that s. 31 permitted the

government to hold portions of the lands reserved under s. 31 for the benefit of the groups and not specifically appropriated to the use of any particular individual:

You should retain unappropriated portions of the lands reserved for the half-breeds (sic), and grant them, only when the applicant had brought himself within the condition of settlement, which by the Act is impliedly intended, as preliminary to his right.<sup>35</sup>

The better interpretation of s. 31, it has been submitted,<sup>36</sup> is that it provides for a benefit to all the members of the existing adult generation in 1870, by way of occupation licence, and that the conditions of settlement are to be attached to the generation of the immediate children, or perhaps later generations of descendants. Archibald explained why the attachment of settlement conditions would not benefit the families of the "Half-Breed" residents of the Province in 1870:

If this course were taken, a great many of the Half-breeds (sic) would never apply at all. One thousand of them are at this moment living on the Prairies. They are hunters by profession, not farmers. Where the Buffalo go, they go. They could not bear the restraints which cultivation of a farm implies. They would rather forfeit their lots, than settle on them, if by settlement was meant some degree of cultivation and improvement of the Lots.<sup>37</sup>

Since s. 31 expressly provides for a benefit to the families from its implementation, it is not within the ambit of the obligation to attach conditions which would defeat the provision's purpose. On the basis of the Indian legislation model, if a grant failed because conditions

were not met, the land reverted to the Crown for the use of the group. It is submitted that if conditions of settlement or otherwise are attached in respect of s. 31 lands, they are required to be attached as conditions precedent to the grant of particular estates in the lands only; their defeasance should result in the consequence that the occupant continues to occupy by his right of use and occupation derived from the general appropriation, the grantee of a conditional state is not doomed by the provisions of s. 31 to lose his right of occupation if he fails to perform settlement conditions. The object is a settlement scheme. Settlement is promoted by withholding grants of estates in the lands until settlement conditions are met. But s. 31 requires the lands be set aside for the benefit of the families, and the object of settlement can not be promoted in a manner which derogates from the benefit intended for the families.

#### D. ENACTMENTS FOR IMPLEMENTATION, IN CHRONOLOGICAL ORDER

An Order in Council of 25th April 1871<sup>38</sup> provided for the distribution of s. 31 lands. It provided that every "Half-Breed" resident and every child of such a person was entitled to participate.<sup>39</sup> If the attachment of conditions aimed at providing security for the lands against the designs of speculators and for keeping the lands within the families are requirements of s. 31, then



clause 3 of the Order of April 25th was the first enacted breach of the obligation:

3. No conditions of settlement shall be imposed in grants made to half-breeds (sic) in pursuance of the provisions of the Act referred to, and there shall be no other restrictions as to their power of dealing with their lands when granted than those which the laws of Manitoba may prescribe.

Canada purported, by this clause, to give up its legislative jurisdiction respecting the lands which s. 31 required it to appropriate for the benefit of the "Half-Breed" people by the making of regulations and the establishment of conditions "from time to time".<sup>40</sup>

Clause 4 expressly recognized the power of the Lieutenant-Governor to exercise his discretion respecting the selection of the lands.

4. The Lieutenant Governor of Manitoba shall designate the Townships or parts of Townships in which the allotments to the half-breeds (sic) shall be made.<sup>41</sup>

Clause 5 provided a mode of distribution. Within the areas selected by the Lieutenant-Governor, individual portions would be allocated on the basis of lots drawn at random. The size of lots would be determined by allocating an equal share to each entitled person from the whole of the 1,400,000 acres.<sup>42</sup> The principle suggested by the background of the negotiations, and the basis of the promises of Canada<sup>43</sup> was that the lands were to be located at places chosen by the people entitled.

The ambiguity of s. 31 does not permit confident

conclusions regarding the particular mode of distribution that would satisfy its requirements. The object of granting compensation in respect of group use of lands for the purpose of promoting cultural survival of the group suggests that a selection which accords with the view of the group would be consistent with the obligation. On the other hand, the object of inducing people to settle on lands and of making eventual grants of estates to individuals might support the proposition that the choices of individuals are to be followed. The negotiations of s. 31 do not permit a determination of the issue.<sup>44</sup> The mode of locating blocks of land in areas preferred by the group and drawing lots for individual selections within the area of each group has the advantage that it avoids giving a preference to individuals who make the first choices of the choicest lands. The object was served by this method in the allocation of United Empire Loyalist lands.<sup>45</sup> The ambit of the obligation in respect of locating lands will be reconsidered below, following upon a discussion of events which occurred in the summer of 1871.

Clause 6 defined "children" as persons under the age of 18 and given that no conditions were attached to the grants, clause 7 provided for claims of children who died after having their claim, was recorded, to descend according to Provincial law.<sup>46</sup> Clause 7 is inconsistent with a recognition that persons who are entitled to s. 31

lands by definition, are entitled whether or not their claim has been recorded. It is also inconsistent with the proposition that s. 31 requires a regulated federal settlement scheme, and not a scheme of grants of alienable estates.

By early June 1871, the local newspaper Le Métis reported that all the parishes had held meetings and nominated committees charged with the selection of the public lands from which each parish desired a block for the settlement of its residents under s. 31.<sup>47</sup> The newspaper published the locations of the lands, as they were selected, as did the English language newspaper The Manitoban.<sup>48</sup> Such public notice was given in conformity with assurances given by Lieutenant Governor Archibald to members of the provincial legislature respecting the proper mode of proceeding with the selection of the s. 31 lands. In response to an inquiry from Royal, Cunningham, Dubuc, Schmidt, Breland and Beaubremin, Archibald declared his intention to act in accordance with the selection made by the "Half-Breed" population:<sup>49</sup>

Lors donc que les métis d'une paroisse ou un certain nombre de métis auront fait choix d'une localité, et auront donné avis public de manière à faire connaître notoirement les terres qu'ils auront choisies, et en auront défini les limites, de manière à empêcher les colons de se fixer dans ces endroits là en ignorance du choix préalablement fait, je me guiderai, si je suis appelé à agir en vertu du règlement fixé par le Gouverneur-Général, sur le principe j'ai mentionné; et je ratifierai les choix ainsi faits, en autant que la chose

pourra se faire sans déranger les townships ou series sectionnelles.

The principle derived from the negotiations and the promises of Cartier<sup>50</sup> were to apply. The only concession required by the public interest was the requirement to make the selections conform with the surveys.

An Order dated 26 May 1871, permitted new settlers to establish themselves on unsurveyed lands and thereby acquire a right of pre-emption or a homestead right, without making provision for the reservation of lands for the purposes of s. 31.<sup>51</sup> The Order recited the circumstances which it was designed to address; and repeated the caution issued by St. John in his report to Archibald in the previous year:<sup>52</sup>

. . . [A]lthough the surveys in Manitoba are not yet made, many emigrants are on the way, and others are about leaving for that Province, and that they consist for the most part of a class, the object of whom is to take up land for farming purposes.

The Order then recited that expediency justified an admittedly "irregular" proceeding, namely, the issue of instructions to prospective settlers to guide their actions in settling upon the public lands in the Province:

1st. That parties found upon the lands at the time of survey, having settled upon and improved the same in good faith as settlers under the land regulations, will be protected in the enjoyment thereof, whether the same be pre-emption or homestead right: Provided they respectively enter for such right with the land officer, and otherwise carry out the provisions of the said regulations in that behalf within three months after the survey

shall have been made.<sup>53</sup>

A second instruction required settlers "to bear in mind" the system of survey which had been adopted for the Province, and which was then described.<sup>54</sup> This Order, then, granted certain rights if the actions upon which the rights were based, were exercised in good faith. The order also provided some description of what constituted good faith for its purposes; settlement was required to be based on a consideration of the existing regulations and the system of survey. As the system of survey dictated a certain degree of conformity respecting the selection of "Half-Breed" lands, so it required the same respecting settler selections. But the good faith requirement of the Order of 26 May must have required more than appears directly from its text. As Le Métis pointed out in an editorial note in its June 22 issue;

We advise immigrants to pay attention to the words "in good faith" in the document. Those words are not useless. If they were to establish themselves on the "Half-Breed" reserves, as described and published in this newspaper, they could not act in good faith and could not be considered as so acting.<sup>55</sup>

The historical record shows that anything but good faith governed the actual selection of lands for immigrant settlers in 1871. Incoming settlers established themselves on lands selected by the Métif parishes, and in some cases refused to relocate.<sup>56</sup> Individuals also sought to protect their own selections by advertising widely. Pierre Falcon,

for example, had selected twelve chains adjoining the twelve-chain lot he already occupied, and two further two-chain selections were made by him on 13 July 1870. The publication of these selections appeared twenty-two times in Le Métis in the first half of 1872.<sup>57</sup>

