

THE NATURE OF METIS CLAIMS

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ABSTRACT/RESUME

The author reviews the nature of aboriginal title in Canada with specific reference to Metis claims today. He then notes the significance of aboriginal claims to Metis in cultural terms and refers to the government concept of claims as essentially political.

L'auteur présente tout d'abord une étude générale de la question des revendications des autochtones au Canada, se référant spécifiquement au cas des Métis à l'époque présente. Il passe ensuite à l'examen de l'importance culturelle de ces revendications parmi les Métis, et constate la nature essentiellement politique de la conception gouvernementale de toute cette question.

Although Native claims to land have been front page news for more than a decade, many people are still justifiably confused about the principles on which they are based (Gibbins and Ponting, 1976; Wilson and Morrison, 1976). One of the most misleading myths is that land claims are based on geographical origins. This belief is easy to dispel, because if it were true, it would be pointless for any Native group to file a claim since there is overwhelming evidence that their ancestors originated in Asia (Stewart, 1973). Moreover, modern studies in archaeology, ethnohistory and geography have demonstrated that Native Canadian populations were engaged in far-ranging movements and migrations not only after contact with Europeans, but before (Ray, 1974; Bishop, 1974; Willey, 1966). Under these conditions it is clear that the basis for Native claims must lie elsewhere than in origins.

A far more dangerous myth, and one which is not so easy to dispel, is that there is an overriding theory of land claims which is supported by the people who participate directly in the proceedings, namely, the judiciary, the government and Native people and their organizations. The fact is that they each have a unique set of concepts to explain the nature of claims and argue them out. The courts use legal concepts, the government political ones and Native people and their organizations cultural terms. How well they understand one another is difficult to assess, because over the years the technical language they have used to discuss claims has become increasingly complex. The purpose of this paper is to demonstrate the accuracy of this proposition with specific regard to Metis claims.

Metis Claims From a Legal Standpoint

The most important concept to emerge from legal discussions about claims is the doctrine of aboriginal rights. According to the judiciary, these rights can only be held by Native Canadians, and are vested in them by virtue of the fact that they were the sovereign inhabitants of Canada before the land was proclaimed the property of French and British monarchs (Indian Claims Commission, 1975:6). In other words, the doctrine of aboriginal rights assigns Native Canadians with exclusive legal rights which stem from their prior occupation of the land and their ability to control it. These rights are not held by other Canadians since they cannot claim prior sovereignty, and this has caused a considerable amount of friction between those who hold the rights and those who do not. On the other hand, it is important to recognize that aboriginal rights do not imply that Native Canadians are a sovereign power (ibid). They are simply subjects of the Crown who possess a special set of rights. Moreover, although the judiciary has never constructed a complete list of aboriginal rights, one which has been recognized by the courts is the right of Native people to claim title to unceded territory, or territory which the sovereign has acquired from them illegally. This is what is meant by the expression Native title.

A Native title cannot be considered an absolute one since the sovereign holds an underlying interest in the land,¹ just as the federal government does in Indian reserves today (Henderson, 1978). On the other hand, the title does

provide Native people with the right to use and occupy unceded territory, and the right to receive compensation for territory they surrender to the Crown. This fact was alluded to many years ago by Canadian jurist Mr. Justice Strong, in his Supreme Court ruling on the St. Catherine's Milling case.² Strong outlined the general meaning of a Native title in the following way:

