W H O I S A N I N D I A N ?

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WHO IS AN INDIAN

I Introduction

In a previous discussion paper, it was established that the recognition of the land rights of Aboriginal peoples in Canada was enshrined in the British North America Act. A second question that must be answered is, who are the descendents of these Aboriginal peoples to whom the rights have passed. Everyone is familiar with the story of Christopher Columbus who, in his quest for a westward route to India, by accident discovered North America. Thanking he had reached India, he called the inhabitants of the land area Indians. The name, although inappropriately applied to aborigines in North America, stuck. Both the colonial powers and the natives themselves have adopted the term Indian to describe the aboriginal people of this country.

In Canada, the question of who has aboriginal rights, therefore, revolves around the definition of this term. As we shall see in exploring this question, Canadian law and practice on the surface at least appears to have been rather confused. In actual practice, the overriding principle which has determined how the term Indian was defined at any given time has been one of expediency. In other words, colonial authorities have, from time to time, arbitrarily limited or expanded their definition of the term to accomplish their own self serving objectives. Exactly how this was done will be explored in more detail later in this paper.

II French Practice

There is no evidence that the early French colonists ever concerned themselves in any legal way about defining who was an Indian since they didn't recognize aboriginal rights. However, in practice anyone who lived as an Indian and followed an Indian life style was considered an Indian. The church considered those natives who had not been catholicized as an Indian. When and if a native person became civilized, i.e. adopted the Gallic values, life style and ways of doing things, and when they adopted catholicism as

II French Practice (Cont'd.)

their religion, they were granted full French citizenship and legally ceased to have the status of an Indian.

Therefore, any descendant of an Indian, be they a full blood or a Metis (halfblood), was considered an Indian as long as they followed the Indian way of life. In a later paper, we will discuss the Metis nation and events at the Red River and in the Northwest. It is important to note here, however, that at least for those Metis who had been gathered together in parishes and settlements and who had a close connection with the Catholic Church, the church did not consider them Indians. In official documents, letters, etc., they almost always make a distinction between the Indians and the halfbreeds. For the most part, it is also clear that they saw the claims of the Metis based on the question of Nationhood and deriving from the fact that they were the original settlers. With the exception of Father Richott, there is little evidence that the Catholic priests had any real concept or appreciation of the question of aboriginal claims and the fact that the Metis, as descendants of the original Indians, had a common claim with the Indians to the land their ancestors had occupied from time immortal.

The priests and other higher officials in the church were the main allies of the Metis in their struggle for recognition by the colonial British and Canadian governments. The statements of rights presented to the government at various times and the records of negotiations indicate that the question of whether the Metis were Indians and therefore entitled to the same or at least equal consideration with the Indian rarely arose. This seems to have been a serious flaw in the understanding of the French clergy which has, over the years, worked to the great disadvantage of the Metis. The Metis themselves educated and greatly influenced by the priests and the church, also seem to have adopted this approach to their rights. There is clear evidence that the Metis themselves and in particular their leaders saw their own status as different from

II French Practice (Cont'd.)

that of the Indians and saw their own claims based on the French concept of Nationhood. In 1869, at least, there is little evidence that Riel and other Metis leaders gave any consideration to the fact that they had a claim based on their Indian ancestry. This is so, even though in their statement of rights they recognized the claim of the Indians and asked that a land settlement for them be part of the guarantees made by Canada in admitting the Red River settlement into confederation as a province.

III Hudson Bay Company Practice

The Hudson Bay Company as is well known established a foothold in Canada around 1670. Their early dealings were largely confined to the immediate area around Hudson's Bay. They traded at the mouths of the rivers but established few trading posts inland until much later. The evidence from those early documents which are available indicates that they followed traditional British practice in their relations with the Indians. This included a recognition of their land rights. The question of the status of the halfbreeds, however, did not come up until much later. There is no clear evidence that the Hudson Bay Company had any official position on the question of whether halfbreeds were Indians. This is not unusual, since there was no need for them to be concerned about this question. The majority of the halfbreeds worked either for the Hudson Bay Company or their rival, The Northwest Company, up to the time the two companies merged in 1821. Some lived with the Indians and a few had established themselves as private traders or as guides, freighters, etc..