Opposition to the mode of selection taking place in the Province was vigorous in Ontario. In August 1871 the Globe attacked not only the s. 31 grants themselves, but, more particularly, the making of 'block' selections,<sup>58</sup> and at the same time supported the actions of those who established themselves on "Half-Breed" lands in the face of notice about the selections.<sup>59</sup>

During the same month, many "Half-Breeds" who were, on the view of Crown Officials, entitled to participate in the benefits of s. 31, joined the ranks of the Indians who signed Treaty 1.<sup>60</sup> The reference is to those who were "Half-Breeds" on the basis of the racial classification that was popular in 1870. In fact, Simpson is referring to "mixed-blood" persons residing in Indian communities who identified themselves as Indians.<sup>61</sup> If s. 31 was intended to benefit the Métif people and if the record shows that "mixed-blood" persons who were not Métif were granted alienable estates in portion of the 1,400,000 acres appropriated by s. 31, there is a breach of the obligation to implement the provisions of the enactment.<sup>62</sup> The violent responses to the perceived transgression of Métif

land rights apprehended by St. John apparently never happened. There were, nevertheless, instances where a response based on the exercise of power as opposed to constitutional validity was threatened. These were instances in which the Métif threatened, but threatened only, to respond to the exercise of unconstitutional power by Ontarians in the same manner. A reader of Le Métis warned in June 1871 that government inaction and local injustices might lead to the Métif and Indians joining forces to oust the intruders.<sup>63</sup> The anonymous writer who signed "Un Métis" described as intolerable the practice of local antagonists of the Métif who directed new immigrants to the "Half-Breed" reserves which were advertised and sanctioned by the Lieutenant-Governor.<sup>64</sup> Those who acted in this way included Dominion land agents.<sup>65</sup>

At a large meeting in St. Norbert on the 24th of March 1872, a number of resolutions were passed to express concerns to the Lieutenant-Governor and Governor-General respecting s. 31 lands.<sup>66</sup> The Métif who had chosen blocks of land along the Red River expressed regret that, despite their protestations, their lands were given to speculators by Dominion land agents, and the wood was removed from the lands.<sup>67</sup> The exasperated group resolved to take "just and efficient measures" to prevent this activity.<sup>68</sup> The next month, the newspaper reported widespread meetings of the local population to express their concerns about the

administration of the Dominion lands department.<sup>69</sup> Among the expressed concerns were the appointment of former secret police agents by the Dominion to administer the lands branch, and the practice of these officials of appointing persons as sub-agents with authority purportedly granted by a permit declaring "The bearer is by this instrument authorised to cut wood on government lands."<sup>70</sup>

On the 14th of April 1872, Canada enacted the Dominion Lands Act<sup>71</sup> which applied exclusively to the public lands in Manitoba and the North-West Territories. The Dominion Lands Act of 1872 provided, inter alia, for the system of survey, and homestead and other rights to public lands. By s. 42, certain provisions were made inapplicable to "territory the Indian title to which shall not at the time have been extinguished". The Indian title to all the lands in the province had been dealt with in August 1871 by Treaty No. 1.<sup>72</sup> Section 105 was a general provision which required the Governor-in-Council to withdraw, inter alia, "Half-Breed" reserves under s. 31 from the operation of the Act. The section specifically authorized the government to make orders for implementing the Act, "or to meet any cases which may arise and for which no provision is made by this Act, . . . ."<sup>73</sup> The withdrawal of "Half-Breed" lands was made subject to then existing rights "as defined or created under this Act."<sup>74</sup> Section 108 of the 1872 Act "confirmed" the Orders of 25th



April 1871 and 26 May 1871, considered above, and at the same time revoked any provisions therein "as may be consistent with" the Act.<sup>75</sup>

The day after the Dominion Lands Act was passed, the Executive made an order, pursuant to s. 105, to remove the lands selected under s. 31 from the operation of the order of 26th May 1871, and to provide for settlers already established on such lands.

An order dated 15th April 1872, recited the number of persons entitled according to census to be about 10,000, and that,

. . . it is important that these lands should be selected and set apart at the earliest moment, to prevent a possible conflict of interest that might arise with immigrants that (sic) will come into the Province in the spring.

The Order authorized the Lieutenant-Governor to select townships, taking care that

. . . only a due proportion of the woodlands of the Province be included in the 1,400,000 acres of land to be granted to the Half-Breeds; the remainder of these woodlands being made available for settlers.

The same Order provided for cases of "Half-Breed" settlers on public lands:

. . . [I]f any of the Half-Breeds have occupied or improved any lands as part of the land appropriated by the Act, and not included in the township so selected, such claimants (original emphasis) shall, to the extent of their several interests in the 1,400,000 acres be confirmed in the selection so made by them, and the 1,400,000 acres be proportionately reduced . . . .

This provision presents an ambiguity by the failure to specify the relevant date for its operation. If it refers to settlement activities prior to 15 July 1872, the provision is inconsistent with the construction that s. 31 lands are supplementary to the private interests provided for in s. 32. That would be so because s. 32(4) provides for a right of pre-emption arising from peaceable possession of public lands the Indian title to which has not been extinguished. The Indian title had not been extinguished outside the Settlement Belt on 15 July 1870<sup>76</sup> and the proposition would apply only to those lands. The provision in the Order could apply to the public lands within the Belt; and indeed, appears to provide for lands within the Belt that were occupied without the sanction and licence of the Hudson Bay Company up to the 8 March 1869, and, as a consequence, are not available as private lands under s. 32(3).

The provision may bear another construction. The reference to occupation or improvement "as part of the land appropriated by the Act" suggests that settlement activities directed to a selection of lands in reliance on s. 31 are intended as objects. If so, the Order recognizes the principle that s. 31 lands are to be subject to individual selection. It merely provides that, where an individual entitled under s. 31 has made a selection of public lands within a township that has not, at the time

the occupant applies for government recognition of his claim, been selected as reserved for s. 31 lands by the Lieutenant-Governor, that individual shall have his selection confirmed to the extent, in area, that is proportional to his individual interest in the 1,400,000 acres. In the case of several claimants of larger tracts, their selections are, similarly, to be confirmed to the proper proportionate share.

In summary, this provision in the Order of 15th April 1872 provides for the confirmation of "Half-Breed" selections in areas outside the Belt after 15 July 1870, on the basis that s. 31 lands are supplementary to the private rights arising under s. 32(4). Furthermore, the Order also recognizes and confirms, under s. 31, lands occupied and improved within the Belt at any time, by persons entitled under s. 31, to the extent of the area of land they are entitled to as a proportion of the 1.4 million acres.

As to the recently arrived settlers, the Order provided

. . . that the operation of the Order in Council of the 26th May last, shall cease with regard to any lands actually selected by the Lieutenant-Governor for the Half-breeds (sic) under the present order . . . .

Furthermore, the Order provided for the confirmation of the holdings of immigrant settlers upon lands in townships set apart by the Lieutenant-Governor for the "Half-Breed" population, to the extent of one-quarter acre, if the lands

were settled on under the Order of May 26, 1871.<sup>77</sup> As an alternative to this right, the Order gave a settler the option of locating another claim elsewhere in the Province.<sup>78</sup> In effect, then, the Order of 15th April 1872, purported to ratify the actions of settlers who took up Métif lands in spite of the protestations and public notices of the occupants.

An Order dated 11 November 1872 dealt with the interests of the Métif families in occupation of homes in communities outside the Settlement Belt, principally those of Ste. Anne and Saint-Laurent.<sup>79</sup> The Order declares that applications were made under s. 32(4) for recognition of these occupied lands, but the claimants requested a free grant instead of a pre-emption right on the basis that, since the Indian title had been removed from the lands, the claimants were in the same position as the occupants described in s. 32(3).<sup>80</sup> The Order provided for free grants in respect of these applications. If the applications were based on the fact of peaceable possession on or before the 15th of July 1870, then the applicants properly relied on the right of pre-emption granted by s. 32, and they were correct in pointing to the fact that only the burden of the Indian title on the Crown's legal interest in the public lands prevented free grants of legal estates in the land.<sup>81</sup> The Order of 11 November 1872 granted a greater interest than provided by s. 32(3) but it

honored the promise made by Cartier to Ritchot that the settled lands of the Métif outside the Belt would be the subject of free grants.<sup>82</sup> If s. 31 rights are supplementary to those in s. 32, as it has been submitted,<sup>83</sup> then the recipients of estates based on pre-1870 possession were entitled to the further benefits of s. 31.

