APPENDIX 'B'

ASSOCIATION OF METIS AND NON-STATUS INDIANS

OF SASKATCHEWAN

A DISCUSSION PAPER

THE FEDERAL-INDIGENOUS TRUST RELATIONSHIP

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I. INTRODUCTION

This paper will attempt to deal with the question of whether or not the Federal Government has been placed into a trust relationship with respect to the Aboriginal or Indigenous Peoples of Canada. It will endeavour to determine whether half-breeds are also beneficiaries of the trust, if in fact it exists.

II. WHAT IS A TRUST?

A good working definition is found in the work of Underhill.

> An equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called trust property) for the benefit of persons (who are called beneficiaries or cestuis que trust) of whom he may himself be one and any of whom may enforce the obligation.[1]

The following are general characteristics which normally (but not always) are present in a trust relationship:

(1) Vesting of the legal interest in the trustee;
(2) Specific property to which the trust can attach;
(3) Holding of the property by the trustee for the benefit of the beneficiary, not for his own benefit; and,
(4) An irrevocable quality to the relationship.

There can be express trusts or trusts that arise through implication, i.e., implied trusts. The majority of texts assume that a trust created by statute is an express trust and rely on the conventional language used when distinguishing an express trust from implied trusts. Support is found in the following:

> All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of

> of law; again, express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts: and that is, when the Court, upon consideration of all circumstances presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant.[2]

Or as was declared by Boy, C., in Coyne v. Braddy:

> Quoting Lord Wesbury L.C., in Dickenson v. Teasdale, 1 DeG J. & S. 53, 46 E.R. 21: "The words express trust are used by way of opposition to trusts arising by implication, trusts resulting, or trusts by operation of law. Two things must combine here: there must be a trustee with an express trust, and an estate or interest in lands vested in the trustee, and which, therefore, the trust must affect. The subject matter of the trust is to be dealt with in conformity with the trust."[3]

Although the preceding language is somewhat unclear, Halsbury clearly declares that a trust declared by statute constitutes an express trust:

> Trusts are either (1) express trusts, which are created by the actual terms of some instrument or declaration or which by some enactment are expressly imposed on persons in relation to some property vested in them, whether or not they are already trustees of that property, or (2) trusts arising by operation of law (other than express trusts imposed by enactments).[4]

Therefore, if a trust is considered to be declared by Federal law, such as the early Indian Acts, then it would constitute an express trust. If, however, it is not clearly set out, then one would have to analyze it to determine whether there is an implied trust arising by operation of law.

III. INDICATIONS OF THE EXISTENCE OF A TRUST RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND ABORIGINAL PEOPLES

A. PRE-CONFEDERATION LEGISLATION:

There is not much to the legislation dealing with Indians prior to 1867. At that time, the then Province of Canada was divided into Upper and Lower Canada, e.g., Ontario and Quebec. In addition to this, the provinces of Nova Scotia and New Brunswick were also involved in early Indian legislation.

> Indian legislation began in Nova Scotia in 1762 with the regulation of trade with Indians. The first Indian legislation dealing with Indian land in Nova Scotia was in 1842, the first Indian legislation in other jurisdictions dealt with Indian Land: Ontario in 1839, New Brunswick in 1844, Quebec in 1850.[5]

The legislation in 1850 with respect to Lower Canada (Quebec) is perhaps the clearest in its indication that a trust relationship existed. That legislation provided for the appointment of a Commissioner of Indian lands who was to hold the lands "in trust" for the Indians "for the use or benefit of such tribe or body."[6] This act equated "trust" with the "use or benefit" terminology. This legislation clearly confined itself to "lands now held by the Crown in trust ... but shall not extend to any lands now vested in any corporation or community." The trust relationship was accompanied by broad powers of management and disposition in the commissioner much like today's Indian Act. However, the commissioner was "personally responsible to the Crown for all his acts" and it is clear that the legislation expressly provided that reserve lands in Lower Canada were held in trust for the Indians by the Crown.

