## Appendix 5A: General Sources of Métis Rights*

The sources of Métis rights are diverse. While some are shared with all Aboriginal peoples, others are Métis-specific. Some rights are common to all Métis people, others attach to particular Métis groups. Many grow from Aboriginal roots, but some are of more recent origin. Some are widely accepted, others are controversial. Some are legal in nature, others are moral or political. The general sources of rights applicable to all Métis people are examined briefly here. Sources specific to the Métis Nation are dealt with in Appendices 5B and 5C. The present discussion of general sources begins with those that relate to legal rights, considered in roughly chronological order, and concludes with moral and political sources. Categories often overlap, and the lines between them sometimes blur. The gulf between legal and moral or political sources is crossed by several bridges.

It is hoped that this preliminary examination of general sources will facilitate an understanding of the more detailed discussions of particular rights in Appendices 5B and 5C. While those discussions focus on rights that are Métis-specific, it is important to appreciate the relationship between those rights and the entitlements that Métis people share with the other Aboriginal peoples of Canada. Therefore, although a full analysis of the rights of all Aboriginal peoples would not be appropriate here, the general principles involved are reviewed briefly as a backdrop to an overview of Métis rights.

### 1. Legal Sources

Legal systems are human constructs, shaped by politically organized societies to serve their particular ends. They have no application beyond the societies for which they were designed or to which they have been extended. The common law of England does not apply to France, for example, and the civil law of France does not apply to England or to countries that inherited English law (although Quebec's civil law is rooted in Quebec's French inheritance). A threshold question to be answered before launching a discussion of legal rights applicable to Métis and other Aboriginal peoples, therefore, is whether the legal system in question is European-based or Aboriginally based.

For purposes of this discussion, the viewpoint is that of Canada's formal European-rooted legal structure. This approach is not intended to deny the existence of an Aboriginal legal order independent of the European-based order or to suggest that one is superior to the other. It is simply a recognition of the fact that 'legality' is an empty notion outside the context of a specific legal system and an indication that the European-rooted legal context has been chosen as the basis for this particular analysis. That choice was dictated by the fact that the Royal Commission on Aboriginal Peoples was created under and is subject to the governmental structure of Canada (which has European origins), of which

legal systems are but a part. The Commission's recommendations will also be implemented in the setting of that governmental and legal system.

The argument is sometimes made that even from the perspective of Euro-Canadian legal systems, non-Aboriginal governments did not acquire the right to assert legislative control over Aboriginal people in some parts of what is now Canada until well after they began purporting to do so.[1] The basis for this argument is the principle that legal sovereignty over a territory cannot be acquired by mere assertion; the claim must be supported by 'effective occupation' of the territory. As to those parts of North America included in the Hudson's Bay Company (HBC) charter of 1670, by which Charles II of England ceded the entire Hudson Bay drainage area (known as Rupert's Land) to the company, the argument contends that the company never exerted 'effective control'.

Those who hold that view claim that neither French and British control over eastern Rupert's Land nor the Hudson's Bay Company's fur trade operations and occupation of trading posts in western Rupert's Land amounted to sufficient effective occupation to displace Aboriginal control (at least not beyond the immediate environs of trading posts and non-Aboriginal settlements). Thus, they conclude that early English and Canadian legislation that purported to affect Aboriginal peoples in the area covered by the HBC charter was not legally valid. They acknowledge that effective control was established in later years, but they argue that this was not until after significant post-Confederation legislation had been enacted. If they are right, it means, for example, that the Dominion Lands Act of the 1870s, which had a major impact on Métis people in the northwest, was a nullity. This is so, they say, because Canada's claim to jurisdiction over Rupert's Land was founded on the transfer of Rupert's Land in 1869 from the company to the British Crown and subsequently to the Canadian government. If the Hudson's Bay Company did not possess Rupert's Land in the first place, there was nothing to transfer to Britain or Canada.

There are some difficulties with that thesis. It may well overestimate the degree of control needed to establish effective occupation for legal purposes and underestimate the degree of control actually exercised in Rupert's Land. The effect of Lord Selkirk's colonizing efforts at Red River and of his 1817 treaty with Indian nations of the area deserves to be considered, for example, as does the significance of the Canada Jurisdiction Act, 1803, a statute setting out juridical arrangements for Rupert's Land.[2]

Assuming, however, that the historical analysis of these critics is correct, it does not alter the foregoing conclusions about the current state of the law concerning Aboriginal legal rights. This is so because of a legal principle known as the de facto doctrine, according to which acts done and rights acquired in good-faith reliance upon laws generally thought to be valid at the time will not be nullified by subsequent discovery that the laws in question were unconstitutional.[3] Legal rights will, therefore, be analyzed on the assumption that the Euro-Canadian legal system was fully applicable from the first.

The fact that the following legal analysis is based on the formal Euro-Canadian legal system is subject, however, to two very important qualifications. One is that Canadian

law itself recognizes and incorporates Aboriginal rights.4 The other is that not all rights are legal rights. The moral and political rights of the Métis peoples, which may well outweigh legal rights in certain respects, are considered at the conclusion of the legal analysis.

## 1.1 The Starting Point: Aboriginal Rights

Most legal rights of Métis peoples are rooted, directly or indirectly, in Aboriginal rights.[5] Since 1982, the strongest legal basis for making that connection to Aboriginal rights is section 35(1) of the Constitution Act, 1982, which states that "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed", and section 35(2) of the same instrument, which defines Aboriginal peoples to include "the Indian, Inuit and Métis peoples of Canada". It is important to understand, however, that section 35 does not grant Aboriginal rights in itself. Aboriginal rights existed before the 1982 constitution. They predate the existence of Canada, in fact, having their origins in the earliest indigenous societies of North America. As Chief Justice Dickson said on behalf of the Supreme Court of Canada in Guerin v. The Queen, Aboriginal rights are legal rights "derived from the Indian's historic occupation and possession of their tribal lands".[6]

Because the rights recognized and affirmed by section 35 are described as "existing", their extent is determined in part by the state of Aboriginal rights immediately before April 1982, when section 35(1) came into effect. The following analysis of Aboriginal rights begins with an examination of the extent to which they were embodied in principles of law inherited by Canada from the United Kingdom. We go on to consider the impact of Indian treaties and of legislation and constitutional provisions.

Aboriginal rights in general

Aboriginal rights are legal rights. The common law, which applies to all parts of Canada in matters relating to the Crown and its obligations, recognizes unextinguished Aboriginal rights as giving rise to enforceable legal obligations. The Supreme Court of Canada has so held in several rulings.[7]

This means, for example, that Aboriginal title to unsurrendered land (a right of occupancy that can be sold to no one except the Crown) is a common law right. The right to hunt, trap and fish, as well as to exploit natural resources in other ways, is another aspect of Aboriginal rights. Extending well beyond land and resources rights is the freedom to participate in and perpetuate Aboriginal cultures in all of their many aspects. One of the most fundamental of Aboriginal rights is the inherent right of self-government, described in our constitutional discussion paper, *Partners in Confederation*.[8] All peoples of the world have the right to create their own governmental arrangements, and at the point of first contact with Europeans, the Aboriginal peoples of North America were politically organized and effectively governed.

It must be understood, however, that although Aboriginal rights, including the right of Aboriginal self-government, were legally recognized, they were never considered to be either absolute or perpetual legal rights. They could be surrendered or modified by treaty, and they could be altered or abolished by statute. Extinguishment by statute was legally possible because it was always assumed by common law that the paramount government, with control over everybody, Aboriginal people and Europeans alike, was the one that derived its ultimate legal authority from the Parliament of England. As Chief Justice Dickson explained in R. v. Sparrow, the Supreme Court's celebrated first decision on section 35, "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown".[9] By Crown, he was undoubtedly referring to all organs of British government, including Parliament, where legislative matters were concerned.

Commentators have condemned the lack of ethical legitimacy of this approach, as well as the specious natural law reasoning by which early scholarly apologists of colonialism attempted to justify its morality. Some have even questioned its legality.[10] It seems unlikely, however, that Canadian courts will ever abandon this view as the historical foundation of their approach to Aboriginal legal rights.

However, as explained in *Partners in Confederation*, Aboriginal rights that were not fully extinguished before 1982, including the right of self-government, are no longer subject to being overridden by statute. Since the entrenchment of existing Aboriginal rights in section 35(1) of the Constitution Act, 1982, the only way to limit them is by agreement, by constitutional amendment, or by the limited legislative regulatory powers referred to in the Sparrow decision.

An important question, about which opinion is far from unanimous, concerns the extent to which the Aboriginal rights recognized and affirmed by section 35 are to be defined by history. The Canadian constitution has long been held by the highest judicial authorities to be a 'living tree', capable of growth over time.[11] This has led some to speculate that section 35, enacted in 1982, may have grafted onto the living tree a new kind of Aboriginal rights appropriate for the contemporary circumstances of Aboriginal peoples in Canada. They suggest that the word 'existing' in section 35 should be construed as referring to rights suitable for conditions in 1982 and the future, rather than for times gone by. If so, we would not need an historical analysis to show whether ancient rights have been extinguished, the only question being whether those rights are appropriate according to the contemporary values of Canadian society. While it is difficult to believe that Canadian courts will accept this approach completely, some of its elements assist an understanding of the constitutional guarantee of existing Aboriginal rights in section 35.

History cannot be ignored altogether. Aboriginality is an historical notion. The word itself derives from the Latin for 'from the beginning'. Although the word 'existing' in section 35 undoubtedly places the focus on contemporary circumstances, it must be remembered that it is only existing Aboriginal rights of Canada's Aboriginal peoples that are constitutionally recognized and affirmed, not every right they may hold. What evidence there is concerning the purpose of inserting the word existing in section 35 late

in the drafting process suggests that it was intended to reassure provincial politicians, some of whom were reluctant to entrench the rights of Aboriginal peoples, that no new rights would be created and that rights previously extinguished would remain extinguished.[12]

On the other hand, the law does not require the rights of Aboriginal peoples to be locked forever in the grip of history's dead hand. Some early authorities did, it is true, take a 'frozen rights' approach to Aboriginal entitlements. There was, for example, a 1979 trial-level decision of the Federal Court of Canada, Baker Lake v. Minister of Indian Affairs, in which, while ruling that Inuit of the Baker Lake area of the Northwest Territories held unextinguished Aboriginal title to the area, Justice Mahoney stated that those who assert Aboriginal title must prove, among other things, that the claimants and their ancestors were members of an organized society that occupied the specific territory claimed, to the exclusion of other organized societies, before sovereignty was asserted by the Crown. Moreover, he said, the common law "can give effect only to those incidents of…enjoyment [of land] that were, themselves, given effect to by the [Aboriginal] regime that prevailed before".[13] Brian Slattery's widely respected study of Aboriginal rights in Canada takes issue with this frozen rights approach, pointing out that it "forces Aboriginal title into a mould familiar to English law, while disregarding the factors peculiar to its origins", and the Supreme Court of Canada eventually approved of his position, concluding: "Clearly, then, an approval to the constitutional guarantee embodied in section 35(1) which would incorporate 'frozen rights' must be rejected".[14] It is probably necessary for a group claiming Aboriginal title to show possession for "a substantial period", which Slattery explains as being sufficient to establish "an enduring relationship with the lands in question" and to "defeat the claims of previous native possessors and to resist newcomers".[15] As to the precise time required, however, he takes a flexible approach:

The requisite length of time depends on the circumstances, but in most cases a period of twenty to fifty years would seem adequate. Time is less important for its own sake than for what it says about the nature of the group's relationship with the land and the overall merits of their claim.[16]

All that needs to be established is sufficient prior occupation to remove any doubt about the genuineness and intended permanence of possession by the claimants' Aboriginal ancestors.

In short, contemporary Aboriginal rights are nourished by both historical and modern factors. In attempting to understand the interaction of past and present, it may be helpful to note that section 35 applies the adjective 'Aboriginal' to two different nouns: rights and peoples. The interplay of historical and contemporary elements is probably different in those two contexts.

Identifying the Aboriginal peoples to whom the guarantees of section 35 belong may call for a more contemporary approach than determining the content of Aboriginal rights. Since constitutional guarantees exist for the benefit of present and future Canadians, not

for those who have passed from the scene, it makes sense that the groups that constitute Canada's Aboriginal peoples should be groups with which today's Aboriginal peoples identify. If a new community of Aboriginal persons springs up somewhere, or an old one reorganizes, it is the new grouping upon whose membership the Aboriginal rights should devolve. As Catherine Bell has observed,

traditional and contemporary cultures, customs and lifestyles become more important when defining entitlement to, and the content of, aboriginal rights rather than being determinative of whether a group is 'aboriginal.'[17]

It is unlikely that even the judge who decided the Baker Lake case would disagree with that assessment. He stated:

While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory.[18]

He added: "That their society has materially changed in recent years is of no relevance".[19]

History does have one important role in identifying Aboriginal peoples. Before a group can claim to be an Aboriginal people, it must be able to establish that it is composed, at least predominantly, of persons with Aboriginal ancestry (whether genetic or determined by marriage or adoption), in the sense that some of their forebears were living in North America before Europeans arrived. Beyond that requirement, it is probable that the term Aboriginal peoples in section 35 will be interpreted in a modern manner.

