/Keith Sumbull

ASSOCIATION OF METIS AND NON-STATUS INDIANS

OF SASKATCHEWAN

A DISCUSSION PAPER

THE CONCEPT OF THE SUPREMACY OF PARLIAMENT AND HOW IT RELATES TO AND AFFECTS THE RIGHTS OF ABORIGINAL PEOPLE IN CANADA

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I. INTRODUCTION

Although the Indigenous Peoples of America had their own institutions and decision-making processes, all issues involving native peoples and lands are now judged on the basis of English and Canadian constitutional law. These laws contain numerous legal rules, including the concept of the Supremacy of Parliament. Basically, this means that Parliament can pass any Act within its jurisdiction and that the Courts cannot question it.[1] However, because we are faced with numerous Statutes, Acts, legislation, etc., including the Royal Proclamation, 1763, one has to see whether or not Indian title may be able to survive the applicability of the supremacy of parliament.

In order to determine this the total constitutional framework of the Imperial Parliament and the creation of the Dominion (Canadian) Parliament will have to be analyzed. This would take quite an extended effort, so this paper will just give it a cursory view. The paper will concentrate on pre-1931 legislation and post-1931 legislation. The conclusion won't be a definitive one, but rather will reflect the complexity of the area and the possible direction the Courts will take if confronted with this issue.

II. CANADIAN PARLIAMENTARY JURISDICTION TO 1931

In dealing with this period of time, it is important to note that in extinguishing the Indian title to the Prairie Provinces, the Federal Government utilized two methods. They entered into treaties with the Indians and unilaterally issued scrip to the Half-breeds. The rights of the Half-breeds were recognized by legislation and the writer proposes to proceed on the basis that the Indian title of the Half-breed is the same as that of the Indians.

The source of Indian title, arguably is in the law of nations[2] and at the very least, is a common law right, which was reaffirmed by the Royal Proclamation, 1763.

> Just as the leading American cases on aboriginal rights developed from an analysis of the policies and practices of the colonizers of North America, the leading Canadian document on Indian rights, the Proclamation of 1763, reflects the pre-existing policies and practices of the British Government and colonists.[3]

That the area may not fall within the boundaries set out by the Proclamation is not critical, as the Courts have accepted the principle that Indian title doesn't have to flow from the Royal Proclamation, but is a common law principle that follows the flag of England.[4]

In any event, Indian title has been recognized in that area of the Hudson's Bay Company known as Rupert's Land and the Northwestern Territories. This is indicated by the treaties which were entered into and by the issuance of scrip to the Half-breeds.

With respect to the development of constitutional law, it is to be noted that after the revolution in Britain in 1688, the British Parliament was legislatively supreme over the King in his Privy Council.[5] In the settled colonies, the inhabitants took with them those laws of the English Common Law which were applicable. Whereas in conquered colonies, the local laws remained the same, unless and until altered by the appropriate British Authorities in London. This could be either the Crown in Council or the British Parliament.[6] However, once the Crown in Council granted a representative assembly to a conquered colony, he was precluded from altering the local laws of that colony by order-in-council.[7]

This, then, was the situation in Quebec after the English defeated the French. By the Proclamation of 1763, the

King granted the new colony of Quebec a representative assembly to administer English law. By this same Proclamation, the King gave specific instructions as to the manner in which Indian rights were to be respected, including the procedure to be used in extinguishing Indian title to the land.

> ...; 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 be; and in the 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 think proper to give for that purpose;[8]

It is also to be noted that the Charter given to the Hudson's Bay Company in 1670 was not affected by conquest and will not therefore be susceptible to the same principles as that governing a conquered colony. Nevertheless, the above quote from the Royal Proclamation makes reference to Indian lands within the bounds of "proprietary" governments, which the writer submits would include the Hudson's Bay Company.[9]

As well, the Charter of 1670, utilizes the terms "plantacions" and "colonyes" in describing the area granted to the Hudson's Bay Company.[10] It goes on to give the Company the power to make "reasonable Lawes Constitucions Orders and Ordinances as to them ... shall seeme necessary and convenient for the good Government of the said Company ..."[11]

At the outset, one must determine the legal status of the Royal Proclamation, before subsequent legislation can be reviewed. In the case of Campbell v. Hall,[12] Lord Mansfield held that the Proclamation had the force of law (Imperial Statute) according to the imperial jurisprudence of the period.