If some "Half-Breed" persons entitled under s. 31 had established themselves on public lands outside the Belt subsequent to the 15th of July 1870, and in reliance upon s. 31, then their claims would not be caught by s. 32; but on the principle recognized by Archibald, their lands would be available as s. 31 entitlements.

An Order dated 3 April 1873<sup>84</sup> recited the view of the Secretary of State that the Order of May 26, 1871 was wrong in recognizing an entitlement in all "Half-Breed" persons in respect of s. 31 lands, and recommended an amendment to exclude heads of families. The view was declared to be based "on a strict interpretation of clause 31 of the Manitoba Act", under which, "the children of half-breed (sic) heads of families alone are entitled to share in the reservation so made to extinguish the Indian title . . . ." <sup>85</sup> This view is contrary to the requirement, elaborated above,<sup>86</sup> that s. 31 is not to be interpreted strictly, but liberally in favour of the group of persons for whose benefit it was enacted, and so as not to exclude

any particular members of the group identified as beneficiaries.<sup>87</sup> The Order of May 1871 was accordingly amended, and a statute passed in the same year purported to define the meaning of "children" intended by s. 31, as follows: "All those [children] of mixed blood, partly white and partly Indian, and who are not heads of families."<sup>88</sup>

Hodges and Noonan opined, in their 1943 report<sup>89</sup> that the Act was

. . . passed to amend the Manitoba Act and get over the anomaly by which children of one pure white parent and one pure Indian parent would have been excluded. Such children, though Half-Breeds themselves, were not children of Half-breed (sic) heads of families.

Hodges and Noonan are wrong in considering that Parliament could, by statute, amend a constitutional provision such as s. 31. If Parliament had a power to define "children" for purposes of implementing the section, that definition could not be inconsistent with the intention of s. 31.<sup>90</sup>

The definition of 'children' in s. 1 of 36 Vic., c. 38, the 1873 statute, accords with the principle derived from the preamble, that s. 31 was intended to provide a benefit to all members of the families of the "Half-Breed" population. The same definition was later adopted to ensure the extinguishment of the Indian title of all "Half-Breed" individuals in the North-West Territories.<sup>91</sup> It must be emphasized, however, that the lands appropriated by

s. 31 are required to be divided among, and granted to, the children of the heads of families. Although it is contended that the heads of families are entitled to a benefit, by way of an entitlement to use and occupy the reserved lands, s. 31 does not permit grants to the heads of families.

Section 2 of the 1873 statute<sup>92</sup> purported to amend the law declared by s. 108 of the 1872 Dominion Lands Act<sup>93</sup> by providing that only such proceedings taken pursuant to the Orders in Council therein referred to<sup>94</sup> would be confirmed.

Since the federal government had interpreted s. 31 as requiring only grants of estates as objects of benefit to the "Half-Breed" population, it had to recognize the anomalous situation of the heads of families, who were left as members of the group singled out by the section, but without a benefit of any sort. S.C. 1874, (37 Vic., c. 20) declared the view that the Constitution establishing a new province, in circumstances where the Imperial authorities were forced to require Canada to recognize the rights of the local residents, and reach agreement with them on the terms of the union, should be interpreted as having failed to consider the rights of the heads of families to the Indian title while it recognized those of the children:

And whereas no provision has been made for extinguishing the Indian title to such lands as respects the half-breed (sic) heads of families residing in the Province . . . .<sup>95</sup>

On the basis of this improbable proposition, the statute provided for a grant of 160 acres of land to each head of family "in the discretion of and under regulations to be made by the Governor General in Council". Thus, the Act purported to treat the heads of families differently from the children; the discretion of the Lieutenant-Governor respecting the selection of lands was removed. Furthermore, as an alternative to land, the Act authorized the distribution of scrip receivable in payment for the purchase of Dominion lands.<sup>96</sup> The statute defined 'heads' of families as parents, as opposed to persons of married status:<sup>97</sup>

2. For the purpose of this Act the term 'half-breed (sic) heads of families' shall be held to include half-breed (sic) mothers as well as half-breed (sic) fathers, or both, as the case may be.

Thus, married men without children were excluded; unmarried mothers were included. On the literal interpretation of the definition of 'children' in S.C. 1873, c. 38,<sup>98</sup> all the categories of persons excluded by this definition would be entitled to grants of s. 31 lands. Whereas s. 1 provided for the regulation of the distribution of land or scrip, s. 2 added a provision for attaching conditions to the grants made to mothers only, at the government's discretion.<sup>99</sup> The Act then provided for the distribution of the land or scrip of the heads, upon death, to such "members of the family and on such conditions as the Governor in Council



may, from time to time determine".<sup>100</sup> This provision leaves it open to the government to provide for descent of inalienable lands to the children, as it is contended s. 31 requires. But the Act failed to provide for conditions on the use of the lands of the male heads of family in such a way as to meet the requirement that the lands be restricted to the families of the "Half-Breed" people.<sup>101</sup> The distribution of alienable lands, and especially the distribution of scrip, to both parents, would tend to facilitate the traffic of these grants in the public market. The recognition of a right in the heads of families to live on the lands appropriated for the "Half-Breed" families, with provision for grants of inalienable estates to the children of these heads would have benefitted the families. The distribution of land, and scrip in fact, resulted only in a benefit for land speculators.<sup>102</sup>

The distribution authorized by the Act of 1874 was designed in accordance with the views of Ontario men such as E.B. Wood, who, as Chief Justice of Manitoba, presided over the monstrous irregularities revealed in the court system in respect of the administration of s. 31 lands by the provincial Commission of Inquiry of 1881.<sup>103</sup> Upon his arrival in Manitoba in 1874, Wood had urged the freeing of the land so that the place "would fill up quickly with an Ontario population and would yield a profitable return for

the money expended on it.<sup>104</sup> Then, in 1875, he wrote,

. . . [A]s to the half-breed (sic) reserves, like all other reserves of every kind, they are a curse to the country, and should be distributed without any delay.<sup>105</sup>

That, the courts in Manitoba certainly did when he was Chief Justice.<sup>106</sup> 37 Vic., c. 20 was enacted as legislation supplementary to s. 31, to rectify an anomaly which does not arise on what is submitted as the true interpretation of the section. If, on its true construction, s. 31 permits only the granting of occupation licenses to heads of families, and if heads of families are married men, in accord with the usual definition in Indian settlement legislation, then no statute could grant any of the 1.4 million acres to the heads of families.<sup>107</sup>

An Order dated April 26, 1875, P.C. No. 406, provided for the distribution of land grants to the children (as originally defined by 36 Vic., c. 38) entitled under s.31, <sup>108</sup> but on the basis of allotments of 190 acres to each child, based on the estimated number of those entitled according to the 1871 census returns.<sup>109</sup> The children entitled under s. 31 were more particularly defined, with the inclusion of orphans of parents who died prior to the date of the transfer,<sup>110</sup> and illegitimate children (who would be implicitly included in the definition of 36 Vic., c. 38 anyway). A further definition was consistent with the argument made, above, for the proper construction of the term "resident".<sup>111</sup>

Children of half-breed (sic) heads of families resident in Manitoba at the period of the transfer, but who were themselves absent at the said time, and who may not have returned to the Province, provided they were not at the time heads of families, shall be entitled.

Section 9 of this Order treated the descent of children's claims differently from heads' entitlements under 37 Vic., c. 20. Whereas the former statute provided that the land or scrip of a deceased head should descend to a member of the family as determined by federal regulations, s. 9 provided for the descent of children's claims according to provincial law.<sup>112</sup> If s. 31 requires that conditions be established by Canada to permit the lands to stay within the "Half-Breed" families, as argued above,<sup>113</sup> then the obligation is breached by a general provision which terminates federal jurisdiction over the subject lands.

The Order of 26 April 1876 provided particulars for the identification of the persons entitled to lands,<sup>114</sup> and ordered Commissioners to visit the parishes to deal with the claims of individuals whose names were published on parish lists drawn from the census.<sup>115</sup> At the same time, the Commissioners were to obtain evidence respecting the heads of families entitled to the benefits provided by S.C. 1874, c. 20.

It is useful to note the activities of speculators which accompanied the work of the Commissioners. According

to D.N. Sprague, this survey occupied two commissioners and their secretaries working independently throughout the summer of 1875, during which time they interviewed nine thousand persons . . . ,

But a group of about 500 speculators, usually from Ontario, operated from the same lists as the commissioners and worked just as systematically through every parish. Frequently, they told people that it was necessary to have an attorney now that the government was processing claims. Thus they secured powers of attorney. Sometimes they told claimants that the government was not to be trusted, no land would ever be granted but twenty-five dollars was offered for the claim on the chance some small portion would be granted. In this way they procured assignments of claims. Occasionally the powers of attorney . . . were made up without contacting the claimant at all. But whether the document was a power of attorney or an assignment of claim (and there were thousands of both) nearly all have two attributes in common. These instruments of surrender were signed with a claimant's mark, an X, almost never a signature, and they were always witnessed by two speculators rather than some disinterested third party.