In the early 1900's, the Courts had an opportunity to deal with the 1850 Lower Canada legislation, as well as the legislation of 1868 passed a year after Confederation. In one case, Justice Duff of the Supreme Court of Canada commented:

> First. It may be observed that the Commissioner is to hold the Indian lands

> "pur et au nom" (for the use of) of the tribe or band and that he is deemed in law to occupy and to possess them "pour l'usage et au profit de telle tribu au peuplade." (for the use or benefit of such tribe or body) These appear to be the dominating provisions and they express the intention that any ownership, possession or right vested in the Commissioner is vested in him for the benefit of the Indians. Therefore, the rights which are expressly given him are rights which are to be exercised by him for them as by tutor for pupil.
>
> Looking at the ensemble of the rights and powers expressly given I can entertain no doubt that in the sum they amount to ownership. By paragraph 7 he is given a right to receive and to recover the rents and profits ....
>
> This in sum, I repeat, is ownership; and none the less so that in the administration of the property the Commissioner is accountable to the Governor. The Governor in this respect does not represent the Crown as proprietor but as parens patriae.
>
> It seems to follow that, on the passing of the "British North America Act," this ownership passed under the legislative jurisdiction of the Dominion as falling within the subject "Indian Lands," and I see no reason to doubt that the provisions of the Act of 1868 (sec. 26, ch. 42) by which the Secretary of State, as Superintendent-General of Indian Affairs, was substituted for the Commissioner provided for by the enactments just cited as the trustee of the Indian title were well within the authority of the Parliament of Canada.[7]

It is clear or at the least arguable that Justice Duff equates the relationship between tutor and pupil and trustee and beneficiary since the legislation referred to expressly declared that the Commissioner was to hold the lands "in trust" for the Indians. Duff, J., also concluded that this trust was carried into the 1868 Act by which the Secretary of State, as Superintendent-General of Indian Affairs replaced the Commissioner.

B. B.N.A. ACT, 1867 AND SUBSEQUENT LEGISLATION:

The B.N.A. Act, 1867,[8] was the first piece of Imperial legislation to form the Federation of Canada. By Section 91, the Federal government's jurisdiction and responsibility was set out. Section 91(24) dealt with Indians, "Indians and Lands Reserved for the Indians." There was no further elaboration on this area. However, in 1763, the British Government did pass a Royal Proclamation which has been referred to as the first Constitution of British North America. This Royal Proclamation has been recognized as having the force of law of an Imperial Statute and has never been repealed.[9]

By this Proclamation, Indian lands not ceded or purchased were to be reserved for them by the new government.

> ... any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

It is certainly arguable that the new government was given the express directive that Indian lands were to be held in trust for their benefit, until proper and legal cessions or purchases could be made. These cessions or purchases were also only to be made by the Crown and not by private individuals, as the Proclamation also directed itself to the "Great Frauds and Abuses" committed in purchasing "Lands of the Indians."

> 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 the Purpose ...

The Royal Proclamation did not contain a definition of Indian, nor did the B.N.A. Act of 1867. The only judicial

utterances on s.91(24) of the Act of 1867 are the cases of Re Eskimos[10] and St. Catherine's Milling.[11] In Re Eskimos, the Supreme Court of Canada concluded that the Inuit (Eskimos) are included in the term Indian. With respect to the "Lands reserved to the Indians", the Judicial Committee of the Privy Council stated that they included all lands reserved to Indians and not merely Indian Reserves.

> In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91(24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in slate to the Act of 1867, for the purpose of shewing 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. (Emphasis added).

Arguably it can be stated that because the Federal government is in "express terms", the body given the responsibility to deal with "Indians and Lands Reserved for the Indians" that this must surely create a trust relationship. The Federal government is made responsible for the administration of Indian matters and the Indians

of necessity are the beneficiaries of any governmental action by virtue of s. 91(24).

Assuming this to be the case, do half-breeds fall within the purview of the term "Indian" as contained in the B.N.A. Act, 1867, s. 91(24)? With reference to the above quote, it can be submitted that the term Indian should be used in its "natural meaning" and should be sufficient to include all peoples of aboriginal or Indian descent. Taking the above case a step further, it is stated that "Indian affairs generally, shall be under the legislative control of one central authority. From the evidence of the various pieces of federal legislation,[12] it can certainly be said that half-breeds were considered to be part of the federal government's responsibility and under its central authority.