This case has been referred to by numerous Canadian decisions for the proposition that the Proclamation has the status of a statute, with Hall, in the Calder Case comparing it to the Magna Carta.

> ... Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire.[13]

The Royal Proclamation has also been viewed as the first Constitution for the British North America and it has not expressly been abrogated or altered, except for the Imperial Statutes with respect to Quebec, in 1774, 1791 and 1840 and the B.N.A. Act, 1867. These Statutes had no relevant bearing on the area covered by the Hudson's Bay Company Charter and the B.N.A. Act, 1867, only vests the Federal Government with the authority to legislate with respect to "Indians, and lands reserved for the Indians." It did not alter the procedure for extinguishment as set down in the Proclamation.

As the Proclamation has been given the status of an Imperial Statute, one must refer to the Colonial Laws Validity Act, 1865,[14] to interpret what force of law it has within Canada. At the outset it is safe to say that the C.L.V.A., 1865, applied to the Provinces of Canada, New Brunswick, Nova Scotia and the other Colonies. The issue is whether or not it applied to the Hudson's Bay Company. The co-authors, Cumming and Mickenberg, express the opinion that this would be the case.

> 35. Any such ordinance would have to be reasonable, in accordance with the terms of the Charter, and after 1865 would have had to conform with the provisions of the Colonial Laws Validity Act, 1865, ...[15]

The best authority to consult for this purpose is the C.L.V. Act itself. The definition section is especially helpful.

> 1. The term "colony" shall in this Act include all of Her Majesty's Possessions abroad, in which there shall exist a legislature as hereinafter defined, ... The terms "Legislature" and "Colonial legislature" shall severally signify the authority ..., competent to make laws for any colony;[16]

From this and the foregoing description of the Charter granted in 1670, it can be concluded that the C.L.V. Act does in fact apply. Even if this is incorrect, the C.L.V. Act, 1865, would have taken effect in that area at the time that it was admitted into the Dominion of Canada, by virtue of an Imperial Order-in-Council.[17] Going a step further, the Parliament of Canada, in passing the Manitoba Act, 1870, would be precluded from passing legislation which would be repugnant to the laws of England which were in force in Canada.

What then is the result of the applicability of the C.L.V. Act, 1865? According to a constitutional law expert, Clement,

> It has, however, been strongly urged officially that the British North America Act, 1867, has so far modified the Colonial Laws Validity Act, 1865, in its application to Canada, but of date prior to 1867, may be, in effect, repealed or amended by Canadian legislation this view has not met with favour at the hands of the Imperial law officers of the Crown, and seems to be entirely opposed to the strong current of English and Canadian authority.[18]

As we have seen above, the Royal Proclamation has received the status of an Imperial Statute, therefore it has the protection of the C.L.V. Act, 1865. We have to review the legislation prior to 1931 to see if this Royal Proclamation has been validly altered or abrogated.

The starting point for the Half-breeds is the tranfer of the Hudson's Bay Company land to the Dominion of Canada.

It would appear that there is no similar legislation which would have adversely affected the Indian population, as evidenced by their treaty relationship with the Crown. In addition, the pertinent legislation would not only have to meet the conditions of the C.L.V. Act, 1865, it is constitutional law that at that time, no Canadian law could claim to challenge the Royal Proclamation, until the passing of the Statute of Westminster in 1931.[19]

As mentioned above, the Federal government by virtue of the B.N.A. Act, 1867, has legislative responsibility over "Indians, and Lands reserved for the Indians." The issue remains with respect to whether or not this delegation of responsibility encompasses every conceivable area which affects Indians. Did the Imperial Parliament divest itself completely from the responsibility it had been faithfully upholding in regard to aboriginal people within its Empire? In reference to the Imperial Order-in-Council admitting Rupert's Land and the Northwestern Territory into the Union, there is an indication that this responsibility was retained by the Imperial Parliament.