. . . [C]ivil servants and elected officials who were closest to these proceedings . . . seized upon the opportunity and joined in the bonanza themselves. As a result, virtually all of the money scrip which was supposed to have been awarded to "Half-Breed" head of families never reached the claimants. As soon as it arrived at the Dominion Lands office in 1876, assignees and attorneys picked it up . . . .

Similarly nearly all of the allotments to children passed to third parties by power of attorney . . . .<sup>116</sup>

An Order dated 23 March 1876 reported the completion of the work of the Commissioners.<sup>117</sup> It expressly

authorized the issue of patents of s. 31 lands to assignees, and made a number of self-serving declarations;

. . . with a view to discourage the operations of speculators in these lands, no prospect has been at any time held out that such assignments would be recognized by the Government; and believing such policy to be directly in the interests of the persons for whose benefit the lands were appropriated; [the Minister of the Interior, David Laird] respectfully recommends that the same now receive the authority of the Privy Council.<sup>118</sup>

Whether the expressed belief was based on honest considerations may be judged by reference to D.N. Sprague's description of Laird's attitude towards the "Half-Breed" people.

. . . [C]orrespondence between the Minister of the Interior and Governor Morris, and also passages from the Minister's private papers, show that David Laird had utter contempt for persons of partly Indian ancestry who established a shelter on one of the rivers of Manitoba in the winter, planted a garden in the spring, spent the summers in pursuit of plains provisions, and returned in the fall to harvest the unattended garden. In Laird's words, they knew "something of farming" but he saw no place for them in a commercially agricultural Manitoba. He wanted to see them evicted from their river lots and encouraged to move north and west "around the different large lakes which abound with fine white fish." There, they would pose no obstacle to the development of commercial agriculture in the south. Also, they could be called upon as a labour force, from time to time, to work on "roads and bridges . . . as well as the freighting of stores and provisions."<sup>119</sup>

It has been submitted that the requirement to attach conditions of "settlement or otherwise" to the grants to the children placed an obligation on the government to

consider the type of conditions that would be appropriate for each individual; blanket regulation was not contemplated by s. 31.<sup>120</sup>

Perhaps the true rationale for facilitating the transfer of "Half-Breed" lands was expressed in the same Order, in respect of a declaration regarding a provision that directed scrip only (and no land) be issued to claimants under the Act of 1874 (c. 20, which provided lands or scrip for heads of families):<sup>121</sup>

. . . [I]n view of the great dissatisfaction which has been caused in Manitoba by the locking up of large and valuable tracts of land for distribution among Half-Breeds, thus seriously retarding the settlement of the country<sup>122</sup> cannot recommend the setting apart of further tracts of land for such purpose, and suggests, therefore, that scrip issue to satisfy all claims under the Act . . . .<sup>123</sup>

The Order of March 1876 also provided for descent of claims under 37 Vic., c. 20, pursuant to the authority of s. 2 of that Act. It is apparent that, in the circumstances of the time, the provisions of s. 4 would indeed help to allay dissatisfaction with the locking up of lands for "Half-Breeds":

4. In the case of the death of either the Half-Breed father or mother, or both, previous to the issue of the scrip to which such Half-Breed father or mother would have been entitled, such scrip shall be equally divided among the children of the family; those of such children over the age of eighteen years, to receive their respective share forthwith; those under the above age but over the age of fourteen years, to receive their scrip as they may severally attain the said age of eighteen

years; and the shares of those under the age of fourteen years to be delivered to the surviving parent, if such there be; if neither parent be living, then to the legally appointed guardian of such children, in either case, for the exclusive use and benefit of the latter.<sup>124</sup>

The question arises whether, if the lands allotted under 37 Vic., c. 20 are supplementary to s. 31, Parliament can so regulate the rights which may fall within provincial jurisdiction under s. 92(13). Federal jurisdiction exists if such regulation flows from the powers granted to the Crown to administer the lands "for the purposes of the Dominion" under s. 30 of the Manitoba Act, 1870 or if the lands set aside for "Half-Breed" heads of family are caught by the terms of s. 91(24) . . . "Lands reserved for the Indians."

An Order in Council, dated the 20th of April 1876<sup>125</sup> established the government policy respecting, inter alia, "staked claims".<sup>126</sup> The terms of the Order do not permit an easy categorization of the claims referred to under s. 32 or s. 31. The preamble declares only that certain claims exist which "do not come clearly within those provided for under the law as it now stands." Certain of the claims described appear to present facts which would bring them under s. 31, if on its proper construction, s. 31 requires the Lieutenant-Governor to base his selection of public lands on the choice made by the "Half-Breed" beneficiaries:

2. Lands alleged to have been taken up, but which were not surveyed as above or occupied, but merely marked out by the claimants, by stakes, prior to the 15th July, 1870.

Following the opinion of the Minister of the Justice, the Order provided that such claims did not come within the Act of 1870.

What constituted the usage of the country at the relevant time is a question of fact. Evidence of the usage has been considered above.<sup>127</sup> If the claims described are within the terms of s. 32(3) (located within the Belt) the claimants were entitled to a free grant. If the lands were located outside the Belt, and if the historical facts show that the marking of stakes was recognized as factual possession of the enclosed land, then the possession so evidenced gives rise to a right of pre-emption under s. 32(4).<sup>128</sup> If neither situation applies, the question is whether the subject lands fall within the category of public lands because no private interest exists in respect of them and whether the Lieutenant-Governor is required to designate them as s. 31 lands. On the basis of the argument previously considered, certain staked claims would be available to the families of the claimants under s. 31.<sup>129</sup> *PAP* The process of distribution of the s. 31 lands initiated by P.C. No. 406 (dated 26 April 1875)<sup>130</sup> was halted by an Order of the 7th of September 1876.<sup>131</sup> By this time the government in Ottawa was headed by Alexander



MacKenzie's Liberals, and the Lieutenant-Governor was Alexander Morris.<sup>132</sup> The Order reported that investigation had revealed the number of persons entitled to s. 31 lands was less than revealed by Archibald's census; the allotment begun on the basis of that census was cancelled, and a new distribution was authorized, based on an allotment of 240 acres to each individual child. The Order declared the government's position that "no satisfactory explanation appears of the difference between the numbers of the children . . ." obtained from the census and the numbers obtained from the government's agents.

The very unusual circumstances surrounding this redistribution are best described in the words of John A. Macdonald, whose government presided over the initial implementation:<sup>133</sup>

If the census that had been taken and returned by Governor Archibald had been accepted there would have been land enough in the appropriation to have settled all trouble, as well for the half-breeds (sic) who were actually registered and got their lands as for the half-breeds (sic) who happened to be away on the plains at the time the final adjudication was made. But it did not suit the Government of the day to accept that. Oh, no. The claims of the half-breeds (sic) in Manitoba were bought up by speculators. It was an unfortunate thing for those poor people; but it is true that this grant of scrip and land to those poor people was a curse and not a blessing. The scrip was bought up; the lands were bought up by white speculators, and the consequences are apparent. I am told that even at this moment, in the vicinity (sic) of Winnipeg, instead of the surrounding country comprising smiling farms, settled with industrious people, the

land is unsettled, in consequence of the scrip having been bought up for a song by speculators. In enacting the legislation necessary to the erection of the Province of Manitoba, in 1870, the Parliament of Canada provided that a tract of 1,400,000 acres of land should be set apart, from which to make grants to the children of the half-breeds (sic) resident in the Province at the date of the transfer, which date, for the purposes of the Act, was fixed as the 15th day of July, 1870. An enumeration of those entitled to share in this allotment was obtained by a census, which Lieutenant Governor Archibald, in December, 1870, reported as having been carefully taken, and which showed that the number was then estimated not to exceed 10,000. It was then decided to grant to each of the half-breed (sic) inhabitants of the Province a free patent for 140 acres of land, in extinguishment of their Indian title; but the question was raised as to whether the legal construction of the Manitoba Act permitted the heads of families to obtain any share of the 1,400,000 acres reserved by the Act. This question having been submitted to the law officers of the Crown, they decided that the half-breed (sic) heads of families were not so entitled; and the Government of the day then concluded that there would be such a reduction in the number of persons entitled to share, consequent upon the decision of the law officers of the Crown, as would permit of the children of half-breed (sic) heads of families born at the time of the transfer receiving an allotment at the rate of 190 acres each. The Indian title of the half-breed (sic) heads of families was extinguished, under an Act passed in 1874 (37 Victoria, chapter 20) by issuing scrip for \$160 to each, that is to say, to the mother as well as to the father. Upon the census made under the direction of Lieutenant Governor Archibald an allotment was made to the half-breed (sic) children at the rate of 190 acres each, in 1873, all the lands affected having been previously surveyed with that object in view. It will be remembered, however, that in the fall of this year a change of Government took place, and the gentlemen who then became responsible for the administration of public affairs, in accordance with a general plan