Again, in reference to the Re Eskimos case, the Supreme Court of Canada ruled that Inuit are Indians for the purposes of s. 91(24). The Federal Government, however, by s. 4(1) of the Indian Act[13] has specifically excluded them from the purview of that Act. This, of course, would be sufficient authority for the proposition that you don't have to be included in the Indian Act in order to fall under the responsibility of the Federal government by virtue of s. 91(24). Although the Indian Act, by section 12, specifically excludes those persons and their descendants who have received lands or money scrip, the above authority would prevail.

Although the Supreme Court of Canada has not dealt with whether or not half-breeds are Indians, re: s. 91(24), there have been several lower court cases dealing with the definition of Indian in relation to the liquor provisions of the Indian Act. In R v. Howson,[14] the N.W.T. Supreme Court stated that the words "any make person of Indian blood" meant any person with Indian blood in his veins, the origin of which doesn't matter. In R v. Hughes,[15] there was an assumption that a quarter-blood was not a status Indian, while recognizing that he or she could be. In addition, a half-breed, not living on a reserve, in R v. Verdi,

was proven to be an Indian.[16]

In Re Eskimos, their Lordships were of accord that the relevant time to look at, in determining who was considered to be an Indian, was at the time of the passing of the B.N.A. Act. Chief Justice Duff relies on historical evidence from around that period and Justice Cannon looks at the pre-confederation activity of the Provincial Legislatures.

Of direct evidential value is the pre-confederation legislation dealing with Indians. The Assembly of Canada passed specific legislation defining who was to be an Indian for the provisions of An Act for the Better Protection of the Lands and the Property of the Indians in Lower Canada.[17] Section 5 of that Act sets out the criteria:

> ..., [B]e it declared and enacted: that the following classes of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands:
>
> First. ... All persons to the particular Body or Tribe of Indians interested in such lands, and their descendants.
>
> Secondly. All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.
>
> Thirdly. All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such; and
>
> Fourthly. All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.

The following years the legislature repealed that definition and substituted the following:[18]

> ..., [T]he following persons and classes of persons, and none other, shall be considered as Indians belonging to the Tribe or Body of Indians interested in any such lands or immoveable property;
>
> Firstly: All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and their descendants;

> Secondly: All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and the descendants of all such persons; and
>
> Thirdly: All women, now and hereafter to be lawfully married to any of the persons included in the several classes herein before designated; the children issue of such marriages, and their descendants.

Following Confederation, the new Dominion of Canada passed "An Act Providing for the Organization of the Department of Secretary of State of Canada, and for the Management of Indian and Ordinance Lands."[18] Section 15 of that Act provided:

> 15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:
>
> Firstly. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; and
>
> Thirdly. All women lawfully married to any of the persons included in the several classes herein before designated; the children issue of such marriages, and their descendants.

This legislation is a good indication of the people whom the Framers of the B.N.A. Act, 1867, had in mind. This is so because the Resolutions of the Quebec Conference in 1867, provided the framework for the B.N.A. Act. This Conference was

attended by delegates from the Provinces of Canada, Nova Scotia and New Brunswick, plus the Colonies of Newfoundland and Prince Edward Island. Under these resolutions, "Indians and Lands Reserved for the Indians" were to remain with the Federal Government.[19]

It is contended that the Framers of the B.N.A. Act, 1867, did not even consider the issue of the extinguishment of the Indian title possessed by half-breeds and that this course was taken because of the subsequent turn of events in 1869, in the Red River District. This period witnessed the Provisional Government of Manitoba in 1870, and the subsequent admittance of Manitoba as a Province into Canadian Confederation by the provisions of the Manitoba Act, 1870.

By virtue of section 31 of the Manitoba Act, the aboriginal title of the half-breeds was expressly recognized:

> 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, ...