When we turn to the meaning of existing Aboriginal rights in section 35, the picture is somewhat more complex. History must play a larger role here because it is only 'existing' rights that are recognized and affirmed by section 35. If the Aboriginal rights of some Aboriginal peoples were extinguished, in whole or in part, by legitimate extinguishment mechanisms (discussed below), that extinguishment must be recognized for legal purposes, and history must be consulted to determine both its legitimacy and its extent.

History also places some broad limits on the nature of rights that can be claimed by particular peoples. It is only the Aboriginal rights of Aboriginal peoples that are protected by section 35, so rights that were not, as a general category, exercised by a people in pre-contact times would not be covered. To take an obvious example, no Aboriginal people could claim an Aboriginal right to form limited liability corporations, since no such entities existed in pre-contact Aboriginal societies. Nor could they claim an Aboriginal right to exemption from income tax. Probably, for the same reason, even some forms of resource exploitation would be excluded (such as diversion of a major river crossing the territory of an Aboriginal people if the result would be to interfere substantially with navigation or inflict massive deprivations on downstream users).

It is important to understand, however, that this historical restriction does not freeze Aboriginal rights in the precise shape they had before contact. As Brian Slattery has rightly said,

[A]boriginal land rights are not confined to "traditional" uses of land. The doctrine of aboriginal title attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands. Its decisions may be influenced, of course, by "traditional" notions, but the stronger influence in the end will likely be current needs and attitudes. For most native groups, land use is a matter of survival not nostalgia.[20]

Old rights and practices take new forms in modern times. Dog sleds are replaced by snowmobiles; Inuit art expands to embrace new media; Aboriginal religious practices are modified by new influences and changing circumstances; resource exploitation grows from hunting, fishing and trapping to include logging, mining, petroleum extraction and hydroelectric generation; education moves on from the training by parents and storytelling by elders to formal schooling at many levels. In all these respects and the many others that make up Aboriginal rights, it is important to understand that it is the contemporary versions of Aboriginal peoples' ancient prerogatives that are preserved by section 35.

Métis Aboriginal rights

Crucial to much of the discussion that follows is the question of whether Métis people are entitled to exercise existing Aboriginal rights. It can confidently be concluded that they are. The evidence from which that conclusion flows is plentiful and persuasive.

Historically, Métis people were closely linked to other Aboriginal peoples. Although the first progeny of Aboriginal mothers and European fathers were genetically both Aboriginal and European, for the most part they followed an Aboriginal lifestyle. Predominant kinship ties also tended to be with the Aboriginal community. In unions between Aboriginal women and Scottish employees of the Hudson's Bay Company, the husbands had a common tendency to treat their 'country families' as temporary, to be left behind when they retired to Scotland.[21] The French-Indian families tended to greater permanence, and their lifestyle, at least initially, was closer to Aboriginal patterns than to European ones.

Subsequently, distinctive Métis social patterns of predominantly Aboriginal character evolved in some areas, although not all persons of mixed Aboriginal and European ancestry chose to follow them. Some opted for European ways; others preferred to embrace Indian ways. Métis culture had developed most fully on the prairies, and the situation by the late nineteenth century was described by Alexander Morris thus:

The Half-breeds in the territories are of three classes — 1st, those who, as at St. Laurent, near Prince Albert, the Qu'Appelle Lakes and Edmonton, have their farms and homes; 2nd, those who are entirely identified with the Indians, living with them and speaking

their language; 3rd, those who do not farm, but live after the habits of the Indians, by the pursuit of the buffalo and the chase.[22]

Alexander Morris anticipated the complete assimilation of the first and second groups into the European and Aboriginal communities respectively. As for the third group, whom he styled "Métis",[23] he suggested that although they should not be "brought under the treaties", land should be assigned to them and assistance should be provided to them. Other evidence of acceptance that Métis persons could avail themselves of Indian status if they chose to do so is found in documents relating to early western treaties, such as the report of W.M. Simpson concerning Treaty 1:

During the payment of the several bands, it was found that in some, and most notably in the Indian settlement and Broken Head River Band, a number of those residing among the Indians, and calling themselves Indians, are in reality half-breeds, and entitled to share in the land grant under the provisions of the Manitoba Act. I was most particular, therefore, in causing it to be explained, generally and to individuals, that any person now electing to be classed with Indians, and receiving the Indian pay and gratuity, would, I believed, thereby forfeit his or her right to another grant as a half-breed; and in all cases where it was known that a man was a half-breed, the matter, as it affected himself and his children, was explained to him, and the choice given him to characterize himself. A very few only decided upon taking their grants as half-breeds. The explanation of this apparent sacrifice is found in the fact that the mass of these persons have lived all their lives on the Indian reserves (so called), and 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 grant.[24]

Evidence is also found in the transcript of negotiations leading to Treaty 3:

CHIEF — I should not feel happy if I was not to mess with some of my children that are around me — those children that we call the Half-breed those that have been born of our women of Indian blood. We wish that they should be counted with us, and have their share of what you have promised. We wish you to accept our demands. It is the Half-breeds that are actually living amongst us — those that are married to our women.
GOVERNOR — I am sent here to treat with the Indians. In Red River, where I came from, and where there is a great body of Half-breeds, they must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land. All I can do is to refer the matter to the Government at Ottawa, and to recommend what you wish to be granted.[25]

The significance of these observations to the present discussion is threefold:

• They indicate that Métis people were recognized, even at that relatively late date, as being entitled to assert Indian status (and thus entitled to Aboriginal rights).

• They show that the operative method of classifying persons for that purpose at the time was self-identification, regulated, presumably, by community confirmation.

• They confirm that Métis rights had not yet been brought under the treaties.

Until recently, the strongest legal evidence that Métis people were entitled to lay claim to Aboriginal rights, even after a distinctive Métis nation had evolved, was section 31 of the Manitoba Act, 1870, a statute of the Parliament of Canada that was subsequently accorded constitutional status by the Constitution Act, 1871:

And whereas it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of ungranted lands, to the extent of 1,400,000 acres thereof, for the benefit of the families of the half-breed ["Métis" in the French version] residents, it is hereby enacted that [such lands be selected and granted to the children of half-breed heads of families residing in the Province at the time the lands were transferred to Canada].[26] [emphasis added]

Section 31 will require extensive analysis later. In the present context, its importance lies in the fact that it includes an acknowledgement by both Canadian and British parliaments that the people of the Métis Nation were entitled to share Indian title to the land and, it seems clear by implication, all other elements of Aboriginal rights. Further acknowledgement of the existence of Métis Aboriginal rights is found in subsequent legislation, such as the federal Dominion Lands Act, 1879, which referred in section 125(e) to Indian title and its extinguishment by grants to Métis people living outside Manitoba on 15 July 1870.

The most recent and conclusive evidence that Aboriginal rights can be exercised by Métis peoples is section 35(2) of the Constitution Act, 1982, which explicitly includes the Métis among the Aboriginal peoples whose existing Aboriginal rights are recognized and affirmed by section 35(1). The constitution of Canada, of which that provision is part, is the supreme law of Canada (as stated in section 52(1) of the same act). Stronger legal confirmation than that would be difficult to imagine.

As to the relationship of Métis to First Nation and Inuit Aboriginal rights, there appear to be two fundamentally different views. The first traces Métis rights to the ancient rights of the peoples from whom Métis peoples derive their Aboriginal ancestry. From that point of view, these rights are older than Métis peoples themselves. The other view is that Métis Aboriginal rights were not derived from those of the ancestral Aboriginal nations but sprang into existence when the Métis themselves were born as a distinct people.[27]

The first approach is more consistent with the meaning of the word Aboriginal: from the beginning. It is also supported by some of the historical evidence referred to above, such as the linkage of Métis to Indian title in the Manitoba Act, 1870; the Dominion Lands Act; and the revelation in the documents concerning the early western treaties that Métis people who chose to do so were permitted (and presumably considered entitled) to associate themselves with and exercise the rights of Indian peoples.

The other point of view — that an entirely distinct Aboriginal people came into being as a result of contact between the Indigenous population and Europeans and subsequent

socio-economic developments — also finds strong support in history. It is unquestionable, for example, that a unique way of life was forged by Métis people of the North American plains and by the mixed-ancestry communities of Labrador. Morris's book recognized the fact for the prairie Métis and suggested that those Métis who chose to live the distinctive life associated with that culture should not be brought under the treaties. This second approach would not do violence to the dictionary meaning of Aboriginal either, since the word could be read to mean 'from the beginning of significant European settlement'.

Which view is more valid probably depends upon context. For cultural and political purposes, such as the design of arrangements appropriate to the present and future needs and aspirations of Métis people, the second approach seems better suited. New peoples emerged from Aboriginal-European contact and the development of distinctive communities and folk-ways. That fact cannot be ignored by Canadians today or by those who are concerned about the shape of Métis life of tomorrow. For legal purposes, however, the first approach seems more likely to apply. The very notion of Aboriginal rights, in a legal sense, has to do with entitlements carried over from a pre-existing legal order into a newly established legal system. By the time the Métis communities came into being as cohesive socio-cultural entities, a European-derived legal and governmental system (albeit rudimentary in some regions) had been in place for some time. It seems unlikely that any Canadian courts would recognize, in addition to the Aboriginal rights possessed by First Nations citizens, an entirely distinct second order of Aboriginal rights held by new social entities that did not exist when the European-based order first asserted jurisdiction.

It is important to stress, however, that the fact that Métis Aboriginal rights spring from the same source as First Nation Aboriginal rights does not mean they are subordinate to those rights. Some people view the relationship as one of subordination. It is sometimes said, for example, that treaties negotiated by Indian representatives without collective Métis participation can extinguish Métis Aboriginal rights. This appears to be a mistaken view. It is worth noting how similar this superior-subordinate model is to both the colonial process by which Great Britain dealt with Canadian affairs at one time and the paternalistic manner in which the government of Canada handled all Aboriginal matters until recently.

Colonialism has ended in British-Canadian relations; both countries are now independent members of the world community with equal footing under international law. Colonial attitudes are also disappearing, if slowly and grudgingly, from the relationship between the government of Canada and Aboriginal peoples. It is difficult to understand why anyone would consider a paternalistic model appropriate for dealing with Métis Aboriginal rights in the 1990s. It seems clear, at any rate, that the law does not subordinate Métis rights to First Nation or Inuit rights. Basic constitutional principles, as currently understood and applied in Canada and the rest of the democratic world, simply leave no room for doubt that Métis Aboriginal rights are independent from and equal in status to those of other Aboriginal peoples.

The most authoritative basis for that conclusion is section 35 of the Constitution Act 1982, the first two subsections of which state:

Recognition of Existing Aboriginal and Treaty Rights

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

Definition of "Aboriginal Peoples of Canada"

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

The plural word "peoples" is especially important since it shows that Aboriginal and treaty rights apply to multiple Aboriginal collectivities rather than to a single Aboriginal universe.[28] The fact that the Métis are explicitly included among those peoples establishes conclusively that Métis Aboriginal and treaty rights are autonomous rights.

The inclusion of Métis people in the constitutionally recognized category of Aboriginal peoples also has major implications under international law. Articles 1 and 2 of the United Nations International Covenant on Economic, Social and Cultural Rights state:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[29]

The draft International Declaration on the Rights of Indigenous Peoples, which has been under discussion in the international community since the early 1980s, makes it clear that this right of self-determination has special significance for the Aboriginal peoples of the world:

Article 3. Indigenous peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
Article 8. Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such; Article 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands…which they have traditionally owned or otherwise occupied or used…. Article 27. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or

used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.[30]

Perhaps the most fundamental feature of Aboriginal peoples' status under the Canadian constitution and the right that they and all other peoples of the world are accorded by international law is the autonomy of each people. The international instruments speak of self-determination, and the Aboriginal rights recognized and affirmed by section 35 of the Constitution Act, 1982 include, as pointed out in *Partners in Confederation*, the inherent right of self-government. The idea that Métis Aboriginal rights are in some way subordinate to First Nation or Inuit Aboriginal rights, or dependent upon First Nation or Inuit leadership for their definition or implementation, is incompatible with the rights of self-determination and self-government that Métis people share equally with all other Aboriginal peoples.

Further evidence, both historical and current, of the independence of Métis Aboriginal rights can be found in sources as diverse as Alexander Morris's book about the early western Indian treaties and Métis involvement in the process and substance of the ill-fated Charlottetown Accord.[31]

How did the erroneous view that Métis rights are subordinate arise? There were probably several causes. One source of error appears to lie in the misapplication of an otherwise valid proposition concerning the legal basis of Aboriginal rights. That proposition is the previously mentioned principle that Aboriginal rights depend on "proof of possession of a territory by an organized society at the time of the Crown's assertion of sovereignty". Some observers appear to think that because a distinct Métis culture did not emerge until after the British and French Crowns had asserted sovereignty in North America, Métis title is not pre-existing and therefore not Aboriginal and is subject to Aboriginal title.