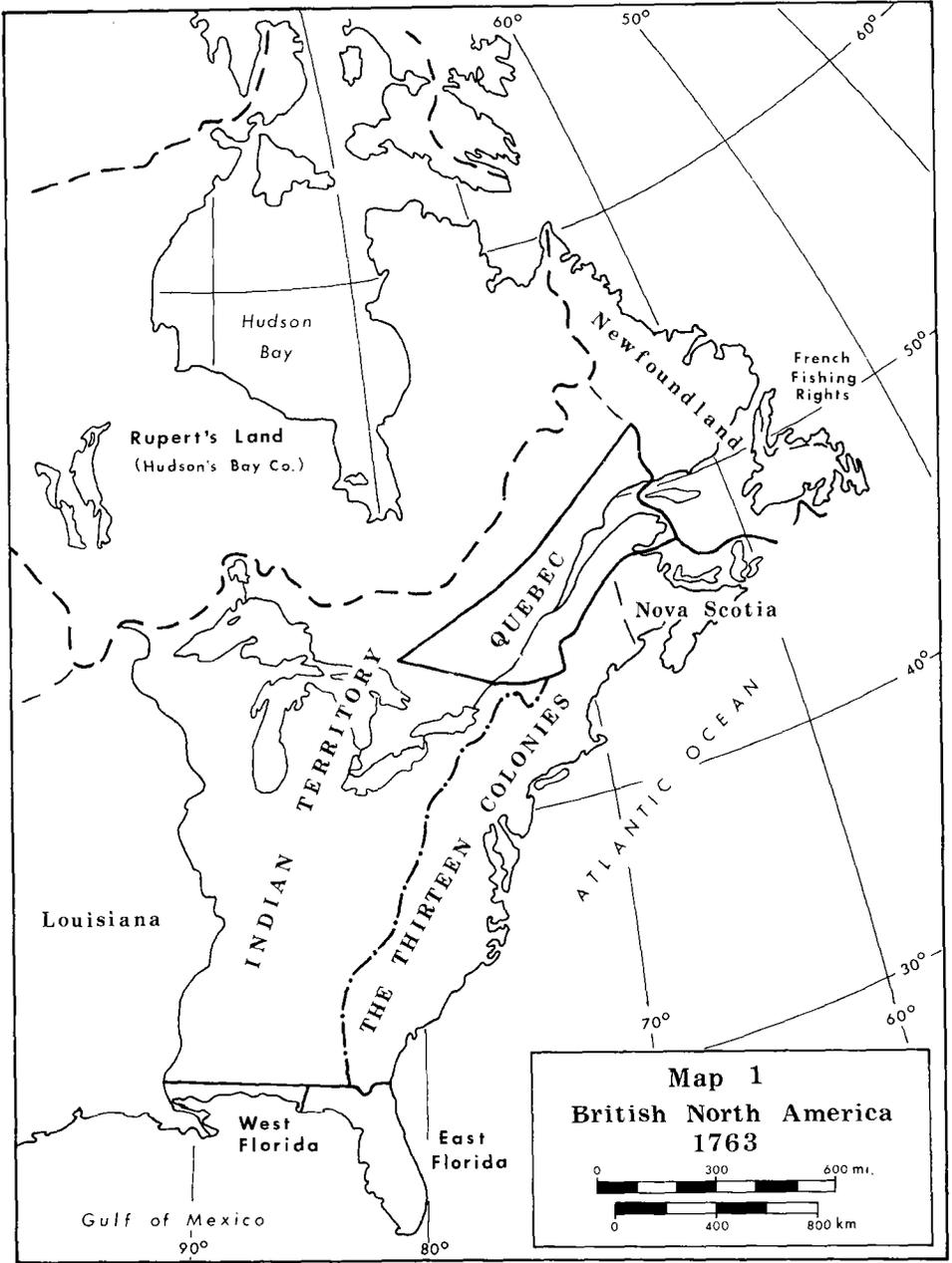
It may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsundered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands (Cumming and Mickenberg, 1972:39)

Since Strong's time the word Native has been dropped from the expression Native title, and replaced by the word aboriginal, reflecting a greater concern with origins,³ but no matter what the origin of the title one thing is clear - like all legal titles a Native or aboriginal title provides the people who hold it with a special legal interest in the land to which the title applies.

The reason the judiciary is concerned with the meaning of aboriginal title is because the Native interest in land rests on a solid legal foundation - the *Royal Proclamation of 1763*. The Proclamation was issued by King George III, to preserve the peace among the three major populations who occupied British North America at the time. One group was the British settlers who lived along the Atlantic seaboard in the Thirteen Colonies. The second was the French-speaking population who occupied the land along the Gulf of the St. Lawrence River. They had become British subjects when France surrendered most of her North American territory to Britain by the Treaty of Paris. Finally, there were the Indians, who were in control of the area west of the settlements (see Map 1).