adopted for the purpose of discrediting the acts of their predecessors, and also for the purpose of finding employment for their hungry followers, rushed to the conclusion that the half-breed (sic) census was in some way or another deficient, and that they must make a new examination into the claims and obtain a new enumeration of the claimants. In May, 1875, nearly two years after this matter had been satisfactorily closed by an allotment made under the auspices of their predecessors, a commission, consisting of Mr. Matthew Ryan, of Montreal, and Mr. J.M. Machar, of Kingston, was sent out to visit the several parishes and make this new enumeration. The final report of this commission was submitted to the Governor General in Council in March, 1876; but examination shows that the commissioners themselves admitted their work to be incomplete, and the agent of Dominion lands, at Winnipeg, was authorised to continue the enumeration. In consequence of the incompleteness of the examination and enumeration made by Messrs. Machar and Ryan, the actual number of half-breed(sic) children entitled to share in the 1,400,000 acres was grossly underestimated; but with all its errors, the Government preferred the work of their own incompetent enumerators, performed in the most perfunctory manner, some six years after the date of the transfer, to the carefully compiled census made under the direction of Mr. Archibald, immediately after the transfer, and when the opportunities of ascertaining the facts must necessarily have been better than they were at the time of the investigation made by Messrs. Ryan and Machar. The actual number of claims enumerated by Ryan and Machar was 5,088; the Dominion lands agent, on the 10th August, 1876, reported 226 more; and the Minister of the Interior at the time jumped to the conclusion, upon what grounds no one can tell, that about 500 more half-breeds (sic) would probably be entitled to share in the allotment. So, with a largeness of heart unparalleled in their dealings with the half-breeds (sic) of Manitoba or any other section of the people of Canada, the Government decided that they would give to each half-breed (sic) child entitled to share in the reserve a free patent for 240 acres. This might look like liberality to the

half-breeds (sic), but if we take a peep behind the screen we find that before that date, apparently despairing of ever receiving patents for their lands, the majority of the claimants had disposed of their rights for a mere song, to speculative friends of the Government; and it was no doubt for the benefit of cormorants of this class that the hearts of Mr. Laird and his colleagues so suddenly expanded. If proof were wanted of this, it is easily to be found in the manner in which the work of apportioning the land amongst the rightful claimants was afterwards proceeded with. Not a solitary allotment upon this new and liberal basis was made until March, 1877, and when the present Government returned to office, in 1878, they found that the half-breeds (sic) of St. Boniface, St. Norbert, St. Francois Xavier, Baie St. Paul, and St. Agathe, containing more than one-half of the half-breed (sic) population, amongst whom the reserved lands were to be distributed, had not only not received their patents, but the allotments had not even been made. And thus, Mr. Speaker, you see that the Government of that day, who, if they had taken the census of Mr. Archibald, would have found full and ample indemnity and compensation for the rights, real or supposed, of the half-breeds (sic) of Manitoba, and cut them down one-half, handed over 240 acres, instead of the 150 or the 190, to the white speculators, their friends, who had bought these claims, and now, what do we find? We find that the difference between the 5,000 and the 10,000 are now on the plains, and now they are claiming the amounts which those hon. gentlemen deprived them of when they were in the Government.

It is thus that, in 1885, the man who introduced s. 31 to Parliament in the spring of 1870, related its implementation to the disastrous events that took place at Batoche in the former year.

An Order in Council dated 26 January 1877, enacted further rules to govern the descent of land or scrip (only

scrip was being distributed) to which heads of families were entitled under 37 Vic., c. 20.<sup>134</sup>

Meanwhile, in respect of the heads'scrip which was being distributed, it has been stated that,

. . . virtually all of the money scrip which was supposed to have been awarded to Half-breed (sic) heads of families never reached the claimants. As soon as it arrived at the Dominion Lands Office in 1876, assignees and attorneys picked it up instead.<sup>135</sup>

An Order dated July 4, 1878 did much to speed up the process of distribution, but in a manner which rid the government of any control over the s. 31 lands: it gave free alienable grants to all the "Half-Breed" children, irrespective of age.<sup>136</sup> The Order recited the expediency of further regulations "with the object of facilitating the final disposal of the land grant to the children of the 'Half-Breeds'." In the contemporary social context, the intention of the government to be derived from the phrase, "the object of facilitating the final disposal of the land grant to the children . . ." must be taken to have been the facilitation of the speculative real estate market in favour of the class of "cormorants" described by Macdonald.<sup>137</sup> Not only did the Order provide for the issue of patents to vest the lands in the beneficiaries in fee simple free of any settlement or other conditions, it also authorized the expropriation of portions of individual allotments for railways and public roads.<sup>138</sup> No

compensation was provided for. The grant of lands free of conditions is contrary to the proposition that s. 31 requires the Crown to make such conditions, in the case of each individual grantee, as are designed to reach the objective of providing a benefit to the grantee as a member of the larger group of beneficiaries.<sup>139</sup> Quare, whether s. 30 of the Act of 1870 permits expropriation by the Crown itself of portions of the lands allotted under s. 31 where the purpose of expropriation is a purpose of the Dominion. If it can be properly argued that expropriation for purposes of the C.P.R. and the Pembina branch rail lines are purposes of the Dominion, it is not readily apparent that the expropriation for local roads and trails which existed prior to the 15th of July 1870 are subsumed under such purposes.

Professor D.N. Sprague has described the consequences of the Order of July 4, 1878:

It caused thousands of patents to be issued at once between 1878 and 1880. Since most of the land changed hands almost as soon as the patents were registered at the Land Titles Office and since most patentees were under the age of twenty-one at the time of such transfer, the sales of "Infant . . . estates" were normally irregular relative to the regulations covering sales of infant estates in Manitoba.<sup>140</sup>

In 1881 a Commission was charged by the Province to investigate the administration of justice in the Province relative to sales of infant estates.<sup>141</sup> Although counsel for the Attorney-General of the Province recommended that

the evidence demanded the need for an official guardian for the children and their property, the matter was dealt with by passing retroactive legislation to cure irregularities in the alienation of "Half-Breed" children's lands, which were statutorily exempt from protective legislation.<sup>142</sup> T.B. Robertson, counsel, described the abuses as "monstrous", in his report which outlined,

. . . [T]he origin and nature of the practise of the Court here under the Infants' Act of 1878, a practise characterized by an almost utter recklessness and disregard of the interests of the Court's wards.<sup>143</sup>

After reviewing the evidence, Robertson stated,

Upon such materials above, which amount really to nothing more than a request made by the speculating purchaser and the stupid improvident and illiterate parent of the infant that the Court will step in to remove the protection which the law wisely afforded to the young and the helpless, and, depriving the latter of his property, divide it between the speculator and the parent -- the Court has habitually done what was asked and made order for the Sale of infants' lands at the price offered to the purchaser mentioned without any further inquiry, empowering the parent to convey the lands to the purchaser and directing payment of part or all of the purchase money to the parent or guardian upon his filing a bond conditional for its application -- not according to any directions given by the Court -- but, in general terms, "for the maintenance of the infant". For a considerable time the practise was to order only about \$40 to be paid to the parent.

This Report by counsel for the Attorney-General contains conclusive historical evidence respecting the "liability to imposition" upon which the protective enactments of the Indian settlement scheme were predicated.