What this conclusion overlooks is that the Aboriginal ancestors of the Métis people were in possession of the land before European assertions of sovereignty and that they exercised that possession as members of organized societies. While it is true that the organized societies (or nations or peoples) existing before European-Aboriginal contact did not include the distinct collectivities we now know as the Métis peoples, they did include numerous other distinct groups whose composition, organization, culture and interrelations were in constant flux over time. New Aboriginal nations and alliances formed as old ones disintegrated, and mixed ancestry was common long before any Europeans arrived. The formation of new Aboriginal communities composed of Aboriginal persons with European ancestry was no different as a socio-political phenomenon from group reformulations that had been occurring since the dawn of human society in North America:

The rise of ‘peoples’, or the development of a collective political consciousness, ought to be recognized as a dynamic process not subject to ‘cut-off’ dates to conform to the preferences of other political societies.[32]

The idea that Aboriginal rights can be claimed only by groups that were organized as Aboriginal nations before European contact may have been strengthened by the misconception that Aboriginal title to land is equivalent to the European concept of exclusive ownership or possession. If that were true, it might follow that newly formed peoples like the Métis could not have claims concerning land already in the exclusive possession of other Aboriginal peoples. However, in most of the areas where Métis peoples evolved, land and resources were shared by all Aboriginal peoples inhabiting the particular area.[33] The Cree, the Sioux and other Aboriginal peoples all simultaneously exercised the right to exploit the resources of the northwestern plains of North America before Europeans arrived, for example. There appears to be no reason why the exercise of the same rights after contact by the new Aboriginal people who chose to call themselves Métis should be treated differently.

A third possible basis for the mistaken view that Métis rights are subordinate to First Nation rights is the use of the term Indian title in the Manitoba Act, 1870 and the Dominion Lands Act, 1879. Both enactments stated that the distribution of land or scrip to Métis persons was aimed “towards the extinguishment of the Indian title to the lands” [emphasis added]. A modern reader, unaware of the way the word ‘Indian’ was used by government officials in the late nineteenth century, might think that Métis title in the west was merely a subset of Indian title.

The truth is that both Métis title and Indian title, as those terms are used today, are coequal subsets of Aboriginal title. The word Indian was used by nineteenth-century British and Canadian governmental authorities in the same way we now use Aboriginal.[34] The area west and north of Upper Canada was known officially as the Indian Territories, without differentiation among the various Aboriginal peoples who lived there.[35] By section 91(24) of the Constitution Act, 1867, the Parliament of Canada was given legislative jurisdiction over Indians, and the Supreme Court of Canada later ruled that the word includes Inuit.[36] Studies conducted for the Commission indicate that the courts will, when called upon to do so, find that Métis people are also Indians for purposes of section 91(24).[37] Because the same government officials who drafted section 91(24) also drafted the 1870 order in council that brought the vast north-central part of North America into Confederation, it is highly probable that even the reference to “Indian tribes” in that document meant Aboriginal peoples in general.

Read with a nineteenth-century vocabulary, therefore, the term Indian title in the Manitoba Act and the Dominion Lands Act means Aboriginal title, and the significance of the word towards in “towards the extinguishment of the Indian Title” becomes clear: it means that when the obligations to Métis persons imposed by the Manitoba Act and the Dominion Lands Act had been met, that portion of Aboriginal title would be void, leaving the non-Métis portion to be dealt with in other ways. Far from indicating the subordination of Métis title to Indian title, therefore, the Manitoba Act and the Dominion

Lands Act provisions show that the land entitlements of all Aboriginal peoples, including the Métis, are independent and coequal in status.

To say that the Aboriginal rights of all Aboriginal peoples are independent and coequal in status does not imply that those rights are necessarily the same for all Aboriginal peoples. Traditional practices of the Siksika (Blackfoot) differed in significant respects from those of the Cree, for example. Those differences never prevented the Siksika, Cree and Métis peoples from simultaneously exercising their Aboriginal rights in the past in the same areas of the prairies, and there is no reason why it should do so now. The theoretical possibility that some aspects of Aboriginal land use by one group might interfere with the rights of other groups seldom materialized in the case of the western Métis; neither the Métis occupation of river lots nor their harvesting of buffalo and other wildlife was seriously incompatible with the simultaneous exercise of Aboriginal rights by the other Aboriginal inhabitants of the area. Nor is there evidence of significant incompatibility between the land use practices of the eastern Métis and those of the Inuit and First Nations peoples with whom they shared the land.

It makes no sense, therefore, to suggest that Métis Aboriginal rights can be extinguished by a treaty negotiated between the Crown and representatives of other Aboriginal peoples, or that they are in any other way inferior or subordinate to the rights of other Aboriginal peoples.

Although the content of Aboriginal rights is the same, in broad outline, for Métis as for First Nations and Inuit, the details may differ considerably in important ways. Just as the Cree and Mi'kmaq peoples, though equally possessed of Aboriginal rights, manifest some of those rights differently, so Métis peoples may exercise their Aboriginal rights differently from other Aboriginal peoples. Cultural customs of some Métis groups are certainly unique, and there were significant historical differences in resource uses as well as in forms of self-government.

Some historical forms of Métis self-government, such as the organization of the buffalo hunt, were undoubtedly distinctive. And while the provisional governments created under the leadership of Louis Riel to govern the Red River Settlement from 1869 to 1870 and the Saskatchewan Métis from 1884-1885 may have been of too temporary a nature to be considered valid models for permanent Métis Aboriginal government institutions, they provided striking illustrations of the principle, acknowledged by Prime Minister Sir John A. Macdonald in 1869, that where no other governmental system operates, "it is quite open for the inhabitants to form a government, ex necessitate".[38] Although that principle applies to more than Aboriginal peoples, it strongly reinforces the Métis Aboriginal right of self-government.

Group or individual rights?

There are differing views about whether Aboriginal entitlements are group rights or individual rights. Group rights, as the term signifies, are vested in and exercisable by

groups on behalf of their individual members. Individuals have no legal means of enforcing them.

Aboriginal rights appear to have both group and individual aspects. They are undoubtedly group rights in certain important respects and probably in most respects. Land rights were not exercised individually on the prairies in Aboriginal times, at least not in the sense of individuals claiming exclusive long-term use of particular tracts of land.[39] In the case of nomadic Aboriginal peoples, land rights were collective in nature. Another long-recognized collective Aboriginal right is the legal authority of Aboriginal leaders to negotiate and enter legally binding treaties, including treaties that extinguish Aboriginal rights, on behalf of the entire membership of their nations. Sections 35(1) and 35(2) of the Constitution Act, 1982 can also be seen as underlining a group approach to rights by their references to Aboriginal peoples, since peoples are collectivities.

On the other hand, certain aspects of Aboriginal rights (such as the right to hunt and fish for subsistence) were often exercised by individuals historically and are still seen as individual. In the Sparrow case, for example, the Supreme Court of Canada permitted a First Nation individual to invoke, under the authority of section 35(1), an Aboriginal right to fish as a defence to individual prosecution for fishing by a method prohibited by federal law. Section 35(4) of the Constitution Act, 1982 states, moreover, that

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. [emphasis added]

It would appear, therefore, that Aboriginal rights are sometimes individual and sometimes collective, depending on the nature of the right in question and the circumstances in which it arises or is sought to be exercised. The link between individual and group rights seems to be that only those persons (like Mr. Sparrow) who are members of collective Aboriginal peoples have the ability to exercise individual Aboriginal rights.[40]

Extinguishment

Aboriginal legal rights remain operative only to the extent that they have not been lawfully extinguished. Three methods of legal extinguishment have been recognized in the past: voluntary surrender, legislation and constitutional amendment.[41]

*Surrender*

Aboriginal rights can be given up, although only to the Crown, only for consideration (something of value given in exchange for the surrender), and (at least where group rights are involved) only by a well-defined Aboriginal group whose leaders understand the legal significance of the situation. The surrender agreement is usually known as a treaty. Where the language of the treaty is unclear, the ambiguity is to be resolved in favour of the Aboriginal people.[42]

Much remains uncertain about extinguishment by surrender; there may be other requirements as well.[43] How thoroughly must the negotiators have understood the legal implications of the agreement? Do the benefits provided in consideration of the surrender have to be adequate, in the sense of being reasonably proportional to the value of the rights surrendered? In the case of ordinary contracts, the law does not concern itself with the adequacy of consideration, but the situation may well be different in the case of Aboriginal treaties because the Crown owes a special fiduciary responsibility to the Aboriginal peoples in question. What is the effect of a "failure of consideration", in the sense of substantial non-compliance by the government of Canada with its obligations under a treaty? Does the Crown's fiduciary obligation affect that matter as well? The answers to these and other questions are unclear.

Some things are clear. One is that treaties can result in the surrender of only the rights they deal with expressly or by unavoidable implication. Another is that treaties bind only those groups whose representatives were parties to the treaties. Both factors could affect existing Métis Aboriginal rights in important ways.

Treaties vary widely in their terms. Some deal with land rights, others do not; some deal explicitly with resource rights, others fail to do so; some touch on governance, others are silent on the subject. To determine what rights may have been surrendered by a particular treaty it is necessary to examine carefully the contents of that treaty. Thus, discovering Métis Aboriginal rights arising from Indian treaties, as for Indian rights arising from the same treaties, will depend on close document-by-document analysis.[44]

Some treaties were entered into with representatives of only some of the Aboriginal groups residing in the areas involved. The fact that excluded groups were sometimes persuaded to adhere to

existing treaties at a later date suggests that those groups would not have been legally affected unless they did so.[45] In the case of Métis people, this is an important fact, because they were scrupulously excluded from most Indian treaties unless they chose as individuals to be considered Indians for that purpose.

Little evidence exists to indicate the involvement of Métis groups in the negotiated surrender of Aboriginal rights. For the Métis of the east, the far west, and the north, in fact, there is absolutely no evidence that such negotiations ever occurred until quite recently. For the Métis Nation, there are two possible exceptions to the rule that the federal government would not make treaties with Métis groups.

The first possible exception was an instance where a Métis group unquestionably did participate in treaty negotiations but where the aftermath seems to have turned the incident into an 'exception that proves the rule'. In 1875 a 'halfbreed adhesion' to western Treaty 3 was negotiated, signed and partially implemented. It was subsequently repudiated by the federal government, however, and that government consistently thereafter denied treaty status to Métis groups, although it continued to allow Métis individuals to opt for Indian status.[46]

The other possible exception is somewhat more plausible. Manitoba's constitution, the Manitoba Act, 1870, was based largely on negotiations between representatives of the government of Canada and the residents of the Red River settlement and its provisional government. For many western Métis, the Manitoba Act constitutes a Métis treaty. Some academic commentators agree. Strong textual support for that point of view comes from section 31 of the Manitoba Act, which provided that land grants should be made to certain Métis persons" towards the extinguishment of Indian title to the lands of the Province". There are legal difficulties with the 'treaty' interpretation of the Manitoba Act, however.

One difficulty is that the Manitoba Act, at least on the face of it, does not contain all the terms agreed upon between the Red River delegation and the Canadian negotiators in 1870. There were important additional verbal promises, partially confirmed by a letter from Sir George-Étienne Cartier on behalf of Canada, to Abbé Ritchot, who headed the Red River contingent. Only if those promises could be incorporated inferentially into the text of section 31 (legally, a dubious possibility) would it be wise for the Métis to regard the Manitoba Act itself as a treaty.

Another difficulty is that the Manitoba Act derives its legal authority from the unilateral law-making powers of the parliaments of Canada and the United Kingdom and contains provisions that were never agreed to by the Red River representatives. If the Manitoba Act negotiations are to be regarded as having produced a Métis treaty, therefore, the treaty must have been a separate agreement, legally distinct from the Manitoba Act itself, comprising both some provisions of the Manitoba Act and the verbal agreements.[47]

Another obstacle to the idea of a Métis treaty is that it is doubtful that the Red River negotiators represented the Métis population exclusively. They appear to have been nominated, on behalf of the general populace of Red River, by a settlement-wide committee known as the Convention of Forty, as well as by the provisional government headed by Louis Riel (and even the provisional government had a small non-Métis component). The negotiators chosen to represent Red River were Abbé Ritchot, Judge John Black and Alfred Scott, a Winnipeg hotel keeper. None was Métis, and they were not even uniform in their Métis sympathies. It is true that Ritchot, the primary Red River negotiator, gave constant voice to Métis concerns and that the legislative assembly of the provisional government, which was predominantly Métis in its composition, ratified the act after being told by Ritchot about the accompanying verbal assurances.[48] Perhaps it is possible to consider the Red River negotiators as having had a dual mandate: to negotiate a land settlement for the Métis and to arrange provincehood on behalf of all residents of the area.