Each group had its own vested interest. The French-speaking population wanted its linguistic and cultural rights preserved; the settlers in the Thirteen Colonies wanted to expand their economic base by acquiring land west of the Appalachian frontier; and the Indians were worried about losing additional territory to private speculators who had cheated them before. The Proclamation attempted to allay the fears of each group, although it also confirmed the authority of the Hudson's Bay Company in Rupert's Land. French-speakers were promised representative government in a newly created province called Quebec. The settlers in the Thirteen Colonies were also promised representative government, and were told more land would be in the offing, but only if it were acquired by the Crown. Finally, the Indian inhabitants of British North America, except for those in Rupert's Land, were told that their aboriginal title would be respected, and that it would only be extinguished if they approved the transaction at a public meeting with government officials.

The procedure for extinguishing the title was outlined at length in the *Royal Proclamation of 1763* and is well worth quoting because of its importance in contemporary court cases. The relevant section reads:



And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to declare and enjoin (Smith, 1975:3).

This section is certainly open to interpretation, particularly with regard to two important questions which have a bearing on Metis claims. Firstly, do the rules for extinguishing aboriginal title apply outside the region that was then known as Indian Territory, that is, in Rupert's Land where the majority of the Metis population eventually established their homes? Secondly, do the rules for extinguishing aboriginal title apply specifically to Metis or only Indians? The answers to both questions can be determined by examining past government actions and responses.

For instance, although the Proclamation makes it clear that the territory under the jurisdiction of the Hudson's Bay Company was exempt from the rules governing the extinguishment of aboriginal title, when Rupert's Land was transferred to Canada in 1869, the deed contained a proviso which placed this responsibility squarely on the shoulders of the federal government. As the deed says:

14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the [Hudson's Bay] Company shall be relieved of all responsibility in respect of them (Cumming and Mickenberg 1972:32).

That the federal government has lived up to this responsibility, and thereby affirmed the principle of aboriginal title outside as well as inside Rupert's Land, is nowhere better illustrated than in the treaties it negotiated with Indians. Indeed, treaties have been the single most important vehicle the federal govern-

ment has used to extinguish aboriginal title.

Furthermore, there are jurists who claim that even if the Proclamation is interpreted literally, aboriginal title throughout Canada still cannot be denied (ibid: 31-32). In Mr. Justice Sissons' opinion, aboriginal title would exist even if there were no Proclamation. In his words:

This proclamation has been spoken of as the "Charter of Indian Rights." Like so many great charters in English history, it does not create rights but rather affirms old rights. The Indians and Eskimos had their aboriginal rights and English law has *always* recognized these rights (ibid) (emphasis added).

In short, because it has been acknowledged repeatedly by both the government and the courts, there can be little doubt that the principle of aboriginal title is valid throughout the country.

In order to confirm that the rules for extinguishing aboriginal title apply to the Metis, only three points need be mentioned. The first is that the *Royal Proclamation of 1763* is a constitutional document, and is therefore much more closely related to the *British North America Act* than to the *Indian Act*. This means that the definition of an Indian in the *Indian Act*, which excludes the Metis, cannot be used to define the undefined Indians mentioned in the Proclamation (cf. Lysyk, 1975:515). If anything, the broad legal definitions of an Indian which were in vogue until just after Confederation would apply, and these definitions drew no distinction between Metis and Indians (Chartier, 1978). They were included in the same legal category, and under these conditions their aboriginal rights would clearly be the same, including their right to claim an interest in the land they occupied. Secondly, when the federal government made scrip available to the Metis in western Canada, it was a de facto admission that they held an aboriginal title. This was made explicit in the *Manitoba Act* of 1870, which candidly stated that the allocation of one million four hundred thousand acres to Metis children was "expedient towards the extinguishment of the Indian Title to the lands in the Province."⁴ Last, but by no means less important, is the fact that Metis were included in treaties which were specifically designed to extinguish aboriginal title. Treaty #3 is a case in point. In sum, there appears to be little doubt that the Metis do have aboriginal rights, and if it can be proven that their title to certain areas was never extinguished or was extinguished through illegal means, the matter could certainly be pursued through the courts, although here the focus would be on legal as opposed to other interpretations of claims.