The federal government, in the present submission, breached its constitutional obligation by permitting grants to issue to the children without appropriate safeguarding conditions which would retain federal jurisdiction over the lands. The provincial legislation also, in this submission, breached its constitutional obligation, implicitly imposed by s. 31, to pass such laws as were necessary to safeguard the interests of the "Half-Breed" people provided by s. 31.<sup>144</sup>

By 1879 the Legislative Assembly had requested the federal government to distribute the s. 31 lands without delay,<sup>145</sup> and requested the issue of patents to those Métif who had staked their claims along the Red River in the spring of 1870, as previously considered.<sup>146</sup> The Order dated April 12, 1880 responded to these requests of the Legislative Assembly by declaring that the whole of the 1.4 million acres had been distributed by this time, and that the staked claims along the Rat River should be denied:

That these claims have formed the subject of repeated applications for patents, but on being submitted to the Department of Justice for opinion as to the title, the latter has in every case been reported as insufficient, that is to say, the mere fact of staking out the land, without entering into bona fide possession and occupation and being found in such bona fide possession and occupation on the 15th July, 1870, did not bring that class of claims within the operation of the Manitoba Act, and therefore patents were refused.<sup>147</sup>

It appears, in fact, that the claims of the Métif at Rat River were considered for inclusion within s. 32(4) alone,



and not within s. 31.<sup>148</sup>

Finally, in 1881, an Order in Council dated 25th February, authorized the sale of Crown grants to those in possession of the contentious 'staked claims' first described in the Order of 20th April 1876:<sup>149</sup>

Lands alleged to have been taken up, but which were not surveyed as above or occupied, but merely marked out by the claimants, by stakes, prior to the 15th July 1870.<sup>150</sup>

The previous position of the government had been that such claims were not entitled to any consideration.<sup>151</sup> The 1881 Order declared the existence of some 175 cases involving about 45,000 acres, all these lands having been staked out in June or early July 1870.<sup>152</sup> These claims were categorized, for purposes of the Order, as follows:

1. Those of such claims as have changed hands, the purchasers having in some cases gone into possession, and are living on the land at the present time.

2. Those of the claims so staked out which remain exactly as they were when it is alleged they were taken up, and are claimed by the persons who staked them out.

3. Those claims which, since being staked out, have been bought up by other parties, for, it is said, speculative purposes, and are now held with that view, nothing having been done upon them in the way of cultivation or improvement.

A homestead entry to the extent of 160 acres, and homestead entitlement in addition to a purchase price of \$1.00 an acre above that amount was offered in respect of the first class.<sup>153</sup> In respect of class two, a homestead

entry for the first 160 acres, and the balance at the price of Railway Belt lands was offered, with the option by the claimant to purchase the whole of his claim at the price of Railway Lands in the Belt in which the lands were situated.<sup>154</sup> Two Commissioners were appointed to recommend a settlement that would be "legal and equitable" in the case of class three claims.<sup>155</sup>

If it is found, as a fact, that the lands were selected from the public lands in the Province by "Half-Breed" people, the present submission is that these lands were to be considered by the Lieutenant-Governor for distribution under s. 31.<sup>156</sup> If s. 31 required the establishment of particular settlement and other conditions as conditions precedent to the issue of a fee simple grant, it is apparent that no such conditions were attached. It must follow that the constitutional requirement in s. 31 does not permit the transfer, under executive or legislative authority, of a Crown title to persons other than members of the families entitled under s. 31. Quare, whether the interposition of interests of bona fide purchasers for value permits a conveyance.<sup>157</sup>

Notwithstanding the government's declaration in 1880 to the effect that all of the 1,400,000 acres had by that time been distributed,<sup>158</sup> it was found necessary, in 1885, to acknowledge that there existed "Half-Breed" persons who, although acknowledged to be entitled to s. 31 lands, had

not had their claims dealt with. An Order dated 28th January 1885<sup>159</sup> provided for the making of an enumeration of persons with outstanding claims. A further Order dated 20th of April<sup>160</sup> provided for the issue of \$240 of scrip to each of the "children" who proved their claims under s. 31.<sup>161</sup> Quare, whether the constitutional requirement to appropriate lands for the benefit of a group can be met with the issue of scrip. Further, an issue of an entitlement to land, if scrip can be characterized as such, does not meet other requirements in s. 31. The discretion of the Lieutenant-Governor in the selection of the lands is not involved. The lands are not appropriated for the purposes of settlement only, as it has been submitted s. 31 requires.<sup>162</sup> No conditions as to settlement and otherwise, on an individual basis, and based on a considered opinion of the Crown respecting the likelihood of the prospective grantee being able to safeguard his interest for his benefit, are attached. The same Order (dated 20th April 1885) purported to do away with s. 31 entitlements which had not been the subject of a claim filed with the Commissioner of Dominion Lands on or before the 1st day of May 1886, together with "the necessary proof" to support the claim.<sup>163</sup> Specifically, the Order recited that all such claims, in the absence of the above requirement, "shall cease and determine".<sup>164</sup> Quare whether such a provision can be properly characterized as a reasonable

means of compliance with the requirement to implement s. 31. Section 31 imposes positive obligations on the Crown; presumably it intended performance within a reasonable time. On the other hand, it is not at all evident that the issue of public notices was a reasonable mode of implementing the group settlement scheme which it is submitted s. 31 intended. If s. 31 required the setting aside of large blocks of land for the use and occupation of the group, and eventual grants to the individual children of heads of families, there was a continuing obligation to make blocks of land available for group use for such a time as was reasonably necessary, in the social economic and geographic conditions of the time, to secure the settlement of all members of the "Half-Breed" population.<sup>165</sup>

It has previously been demonstrated that, as a group, the Métif, at least, from the "Half-Breed" population, did not in fact benefit from the purported implementation of s. 31. It was in 1885 that Macdonald criticized the delays, the mechanisms designed to favour the speculative friends of the government, and declared that those cheated out of their lands were still on the western plains demanding redress.<sup>166</sup>

Notwithstanding the declarations earlier made by the government that all of the 1.4 million acres had been distributed, and the consequent issue of scrip in purported satisfaction of the "supplemental" claims,<sup>167</sup> it was

declared in 1891 that there was, in fact, land left over from the 1.4 million acres appropriated for the purposes of s. 31.<sup>168</sup> The Order dated 9th January 1891 reported errors in administration and the removal of individuals to the North-West Territories where their "Half-Breed" claims had been settled, as reasons for the surplus of land. The Order provided for the disposal of the appropriated lands by the Crown "in such manner as is provided by law and the Regulations passed from time to time by Your Excellency in Council in regard to Dominion Lands". In the present submission the relevant law is s. 31 which requires the lands be appropriated only for the benefit of the families of the "Half-Breed" residents. Any other purported appropriation, whether by the Executive or the Legislature which is inconsistent with this constitutional requirement is, in this submission, a breach of s. 31. That includes a dealing with the lands under the general Dominion Lands regulations.

Notwithstanding the time limit fixed by the Order of 20 April 1885 (viz. 1st May 1886), and the provisions of the Order of the 9th of January 1891, the federal government continued to make individual allotments purportedly under s. 31, in particular cases. One such notable case is the issue of 240 acres of land, in 1898, to Jean Riel, the son of Louis Riel, who was executed by the federal Crown in 1885.<sup>169</sup>

#### E. SECTION 31 AND S. 32 CLAIMS DISTINGUISHED

Before concluding, it is pertinent to remark upon the distinction between s. 32(4) and s. 31. Section 32(4) provided for the grant of titles based upon possession of public lands as settlers. Section 32(4) provided for the imposition of "once and for all", defeasible, "terms and conditions as may be determined by the Governor in Council". These lands for settlers were granted subject to the allottee making certain "improvements" appropriate for the promotion of settlement as a matter of public policy; one of the "purposes of the Dominion" stipulated in s. 30.<sup>170</sup>

Section 31 also provided for the making of conditional grants. It did so, however, on the basis of a continuing, supervised scheme; "on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine". This federal regulated scheme attached to the grants for the benefit of members of the "Half-Breed" group of beneficiaries, in addition to the rights which some of them might derive under s. 32. If an individual "Half-Breed" claimed lands under s. 32, he was subject to the usual "settlement" conditions. But whether or not he did so, any claim of a "Half-Breed" based on his possession of lands which are properly characterized as "public lands" had to be considered for inclusion in the scheme provided by s.

31.<sup>171</sup> In the case of lands outside the Belt, a "Half-Breed" would be entitled to claim a right of pre-emption in respect of any lands he possessed peaceably on July 15, 1870. In addition, he was entitled to the benefits of s. 31. In the case of lands within the Belt, s. 32 does not provide a right of pre-emption arising from mere possession; ss. (3) only provides a right to a freehold grant if the claimant has a title derived from occupancy "with the sanction and under the license and authority of the Hudson's Bay Company" up to the 8th day of March, 1869.<sup>172</sup> For "Half-Breed" persons in possession of lands within the Belt but without such title as provided in ss. (3), an entitlement was derived from s. 31. Presumably s. 32 provides for all rights of private interests within the province; lands within the Belt that are not the subject of s. 32 interest must, then, by definition, be characterized as "ungranted" lands within the meaning of s. 31.