Politically speaking, it is certainly legitimate to refer to the Manitoba Act and attendant verbal promises as a Métis treaty, and no one can justifiably object when the Métis who trace their origins to the Red River Valley treat it as such in negotiations concerning their aspirations for the future. Legally, however, the situation is far from clear.

But ultimately it does not matter, from a legal perspective, whether the Manitoba Act provisions constitute a treaty. Aboriginal rights were extinguishable, according to common law, by legislative enactment or by constitutional amendment as well as by treaty. The provisions of section 31 of the Manitoba Act were part of a legislative enactment having constitutional force. The extinguishment implications are therefore the same legally, whether or not the act was a treaty. (Treaties can be sources of Métis rights as well as instruments of extinguishment. Later in this appendix, we discuss the possibility that the Manitoba Act and related promises could be considered a treaty for the meaning of the guarantee contained in section 35 of the Constitution Act, 1982.)

More important than whether the Manitoba Act extinguishment provision was part of a treaty or a statute is whether, and to what extent, it resulted in the legal extinguishment of Métis Aboriginal rights in Manitoba. Subsumed in that question are several difficult legal puzzles. Was the vague phrase 'towards the extinguishment' sufficiently explicit to effect extinguishment in law? If so, was the extinguishment conditional upon full and fair distribution of the associated land grants to their intended recipients? Who were the intended recipients? If the intended recipients did not include all Manitoba Métis, did the Aboriginal title of the excluded group survive? To the extent that the Aboriginal title of Manitoba Métis was extinguished, how were other aspects of their Aboriginal rights, such as the inherent right of self-government, affected? These matters are addressed in Appendix 5C.

*Legislation*

Until 1982, when section 35 was enacted to give constitutional recognition to existing Aboriginal rights, such rights could be extinguished by simple legislative enactment. The Sparrow case made it clear, however, that extinguishment by legislation had to be unmistakable in intent and that mere statutory regulation did not equate to extinguishment. The body competent to extinguish by statute is the Parliament of Canada, to which section 91(24) of the Constitution Act, 1867 assigned authority to make laws concerning "Indians, and Lands reserved for the Indians". (This assumes, in the context of Métis rights, that section 91(24) applies to Métis people as well as to "Indians".) The Indian Act is the principal federal statute, but by no means the only one, that has encroached on Aboriginal autonomy over the years. Powers of self-government exercised initially by Aboriginal communities on their own authority were eventually modified and controlled by statute; many other Aboriginal entitlements, such as the right to hunt and fish, were legislatively restricted in a variety of ways. Although legislative extinguishment of Aboriginal rights has not been possible since 1982, Parliament remains capable, according to the Sparrow decision, of a limited degree of regulation of those rights. To qualify for application under the Sparrow principles, however, legislative regulation must now meet a very stringent test.[49] The Indian Act does not apply to Métis people unless they are registered as Indians, but certain other federal legislation impinging on Aboriginal rights does affect them.

A number of provincial enactments have also encroached on Aboriginal rights. Although it is doubtful that the provincial legislatures have the constitutional jurisdiction to do so

on their own authority, Parliament has delegated much authority to them by section 88 of the Indian Act, which subjects Indian people to provincial laws of general application. Section 88 is not applicable to Métis persons, however, since the Indian Act restricts its application to persons who are registered or entitled to be registered as Indians under the act.

An attempt to extinguish the Aboriginal title of the Métis of Manitoba was made in the Manitoba Act, 1870. Since that act had constitutional authority, its extinguishment provisions are examined in the next section. With respect to the Aboriginal title of western Métis outside the tiny original 'postage stamp' province of Manitoba, a key enactment was the Dominion Lands Act, 1879 and subsequent amendments, which offered scrip, redeemable for Crown lands, in return for extinguishment of Indian title. Although a large quantity of prairie land was eventually distributed through that scrip system, almost none of it ended up in Métis hands, most scrip having been bought for ready cash by land speculators and redeemed by them or by people who purchased it from them. The process by which that came about is well illustrated in Frank Tough and Leah Dorion's study of Métis entitlements in the regions of western Treaties 5 and 10 and is examined more fully in Appendices 5B and 5C.[50] No attempt appears ever to have been made to extinguish Métis title by legislation outside the areas covered by the Manitoba Act and the Dominion Lands Act. The extent to which resource use rights and other Métis Aboriginal rights may have been extinguished is touched on later in this appendix.

*Constitutional amendment*

Since 17 April 1982, when proclamation of section 35 constitutionalized all unextinguished Aboriginal rights, Parliament has not had the power to extinguish Aboriginal rights by ordinary legislation. Aboriginal rights can now be extinguished only by surrender or by constitutional amendment.

The only constitutional provision purporting to extinguish Aboriginal rights is section 31 of the Manitoba Act, 1870 (a federal statute confirmed and given constitutional status by the Constitution Act, 1871):[51]

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted [Crown] lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

Implementation of the Manitoba Act was subject to considerable subsequent legislation, both federal and provincial, enacted with a view to clarifying, modifying and

supplementing section 31 and other provisions of the Manitoba Act. The constitutional validity of some of that supplementary legislation is questionable and is the subject of litigation now before the courts. Administration of the Manitoba Act, so far as Métis people were concerned, has been the subject of intense controversy ever since 1870. The manner in which the Manitoba Act promises were carried out is examined in Appendix 5C.

*Conclusion*

The critical question remaining is what, if anything, was extinguished? The overall impact of the various attempts to extinguish Métis Aboriginal rights in the west is difficult to assess accurately, partly because the facts are not, and probably never will be, fully known, and partly because the law of extinguishment remains unclear in several crucial respects. A few observations, however, can be made with reasonable confidence.

Most explicit measures to extinguish Métis Aboriginal rights addressed only the Aboriginal title to land, leaving other Aboriginal rights, such as cultural and governmental rights, largely undisturbed. Section 31 of the Manitoba Act, for example, refers only to extinguishment of the Indian title to the lands in the province. This is not to say that other Aboriginal rights could not be extinguished by legislation, but the Supreme Court of Canada in Sparrow placed severe limits on Parliament's power to do that. The extent of remaining Métis Aboriginal resource-use rights depends on the answers to at least two controversial legal questions, examined later in this appendix: Are they distinct from title rights? and To what extent has legislation on the subject expressed an unequivocal intention to extinguish them?

Some Métis groups were never party to either treaties or legislation purporting to extinguish Aboriginal title to land. Where such groups possess sufficient cohesiveness and distinctiveness to be considered peoples, they would seem to retain Aboriginal title to the lands they historically possessed as a group. Identifying such groups and determining the degree of distinctiveness and cohesiveness required to qualify them as bearers of group rights will not be easy, of course, but some, such as the Métis Nation and perhaps the Labrador Métis, are easy to identify.

Where legislation (Manitoba Act and Dominion Lands Act) purported to extinguish Métis Aboriginal title in return for grants of land, large-scale irregularities (ranging from fraud and unconstitutional alteration of rights to negligence and breach of fiduciary duty) have been documented. These irregularities resulted in very little of the compensatory land grants ending up in Métis hands. This failure of consideration, if true, may well have nullified the extinguishment. The law of extinguishment is not clear enough on this question to permit a reliable conclusion until a high level court has ruled on it, but the question is currently before the courts.

Where Aboriginal rights were effectively extinguished for a group as a whole by some treaty or legislative provision, the fact that certain individual members of the group did not participate in the group decision or did not share in the compensatory benefits would

probably not have nullified the extinguishment, although it might give those individuals or their successors a right to personal relief. Aboriginal title being a group right, it can be extinguished only by group action. If an otherwise valid extinguishment instrument created individual rights in return for extinguishment, those individual rights are probably enforceable individually, but non-compliance in a few specific cases would not affect the general efficacy of the extinguishment. Whether this was the case for the Manitoba Act and the Dominion Lands Act will depend on whether the courts find that the large-scale failure of consideration that is alleged to have occurred in those situations had the legal effect of nullifying the extinguishment process altogether.

While it is not possible to reach definitive conclusions about all of the aspects of the extinguishment of Métis Aboriginal rights in advance of judicial rulings on certain questions, it seems clear that some of those rights — perhaps most of them — have never been extinguished. Aboriginal rights, therefore, constitute a major source of Métis legal rights.

## 1.2 The Royal Proclamation of 1763

In 1763, following the conclusion of hostilities with France, George III of England issued a Royal Proclamation concerning his newly acquired North American territories. That proclamation contained several provisions relating to Aboriginal peoples. Underlying those provisions was an acknowledgement that lands "not having been ceded to or purchased by" the Crown were reserved to "the several Nations or Tribes of Indians…as their hunting grounds". This provided powerful early evidence of the existence of Aboriginal rights in English law.

Although this Royal Proclamation applied to much of what is now eastern Canada, it did not apply directly to the homeland of the Métis Nation (which fell within the vast area known as Rupert's Land covered by the 1670 Charter of the Hudson's Bay Company), since the proclamation expressly excluded "the Territory granted to the Hudson's Bay Company".[52] It also excluded settled parts of Quebec, Newfoundland, Florida and the 13 New England colonies. Whether it applied to what is now British Columbia is a matter of doubt, the Supreme Court of Canada having divided inconclusively on the issue in Calder.

These exclusions from the 1763 proclamation were not fatal to Aboriginal rights, however; the Supreme Court has made it clear on more than one occasion that Aboriginal rights never depended on the Royal Proclamation for their existence; it was evidentiary only.[53]

In any case, the omission of Hudson's Bay Company lands, which was the most serious exclusion affecting Métis people, was offset in part by an imperial order in council, dated 23 June 1870, that transferred those lands to Canada in accordance with section 146 of the Constitution Act, 1867, subject to an obligation to respect Aboriginal interests that was similar to that contained in the 1763 proclamation. The 1870 order in council is examined in Appendix 5C.

## 1.3 The Crown's Fiduciary and Other Obligations

A strong case can be made in support of the proposition that Canadian governments owe a legal duty of care to the Aboriginal peoples of Canada, including Métis people.[54]

This duty of care is a consequence of the fact that Aboriginal peoples, including Métis, hold Aboriginal rights. It is a legal axiom that rights and obligations are correlative. Thus, it would be meaningless, in a legal sense, to assert that someone had a right unless someone else had an obligation to do something that would permit that right to be realized or to refrain from doing anything that would prevent its realization. If I have a legal right to be paid by you, you must have a corresponding obligation to pay me; if you have the right to express yourself freely, governments must have a corresponding obligation to refrain from acting in ways that would suppress or interfere with your free expression. Section 35(1) of the Constitution Act, 1982 recognizes and affirms existing Aboriginal rights. Since rights and obligations are correlative, section 35(1) must recognize and affirm an implicit obligation on someone's part to refrain from suppressing those rights and perhaps even to contribute positively to their realization. An obligation on whose part? Since constitutional responsibilities have been held to be exclusively governmental in nature, the obligation must lie with governments.[55]

Compelling authority for concluding that such an obligation exists is provided by the Guerin decision.[56] In that case, the Supreme Court of Canada held that the Crown was legally liable for damages to an Indian band for mismanaging the leasing of certain band lands to a golf club. The court found that the nature of Aboriginal title in land and the fact that it can be surrendered only to the Crown, coupled with the surrender provisions of the Indian Act, created a unique fiduciary relationship between the Crown and Indian peoples concerning surrendered Indian lands. That fiduciary relationship imposes trust-like responsibilities on the Crown, requiring it to act with the utmost good faith and care in the interests of the Indian people affected by its actions.

While the principle determined in the Guerin case was stated to apply to surrendered Indian lands, it seems to have broader application. Some of the conduct for which the Crown was held liable in that case occurred before the land in question was surrendered by the band. In any event, the Supreme Court of Canada subsequently stated the principle in much broader terms in Sparrow, a decision that dealt with legislative restrictions on the Aboriginal right to fish:

In our opinion, Guerin, together with R. v. Taylor and Williams (1981), 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (C.A.), ground a general guiding principle for section 35(1). That is, the government has the responsibility to act in a fiduciary capacity in respect to Aboriginal peoples. The relationship is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.[57]

Not only does this more recent articulation of the fiduciary duty appear to extend beyond Indian lands, surrendered or otherwise, but the court's use of the term Aboriginal peoples

suggests that the duty is not restricted to Indian peoples. If it applies to Inuit and Métis people as well, the fact that the duty was found in Guerin to be based partially on the terms of the Indian Act, which does not encompass those groups, may lessen its significance. The Supreme Court seemed to be indicating in Sparrow that the federal government's fiduciary responsibility for Aboriginal peoples is rooted, independently of the Indian Act, in the historical relationship of the Crown to all those peoples.