As well, in 1906, an Order-in-Council provided for the extinguishment of "the aboriginal title" in Northern Saskatchewan. That it was in the public interest that the territory involved "should be relieved of the claims of the aborigines; ..."[20]

That it is submitted, portrays that the half-breeds were viewed as a member of the aboriginal class and would fall within the words of Justice Cannon, in Re Eskimos, that the word Indians "included all the present and future aborigine native subjects of the proposed Confederation of British North America, ..."

According to Cumming and Mickenberg:

> The most immediate legal effect upon those Metis who received scrip or lands is that they are excluded from the provisions of the Indian Act. As the discussion in Chapter 2 indicates, these Metis are still "Indians" within the meaning of the British

> North America Act and the Federal Government continues to have the power to legislate with respect to this group of native people.[21]

In chapter 2 of their book, the co-authors, Cumming and Mickenberg, propose that if an individual possesses sufficient racial and social characteristics to be termed a "native person", he should also be considered an "Indian" within the meaning of the B.N.A. Act.[22]

As stated above, s. 91(24) of the B.N.A. Act can be equated to a trust responsibility and half-breeds as "Indians" within that meaning in s. 91(24) would also be beneficiaries of that trust.

C. CASELAW:

Although there has yet to be a case directly on point, there have been numerous cases dealing with the possibility of the government being a trustee for different purposes. There has also been limited research in this area, although there is currently a case going on in British Columbia which may decide this issue, i.e., the existence and scope of the Federal Government's trust responsibility. In this instance, the Musqueam Band in December 1975 filed a Statement of Claim alleging the Crown's failure to exercise the degree of stewardship, care and prudent management required of a trustee in granting a lease of Reserve land.

In a paper developed by Graham Allen for the Union of B.C. Indian Chiefs, this issue is addressed. The following excerpt from that paper will reflect the current status of the law in Canada.

> Is the Crown the Trustee of Indian Lands?
> In an excellent research paper entitled "The Trusteeship Role of the Government of Canada" (1971), Dennis M. Brans, working on a Summer Project for the Indian Claims Commission, fully examined this question. What had to be decided in his view was described as follows: "Many references have been made in decided cases to the Indians as 'wards' or 'minors' and to the Crown as 'trustee' or 'guardian'. The use of such

> words, without stopping to inquire into their legal implications has often prejudiced the Indian position. The question is whether these references constitute a recognition of a legal right approaching trusteeship, or whether they are merely words of description to illustrate a political arrangement." (Emphasis added) After a careful review of the relevant cases, Mr. Brans concluded: "The effect of the usage by the courts of words such as 'ward' and 'trustee' has been to create a quite plausible trust analogy .... in Miller v. The King (1950) where the case was sent back for trial, the Supreme Court said: 'I see no more difficulty in the present instance, should the facts warrant, in making a declaration that the monies in the hands of the Crown are trust monies and that the appellant and those upon whose behalf he sues are cestuis que trust'." In a July 1975 opinion prepared for the Alliance (of the Musqueam, Sechelt and Squamish Indian Bands), Squamish Band Legal Advisor J. Paul Reecke wrote: "The Federal Crown is in a position of trust with respect to lands and monies held by the Crown for the use and benefit of Indians or bands. Miller v. The King 1950 S.C.R. 168 .... Having accepted the charge as trustee arising as a result of, among other things, Section 91(24) B.N.A. Act, Section 13 of the terms of Union with British Columbia, and as a further result of the exercise of Federal power through the enactment of legislation, particularly the Indian Act, the Crown has brought itself within the law of trustees. The Crown's acceptance of its position as trustee under the Indian Act is seen in, among others, the following sections: ..."

However, on the other side of the scale, there are people who say that any reference to the Crown as trustee is merely misunderstood and that its true nature is merely political. This position has been advanced by Professor L. C. Green who stated that:

> Even had the various documents to which reference has been made given rise to a conception of trusteeship ... there might have been good ground for arguing that, looking at the situation which existed

> when the relations between the Crown and the Indians were first established and the concepts of law that then prevailed, together with the understanding of the legal consequences of that relationship, the present concepts could not be applied retroactively. In so far as these concepts are modern innovations of an ideological character, they are clearly no more than propaganda moves in a political game, completely devoid of legal significance.[23]

The case that probably best describes the responsibility of the Federal Government, although it deals with the Indian Act is a decision of the Supreme Court of Canada.[24] The main point in issue was a lease of Indian land by the Superintendent General, however in reviewing the relevant legislative and legal authority of the Superintendent General to so do, Mr. Justice Rand also briefly addressed himself to "trusteeship."