**F. JOHN A. MACDONALD'S VIEW THAT UNCONDITIONAL GRANTS DID NOT BENEFIT THE "HALF-BREED" POPULATION**

It was John A. Macdonald, who, as Minister of Justice, introduced s. 31 to the Parliament in 1870. It is appropriate to conclude this part with his assessment of the question whether the grant of alienable land and scrip provided, as s. 31 requires, a benefit to the families of

the "Half-Breed" people:

Giving him his land and giving him more land was giving him nothing. The nomadic half-breed (sic), who had been brought up to hunt, having had merely his shanty to repair in the dead season, when there was no game--what advantage was it to him to give him 160 or 240 acres more? It was of no use to him whatever, but it would have been of great use to the speculators who were working on him . .

. .

. . . the Government knew . . . the Minister of the Interior, knew that we were not acting in the interests of the "Half-Breeds" in granting them scrip, in granting him the land.<sup>173</sup> We had tried, after consulting man after man, expert after expert, to find what was best for the country, and we found, without one single exception, they were all opposed to granting unlimited scrip and immediate patents to the half-breeds (sic).<sup>174</sup>



## ENDNOTES

## CHAPTER V.

1. The Manitoba Act, S.C. 1870, c. 3 in R.S.C. 1970, Appendix II, No. 8, p. 247, ss. 1-2.
2. Mailhot, supra, Chapter I, note 40.
3. Ibid., at 120.
4. Ibid.
5. Ibid., at 143-144.
6. Ibid., at 140.
7. Ibid., at 165.
8. Ibid.
9. Ibid., at 173.
10. See, Order in Council dated 12 April, 1880, in N.O. Côté, Orders in Council Respecting Claims of the Half-Breeds. 1871-1925, Ottawa: Dept. of the Interior, 1929 at 55. [hereinafter cited as Côté]
11. Mailhot, supra, Chapter I, note 40, Chapter VIII.
12. Ibid., at 224.
13. Ibid.
14. "Return: Instructions to the Honorable A. Archibald", Sessional Papers, No. 20, 1871, Ottawa, at 5.
15. Ibid., (No. 370) at 7.
16. Supra, Chapter III, note 127.
17. Ibid.
18. Ibid.
19. Ibid.

20. P.A.C. R.G. 15 Vol. 229. Despatch dated Dec. 27, 1870.
21. An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada, S.C. 1869, c. 3.
22. Sprague, supra, Chapter I, note 12, at App. D 4.3.
23. Ibid.
24. Ibid.
25. Reference Re Language Rights Under the Manitoba Act, 1870, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1 at 19; (1985), 35 Man. R. (2d) 83 at 107; (1985), 59 N.R. 321 at 345; [1985] 4 W.W.R. 385 at 404-405. In Re the Regulation and Control of Aeronautics in Canada, [1932] A.C. 54 at 70, Lord Sankey, L.C. said in respect of the Constitution Act, 1867: "Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded . . . ." This was recently quoted with approval by the Supreme Court of Canada in Re British North America Act and the Federal Senate (1979), 30 N.R. 271 at 287.
26. Sprague, supra, Chapter I, note 12, App. D 4.4, Lt. Gov. Archibald to J. Howe, Secretary of State, December 27, 1870.
27. Ibid.
28. Ibid.
29. Supra, Chapter III, notes 24, 25.
30. Sprague, supra, Chapter I, note 12, App. D 4.4, 4.5, Lt. Gov. Archibald to J. Howe, Secretary of State, December 27, 1870.
31. Lysyk, supra, Chapter III, note 114, at 471.
32. Sprague, supra, Chapter I, note 12, App. D 4.5.

33. Morton, ed. 1984, supra, Chapter I, note 29, at 204.
34. Sprague, supra, Chapter I, note 12, App. D 4.6.
35. Ibid.
36. Supra, Chapter IV, text following note 2.
37. Sprague, supra, Chapter I, note 12, App. D 4.6.
38. P.C. No. 874, Côté, supra, note 10 at 1.
39. Ibid., clause 1.
40. The Manitoba Act, S.C. 1870, c. 3, s. 31, in R.S.C. 1970, Appendix II, No. 8, p. 247 at 254-255.
41. Côté, supra, note 10.
42. Ibid., clause 5.
43. Supra, Chapter III, note 273.
44. Supra, Chapter III, notes 246-298.
45. Supra, Chapter III, note 288.
46. Côté, supra, note 10, clauses 6, 7.
47. Le Métis 8 juin, 1871, at 1.
48. Ibid.
49. Le Métis 15 juin, 1871.
50. Supra, Chapter III, note 277.
51. Order in Council dated May 26, 1871 Order-in-Council respecting Half-Breeds 1871-1925, Ottawa: Treaties and Historical Research Centre D.I.A.N.D. (T.H.R.C.)
52. Supra, Chapter III, note 127.
53. The rights mentioned were provided in the Order of 25 April 1871: Côté, supra, note 10.
54. Supra, note 51, clause 2.
55. Writer's translation of the French text.
56. Le Métis 13 juillet, 1871.

57. Le Métis, 18 Janvier 1872; 27 janvier 1872; 3 fevrier 1872; 10 fevrier 1872; 17 fevrier 1872; 29 fevrier, 1872; 2 mars 1872; 13 mars 1872; 3 avril 1872; 10 avril 1872; 17 avril 1872; 29 avril 1872; 1 mai 1872; 8 mai 1872; 15 mai 1872; 29 mai 1872; 5 juin 1872; 12 juin 1872; 19 juin 1872; 26 juin 1872; 3 juillet 1872; 10 juillet 1872.
58. Le Métis 3 août, 1871.
59. Ibid.
60. Morris, supra, Chapter III, note 77, at 41.
61. Ibid.
62. When given the choice to characterize themselves as "Half-Breed" or Indian, most "mixed-blood" persons opted to join Treaty One, according to Morris, on the basis that they "would rather receive such benefits as may accrue to them under the Indian treaty, than wait the realization of any value in their half-breed (sic) grant: loc. cit.
63. Le Métis, letter dated 21 juin, 1871, published on 27 June, 1871.
64. Ibid.
65. Le Métis 27 mars, 1872; P. Mailhot, supra, Chapter I, note 40, at 235.
66. Le Métis 17 mars, 1872.
67. Ibid.
68. Ibid.
69. Le Métis 3 avril, 1872.
70. Ibid. "La Question des Terres". Writer's translation.
71. Dominion Lands Act, S.C. 1872, c. 23.
72. Treaty No. 1 was signed on August 3, 1871; Treaties 1 and 2 between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions, Ottawa: Queen's Printer, 1957.
73. Dominion Lands Act, S.C. 1872, c. 23, s. 105.

74. Ibid.
75. Ibid., s. 108.
76. Order in Council dated April 15, 1872, supra, note 51.
77. Ibid.
78. Ibid.
79. Order in Council dated November 11, 1872, supra, note 51.
80. The text of s. 32(3) provided: "All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown."  
Sub-section 4 provided: "All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council."
81. Archer Martin considers the point in supra, Chapter III, note 43, at 99.
82. Report of the Select Committee, 1874, supra, Chapter I, note 105, at 74. (Letter No. 58, Cartier to Ritchot, dated 23 May, 1870).
83. Supra, Chapter IV, notes 8, 9.
84. Côté, supra, note 10, at 11.
85. Ibid.
86. Supra, Chapter I, note 134.
87. Supra, Chapter IV, note 18.
88. Dominion Lands Act explained, & C. Act, S.C. 1873, c. 38, s. 1.

89. P.C. Hodges & E.D. Noonan, Saskatchewan Metis Brief On Investigation Into The Legal, Equitable and Moral Claimes (sic) Of The Metis People Of Saskatchewan In Relation To The Extinguishment Of The Indian Title, Regina: July 28, 1943 at 51. [hereinafter referred to as Hodges]
90. Accord, Kent McNeil, Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada, Saskatoon: University of Saskatchewan Native Law Centre, 1983 at 26.
91. See P.C. No. 1202 dated 2 July, 1885, and P.C. No. 1182 dated 6 June 1901, at Côté, supra, note 10, p. 66 and p. 141, respectively.
92. Dominion Lands Act explained, & C. Act, S.C. 1873, c. 38.
93. Dominion Lands Act, S.C. 1872, c. 23.
94. That is, those dated April 25, 1871 and May 26, 1871.
95. An Act respecting the appropriation of certain Dominion Lands in Manitoba, S.C. 1874, c. 20.
96. Ibid., s. 1.
97. Ibid., s. 2.
98. Supra, note 92.
99. An Act respecting the appropriation of certain Dominion Lands in Manitoba, S.C. 1874, c. 20, s. 2.
100. Ibid., s. 3.
101. Ibid., ss. 1, 2.
102. Infra, note 133.
103. Wood, supra, Chapter I, note 8.
104. P.A.C. Mackenzie Papers, M.G. 26B, at 602.
105. Ibid., at 803.
106. Wood, supra, Chapter I, note 8.
107. Quare, whether federal legislation purporting to regulate the descent of rights to granted lands or scrip, apart from an obligation that arises pursuant

to s. 31, is not ultra vires because it is legislation in respect of which only the province can legislate under s. 92(13). Parliament may have the power so to regulate rights of descent if the "Half-Breeds" and their lands are within the federal power granted by s. 91(24) of the Constitution Act, 1867. See, A.G. Canada v. N.I.B., [1976] 1 S.C.R. 170, sub. nom. Canard v. A.G. Canada, [1972] 5 W.W.R. 678 (Man. C.A.).