Metis Claims From a Political Standpoint

The Government of Canada has identified two categories of claims it will consider - comprehensive claims and specific claims. The former are based on unfulfilled aboriginal rights; the latter on treaty violations and government mismanagement of Indian assets. As a recent publication by the Department of

Indian Affairs and Northern Development explains:

The term "comprehensive claims" is used to designate claims which are based on traditional Native use and occupancy of land. Such claims normally involve a group of bands or Native communities within a geographic area and are comprehensive in their scope including, for example, land, hunting, fishing and trapping rights and other economic and social benefits.

. . . The term "specific claims" . . . refers to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties (Department of Indian Affairs and Northern Development, 1982:7).

Of course, all claims do not reach the courts, especially specific ones. Instead, many are resolved through face to face negotiations between Native organizations and the government, which is in perfect harmony with the government's interpretation of claims. Indeed, from the standpoint of cabinet ministers and senior civil servants, claims are a political rather than a legal problem. Pierre Trudeau admitted as much in a speech he gave on August 8, 1969, in Vancouver, in which he categorically denied the existence of aboriginal rights, and proposed that treaties were contracts which could and should be renegotiated. In his words:

. . . the way we propose it, we say we won't recognize aboriginal rights. We will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn't go on forever (Cumming and Mickenberg, 1972:331).

Former Justice Minister Otto Lang made the same point much more succinctly. As he put it in 1974:

We have legal questions raised about (claims) and non-lawyers particularly love the legal questions; love to think that the caveat or the Court will decide the issue. But probably it is not so. The important questions are the political ones (emphasis supplied) (1974:14).

And today, although aboriginal rights are recognized in the constitution, the same philosophy prevails, with the Department of Indian Affairs and Northern Development candidly admitting that "it is a matter of policy that the government is willing to negotiate settlements" (Department of Indian Affairs and Northern Development, 1981:8).

The politicization of claims has placed Native Canadians in an awkward position. Since claims research is funded by the government, the Native organi-

zations who conduct the research face the problem of preparing a case against the people who support their research. Moreover, even if it is assumed that there is no government interference in claims research, once a case is prepared for negotiation Native organizations are faced with the problem of trying to strike a bargain with the sovereign, and the sovereign has the power to make unilateral decisions with binding conditions. If Indians have suffered as a result, the Metis have suffered even more.

Take the case of the James Bay Agreement. The Agreement was negotiated between the Cree and Inuit of northern Quebec and the governments of Quebec and Canada, and is the largest out-of-court settlement of a land claim in the history of Canada. The terms of the Agreement bear a striking resemblance to those contained in the 1971 land settlement reached between the Native people in Alaska and the Government of the United States, but there are also important differences. According to Harry Daniels, former President of the Native Council of Canada (NCC),⁵ one of the most outstanding differences is that while mixed-bloods were party to the negotiations in Alaska, the Metis were ignored in Quebec. He made this point in a brief the NCC presented to the Standing Committee of the Senate on Legal and Constitutional Affairs in 1977. The relevant sections of the brief read as follows:

The James Bay Agreement has been heralded by its supporters as being a unique, modern way of settling disputes over aboriginal rights and native land claims. Indeed some have said it is a model of how negotiations between native peoples and government can be carried out. Mr. John Ciacca, member of the Quebec National Assembly and special representative of former Premier Robert Bourassa in the James Bay negotiations, says in the introduction to the printed version of the Agreement that it is "an Agreement without precedent in the history of North America in relations between the State and native peoples." He also says that it has the desirable virtue of rejecting "paternalism as a policy for dealing with native peoples." His enthusiasm does not impress us.