There is little question that the Hudson Bay Company, on the one hand, saw the halfbreeds as a different and separate group from the Indians. At the same time, there is evidence that they treated them as part of the native population.

III Hudson Bay Company Practice (Cont'd.)

In a petition to the Secretary of State for the colonies by natives of Rupertsland dated February 17, 1847, the petitioners refer to the native people as "Indians and halfbreeds" and also refer to "the natives, who are the original owners of the soil". The Hudson Bay Company in reporting on the memorial from the natives of Rupertsland exhibited their ambiguous view on this question of who is an Indian in the following statement:

"1. It is proper to observe in the outset that there is an ambiguity calculated to mislead in the term "natives" as used in the memorial, which is sometimes employed to denote halfbreeds, a person of mixed race and sometimes the Indians or aboriginal inhabitants. In the report it is applied exclusively to the letter".

In this statement, the Company is attempting to draw a clear distinction between the Indians and halfbreeds. In replying to this report, A. K. Isbister, a halfbreed and legal counsel for the petitioners, disputes this distinction. His statement was as follows:

"The distinction which is drawn between the native Indians and their half-caste offspring is in itself unobjectionable, but the inference it is afterwards attempted to found on this distinction, namely, that the halfbreeds are, from their circumstances of their mixed parentage, divested of the rights inherent in the aboriginal inhabitants, cannot be admitted. It is at variance with the established usage in Canada and the United States, where half-castes are in every case admitted to full participation in the privileges of their Indian connexions".

In 1857, a special committee was set up by the colonial office to investigate their request for an extension of their charter in the Northwest Territories and the Pacific Northwest. In hearings before the select committee, the Hudson's Bay Company appears to be taking the position that they did not distinguish between the rights of Indians and halfbreeds. We quote as follows:

III Hudson Bay Company Practice (Cont'd.)

" Mr. Grogan - what privileges or rights do native Indians possess strictly applicable to themselves?

Mr. Ellice - they are perfectly at liberty to do as they please; we never restrain Indians.

Mr. Grogan - Is there any difference between their position and that of the halfbreeds?

Mr. Ellice - None at all. They hunt and fish and live as they please."

At this time, the official position of the Company was that Indians and halfbreeds had the same rights, that is, they were all considered as part of the native population.

IV Other Early Examples of Official Practice

The company of New France clearly followed French policy set out above. The Northwest Company, although it operated out of Montreal,employing mostly French and Metis workers, was owned and controlled by British interests. We have no official records indicating who they considered to be an Indian. It can, however, be assumed that they followed the same approach to the question as did the Hudson Bay Company; they had no official position. Since the two companies merged in 1821, the references quoted above also likely would reflect the position of officials of the Company.

In 1760 when New France was ceded to Canada, the Articles of Capitulation made some reference to the protection of the rights of the Indians in the territory. However, nothing in this document gives any indication as to who was officially considered to be an Indian other than that they are referred to as the savages.

The Royal Proclamation of 1763 does not help us on this question of who is an Indian either. Although it both confirms and establishes Indian rights, it refers to them only as "the several nation or tribes of Indians with whom we are connected".

V Early Canadian Legislation

Early constitutional documents of Canada make no reference to Indians. The Treaty of Amity, Commerce and Navigation 1794, although it outlines Indian rights to cross the international boundary and to be able to transport goods duty-free from Canada to the U.S.A. and visa versa, does not clarify who qualifies as an Indian. The Act of 1840 to re-unite Upper and Lower Canada and for the government of Canada likewise makes no reference to Indians.

The first Indian Act passed in Canada was passed in 1850 and was revised in 1851. The 1850 Act contained the following definition of an Indian:

"First - all persons of Indian blood, reputed to belong to the particular body or tribe of Indians and the descendants of all such persons.