108. Côté, supra, note 10, at 14.
109. Ibid., clause 12.
110. Ibid., clause 'P'.
111. Ibid., clause 'Q'.
112. Ibid., clause '9M'.
113. Supra, Chapter IV, notes 128-131.
114. Supra, note 10 at 14, ss. 9, 10, 11.
115. Ibid., clauses 2, 5.
116. D.N. Sprague, "The Manitoba Land Question, 1870-1882", U. of Manitoba, unpublished, n.d., at 9, 10.
117. Côté, supra, note 10, at 32.
118. Ibid., "Memorandum" appended to the Order in Council, and dated March 17, 1876.
119. Sprague 1980, supra, Chapter I, note 40, at 81.
120. Supra, Chapter IV, notes 131, 132.
121. An Act respecting the appropriation of certain Dominion Lands in Manitoba, S.C. 1874, c. 20, supra, note 95 to note 101.
122. Although this candid recital applies to heads' scrip and land, it also represents the government policy respecting s. 31 lands, and expressed by E.M. Wood in 1874, supra, note 104.
123. Apparently no land but 3,186 claims of \$240 each for a total of \$509,760 was granted: Hodges, supra, note 89, at 57.
124. Côté, supra, note 10, at 32.

125. P.C. No. 85, T.H.R.C., supra, note 51.
126. Supra, notes 10-13, and Chapter IV, notes 111-122.
127. Supra, Chapter IV, notes 111-122.
128. Supra, note 80.
129. P.C. No. 85 also provided for lands settled upon after the 15th of July 1870, and, in two categories, those settled prior to the Public Lands Notice of March 21st 1873 and those settled upon after the notice: supra, note 125.
130. Supra, note 109.
131. Côté, supra, note 10, at 37.
132. Stanley, 1936, supra, Chapter I, note 33, at 188, 191.
133. H. of C. Deb., July 6, 1885 at 3113-3114.
134. Côté, supra, note 10, at 41. See supra, note 107, respecting the issue of the constitutional validity of such statutory regulation.
135. D.N. Sprague, supra, note 119, at 79.
136. Côté, supra, note 10, at 45 (P.C. No. 579).
137. Supra, note 133.
138. P.C. No. 579, Côté supra, note 10, at 45.
139. Supra, Chapter IV, notes 131, 132.
140. Sprague, supra, Chapter I, note 12, at 26-27.
141. Wood, supra, Chapter I, note 8.
142. See, generally, Gerhard Ens, "Metis Lands in Manitoba" (1983), 5 Manitoba History 2 at 3.
143. P.A.M. R.G. 7 B1 Box 12, file 3.
144. Protestant School Bd. of Montreal v. Minister of Education (1978), 83 D.L.R. (3d) 645 at 674 (Qué. Sup. Ct.); Nissan Auto Co. (Can.) Ltd. v. Pelletier (1978) 77 D.L.R. (3d) 646 at 664, per Deschênes, C.J.S.C. (Qué. Sup. Ct.).



145. Order in Council dated April 12, 1880, N.O. Côté, supra, Chapter I, note 37, at 55.
146. Ibid.
147. Côté, supra, note 10, at 55.
148. Appendix F27.5 Memorandum on the subject of the so-called 'staked claims' in Manitoba, P.A.M. R.G. 12 B1 Lt. Gov.'s Collection Doc. #1557 in Sprague, supra, Chapter I, note 12.
149. Order in Council dated February 25, 1881, Ottawa: D.I.A.N.D. Treaties and Historical Research Centre Collection 1871-1925.
150. P.C. No. 85, dated April 20, 1876, supra, note 125.
151. Ibid.
152. Order in Council dated February 25, 1881, supra, note 149.
153. Ibid.
154. Ibid.
155. Dubuc and Miller, J.J., of the Court of Queen's Bench. See the involvement of the two judges in the matters examined by the 1881 Inquiry: Wood, supra, Chapter I, note 8.
156. Supra, Chapter IV, text of "Summary" following note 122.
157. In Mottaz v. U.S.A., 753 F2d 72 (Minn. 1985), it was held that alienation of allotted lands under the General Allotment Act, 1887 does not transfer title and the allottee and his heirs may not be barred by statutes of limitations or laches from bringing suit.
158. Order in Council dated April 12, 1880, Côté, supra, note 10, at 55.
159. P.C. No. 135, Côté, supra, note 10, at 62.
160. P.C. No. 810, Côté, supra, note 10, at 65.
161. Ibid.
162. Supra, Chapter IV, notes 79, 80.

163. Order dated April 20, 1885, Côté, supra, note 10, at 65.
164. Ibid.
165. Supra, Chapter IV, notes 135, 137.
166. Supra, note 133.
167. Supra, note 159.
168. P.C. No. 2800, dated January 9, 1891, supra, note 51.
169. P.C. No. 2567, dated November 26, 1898: Côté, supra, note 10, at 120.
170. Respecting Dominion lands policy in the west, see Martin, supra, Chapter II, note 45.
171. Supra, Chapter IV, notes 93-99.
172. Section 32(3) of the Act of 1870; see supra, note 80.
173. H. of C. Deb., July 26, 1885, at 3117. Although these remarks were made in the context of criticism of land grants in the North-West Territories they apply equally to the same type of scheme which was used to implement s. 31 in Manitoba.
174. Ibid., at 3114.

## VI. CONCLUDING REMARKS

It has been argued that the general language of s. 31 presents ambiguities which are properly addressed by construing the section as intended to provide constitutional protection for a land base for the "Half-Breed" population of Manitoba upon the occasion of the local population coming to an agreement to join the Dominion of Canada. Canada retained control and jurisdiction, "for the purposes of the Dominion", over the public lands in the province, pursuant to s. 30, and s. 31 was intended as a fetter on those general powers. Section 31 must then be interpreted in a way which promotes the benefit of the people entitled to its benefits, and not the purposes of the Dominion. The purposes of s. 31 are properly elaborated by reference to the past practice and policy of the Crown in respect of the declared object to extinguish the Indian title in the province. Section 31 is a statutory provision for the quick settlement of the claims of the "Half-Breed" population to Indian title at a time when the public interest represented by the "purposes of the Dominion" required a Crown title unburdened by Indian title to distribute Crown grants for purposes of

railway building and immigrant settlement. Section 31, as such, is a unique statutory response to the unique circumstances at Red River, and fits the past pattern whereby the practice and policy of the Crown respecting Indian title has been a response to the varied circumstances which accompanied settler expansion. Reference to those factors, as well as the historical background of the negotiations for s. 31 between Canada and representatives of the local population which forced Canada to negotiate an agreement with them, permits an elaboration of the settlement scheme indicated by the text of s. 31.

That settlement scheme, if its intention can be derived from the policy of statutes in pari materia and the general practice of the Crown in extinguishing the Indian title, required the Crown to exercise a positive role to protect the families of the "Half-Breed" beneficiaries. As the text of the section indicates, conditions "as to settlement and otherwise" were to be attached, in individual cases, to secure the lands within the families, and to protect the illiterate grantees from imposition by the settler population. In fact, the lands were granted freely only to the children, and the other members of the families were provided for by supplementary legislation. No conditions were attached to grants to promote the cultural survival of the Métif people who had negotiated s. 31. The implementation of s. 31 was effected to promote,

not the benefit to the "Half-Breed" population, but the benefit of land speculators whose activities tended to promote the purposes of the Dominion. The apparent anomaly of a government supervised scheme provided in a constitutional pact between peoples is explained by the role of Abbé Ritchot, a religious leader of the Métif, who pressed their claims to the Indian title during negotiations.

The general language of s. 31 makes it difficult to describe precisely the scope of the obligation to set apart lands for the benefit of the families of the "Half-Breed" residents. The approach has been to describe the ambit of that obligation by reference to social facts in light of the general objects of s. 31 derived from the past practice and policy respecting similar settlement schemes upon the occasion of the extinguishment of the Indian title.

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