While that historical relationship was originally with the British Crown, it was transferred to Canadian authorities in 1867 (and later dates for areas subsequently added to Canada).[58] Because section 91(24) of the Constitution Act, 1867 confers on Parliament jurisdiction over "Indians, and Lands reserved for the Indians", it is the Crown expressed through Canada (the federal rather than provincial order of government) upon which this responsibility now primarily falls. However, there may also be matters within provincial jurisdiction for which, because of their impact on Aboriginal peoples, provincial governments have fiduciary responsibilities.[59]

Does the fiduciary obligation apply to Métis peoples? It appears that it does. It will be recalled, first, that the Supreme Court of Canada was careful in Sparrow to describe it as a duty owed to Aboriginal peoples, not just to Indian people, and the court did this with full knowledge that section 35(2) now defines Aboriginal peoples to include Métis. Moreover, it seems clear that although section 91(24), enacted in 1867, refers expressly only to Indians, that term embraces all Aboriginal peoples, including the Métis.

In Re Eskimos the Supreme Court, in determining that 'Eskimos' (Inuit) were 'Indians' under section 91(24) of the Constitution Act, 1867, stated that the decision was based upon how Eskimos were viewed at or around the time of Confederation. What is the evidence regarding use of the term Indian in relation to the Métis at or around the time of Confederation?

There is considerable evidence and legal scholarship to suggest that in 1867 the population of mixed Aboriginal and European ancestry was included under the broad generic term Indians in section 91(24) of the Constitution Act, 1867.[60] There are also interpretations of the evidence and legal argument that assert that the Métis were not considered Indians at the time of Canada's union.[61] The author of Canada's leading treatise on constitutional law has stated, however, that most of the evidence and argument favours the view that the Métis are Indians under section 91(24).[62] The Manitoba Aboriginal Justice Inquiry concluded in 1991 that "Métis people…fall within the constitutional definition of 'Indians' for the purposes of section 91(24)…and fall within primary federal jurisdiction".[63] Two research studies conducted for the Commission reached the same conclusion.[64] These conclusions have considerable though not unanimous support from Métis representatives. Some Métis people are offended to be characterized as 'Indians' because, in their view, the term undermines the distinct nature of Métis peoples. Some Inuit have similar concerns.

The key to resolving this difference of opinion appears to lie in the fact that legal terminology does not always correspond with everyday language. In a social sense, of

course, it would be wrong to refer to Inuit or Métis persons as Indians. For the special legal purpose of determining who falls under the law-making jurisdiction and responsibility of Parliament, however, only the word Indian is available to us.[65] It was placed in the constitution in 1867 at a time when its drafters thought it a satisfactory general equivalent of Aboriginal. That being so, courts will probably have no difficulty concluding that Métis are Indians within the special legal meaning that word bears in section 91(24) of the Constitution Act, 1867 while also acknowledging that Métis are socially, historically and culturally distinct from all other Aboriginal peoples.

This does not necessarily deprive provincial legislatures of constitutional jurisdiction to legislate on aspects of Métis rights that have provincial dimensions. It means, however, that Parliament has paramount jurisdiction and that the fiduciary obligation owed to Aboriginal persons, including Métis people, is owed primarily by the government of Canada.

What does that fiduciary obligation entail? It certainly means that governments must do nothing that would interfere with the free exercise of existing Aboriginal rights. That negative obligation clearly applies to both federal and provincial governments. There is good reason to believe that at least the federal government, in which section 91(24) vests authority over Aboriginal matters, also has a positive obligation to take steps necessary to the full realization of existing Aboriginal rights.

Courts have traditionally been more reluctant to impose positive duties (requiring someone to undertake a particular action) than negative ones (prohibiting someone from doing something). Positive obligations have always been imposed in some circumstances, however, and since fiduciary responsibilities have long been recognized to be positive as well as negative in some circumstances,[66] the fiduciary relationship referred to in Guerin and Sparrow would seem to include a duty to take positive measures. This conclusion is consistent with the nature of constitutional obligations generally. Although many constitutional obligations of governments are predominantly negative (not to prevent exercise of the fundamental freedoms of religion, expression, association and so on), some are unquestionably positive (to hold elections at least every five years, to convene Parliament and provincial legislatures at least once a year, to provide public support for minority denominational schools and minority language schools). There is no reason, therefore, to interpret the federal government's constitutional obligations concerning Aboriginal rights as entirely negative. At least one writer has concluded that the fiduciary duty to Aboriginal peoples involves both positive and negative obligations.[67] It is instructive to note that the Supreme Court of Canada has recently indicated that it is willing, in appropriate circumstances, to award positive remedies, such as reading into statutes unconstitutionally excluded legislative benefits rather than just striking down the deficient legislation.[68]

Although the full implications of the federal government's positive obligations respecting existing Aboriginal rights cannot be catalogued, it is possible to speculate about some of them. Where there are Métis groups with whom treaties or claim settlements were never completed, it seems clear that the government of Canada is obliged to initiate

negotiations. If the exclusion of Métis groups from treaty or settlement negotiations in which they should have been included has resulted in harm to Métis interests, the government of Canada is probably obliged by its fiduciary duty to compensate the Métis groups for such harm. If the realization of a particular Métis Aboriginal right requires legislative enactment, Parliament may well have an obligation to enact suitable legislation.[69] While the courts may not be empowered to order Parliament to fulfil a legislative obligation, they clearly have the power to order compliance with the constitution by the Crown and its subordinates. Even Parliament may be subject to declaratory rulings of the courts, which can have a powerful political impact.

## 1.4 Treaty Rights

Treaties are major sources of rights for First Nations. This is not true, generally speaking, for Métis peoples because few treaties have been made with them as such. As explained earlier, some consider that section 31 of the Manitoba Act, 1870 and attendant verbal promises constitute a treaty, but courts would probably not accept that interpretation.

This means that the Manitoba Act, 1870 should be looked upon as a constitutional not a contractual guarantee, which could remove the possibility of direct enforcement by the courts of the verbal promises made to Abbé Ritchot by George-Étienne Cartier and John A. Macdonald. Nevertheless, the written constitutional guarantee remains capable of judicial enforcement and of interpretation in light of the verbal promises.

## 1.5 Section 35 of the Constitution Act, 1982

Section 35(1) of the Constitution Act, 1982 recognizes and affirms the existing Aboriginal rights of the Aboriginal peoples of Canada. Although it is only existing rights to which section 35 applies, it is nevertheless appropriate to treat that provision as an independent source of rights in at least two respects. First, it constitutionalized the 1982 status quo, so far as Aboriginal and treaty rights are concerned, with the consequence that those rights can no longer be extinguished by ordinary legislation (or, arguably, even by consent unless the consent is confirmed by constitutional amendment). Second, by declaring, in section 35(2), that Aboriginal peoples include Métis for purposes of section 35(1), it has confirmed their independent existence and removed any possibility that their rights can be perceived as somehow subordinate to those of other Aboriginal peoples.

By focusing on the rights of peoples rather than individuals, section 35 emphasizes the collective side of Aboriginal and treaty rights. It will be recalled that collective rights (such as the right of self-government or of treaty negotiation) are enforceable only by the group and cannot be exercised by individuals on their own behalf. Although the Sparrow decision shows that section 35 has significance for individuals, it is likely that the only persons who can rely on section 35 as individuals are members of the Aboriginal people whose particular rights are in question. Even though he was of Aboriginal ancestry, Mr. Sparrow would probably not have been allowed to exercise Aboriginal fishing rights if he could not show that he was currently accepted as a member of his people (see our

discussion on group and individual rights earlier in this appendix). The processes and criteria of group membership are, therefore, of great importance.

How is membership in an Aboriginal people determined?[70] Although various tests have been employed over the years, for various purposes in various jurisdictions (degrees of consanguinity, bureaucratic discretion, family status, individual choice and so on), the method that has won widest acceptance in recent years is a modified self-determination approach, consisting of three elements:

• some ancestral family connection (not necessarily genetic) with the particular Aboriginal people;

• self-identification of the individual with the particular Aboriginal people; and

• community acceptance of the individual by the particular Aboriginal people.

It is sometimes suggested that a fourth element is also required: a rational connection, consisting of sufficient objectively determinable points of contact between the individual and the particular Aboriginal people, including residence, past and present family connections, cultural ties, language, religion and so on, to ensure that the association is genuine and justified. The more common view, however, appears to be that while these criteria can be used to determine whether an individual should be accepted as a member, they are not primary components of the test.

It is important when considering section 35 to know something about the meaning of the word 'peoples'.[71] Unfortunately, no authoritative definition of its meaning in section 35 exists. Definitions from other sources, such as international law, can be helpful, bearing in mind that the meaning of any word is strongly influenced by the context in which it is used. Catherine Bell has suggested that a definition developed by the International Commission of Jurists might be applicable. In that definition, 'people' has the following elements:

• a common history;

• racial or ethnic ties;

• cultural or linguistic ties;

• religious or ideological ties;

• a common territory or geographical location;

• a common economic base; and

• a sufficient number of people.[72]

This definition is clearly not adequate for all purposes, since, for example, the elements of common geography and a common economy would be hard to apply to the Jewish people outside Israel or to some of the widely dispersed Aboriginal peoples of Canada, including many Métis. It nevertheless conveys a good general impression of the factors commonly considered to constitute a people, including the key requirement that members exhibit a sense of community and societal cohesiveness, a feature that other groups with common characteristics (women, for example, or people with disabilities) do not possess. This cohesiveness need not involve formal governmental structures. The International Court of Justice advised in 1975 that it is possible for a people (in that case, nomadic inhabitants of the Sahara desert) to exist for the purpose of exercising the right of self-determination under international law without possessing the governmental machinery of a nation-state.[73]

A definition of Indigenous peoples in an early draft of a proposed International Covenant on the Rights of Indigenous Nations was as follows:

The term Indigenous People refers to a people (a) who lived in a territory before the entry of a colonizing population, which colonizing population has created a new state or states to include the territory, and (b) who continue to live as a people in a territory and who do not control the national government of the state or states within which they live.

For Métis in Canada, the reference in this proposal to having lived in a territory before the arrival of the colonizing population is problematic, since Métis could not, by definition, have existed before contact. That difficulty is of little significance to Canadian constitutional law, however, since section 35(2) of the Constitution Act, 1982, which supersedes all international understandings so far as the law of Canada is concerned, explicitly includes the Métis among the Aboriginal peoples to whom section 35(1) applies.

It is significant that section 35 employs the plural word ‘peoples’ rather than the singular ‘people’. The beneficiaries of section 35 are clearly considered to be grouped in several distinctive Aboriginal peoples, rather than to constitute a single Aboriginal people. What is not entirely clear from the bare text of section 35 is whether the phrase “Indian, Inuit and Métis peoples of Canada” was intended to refer to three peoples or whether some or all of the three categories encompass multiple peoples. Bell argues persuasively for the latter approach. Applying international standards to the Canadian situation, with due allowance for contextual differences, there can be little doubt that many distinct First Nations exist in Canada, from the Mi’kmaq Nation of the east to the diverse cultures of the prairies and west coast. Although fewer distinct peoples exist among Inuit and Métis than among First Nations, the cultural differences among various groups of Inuit and Métis mark them as multiple peoples too.

Some Aboriginal groups are referred to by themselves and others as nations. What is the relationship between a people and a nation? It appears that the terms have synonymous meanings. Webster’s International Dictionary of the English Language explains that the

word nation is derived from a Latin verb meaning to be born and defines it in part as follows:

A people connected by supposed ties of blood generally manifested by community of language, religion and customs, and by a sense of common interest and interrelation; thus the Jews and the Gypsies are often called nations….

Popularly, any group of people having like institutions and customs and a sense of social homogeneity and mutual interest. Most nations are formed of agglomerations of tribes or peoples either of a common ethnic stock or of different stocks fused by long intercourse. A single language or closely related dialects, a common religion, a common tradition and history, and a common sense of right and wrong, and a more or less compact territory, are typically characteristic; but one or more of these elements may be lacking and yet leave a group that from its community of interest and desire to lead a common life is called a nation.

It seems reasonable to conclude that the meaning of section 35 would not have been altered significantly if its drafters had substituted the word nations for the word peoples.[74]

Can there be peoples within peoples? It seems so. The Hasidim, for example, can be considered a people within the much broader people comprising world Jewry. In the Canadian Aboriginal setting, the Cree people constitute a nation as, probably, do certain smaller Cree groupings. Whether subdivisions as small as bands can aptly be described as peoples is uncertain. Some bands do refer to themselves as nations, but that usage is not universally accepted. It is clear, however, that separate bands, even if not peoples in themselves, may exercise, as collectivities, at least some elements of their peoples' rights. The Supreme Court of Canada in R. v. Sparrow attributed Aboriginal rights to the Musqueam band, which had only 649 members. While the band was not described as a people or nation, its distinctive existence since pre-contact times was noted and relied upon as a basis for the decision that it is entitled to exercise Aboriginal rights. Such smaller peoples do not necessarily have the same characteristics and capacities as the larger ones, however, and a group may well be a people for one purpose but not for another. While the Musqueam band might be a people for the purpose of exercising Aboriginal fishing rights or the inherent right of self-government within the context of the Canadian state, it is highly unlikely that it would be considered by international law to be a people entitled to the degree of self-determination required to establish a separate nation-state.[75]

Problems could arise from overlapping concepts of nationhood or peopledom in situations where the larger and smaller groups both seek to exercise control over some aspect of nationhood. Since a common approach to problem solving among Aboriginal peoples tends to be 'bottom up' rather than 'top down', the general principle applicable to resolving such jurisdictional difficulties ought to be that the smaller nation has exclusive priority over local questions (such as membership in the smaller nation or the exercise of hunting rights within its territory), and the larger one is paramount with respect to issues that extend beyond local significance. Thus, while a Cree band may decide whom to

admit or exclude from its own membership, it cannot decide who is or is not a member of another band, a Cree, an Indian or an Aboriginal person.