> 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 Company shall be relieved of all responsibility in respect of them.[20]

It would appear from this that the Imperial Parliament is living up to its obligations to American Indigenous peoples, probably keeping the provisions of the Royal Proclamation in mind.

What then is the legal consequence of a Federal Government Act which would be inconsistent with the provisions of the Royal Proclamation? Clement had this to say,

> And, in 1902, Lord Halsbury (in delivering the judgment of the Privy Council in a case involving the validity

> of an Act of the legislature of Natal, which took away, in certain cases, the right to trial by jury), used much the same language, adding:
>
> "The devious purpose and meaning of that statute"--the Colonial Laws Validity Act--"was to preserve the right of the Imperial Legislature to legislate even for the colony although a local legislature has been given, and to make it impossible, when an Imperial statute has been passed expressly for the purpose of governing that colony, for the colonial legislature to enact anything repugnant to an express law applied to that colony by the Imperial legislature itself."[21]

In his book, The Statute of Westminister, 1931, K. C. Wheare phrased it as follows:

> The Act of 1865 therefore lays down one criterion of repugnancy. Any Act of a colonial legislature repugnant to the provisions of an Act of the Parliament of the United Kingdom extending to the colony either by express words or by necessary intendment, or repugnant to any order or regulation made under the authority of such an Act, shall be held to be void to the extent of such repugnancy.[22]

Although a Dominion has been given its own constitution with enumerated powers, this does not preclude Imperial Statutes from having the force of law in that Dominion. In the Union Steamship Company v. The Commonwealth case,[23] the High Court of Australia held a Dominion Act repugnant to Imperial legislation even though the Australian Constitution received specific powers to enact laws with respect to shipping and navigation. In his judgment, the Chief Justice addressed the argument in these terms:

> In my opinion, the Colonial Laws Validity Act applies to laws passed under a power given by an Imperial Act passed after that Act, as much as to laws passed under a power given by an Imperial Act passed before it.[24]

This being the constitutional background, did the Federal Government after 1867 have the legislative jurisdiction to extinguish Indian title in any manner it so desired?

The first Act, 1870, which expressly dealt with the Half-breeds' right to benefit from Indian title. This was provided for in section 31 which provides:

> 31. And whereas, it is expedient, towards the extinguishment of the Indian title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.[25]

This unilateral extinguishment is contrary to the Royal Proclamation which provided that:

> ..., [I] f 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 ...[26]

But that doesn't end there. In 1871, the Imperial Parliament ratified the Manitoba Act, 1870, by way of the B.N.A. Act, 1871.[27] This provided inter alia,

> 5. The following Acts passed by the said Parliament of Canada, and instituted respectively,--"An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada;" and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of the Province of Manitoba", shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

It is not certain or clear that the Imperial Parliament gave particular attention to S.31 of the Manitoba Act, however, it is clear that the B.N.A. Act, 1871, would prevail over the provisions of the Royal Proclamation, if indeed that was the intention. The Imperial Parliament is supreme in its field and can repeal or amend its own statutes.

> Thus Parliament may remodel the British Constitution, prolong its own life, legislate ex post facto, legalize illegalities, provide for individual cases, interfere with contracts and authorize the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Commonwealth, introduce communism or socialism or individualism or fascism, entirely without legal restriction.[28]

It therefore appears that the Federal Government may have a good basis to argue that the Indian title of the Half-breed was validly extinguished in the new Province of Manitoba. This is so notwithstanding that only children of Half-breed heads of family were to participate in the grant. That merely provides for the method of extinguishment, the first part of the section indicating that the extinguishment of the whole family was intended. This, of course, is open to attack, as is the phrase, "towards the extinguishment of Indian title".