The facts are, Mr. Chairman, that the Agreement is neither unique nor modern. It... is in fact a pale, less generous version of the one negotiated between the U.S. government and the native peoples of Alaska in 1971. The basic formula is identical:

-extinguishment forever of all aboriginal titles or claims of title in return for payment of monies without interest over a 20 year period;

-3 categories of land for use and occupancy by native peoples;

-the creation of communal corporate structures for economic and social development as well as promises of opportunities to participate in local government structures.

The Alaska Settlement, at least from the point of view of compensation, is far more generous - in exchange for 325 million

acres of land \$962,500,000, (\$2.92 per acre) compared with \$225 million in the James Bay Agreement in exchange for extinguishment of title to 262 million acres. The James Bay Agreement works out to about 86 cents per acre - that is, 14 cents less per acre than was paid by the government in the 1880's for Metis scrip lands in Manitoba.

Perhaps even more important and to the point, Mr. Chairman, (the Agreement)... extinguishes the rights of other native groups in the area who are not even co-signors, whose consent was not obtained. These are the Metis and Non-status Indians We estimate that there are several thousand such native persons. Indeed they very likely outnumber those people in the Cree and Inuit organizations who co-signed the Agreement (Daniels, 1979b: 21ff).

Daniel's argument cannot be taken lightly, for it shows just how difficult it can be for Metis people to gain political access to the sovereign when land is at stake. On the other hand, while government officials may shy away from negotiating with Metis, claims are now being prepared in the Maridmes, Quebec, Ontario, western Canada, and Northwest Territories and the Yukon (Daniels, 1979b). But even if the federal government does not make a unilateral decision to ignore Metis claims, past statements by the Prime Minister, his cabinet colleagues and the Department of Indian Affairs and Northern Development suggest that there is a strong possibility that these claims will be seen as a political problem and negotiated on a political level.

Metis Claims From a Cultural Standpoint

Finally, we come to the Native perception of claims, which is decidedly more cultural than it is political or legal. For instance, according to Joe Jack from the Council of Yukon Indians, claims are a weapon to fight against cultural genocide. In 1978, he stated that Yukon Indians

will continue to negotiate (claims) with the same degree of optimism that we have held in the past. We are still optimistic that the federal government and the territorial government will change their views and let Indian people assume their rightful position in all facets of Canadian life. We demand that the federal government and the Canadian people consider the ramifications of continuing to sacrifice Native rights for industrial development, primarily for American interests. A continuance of this approach - as we have stated in the past and as we reassert now - is cultural genocide (Keith and Wright: 1978:100).

Spokespeople for the Dene Nation have also emphasized that there is a direct

relationship between claims and the integrity of Native culture. In the words of Steve Kakfwi:

Basically our position is - you could call it a land claim, . . . (that) the Dene Nation has a history going back thousands of years. We have our own language, our own land, our own way of worship, our own economic system, our own education system, our own political systems, our own way of deciding among ourselves how we are going to live with one another, with our neighbours, and with each other individually. There has been a strong indication . . . that some people would feel a lot more comfortable if we compromised our position... (but) it is really important that people in southern Canada understand our concept of the Dene Nation. What we want is to have a relationship with the rest of Canada that respects and relates to us as a nation. And to this end we have developed a position. As a nation, supported by international law, we have the right to self-determination and the right to govern ourselves (ibid: 101).

Although not as adamant about sovereignty as the Dene Nation, other Indian organizations in the country have expressed similar views about the role of claims in strengthening Indian culture (ibid: 99-109).

As far as the Metis are concerned, they have been no less adamant in pointing out that there is a strong relationship between claims and culture. The NCC have gone to considerable pains to emphasize this relationship. In one of their publications, *A Declaration of Metis and Indian Rights*, they list four claims directly related to cultural issues. The first demands that Metis identity be appreciated for its cultural uniqueness, and "that Metis nationalism (be recognized as)... Canadian nationalism" (Native Council of Canada, 1979:1), not an aberrant form of nationalism based on cross-cultural mating. The second deals with the relationship between Metis culture and the culture of the French-speaking and English-speaking majorities in the country, and demands that the Metis be regarded "as equal partners in Confederation" (ibid). The third demand deals with the future of Metis culture, and says that the Metis "have the right to educate our children and to flourish as a distinct people with a rich cultural heritage (ibid:2). Last, the NCC demands that the Metis "have the right to educate our children in our native language, customs, beliefs, music and other art forms" (ibid).