How do these observations about peoples and nations apply to Métis people?

It is clear, in the first place, that the historical Métis Nation of the west is a people within the meaning of section 35 and, accordingly, is a nation with which other orders of government in Canada must treat when dealing with the collective Aboriginal and treaty rights of those who form part of the nation. The Métis of Labrador appear at least close to being in an equivalent position. Other cohesive collectivities of Aboriginal people who refer to themselves as Métis may possibly be peoples and nations as well.

It remains a matter of dispute whether the Labrador Métis and other eastern Métis can be considered Métis peoples within the strict meaning of that expression in section 35. It probably does not matter, however, for legal purposes since they are unquestionably Aboriginal peoples, and section 35 applies to all Aboriginal peoples, regardless of whether they can be classified as Indian, Inuit, or Métis.[76]

## 1.6 The Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights

The rights discussed thus far have, for the most part, been specific to Aboriginal peoples. Certain other general rights may also have peculiar application to Canadians of Métis inheritance. This is true of section 32 of the Manitoba Act, which, although applicable to all Red River residents in possession of settled lots before 1870, was especially important to the Métis since they were by far the most numerous of the pre-provincehood settlers. It may also be true of some rights conferred on all Canadians by the Canadian Charter of Rights and Freedoms, which came into force on the same day that Aboriginal rights were recognized and affirmed in section 35 of the Constitution Act, 1982. Similar rights, although lacking constitutional status, were created by the Canadian Bill of Rights of 1960.

Even if it is erroneous to believe that cultural and governmental rights constitute a part of the unextinguished Aboriginal inheritance of Métis people, alternative constitutional protection for those same rights might be found in the fundamental rights provision of the Charter. Section 2 guarantees freedom of conscience and religion, freedom of expression and freedom of association. The right to associate freely with others empowers Métis people to form groups, without governmental interference, composed of any others with whom they have an affinity. And, of course, freedom of religion and expression, read in light of the injunction in section 27 to interpret the Charter in a manner that preserves and enhances Canada's multicultural heritage, ensures that those who gather together will be able to manifest their cultures as they choose. An argument even could be made, perhaps, to the effect that freedom of expression includes the right to organize and participate in distinctive forms of self-government.

The guarantee of equality rights under section 15(1) of the Charter may be especially significant. That provision prohibits discrimination based on race or national or ethnic origin, among other factors. It is well established that this includes systemic discrimination — inequality that results unintentionally from the manner in which government conducts public affairs.[77] A powerful case can be made for the position that the Métis of Canada, both as individuals and as groups, have been the victims of systemic discrimination over the years and still are. Special federal government programs and grants designed to benefit persons with Indian status (and sometimes Inuit) have often been closed to Métis persons. Métis persons denied access to a program of financial assistance for post-secondary education that is available to other Aboriginal persons may well be able to persuade a court that they have been discriminated against unconstitutionally. Those who wished to defend the exclusion would have to establish that the situation and needs of Métis persons are so unlike those of other Aboriginal people in relevant respects that they cannot reasonably be expected to be treated comparably. It seems unlikely that a convincing case could be made. The comparison would have to be based on functional criteria, not on such arbitrary factors as whether a person's great-grandparents opted for or against taking Métis scrip.

## 1.7 International Law

Many international instruments to which Canada is a party enshrine basic human rights applicable to the situation of the Métis peoples of Canada. These include United Nations guarantees in a number of documents.[78] The Universal Declaration of Human Rights states, in part, that

7. All are equal before the law and are entitled without any discrimination to equal protection of the law….

8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The International Covenant on Economic, Social and Cultural Rights declares that

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The International Covenant on Civil and Political Rights guarantees the right of self-determination, identical to Article 1 of the cultural covenant. It further guarantees a right of resource use, identical to Article 2 of the cultural covenant. Finally, it states:

27. In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

In addition to these fully adopted international instruments, an International Declaration on the Rights of Indigenous Peoples is in the process of being enacted. Significant articles of that draft declaration read as follows:[79]

Article 3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

Article 8. Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such;

Article 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands…which they have traditionally owned or otherwise occupied or used….

Article 27. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.[80] [emphasis added]

These international norms do not constitute a direct part of Canadian law. International conventions are binding on Canada as a country in international law, but they impose no direct legal obligations enforceable against Canadians in Canadian courts.[81] We do not, therefore, consider them further in the legal context. They do provide strong support, however, for the moral and political arguments covered later.

## 1.8 Remedial Rights

The ancient legal maxim, ubi ius ibi remedium — where there is a right, there is a remedy — reminds us that the law provides many types of remedy for the breach of legal wrongs, including an inherent power of superior courts, in some situations, to fashion novel remedies where existing ones are inadequate to redress particular violations of rights.[82] To those who work with the law, the maxim may sometimes seem misleading, since they know how many procedural impediments clutter the path between right and remedy and that legal remedies are not always ideal, even when available. It is nevertheless significant that the law starts from the assumption that every wrong has a remedy unless the contrary can be proved.

Questions concerning the legal redress of Métis rights can be divided into two categories: types of legal relief available, and time limitations.

Types of legal relief available

*Self-help*

To the extent that Aboriginal rights have not been extinguished, some of them can be exercisable without the help of legal institutions. A right to hunt, for instance, can be realized simply by hunting. A right to engage in Aboriginal religious practices can be fulfilled by just doing it, as can a right of self-government, to the extent that it causes no detriment to those who choose not to subject themselves to the government in question.

Whether this is true for all unextinguished Aboriginal rights is not certain. Could an Aboriginal group whose Aboriginal title to land remains intact physically exclude others from the land in question? Some would say they could, as long as they observed generally applicable laws concerning the use of force. Others would argue that this is not legally possible, because the concept of Aboriginal title often involves a sharing of the resource rather than an exclusive use of it by any one group. Self-help must be used with great caution.

*Administrative adjudication*

If it were considered advisable to engage in individualized adjudication of Métis claims for past denials of rights, a special claims tribunal with expertise in Métis matters and procedures tailor-made for such matters would probably be the most effective agency. Past inquiries into Métis affairs[83] have not succeeded in resolving these issues, however. If this were a desirable way to proceed, legislative authorization by Parliament would be required. No suitable tribunal exists, and much thought would be required to devise one. The government of Canada has refused to accept a Métis claims commission in the past.[84]

*Litigation*

It would be possible for those who contend that rights of their Métis predecessors were violated to seek judicial redress. Some such litigation is already in progress. Other actions against the Crown for breach of fiduciary duty are foreseeable. This approach would not always provide entirely satisfactory solutions, however. Courts do not generally have the specialized knowledge of and expertise in Aboriginal matters required to deal well with these kinds of disputes, and their procedures are not well suited to the task. Problems of proof are difficult. As will be seen, some serious time limitation problems arise in the context of litigation. The impact of even successful litigation is sporadic, because it usually focuses on particular narrow fact situations rather than on broad questions of social policy.

The easiest type of Métis rights litigation, from the procedural and evidentiary points of view, would be a challenge or challenges to the constitutional validity of questionable

federal and provincial legislation or actions concerning those rights. The cases now before the courts include claims of that type. A claim or claims under the Charter, based, for example, on allegations of systemic discrimination, would be relatively simple to launch. Such litigation could seek a variety of appropriate specific remedies or a simple declaration of rights upon which subsequent political remedies might be based. Section 24(1) of the Charter offers a particularly wide range of remedial options, including, where appropriate, mandatory and structural injunctions. Constitutional references can be, and occasionally are, raised in criminal proceedings, such as in prosecutions of Métis persons for alleged violations of hunting and fishing laws.

Even in constitutional litigation, however, judicial solutions are far from ideal. The process is slow, unpredictable and often prohibitively expensive. The questions addressed depend on who happens to have commenced legal proceedings and for what purpose, and decisions are often all-or-nothing matters, lacking the balance and sophistication permitted by negotiated solutions.

Time limitations

The passage of time can sometimes provide a defence to even the strongest of legal claims. Section 32(1) of the federal Crown Liability Act stipulates that causes of action against the federal Crown within particular provinces are subject to the time limits imposed by the laws of the province in question.[85] In Manitoba, for example, the Limitation of Actions Act imposes the following time limits, among others:

• actions grounded on fraudulent misrepresentation, within six years from the discovery of the fraud;

• accident, mistake, or other equitable ground of relief, six years from the discovery of the cause of action;

• recovery of land, 10 years after the right accrued;

• any other action, within six years after the cause of action arose.

Section 53 states:

At the determination of the period limited by this Act to any person for taking proceedings to recover any land…the right and title of that person to the land is extinguished.[86]

The Public Officers Act of Manitoba provides, in section 21(1), that actions against public officials must be brought within two years next after the act, neglect or default complained of, or, in case of continuance of injury or damage, within two years next after the ceasing thereof.[87]

By placing time limits on actions against public officers and on actions for fraud, breach of fiduciary duty (which relates to equitable relief), recovery of land, and any other action, these laws erect major obstacles to the ability of courts to remedy violations of Métis rights that are alleged to have occurred well over a century ago.

There are circumstances in which these time limits can sometimes be extended or avoided. Few of those circumstances would be applicable to litigation concerning Métis rights, however. Section 14 of the Manitoba Limitations of Actions Act permits actions to be brought late if the plaintiff was not aware of "all material facts of a decisive character upon which the action is based", but that provision ceases to be operative 30 years after the cause of action first arose (section 14(4)). Another extension device unlikely to be applicable is section 5, which delays the beginning of the limitation period for any cause of action concealed by the fraud of the person relying on the limitation period until the time when the fraud was first known or discovered. Even assuming that recently discovered fraud of that kind could be established, the perpetrator of the fraud would be long-since dead. Only if such fraud were practised on behalf of the Crown or some other existing corporate entity, therefore, could section 5 be invoked today, and the likelihood of those circumstances being established are not great.

There are, nevertheless, a few time extension possibilities that could be applied to modern claims for violations of Métis rights. One is built into certain of the provisions themselves. The Manitoba time limits respecting fraud and equitable relief both refer, for example, to a period commencing from the discovery of the fraud or cause of action. Frauds or breaches of fiduciary obligation discovered within the last six years would still be actionable, therefore, regardless of when the wrongdoing originally occurred. Another and even more important possibility arises from the fact that legal wrongs of a continuing nature always remain actionable, because each new day that the wrong continues brings with it a new cause of action. It is possible that the Crown's continuing failure to meet its positive fiduciary obligations to Métis people would, if established, involve a continuing wrong of that kind.

Undoubted instances of continuing wrongdoing incapable of being legalized by limitation laws are unconstitutional legislation and unconstitutional acts or omissions by government authorities. If the Parliament of Canada and/or the legislature of Manitoba enacted statutes that violated the constitutional rights of the western Métis, litigation to establish that fact cannot ever be limited by time.[88] Continuing systemic discrimination against Métis people will always be open to Charter challenge. And constitutional defences can always be raised to criminal prosecutions relating to matters affected by Aboriginal or treaty rights.

## 2. Sources of Moral and Political Rights

## 2.1 Entitlement

Whatever their legal rights might be, the Métis people of Canada appear to have an indisputable moral and political right to immediate political action by both federal and provincial governments to deal with Métis concerns.

It is not necessary to dwell at length on the sources of that entitlement, since they are obvious:

• the internationally recognized right of all distinct peoples or nations, including Aboriginal peoples or nations, to appropriate levels of political self-determination;

• the fact, previously explained, that many Canadians of Métis ancestry are members of Métis peoples or nations; and

• the fact, touched upon earlier and elaborated in succeeding appendices, that both Métis individuals and Métis people collectively have suffered severe injustices at the hands of Canadian governments, federal and provincial, in the past, with continuing detrimental consequences.

However strong or weak the legal arguments may be (and there is good reason to consider many of them strong), it would be difficult for any fair-minded Canadian aware of the facts to deny that Métis people have a moral entitlement to reparation for a century and a quarter of abuse and neglect.

In the international community, where opinion is shaped by the various UN instruments quoted earlier, it can be expected that observers aware of the situation of Métis people in Canada would strongly condemn inaction or weak action by Canadian authorities to ensure just and prompt redress for the many wrongs they have suffered.