It is arguable that the granting of land was merely one of the first steps in extinguishing the Half-breed's Indian title. It is of course also arguable that this meant the complete extinguishment of the Half-breeds' rights to Indian title, which only left the "Indians" to deal with. This last proposition, however, is questionable because the federal government in extinguishing Indian title in the rest of the prairie provinces didn't simultaneously deal with or extinguish Half-breed Indian title.

Aside from the constitutional recognition of Half-breed Indian title in the B.N.A. Act, 1871, for the Province of Manitoba, it has also been judicially expressed that Indian title, which would include Half-breeds, was incorporated into the B.N.A. Act, 1867.[29]

By Section 146 of the B.N.A. Act, 1867, provision was made for the entry of Rupert's Land and/or the North-Western Territory into Confederation and that,

> ... the provisions of any Order-in-Council in that behalf shall have the effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Subsequently, by deed, the Hudson's Bay Company on November 19, 1869, surrendered its charter to the Crown. Following the negotiations between the Provisional Government and the Canadian Government, the British Parliament passed an Imperial Order-in-Council on June 23, 1870, by which Rupert's Land was to become part of Canada on July 15, 1870. Contained in that Order-in-Council is the following condition:

> 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 Company shall be relieved of all responsibility in respect of them.[30]

Also incorporated into the O.C. were two Addresses to Her Majesty by the Senate and House of Commons. The first one dated December, 1867, asked for the transfer of Rupert's Land to Canada and contained the following:

> ... that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[31]

Mr. Justice Morrow, in the Paulette case was of the opinion that the provisions or "conditions" of the Order-in-Council above referred to, had,

> ... become part of the Canadian Constitution and could not be removed or altered except by Imperial Statute.[32]

Other than the Manitoba Act, it would appear that the Canadian Parliament would be precluded from dealing unilaterally with the aboriginal rights of the Indigenous people covered by that Order-in-Council, i.e., those living within the area covered by the Hudson's Bay Company Charter.

However, Justice Mahoney, in the recent Baker Lake case[33] (which may still be appealed) took a different approach to S.146 of the B.N.A. Act from that of Morrow, J., in Paulette. With respect to paragraph 14 of the O.C. above quoted, Mahoney had this to say:

> ... The provision neither created nor extinguished rights or obligations vis a vis the aborigines, nor did it, through section 146 of the British North America Act, 1867, limit the legislative competence of Parliament. It merely transferred existing obligations from the company to Canada.[34]

Mahoney attributed the aboriginal title of the Inuit to the

common law and not to the provisions of S.146 and the O.C. He therefore ruled against its incorporation into the Constitution. This issue, however, is not a settled one.

Even if it was referentially incorporated into the Constitution, the Manitoba Act, 1870, by virtue of the B.N.A. Act, 1871, would prevail. However, outside of Manitoba, the C.L.V. Act, 1865, and the possible incorporation of Indian title into the B.N.A. Act, 1867, would prevail.

The next problem before 1931, was the transfer of natural resources from the Federal Government to the provinces of Manitoba, Alberta and Saskatchewan in 1930,[35] ratified by federal legislation and the Imperial Government by the B.N.A. Act, 1930.[36]

In the negotiations prior to the transfer, the Federal government had a study done to see if Indian title to the provinces was extinguished. Indian treaties covered the provinces and Cote, a federal employee, did a study or report on scrip issuance to Half-breeds. His report, in essence a history of scrip distribution, concluded that the Half-breeds' Indian title was extinguished.[37] On this basis, the federal government transferred the resources with this proviso:

> 10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed as well as those confirmed, shall be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligation under the treaties with the Indians

> of the Province, and such area thereafter be administered by Canada in the same way in all aspects as if they had never passed to the Province under the provisions hereof.[38]

The B.N.A. Act, 1930, confirmed the agreements with the following words:

> 1. The agreements set out in the schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council as terms or conditions of union made or approved under any such Act as aforesaid.[39]

This, therefore, means that whatever the Agreements have intended and what they contain, overrides anything of conflict within the Constitution. Whether or not these Agreements were intended to extinguish any aboriginal title which may have existed will be reviewed in the next part.