> But I agree that s. 51 requires a direction by the Governor in Council to be a valid lease of Indian lands. The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of Governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

IV. WHAT ARE THE DUTIES OF A TRUSTEE?

As noted in the above sections, there are different types of trust relationships. As well, the relationship of trustee and beneficiary is just one type of fiduciary relationship. Other types include guardian and ward, and agent and principle. All of these have in common the undertaking by one person to act in the interests of another person.[25] Along with this undertaking

is the responsibility of the trustee to act under a high standard of conduct, to be loyal and under a disinterested service.

Depending on the authority exercised, the standard of care may be higher. For example, where the trustee has a greater independent authority to act, the higher is his fiduciary duty. It is also the trustee's duty to act diligently and actively in the execution of the trust.

If we are right in saying that the Federal Government is a trustee by virtue of s. 91(24) of the B.N.A. Act, 1867, what are its duties? The Crown in Canada, (Federal Government) delegates its trust responsibility to the Department of Indian Affairs and Northern Development, over which a minister of the Crown responsible to Parliament presides. This has been the case since 1860 as seen above. After 1867, by virtue of the 1868 Act setting up the Secretary of State[26] that Minister presided over Indian Affairs, until it was later altered and the Minister of the Interior presided.

Referring back to the B.N.A. Act, 1867, the Federal Government was responsible for "Indian Lands." This was by no accident as will be seen from the following concerns and as reflected by the Royal Proclamation as noted earlier.

One of the first recorded instructions to British colonial governors was issued by Charles II in 1670, declaring that justice must be shown to the Indians and that their property must be protected.[27]

In 1837, in a report from the Select Committee of the House of Commons on the Aborigines of the British Settlements, the Commissioners stated:

> The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Government, as administered either in this country or by the Governors of the respective colonies. This is not a trust which could conveniently be confided to a local legislature.

This recommendation was adhered to and as summarized in the case of Mowat v. Casgrain:[28]

> By the Union Act, the Government of the Dominion is entrusted with the administration of the affairs and property of the Indians in Canada, ...

It is also significant that by s. 109 of the B.N.A. Act, 1867, the Imperial Parliament in establishing that lands, etc., belonged to the provinces, stated that they were subject to any existing trusts.

> All lands, Mines and Royalties ... Shall belong to the several provinces ... subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

It is arguable that the Imperial Government had in mind the Indian lands which were yet unsurrendered and the necessary trust relationship or responsibility on the part of the Federal government.

Added support of the Federal Government's responsibility and obligation to its trust relationship with the Indian Peoples is to be found in a joint address from the Senate and House of Commons to Her Majesty in December, 1867.

> And furthermore 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.

This address was followed up in May of 1869 concerning the admittance of Ruperts Land into the Union with the following resolution:

> That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provisions for the protection of the Indian tribes whose interest and well-being are involved in the transfer. (Emphasis added).

In an address of the Senate of Canada to Her Majesty in 1871 respecting the admittance of British Columbia into the Union, the trusteeship role was more clearly set out.

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union. (Emphasis added).

This trust responsibility was also reflected in the assurances given to Indians at the making of treaties.