## 2.2 Inadequacy of Legal Solutions

In foregoing discussion we examined a wide variety of legal rights to which Métis in all parts of Canada appear to be entitled. Many of these rights seem likely to be confirmed by the courts if their realization is left to litigation. Perhaps, therefore, Métis people could expect eventually to receive substantial redress through the courts.

Litigation seldom offers the best solutions, however, especially for complex socio-political problems. Leaving the determination of Métis claims entirely to the courts would be unsatisfactory for many reasons. The law is far from certain about several of the legal rights discussed. Some of the injustices complained about over the years may not have involved illegal behaviour in the first place or may have been rendered unactionable by the passage of time. The severe standards of proof demanded by litigation present major hurdles; what seems obvious to a historian or sociologist may not seem so to a judge. The off-the-shelf remedies available to the courts may be less suitable and less flexible than remedies that could be consensually or legislatively tailor-made for the particular problem. Litigation is not well suited to ensuring consultation with all affected parties and interests. It is sporadic and yields only hit-or-miss remedies, rather than

solutions that are integrated with whatever else is going on in the community. It is maddeningly slow and inordinately costly, and litigation contributes to combative mind-sets that are inimical to rational, co-operative problem solving. In situations as complicated as the rectification of historical wrongs to whole segments of society, the courts can at best provide guidance about the legal rights involved and incentive for remedial action. At worst, they can fragment such remedial action and delay its implementation.

Political solutions are therefore to be preferred; however, the political process is difficult to harness. Demands on the time and attention of politicians, especially those in power, are incessant. To persuade politicians to deal effectively with a problem as massive and intractable as the quest for justice by Métis people requires convincing them that the problem is urgent, that it is capable of being solved on acceptable terms, and that there are good political reasons for doing so. A convincing case can nevertheless be made for immediate political action.

## 2.3 Timeliness of Political Action

Why is the time finally ripe for the redress of these long-standing Métis wrongs? Several reasons could be cited, including growing public awareness of the need, the pressure of current litigation, and the inclusion of Métis people in section 35(2) of the Constitution Act, 1982. The primary reason is that Métis people are now organized politically in ways that cannot be ignored. This is most obviously true in the case of the Métis Nation, where political awareness is very high and the quality of political leadership is impressive. In eastern Canada too, however, there is a new Métis self-awareness and a growing realization in the general community that the Métis must be reckoned with. The Métis of Labrador have leadership befitting the nation they claim to be, and other Métis organizations in eastern Canada are gathering strength. This new political effectiveness has enabled the Métis to tell their story to other Canadians more compellingly than ever before, and it has empowered them to put increasing pressure on federal and provincial politicians to do something material about their complaints. It has also given them skilled leaders who are ready and able to negotiate practical forms of redress and to monitor or administer those solutions to ensure their effective implementation.

Another reason for taking advantage of the political window now open goes back to the legal issues discussed earlier. If a political solution is not arrived at soon, the courts will be left to their own devices. Several legal actions are already in progress, and litigation will increase, with an unfortunate impact on rational decision making by governments, unless something stops it soon. Nothing is likely

to stop the litigation process except agreed settlements of Métis grievances on terms more general and more sophisticated than courts can fashion.

## 2.4 The Process

Appropriate political solutions will be complex and much too situation-specific to speculate on here, but one general observation must be made: unilateral solutions, however well intentioned, will not be satisfactory. Canada's Métis peoples, especially the Métis Nation, have already had too many bad experiences with remedial measures imposed upon them by legislation and policies they had nothing to with shaping. What is needed is bilateral and multilateral negotiation between the government of Canada (in conjunction, where appropriate, with provincial, territorial and Aboriginal governments) and the Métis peoples in question.

## 3. Conclusions

### 3.1 Legal Rights

The legal rights of Métis people include the following:

• Aboriginal rights are recognized and affirmed by section 35 of the Constitution Act, 1982. They include title to land, resource exploitation, cultural rights and self-government. Although only existing rights are so protected, it seems clear that the Aboriginal rights of Métis people have never been fully extinguished. The precise extent to which they may have been extinguished will require careful situation-by-situation analysis. In many cases, however, the continued existence of Métis Aboriginal rights is obvious. Where they do continue to exist, Métis Aboriginal rights are independent of the rights of other Aboriginal peoples.

• The fiduciary duty of the Crown applies to the Métis people. The degree to which Canadian governments have met this obligation calls for detailed scrutiny.

• The Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights add important guarantees of cultural expression and equality to the totality of Métis legal rights. The equality guarantee is especially significant given the benefits available to other Aboriginal peoples that have been denied Métis peoples.

• Remedial rights are available to provide appropriate legal redress for the violation of legal rights, although some procedural obstacles such as time limits may be difficult to overcome in some circumstances.

Other legal rights, specific to the Métis Nation, are discussed in Appendices 5B and 5C.

### 3.2 Moral and Political Rights

The fact that a strong case might be made for legal relief does not mean that Métis people would be wise to make litigation the primary route to restitution or that governments would be either wise or just to stand back and await the outcome of litigation. Lawsuits are slow, costly, unpredictable, piecemeal and clumsy. Negotiated political solutions to problems as complex as those of Métis rights are much to be preferred over judicial ones. One academic authority, who has expressed the view that a negotiated settlement is

"without a doubt the most satisfactory way", has also warned that "where the prevailing political will or philosophy is one that favours the interests of the state against the interests of the Aboriginal peoples, then the outcome of a negotiated settlement can be easily predicted".[89] It appears, however, that the political climate is right for a negotiated settlement. Métis people are now represented by organizations that are both determined and equipped to engage in those negotiations, and their significance and political strength grows by the day.

The government of Canada and, where appropriate, the governments of the provinces and territories are obliged, politically as well as morally, to make arrangements for such negotiations as soon as possible. The political wisdom of doing so should be obvious. As to the moral obligation, even if Métis people had no legal entitlement to redress, their moral claim to justice would be overwhelming, whether measured by the standards of international law or by the even higher domestic standards of fair play in which Canadians have always taken pride.

## Annex to Appendix 5A: Correspondence Concerning a Métis Claims Commission

Minister of Justice and Attorney General of Canada Ministre de la justice et procureur général du Canada

April 24, 1981

Mr. Harry Daniels
President
Native Council of Canada
170 Laurier Avenue West
Suite 500
Ottawa, Ontario
K1P 5V5

Dear Mr. Daniels:

Please find enclosed the Government's response to your land claim submission, as prepared by our legal advisors. You will note that it is their considered opinion that the claim as submitted does not support a valid claim in law nor would it justify the grant of funds to research the issue further.

Notwithstanding this opinion, let me state again that the Government is very concerned about the social and economic conditions experienced by many Metis and Non-Status Indians and that those problems will remain a focus of the Government's attention.

However, because of this position of our legal advisors, it is our view that the problems of MNSI are not to be resolved by land claim compensation and that we must now search for other means to address the unique problems of this group of native Canadians.

Yours sincerely,

Jean Chrétien
Ottawa, Canada

December 22, 1981

Mr. Jim Sinclair
Constitutional Spokesman
Native Council of Canada
170 Laurier Avenue West
5th Floor
Ottawa, Ontario
K1P 5V5

Dear Mr. Sinclair:

Thank you for your letters of November 24 and 25, 1981, in which you raised again the question of native land claims. I will try to clarify the government's position on this issue as it relates to the Constitutional process.

On the basis of the material which the native groups submitted, my officials concluded that there was no valid land claim in law. As I have told you in recent meetings, if you have other material which would cast further light on this matter and perhaps lead the government to revise its opinion, I will be very pleased to receive it and will ask my officials to review their findings.

I must hasten to point out, however, that it is the wording of the Constitutional resolution and not the opinion of government lawyers which will determine the protection afforded your people in the new Constitution. A legal opinion of the Minister of Justice does not have the force of law, and if the courts eventually maintain that your "existing rights" include land title, the government will be obliged to live with that decision.

I have, furthermore, stressed to you that the land title does not exhaust the list of aboriginal rights which you may claim. It is therefore mistaken to say that to deny the validity of land claims is to deny you any and all rights.

On the question of a consent clause and the extension of section 91(24) to cover Métis and non-status Indians, I would certainly be prepared to deal with these issues at the post-patriation First Ministers' Conference in which native leaders will participate. However, I cannot at present commit the federal government to supporting these propositions. Our final stance on these issues will be negotiated around the conference table.

On the establishment of a political process for the discussion of issues of concern to the Native Council of Canada, we already have the mechanism of joint Cabinet-NCC meetings. My officials are currently trying, in consultation with the NCC, to set up such a

meeting for late January. I have also agreed to convey to the Prime Minister your desire to meet with him, although his heavy schedule will make it difficult to arrange a major meeting in the very near future. If you have a proposal to present for establishing a further mechanism for government/native consultation, I will study that proposal with great interest, but first I need to have the details before me.

Finally, I will be writing to you separately to discuss the extension of funding of national native organizations in preparation for your participation in the First Ministers' Conference.

Yours sincerely,

Jean Chrétien

## Notes:

***** This appendix was prepared for the Commission by Dale Gibson, Belzberg Fellow of Constitutional Studies, University of Alberta.

**1** See Kent McNeil, "Aboriginal Nations and Québec's Boundaries: Canada Couldn't Give What It Didn't Have", in Negotiating With A Sovereign Quebec, ed. Daniel Drache and Roberto Perin (Toronto: James Lorimer & Company, 1992), p. 116.

**2** Canada Jurisdiction Act, 1803 (U.K.), 43 Geo. III, c. 138.

**3** See Dale Gibson and Kristin Lercher, "Reliance on Unconstitutional Laws: The Saving Doctrines and Other Protections" (1986) 15 Man. L.J. 305.

**4** See Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar. Rev., p. 727.

**5** Some may ask why so much emphasis should be given to the notion of Aboriginal rights — an alien notion imposed on Aboriginal peoples by an alien legal system and involving a form of what some consider racist arrogation that autonomous Indigenous peoples should not have to tolerate. Would it not be more appropriate, they ask, to approach Métis rights on a nation-to-nation basis? The answer is that while this may well be true from a moral and political standpoint, the present discussion concerns the norms of that 'alien' (that is, Canadian) legal system. Moral and political considerations are discussed later. A legal analysis is useful at this point because knowing what relief, if any, the legal system is capable of delivering will help us to determine what new political measures may be needed.

**6** Guerin v. R., [1984] 2 S.C.R. 335 at 376.

**7** See Slattery "Understanding Aboriginal Rights" (cited in note 4); Peter W. Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992), p. 679. The principal Supreme Court rulings on the subject are Calder v. B.C. (A.G.), [1973] S.C.R. 313, 34 D.L.R. (3d) 145; Guerin v. R., [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321; R. v. Sparrow, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385; and Roberts v. Canada, [1989] 1 S.C.R. 322 at 340.

**8** RCAP, *Partners in Confederation*: Aboriginal Peoples, Self-Government, and the Constitution (Ottawa: 1993).

**9** Sparrow (cited in note 7) at 1103.

**10** See James Young Blood Henderson, "Land in British Legal Thought", research study prepared for the Royal Commission on Aboriginal Peoples [RCAP] (1994). For information about research studies prepared for RCAP, see A Note About Sources at the beginning of this volume.

**11** The living tree approach was first articulated by Lord Sankey, on behalf of the judicial committee of the Privy Council, in Edwards v. Canada (A.G.), [1930] A.C. 124 at 136, and has since been applied by the courts many times.

**12** The word 'existing' was discussed by the Supreme Court of Canada in Sparrow (cited in note 7) at 1091.

**13** Baker Lake (Hamlet of) v. Minister of Indian Affairs and Northern Development (1979), 107 D.L.R. (3d) 513 (F.C.T.D.) at 542 and 543. At a later point (at 546), Judge Mahoney refers to "time immemorial", which in English common law is sometimes taken to refer to the year 1189, the beginning of the reign of Richard. In this case, he stopped the clock at the time of early British assertions of authority over North America: the period from 1610 to 1670.

**14** The Supreme Court's approval occurred in Sparrow (cited in note 7) at 1093. For Slattery's view, see "Understanding Aboriginal Rights" (cited in note 4) at 759.

**15** Slattery, p. 758. As to the references to previous and new claimants, it should be borne in mind that Slattery acknowledges the possibility of Aboriginal groups sharing possession of land.

**16** Slattery, p. 758. While Slattery offers scant supporting authority for these views, until the Supreme Court of Canada has spoken on the issue, every analyst is forced to speculate on the basis of general principle. Slattery's approach seems to be well attuned to general principles of Aboriginal law.

**17** Catherine Bell, "Who Are the Metis People in Section 35(2)?" (1991) 29 Alta. L. Rev. 351 p. 369. See also Dale Gibson, "The Beneficiaries of Section 35" (forthcoming).