III. CANADIAN PARLIAMENTARY JURISDICTION AFTER 1931

The major turning point in Canadian Constitutional history was the passing of the Statute of Westminister, 1931[40] by the Imperial Parliament. This Statute abolished the C.L.V. Act, 1865, and gave the Dominion of Canada greatly expanded powers. For our purpose, the following two sections of the Statute of Westminister are important:

> 2. 1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> 2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to

> the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation insofar as the same is part of the law of the Dominion.
>
> . . . .
>
> 4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that the Dominion has requested, and consented to the enactment thereof.

It is clear from section 2 that the C.L.V. Act will no longer affect laws passed after 1931, however, it still has binding force over laws passed by the Dominion of Canada prior to 1931. It is also clear that the Dominion of Canada can repeal or amend any Imperial Act, regulation or order that is applicable to Canada. This, however, does not apply to the B.N.A. Acts, otherwise known as the Constitution of Canada.[41]

An exception to this last proposition, is the B.N.A. Act, (No. 2), 1949[42] which is "An Act to amend the British North America Act, 1867, as respects the amendment of the Constitution of Canada."

> 1. Section 91 of the British North America Act, 1867, is hereby amended by renumbering Class 1 thereof as Class 1A and by inserting therein immediately before that Class the following as Class 1: --
>
> "1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the

> Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least one each year, and that no House of Commons shall continue for more than five years from the day of the return of the writs for choosing the House: Provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House."

These two pieces of Imperial legislation are now the controlling factors in determining the extent of power the Dominion Parliament possesses. They would have to be reviewed in the context of the fact situation surrounding the exercise of the powers granted. For example, the B.N.A. Act (No. 2), 1949, sets out areas which the Federal Government cannot amend. It, however, does not mention Indians or Indian lands.

A further issue is the determination of the extent of jurisdiction conferred on Parliament by virtue of S.91(24). Although there does not appear to be any cases which directly deal with the supremacy of the Federal Parliament to abrogate or abridge Indian title to land, some references (obiter dicta) have referred to it and to the Federal Parliament's jurisdiction. In the St. Catherine's Milling case,[43] the Privy Council held that "lands reserved for Indians" are not synonymous with Reserves.[43a]

> ... counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of showing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest,

> by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in Sect. 91(24), and the words actually used are according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian Affairs generally, shall be under the legislative control of one central authority.[44]

This case, as well as subsequent cases, went on to look at the proprietary rights, holding that the federal government had the authority, or arguably the mandate, to extinguish the Indian title, but that the province received the fee simple.[45]

The Privy Council in the St. Catherine's Milling case was dealing with reference to S.91(24) of the B.N.A. Act, 1867, which states that:

> ... the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:
>
> . . . .
>
> 24. Indians, and lands reserved for the Indians.

In reference to this section, LaForest interpreted it as follows:

> It should be noted that the administration and control of Indian lands is included in the grant of legislative power. This includes the right of the Crown in right of the Dominion to recover possession of reserved lands improperly in the possession of an individual, and, except as modified by statute, possibly the power of abrogating the Indian title.[46]

The issue then is whether or not Parliament can extinguish Indian title, without recourse to the Imperial Parliament. This has been resolved in Canadian Courts with respect to hunting rights. These cases have held that the Federal Government could "abrogate the rights of Indians to hunt whether arising from treaty or under the Proclamation of 1763 or from user from time immemorial, ..."[47] These cases addressed themselves to the narrower issue of hunting, and are not prima facie authority as to Parliament's power to abrogate the whole sphere of aboriginal title.