> Therefore, the promises we have to make to you are not for today only but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.[29]

With this in mind, has the Federal Government complied with its trust responsibility to western half-breeds or has it violated this trust? It would seem to be the law that a trustee merely has the obligation to exercise reasonable care. The test is what an ordinary prudent man would exercise in the management of his own affairs. These principles were discussed by Middleton, J. A. in the case of Davies v. Nelson.[30]

> The standard of care required by a trustee is now thoroughly established by three decisions of the House of Lords. In Learoyd v. Whiteley, 12 App. Cas. 727, 57 L.J. Ch. 390, 20 Mews 453, Lord Watson says (p. 733): 'As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs.' And Lord Halsbury, L.C., states (p. 731): '... it is quite clear that a trustee is entitled to rely upon skilled persons in matters in which he cannot be

> expected to be experienced.' In Knox v. MacKinnon, 13 App. Cas. 753, 20 Mews 465, Lord MacNaughten states (p. 768) that a trustee is required 'to bring to the management of trust affairs the same care and diligence which a man of ordinary prudence may be expected to use in his own concerns.' The third decision in Rae v. Meek, 14 App. Cas. 558, 20 Mews 457, which merely emphasizes the principles laid down in the earlier decisions, Lord Herschell stating (p. 569): 'These cases establish that the law ... requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs' ... A trustee is not called upon to be omniscient. All that he is called upon to do is honestly to exercise his best judgment, to take the same care of the property as he would have taken if it had been his own.

From our research to date, it is quite readily apparent that the Federal Government knew full well what was and would happen to the lands of the half-breeds with the issuance of scrip and the alienability of the land. In contrast, at least the Federal Government assured that Indian reserved lands would be inalienable, thereby protecting the land rights of the Treaty Indians.

V. CONCLUSION

For the purpose of this paper, it is sufficient to state that there is a legal basis to claim that the Federal Government has been placed in a trusteeship role with the aboriginal inhabitants of this land, including half-breeds. Our research has provided ample evidence and instances where this trust has been grossly violated. It will not serve any great purpose to review this material in his paper. Suffice to say that this violation of the trust has resulted in an injustice which currently finds the half-breed population a landless people, while at the same time sharing a similar social and economic deprivation confronting Treaty Indians.

FOOTNOTES

1. Underhill's Law of Trusts and Trustees, 11th Ed., 1959 at 1.
2. Cook v. Fountain (1676) 36 E.R. 984.
3. 13 O.K. 173.
4. Halsbury (3d) Vol. 38 para. 1370.
5. D. Sanders, The Friendly Care and Directing Hand of the Government: A study of Government Trusteeship of Indians in Canada, February 22, 1977.
6. 13 and 14 Vic. (1850) Cap. 42; An Act For the Better Protection of the Lands and Property of the Indians in Lower Canada.
7. A. G. for Canada v. Giroux (1916) 53 S.C.R. 172.
8. 30 - 31 Vic., c. 3 (U.K.)
9. Campbell v. Hall (1774) 1 Cowp. 204; Rex v. Lady McMaster (1926) Ex. C.R. 68 at 72.
10. 1939 S.C.R. 104; (1939) 2 D.L.R. 417.
11. (1889) 14 A.C. 46.
12. Manitoba Act, s.c. 1870, C. 3; Dominion Lands Act s.c. 1872, c. 23; Dominion Lands Act s.c. 1879, c. 31; etc.
13. R.S.C. 1970, c. I-6.
14. (1894) Terr. L.R. 492.
15. (1906) Canadian Law Journal 736 (B.C.S.C.).
16. (1914) 23 C.C.C. 47 (N.S. County Court).
17. Supra, note 6.
18. 31 Vic. (1868) Cap. 42 (Canada).
19. Supra, note 10, at 429 - 430.
20. AMNSIS Documents, Orders-in-Council.
21. Cumming and Mickenberg, Native Rights in Canada, 2nd Ed., 1972 at 203 - 04.
22. Ibid., at 9.

23. L. C. Green, North America's Indians and the Trusteeship Concept, Anglo-American Law Review, 137 at 162.

24. St. Ann's Island Shooting and Fishing Club v. The King (1950) S.C.R. 211.

25. Crawford, B., Restitution, 1969 at 265.

26. Supra, note 18.

27. J.L.A.C., 1844 - 45, Appendix EEE, Section J.

28. (1889) 6 Que. Q.B. 12.

29. Alexandre Morris, The Treaties of Canada with The Indians, Toronto, 1971 at 96.

30. 61 O.L.R. 457; [1928] 1 D.L.R. 254 (C.A.).