Nor have individual Metis spokespeople been silent about the relationship between culture and claims. Duke Redbird, one of the leading Metis political figures in the country and currently President of the Ontario Metis Association, puts it this way:

Quite apart from the "reality" of aboriginal rights being recognized and satisfied by the Canadian government, the concept is the focal point of a great deal of modern Metis organizational

strategy. The rights issue is an effective standard of "kukwium" to organize the Metis around a "cause". It not only gives the movement international status in terms of Third and Fourth World development, but becomes . . . an issue, or cause, that every Metis can identify with - a cause that is greater than themselves (Redbird: 1978:59).

Conclusion

Given these varied interpretations, it is obvious that land claims - and particularly Metis claims - raise problems that are far more complex than simply deciding who should be compensated and what they should receive. From a legal standpoint claims raise questions which ultimately deal with the interpretation of constitutional documents such as the Royal *Proclamation* of 1763, the *British North America Act* and other important documents such as treaties. From a political standpoint they raise questions which deal with sovereignty, power and the relationship between Native Canadians and the rest of the country, now and in the future. Finally, from a cultural standpoint they raise questions which have to do with the future of Native identity, and the right to self-determination within the cultural mosaic of Canada. No doubt all of these issues will be raised as the process of Metis land claims evolves. In the meantime, it is worthwhile to keep in mind that unless the judiciary, the government, and Native people and their organizations become more sympathetic to each other's perceptions, there will be more conflict than compromise, more delay than resolution and more confusion than exists today.

NOTES

1. An absolute title is one "which excludes all others which are not compatible with it... (and which) cannot exist at the same time in different persons . . . or government." Black, Henry Campbell, *Black's Law Dictionary*, 4th ed., rev., St. Paul, West Publishing, 1968, 1656.
2. "*St. Catherine's Milling* involved a dispute between the Province of Ontario and the Government of Canada as to the ownership of certain lands ceded by the Saulteaux Tribe of Ojibwa Indians in an 1873 treaty with the Dominion. The Province claimed ownership of the lands by virtue of section 109 of the British North America Act. That section guarantees provincial ownership of all lands lying within the boundaries of the respective provinces, subject to any trusts or other interests in those lands. The Dominion claimed that by virtue of the Proclamation of 1763, the content of aboriginal title to lands reserved for Indians was that of fee simple. As such, the Dominion argued that it received a complete title as a result of the treaty. However, both the Supreme Court of Canada and the Privy Council held in favour of the Province. The Privy Council ruled that as a result of the

- Royal Proclamation the ownership of Indian lands was split, with the Crown holding the underlying legal fee and the Indian possessing a right of occupancy, termed a "personal and usufructuary right." The Court ruled that upon Confederation the Crown, in right of the Province, became possessed of the proprietary estate and this became a *plenum dominium* (right of full ownership) upon the surrender of the Indian title." Cumming, Peter A. and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed., Toronto the Indian-Eskimo Association of Canada, 1972, 33.
3. According to jurist J.C. Smith, "the origins of the concept of native aboriginal title is not . . . to be found in international law, nor in the theory of aboriginal rights traceable to the Spanish theologian, Francisco de Victoria (as Cumming and Mickenberg argue). It goes much deeper than this. It lies in the institutions of property of all people which, although differing from culture to culture, nearly all give recognition to the principle that the land which a people have developed and used from time immemorial belongs to them. The basis of the title as between a dominant and servient system is, therefore, long-term use and occupation by the servient systems of the lands now under the sovereignty of the dominant system. It is a possessory title." The Concept of Native Title, *University of Toronto Law Journal*, 1974, 24, 9.
 4. *An Act to amend and continue the Act 32 and 33 Victoria, Chapter 3; and to establish and provide for the Government of the Province of Manitoba.* Chapter 3, 51st, 32nd and 33rd Victoria, 12th May, 1870.
 5. The NCC represents close to one million Metis and Non-Status Indians.

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