**18** Baker Lake (cited in note 13) at 543.

**19** Baker Lake, at 544.

**20** Slattery, "Understanding Aboriginal Rights" (cited in note 4), p. 746.

**21** See Jennifer S.H. Brown, Strangers in Blood: Fur Trade Company Families in Indian Country (Vancouver: University of British Columbia Press, 1980); and Sylvia Van Kirk, "Many Tender Ties": Women in Fur-Trade Society in Western Canada, 1670-1870 (Winnipeg: Watson & Dwyer, n.d.).

**22** Alexander Morris, The Treaties of Canada With the Indians of Manitoba and the North-West Territories (Toronto: Belfords, Clarke & Co., 1880), p. 294.

**23** For a discussion of the complex labelling process to which the Métis, along with all other Aboriginal peoples, have been subjected over time, see Paul L.A.H. Chartrand, "'Terms of Division': Problems of 'Outside Naming' for Aboriginal People in Canada", Journal of Indigenous Studies 2/2 (Summer 1991), p. 1.

**24** Morris, Treaties of Canada (cited in note 22) p. 41.

**25** Morris, Treaties of Canada, p. 69.

**26** Constitution Act, 1871 (U.K.) 34-35 Vict., c. 28; Manitoba Act, 1870 (U.K.), 33 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 8.

**27** See Catherine Bell, "Metis Aboriginal Title", LL.M. thesis, University of British Columbia, 1989.

**28** See Gibson, "Beneficiaries of Section 35" (cited in note 17).

**29** United Nations Resolutions, Series I: Resolutions Adopted by the General Assembly, vol. XI, 1966-1968, comp. and ed. Dusan J. Djonovich (Dobbs Ferry, New York: Oceana Publications, 1975), p. 165.

**30** United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th session, UN Document E/CN.4/Sub2./1993/29 (1993), pp. 52-57. The provisions quoted are qualified by other articles in the draft declaration that restrict the rights of peoples to establish new nation states. The articles cited demonstrate an emphasis in the draft declaration on self-reliance that is incompatible with the notion of subordinate rights.

**31** Morris, Treaties of Canada (cited in note 22), p. 294-295.

**32** Paul L.A.H. Chartrand, "Self-Determination Without a Discrete Territorial Base?", in Self-Determination: International Perspectives, ed. D. Turp.

**33** Delgamuukw v. R. (B.C.) (1993), 104 D.L.R. (4th) 470; 30 B.C.C.A. 1; Slattery, "Understanding Aboriginal Rights" (cited in note 4), pp. 741, 758; David G. Mandelbaum, The Plains Cree: An Ethnographic, Historical and Comparative Study (Regina: Canadian Plains Research Centre, University of Regina, 1979), pp. 7-46; and Irene M. Spry, "The Tragedy of the Loss of the Commons in Western Canada", in As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies, Ian A.L. Getty and Antoine S. Lussier, eds. (Vancouver: University of British Columbia Press, 1983).

**34** See Chartrand, "Terms of Division" (cited in note 23), p. 5.

**35** Canada Jurisdiction Act, 1803 (U.K.), 43 Geo. III, c. 138.

**36** In the matter of a reference as to whether the term "Indians" in head 24 of section 91 of the British North America Act, 1867, includes Eskimo inhabitants of the province of Quebec, [1939] S.C.R. 104, commonly referred to as Re Eskimos.

**37** See Bradford W. Morse and John Giokas, "Do the Métis Fall Within Section 91(24) of the Constitution Act, 1867?", and Don S. McMahon, "The Métis and 91(24): Is Inclusion the Issue?", in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: RCAP, 1995); see also Hogg, Constitutional Law of Canada (cited in note 7), p. 666; and Clem Chartier, "'Indian': An Analysis of the Term as Used in section 91(24) of the BNA Act" (1978-1979) 43 Sask. L. Rev. 37. Also see the discussion of this issue in the section on the Crown's fiduciary and other obligations later in this appendix. For contrary views, see Bryan Schwartz, First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal: Institute for Research on Public Policy, 1986), p. 245; and Thomas E. Flanagan, "The History of Metis Aboriginal Rights: Politics, Principle, and Policy" (1990) 5 Can. J. L. & Soc. 71. In 1991, the Aboriginal Justice Inquiry of Manitoba concluded that Métis do fall within section 94(24). See Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People (Winnipeg: Queen's Printer, 1991).

**38** Letter from Sir John A. Macdonald to William McDougall, MP, 27 November 1869, quoted in George F.G. Stanley, Louis Riel (Toronto: Ryerson Press, 1963), p. 76.

**39** Whether the customary use of permanent river lots by individual members of the Métis Nation from relatively early times could be considered an 'Aboriginal' practice goes back to the question, just discussed, about whether Métis rights are necessarily referable to the Aboriginal rights of other Aboriginal peoples.

**40** See Bell, "Who Are the Metis People", pp. 353-381, and Gibson, "Beneficiaries of Section 35" (both cited in note 17).

**41** See RCAP, Treaty Making in the Spirit of Coexistence: An Alternative to Extinguishment (Ottawa: Supply and Services, 1995).

**42** Slattery, "Understanding Aboriginal Rights" (cited in note 4), p. 763, as to informed consent, and pp. 761-762, note 131, as to ambiguity.

**43** See RCAP, Treaty Making (cited in note 41).

**44** It is not just the documents themselves that require study, of course. Equally important are the oral understandings that accompanied the documents, such as the promises made to the Manitoba Métis at the time of the Manitoba Act, 1870. See Appendix 5B.

**45** See Morris, Treaties of Canada (cited in note 22), p. 329; and Frank Tough and Leah Dorion, "'The claims of the Half-breeds---have been finally closed': A Study of Treaty Ten and Treaty Five Adhesion Scrip", research study prepared for RCAP (1993).

**46** Martin F. Dunn, "All My Relations: The Other Métis", research study prepared for RCAP (1994).

**47** See Paul L.A.H. Chartrand, Manitoba's Métis Settlement Scheme of 1870 (Saskatoon: Native Law Centre, University of Saskatchewan, 1991), p. 127.

**48** See Philippe R. Mailhot, "Ritchot's Resistance: Abbé No'l Joseph Ritchot and the Creation and Transformation of Manitoba", PH.D. dissertation, University of Manitoba, 1986.

**49** Sparrow (cited in note 7) at 1111.

**50** Tough and Dorion, "'The claims of the Half-breeds'" (cited in note 45).

**51** Constitution Act, 1871 and Manitoba Act, 1870 (cited in note 26).

**52** But see Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763, the Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company" (1973-1974) 38 Sask. L. Rev. 123.

**53** See, for example, Guerin (cited in note 7) at 376.

**54** See Slattery "Understanding Aboriginal Rights" (cited in note 4), p. 753; and Canadian Bar Association, UFOs — Unidentified Fiduciary Obligations (Winnipeg: Canadian Bar Association, 1994).

**55** R.w.D.S.U. v. Dolphin Delivery (1986), 33 D.L.R. (4th) 174 (S.C.C.).

**56** Guerin (cited in note 7).

**57** Sparrow (cited in note 7) at 408.

**58** R. v. Secretary of State (U.K.), [1982] 2 All E.R. 118 (C.A.).

**59** Slattery, "Understanding Aboriginal Rights" (cited in note 4), p. 755; and Gord Hannon, "Benefits and Burdens: A Number of Questions About Fiduciary Duties of the Provincial Crown to Aboriginal People", in Canadian Bar Association, UFOs (cited in note 54).

**60** See authors and publications cited in note 37.

**61** See, for example, Schwartz, First Principles, Second Thoughts, and Flanagan, "History of Metis Aboriginal Rights" (both cited in note 37).

**62** Hogg, Constitutional Law of Canada (cited in note 7).

**63** Report of the Aboriginal Justice Inquiry of Manitoba (cited in note 37).

**64** Morse and Giokas, "Do the Métis fall Within Section 91(24)", and McMahon, "The Métis and 91(24)" (both cited in note 37).

**65** It has sometimes been suggested that Parliament's jurisdiction over "peace, order and good government" provides an alternative basis for federal jurisdiction over Métis. For an assessment of the argument see Larry Chartrand, "The Métis Settlements Accord: A Modern Treaty", paper presented at an Indigenous Bar Association conference (unpublished, 1992). It seems an unnecessary complication, though, to treat federal jurisdiction over those Aboriginal persons who are Métis on a different basis than federal jurisdiction over those who are Inuit.

**66** They include, for example, a long-established duty to make full disclosure of facts known to be of significance to the beneficiaries' interests: Mark Vincent Ellis, Fiduciary Duties in Canada (Don Mills, Ontario: Richard De Boo, 1993), pp. 1-5.

**67** Peter W. Hutchins, "Benefits and Burdens: When Do Fiduciary Obligations Arise?", in Canadian Bar Association, UFOs (cited in note 54).

**68** See Schacter v. R. (1992), 93 D.L.R. (4th) 1 (S.C.C.).

**69** The Supreme Court of Canada recognized in the Sparrow decision (cited in note 7), that section 35 incorporates fiduciary obligation and that it imposes responsibilities with respect to legislative regulations affecting Aboriginal rights.

**70** See Coopers & Lybrand, "Identification Process for Indigenous Peoples in Selected Countries and Options for the Registration of Métis Peoples in Canada", research study prepared for RCAP (1993); and Queensland, State of v. Wyvill (1989), 90 A.L.R. 611 at 616.

**71** See Chartrand, "Terms of Division" (cited in note 23) for a review of authorities on the meaning of 'peoples'. See also Bell's study, "Who Are the Metis People" (cited in note 17).

**72** Bell, "Who Are the Metis People". A somewhat similar list of characteristics is found in Greco-Bulgarian Communities, a 1930 decision of the permanent Court of International Justice, quoted in L.C. Green, "Canada's Indians: Federal Policy, International and Constitutional Law" (1970) 4 Ottawa L. Rev. 101. See also Ian Brownlie, "The Rights of Peoples in Modern International Law", in The Rights of Peoples, ed. J. Crawford, p. 1; and Russel L. Barsh, "Indigenous Peoples and the Right to Self-Determination in International Law", in B. Hocking, ed. International Law and Aboriginal Human Rights (Sydney: The Law Book Company, 1988), p. 68.

**73** Western Sahara, Advisory Opinion, [1975] I.C.J. Rep. 12 at 31-33. A similar question, put to the United Nations Human Rights Committee on behalf of the Lubicon Lake Indians of Alberta by Chief Bernard Ominayak, was put aside without decision because the Committee ruled that Chief Ominayak could not, as an individual, bring a question to it. United Nations document CCPR/C/38/D167/1984, 26 March 1990.

**74** A contrary view is expressed in a research study prepared for RCAP by Harold Bhérer, "Canadian Governments and Aboriginal Peoples: Plan for A Project Under the Aboriginal Governance Research Program" (1993).

**75** In "Terms of Division" (cited in note 23), p. 10, Chartrand points out that the government of Canada has taken the position internationally that the use of the word 'peoples' in section 35 does not signify peoples who, under international law, would be entitled to the right of self-determination: Canada, Privy Council Office, Observer Delegation of Canada, UN Working Group on Indigenous Populations, Fifth Session, August 1987, Geneva. "Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations", p. 2. Chartrand counters this view in "Self-Determination" (cited in note 32).

**76** See Gibson, "The Beneficiaries of Section 35" (cited in note 17).

**77** See Dale Gibson, The Law of the Charter: Equality Rights (Toronto: Carswell, 1990), p. 119 and following.

**78** The International Bill of Human Rights (New York: United Nations, 1978) contains the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights; and Optional Protocol.

**79** UN Document E/CN.4/Sub2/1993/29 (1993) (cited in note 30).

**80** It must be acknowledged that other provisions of the draft declaration place important restrictions on the right of self-determination; it is not an unqualified right in all circumstances. The provisions quoted do provide powerful evidence, however, that cultural, social, economic and political autonomy of distinct peoples is a principle that has won wide acceptance across the world.

**81** Hogg, Constitutional Law (cited in note 7), p. 285 and following.

**82** Ashby v. White (1702), 2 Ld. Raym. 938; 3 Ld. Raym. 320.

**83** See Chartrand, Manitoba's Métis Settlement Scheme (cited in note 47), pp. 6-8 and p. 1 concerning inquiries in 1881 and 1943, for example.

**84** See Chartrand, Manitoba's Métis Settlement Scheme, p. 147, for a discussion of a possible claims commission approach. The government of Canada has rejected such an approach in the past. See the annex this appendix.

**85** Crown Liability Act, R.S.C. 1985, c. C-50.

**86** Limitation of Actions Act, R.S.M. 1987, c. L. 150, ss. 2(1) (j) (k) (n), 25.

**87** The Public Officers Act, R.S.M. 1987, c. P230.

**88** Amax Potash v. Saskatchewan, [1977] 2 S.C.R. 576 (S.C.C.).

**89** Chartrand, Manitoba's Métis Settlement Scheme (cited in note 47), p. 145.