There are, however, some recent cases which advocate the proposition that the Canadian Parliament can in fact and law extinguish Indian title, even without compensation. In the Calder case, Hall, J., referred to the legislative competence of Parliament (Canadian) to extinguish Indian title, but that it hadn't exercised that power.

> It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the province, after Confederation, enacted legislation, specifically purporting to extinguish the Indian title, nor did Parliament at Ottawa.[48]

In reference to compensation, Hall, J., stated that "only express words to that effect in an enactment would authorize a taking without compensation."[49]

Judson, J., on the other hand held that as long as there existed legislation which resulted in an abrogation of Indian title, that would be sufficient.

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe

> might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.[50]

Hall, as noted above, views this proposition as falling short of established law with respect to Indian title, because there was no question that the government had complete sovereignty and the Indians only the right to the use of it until extinguished. Hall, held that in order for there to be valid legislative extinguishment, it had to be specifically referred to in clear language.

> It would, accordingly, appear to be beyond question that the onus of proving that the sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain." There is no such proof in the case at bar; no legislation to that effect.[51]

In the Paulette case,[52] Morrow, J., referred to the above principle enunciated by Hall and concluded that:

> With the above principle in mind I conclude under this heading that there is enough doubt as to whether the full aboriginal title had been extinguished, certainly in the minds of the Indians, to justify the caveators attempting to protect the Indian position until a final adjudication can be obtained.[53]

Although this judgment of the N.W.T. Supreme Court was reversed in the C.A. and Supreme Court of Canada, it was merely done on a technical basis, therefore not overruling the other findings of Judge Morrow.

However, an opposite approach was taken in the Federal Court, Trial Division, by Mahoney, J., in the Baker Lake case.[54] Justice Mahoney in referring to the Calder case stated that he:

> ... cannot accept the Plaintiff's argument that Parliament's intention to extinguish an aboriginal

> title must be set forth explicitly in the pertinent legislation. I do not agree that Mr. Justice Hall went that far.[55]

He further stated that "no Canadian legislation requiring that legislative extinguishment of aboriginal titles be affected in a particular way, has been brought to my attention."[56] To make his point more clear, Mahoney uses the example of parliament's abrogating the Indians' right to hunt.

> The decision in Sikyea v. The Queen, delivered by Mr. Justice Hall for the Court (S.C.C.), is an example. The right freely to hunt, as one's ancestors did, over particular land, has been an important incident of most, if not all, aboriginal titles yet asserted in Canada. It is the right proved here. It is, nonetheless, a right that has been abridged by legislation of general application making no express mention of any intention to deal with aboriginal title in any way.[57]

Justice Mahoney goes on to say that once a statute is validly enacted and its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it.[58] The precedent that he uses for this principle is the statement by Judson, J., in Calder that:

> To say that the necessary result of legislation is adverse to any right of aboriginal occupancy is tantamount to saying that the legislator has expressed a clear and plain intention to extinguish that right of occupancy.[59]

Justice Mahoney, does not refer to the Colonial Laws Validity (C.L.A.) Act, 1865, in his analysis of the case even though he reviews all of the legislation which could possibly affect the aboriginal title of the Inuit. He discounts the Crown's argument that the Inuit title was extinguished by the Royal Charter of May 2, 1670, given to the Hudson's Bay Company, as well as July 15, 1870, when Rupert's Land was admitted into Canada.

However, with respect to extinguishment since 1870, Mahoney was of the opinion that Parliament was legislatively competent to extinguish Indian title.

> Since the admission of Rupert's Land to Canada, it has been within the legislative competence of the Parliament of Canada to extinguish it. Parliament has not enacted legislation expressly extinguishing that title.[60]

The legislation that Mahoney dealt with was with respect to the Inuit only and his conclusion as seen above was that their aboriginal title was not extinguished. The legislation reviewed was the Dominion Lands Act, 1872,[61] Dominion Lands Act, 1879,[62] Dominion Lands Act, 1883,[63] The Dominion Lands Act, 1908,[64] and the Territorial Lands Act of 1950.[65]

In order to determine whether Parliament intended to and in fact and law did extinguish the aboriginal title of the Half-breeds, one would have to review the Manitoba Act, 1870, and the subsequent Order-in-Council, regulations and other Dominion Acts, such as the Dominion Lands Acts, supra. One would also have to analyze the actions surrounding the legislation and issuance of scrip to see if there is anything that would make illegal, the otherwise possible legislative legalities, i.e., parliament's competence to extinguish Half-breed aboriginal title irrespective of the C.L.V. Act, 1865.

The writer submits that the last relevant piece of legislation to analyze would be the B.N.A. Act, 1930, by which the natural resources in Alberta, Saskatchewan and Manitoba were transferred to the respective provinces.

As mentioned earlier, the Federal Government by Cote's report would have been lead to the conclusion that the Half-breeds' aboriginal title had been extinguished, therefore they wouldn't have addressed themselves to that issue. As well, the Transfer Agreement[66] itself specifically states that:

> 1. In order that the Province may be in the same position as the

> original Provinces of Confederation are in virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of the agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, ...[67]

According to the St. Catherine's Milling case,[68] the Indian title in Ontario with respect to S.109 of the B.N.A. Act, 1867, was "an interest other than that of the Province in the same."[69] It is, therefore, arguable that the phrase in the above Agreement that it was "subject ... to any interest other than that of the Crown in the same, ..." also leaves room to assert that unextinguished Indian title would survive any form of extinguishment, short of express words to that effect. It is also open to argue that, alternatively, the Federal Government, by virtue of S.91(24) of the B.N.A. Act, 1867, was placed in a trust responsibility with respect to Half-Breeds and their lands, therefore if Half-breeds still had outstanding land claims, then the Agreement was subject to that trust.

IV. CONCLUSION

From the foregoing exposition of the law, one can see that it is extremely important to have a very extensive evaluation done with respect to the impact of the law, constitutionally and otherwise, on the concept of Indian title and its survival. This is especially so with respect to the principle of the Supremacy of Parliament.

The related issue of the "trusteeship" role of the Federal Government will also have to be viewed with respect to

the legislation and possible extinguishment, coupled with the possibility of compensation if, in fact, Indian title has been extinguished by legislation.

It is also necessary to review the legislation dealing with Half-breed scrip and all regulations and Orders-in-Council passed under them, to see if the "intention" of Parliament has been met, if in fact the legislation itself was valid. Additionally, it is important to review the law respecting the Royal Proclamation, 1763, to determine if in fact it has the status of being part of the Constitution of Canada. If so, then it can be used as the sole statute which deals or sets out how Indian title can be extinguished, except for the B.N.A. Act, 1871, which ratified the Manitoba Act, 1870.

Because of all of this uncertainty, it is important that A.M.N.S.I.S. ensures that the Constitution remains in England, until our rights can be guaranteed. As long as it remains there, we are still bound by English Constitutional Law and any change to the B.N.A. Acts would have to be by the British Parliament. Even if the British Parliament does not have effect control over the Canadian government, it nevertheless still has symbolic control and this could be taken advantage of politically.

FOOTNOTES

1. Jennings, The Law and the Constitution, 5th Ed., 1959, at 147.
2. A.M.N.S.I.S., Notice to the Government of Canada of our Position on the Constitution, January, 1979, at 13 - 29.
3. Cumming and Mickenberg, Native Rights in Canada, 2nd Ed., 1972, at 23.
4. W. H. McConnell, the Calder Case in Historical Perspective, 1973 - 74, 38 Sask. Law Rev. 88, at 107.
5. Whyte and Lederman, Canadian Constitutional Law, 2nd Ed., 1977 at 2-1.
6. Ibid., at 2-2 to 2-3.
7. Ibid., at 2-3; Campbell v. Hall (1774) 98 E.R. 1045.
8. Royal Proclamation of 1763, R.S.C. 1970, Appendices Vol., at 127 - 129.
9. Supra, note 3, at 29.
10. Ibid., at 138 - 139.
11. Ibid., at 141.
12. (1774) 98 E.R. 1045.
13. Calder v. A. G. of B.C. (1973) 4 WWR 1; (1973) 34 DLR (3d) 145, at 203.
14. 28 and 29 Victoria, c.63, (Imp.).
15. Supra, note 3, at 142, footnote 35.
16. Supra, note 14.
17. Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union, June 23, 1870, found in R.S.C. 1970, No. 9, at 257.
18. W.H.P. Clement, Clement's Canadian Constitution, 3rd Ed., 1916.
19. 22 Geo. V, ch. 4.
20. Supra, note 17.
21. Supra, note 18, at 58 - 59.
22. K. C. Wheare, The Statute of Westminister, 1931, 1933 at 34.
23. 36 C.L.R. 130.
24. Ibid., at 141.
25. Manitoba Act, S.C. 1870, C.3.
26. Supra, note 8, at 128.
27. 34 - 35 Victoria, c. 28 (U.K.).
28. Supra, note 1.

29. Re Paulette (1973) 6 W.W.R. 97, at 136 (N.W.T.S.C.).

30. Supra, note 17.

31. R.S.C. 1970 Appendices, at 264.

32. Supra, note 29.

33. Hamlet of Baker Lake v. The Minister of Indian Affairs and Northern Development, et al, unreported, November 15, 1979, (Fed. Court, Trial Division).

34. Ibid., at 51.

35. The Agreements were by Memorandum of Agreement entered into on March 20, 1930 and ratified by B.N.A. Act, 1930, and appended.

36. 20 - 21 Geo. V, c.26 (U.K.)., contained in R.S.C. 1970, Appendices.

37. Public Archives Canada, R.G. 15, Vol. 24, Cote, Book E.

38. R.S.C. 1970, Appendices, at p.p. 370 (Manitoba), 380 (Alberta), 388 (Saskatchewan). (Emphasis mine).

39. Supra, note 36.

40. Supra, note 19.

41. This is the current law as applied by the Courts and just reinforced by the Supreme Court of Canada with respect to the issue as to whether or not Canada (Parliament) can change the Senate and Manitoba and Quebec's attempt to change the language guarantees enshrined in the B.N.A. Acts, 1867, and 1871.

42. 13 Geo. VI, c.81 (U.K.). Found in R.S.C., 1970 Appendices at 435.

43. St. Catherine's Milling and Lumber Company v. The Queen (1889) 14 A.C. 46.

43(a). Ibid. (Emphasis added).

44. Ibid., at 59. (Emphasis added).

45. See discussion paper, "The Nature of Indian Title", January, 1980.

46. G. V. LaForest, Natural Resources and Public Property under the Canadian Constitution, 1969, at 160.

47. Cartwright, J., in his dissenting judgment in R v. George referring to the S.C.C. adoption of Johnson, J.A.'s reasoning in R v. Sikyea (1967) 43 D.L.R. (2d) 150, aff'd (1964) S.C.R. 642, 44 C.R. 266.

48. Supra, note 13 at 208 - 209. (Emphasis added).

49. Ibid., at 173.

50. Ibid., at 167.

51. Ibid., at 210.

52. Supra, note 29.
53. Ibid., at 143.
54. Supra, note 33.
55. Ibid., at 53.
56. Ibid.
57. Ibid. (Emphasis added).
58. Ibid.
59. Ibid., at 55.
60. Ibid., at 51.
61. S.C. 1872, c.23.
62. S.C. 1879, c.31.
63. S.C. 1883, c.17.
64. S.C. 1908, c.20.
65. S.C. 1959, c.22, now R.S.C. 1970, c. T-6.
66. Acts Relating to the Transfer of Natural Resources to the Province, Statutes of Saskatchewan, 20 George V, 1930, Chapter 87.
67. Ibid. (Emphasis added).
68. Supra, note 43.
69. Ibid., at 58.