Secondly - All persons intermarried with any such Indians and residing amongst them and the descendants of such persons.

Thirdly - All persons residing among 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."

From this definition, it is quite clear that the accepted British and Canadian practice was to define persons of mixed blood (Indian-White) also as being Indians.

The 1851 definition restricted the definition as it applied to while males living among Indians and whites adopted into Indian tribes. The first and third definitions remained the same; that is, mixed blood persons were still defined as being Indians. The next Canadian legislation dealing with Indian matters was the Indian Enfranchisement Act of 1859. There was also a further

V Early Canadian Legislation (Cont'd.)

Indian Act passed dated in 1860. The definition of an Indian in these Acts was identical to that used in the 1851 Act.

In 1868, one year following the passage of the B.N.A. Act, a new department was created by the government of Canada to be responsible for Indian affairs. Up to that time, the respective colonies each had administered Indian affairs in their territory. The 1868 Act established the "Department of the Secretary of State". The definition of Indian in this Act was a repetition of the definition contained in the 1851 and 1860 acts.

It will be recalled that the Manitoba Act which made special provisions for land grants to the halfbreeds living within the boundaries of the new province of Manitoba was passed in 1870. In 1874, four years after the passage of this Act, the Canadian parliament passed an Act to amend previous laws dealing with Indian matters. That Act stated that the definition of the 1868 Act still applied. In 1876, an Act was passed to amend and consolidate laws respecting Indians. This in effect was the first Indian Act and is the model on which all subsequent Indian Acts were framed.

The definition of Indian in this Act, although somewhat more complicated, does not essentially differ from early definitions in terms of "who is considered to be an Indian" except that half-breeds in Manitoba who had received a land grant would not be considered an Indian. Other halfbreeds could only be considered Indians and admitted to treaty in special circumstances to be decided by the Superintendent General of Indian Affairs or his agent. It will be recalled that the period 1871 to 1877 was a very active treaty-making period. During the treaty negotiations, the commissioners and administrators generally followed a fairly consistent practice of admitting to treaty only those halfbreeds who lived with the Indians or who followed a life style similar to the Indians. This later group are believed to have been the "irregular bands" referred to in the new definition in the 1876 Act.

VI The Meaning of the Term Indian in the B.N.A. Act

Unfortunately, the term "Indian" was not defined in the B.N.A. Act. Therefore, one must conclude that there was a commonly used working definition which was accepted by the fathers of confederation and early legislators and that they therefore felt no need to define the term in the constitution. It is difficult to draw any conclusions other than that the working definition accepted was the definition contained in the 1850, 1851 and 1860 Acts. This view is re-enforced by the fact that the 1868 Act, passed immediately after confederation continued to use of the definition in the earlier legislation. Therefore, it is the general view of various constitutional experts that the term Indian as contained in the B.N.A. Act is broad enough to include all aboriginal peoples and their descendants (Indians, Eskimos and halfbreeds).

Further, since there have been no amendments to the B.N.A. Act dealing with the term Indian, the term must still have the same meaning today as it had in 1867. It is, therefore, also generally agreed that the term Indian as used in the natural resources transfer, agreements, also carries the broad definition of Indian referred to above, since these agreements are constitutional amendments to the B.N.A. Act and did not pretend to re-define the term Indian. It is further agreed that subsequent legislation dealing with Indian matters such as the Indian Act, the Manitoba Act, the Dominion Land Act, and provincial game acts cannot alter the meaning of a term contained in the constitution.

VII Subsequent Indian Acts and other Legislation

The thrust of Indian Acts since 1874 has been to gradually restrict the definition of the term Indian to descendants of registered Indians. Section 91 sub. 24 of the B.N.A. Act gives the federal government exclusive authority to legislate on Indian affairs. The government can, therefore, pass legislation to apply to only one or to several classes of native people. However, it is

VII Subsequent Indian Acts and other Legislation (Cont'd.)

agreed that such restrictive legislation cannot change the definition of the term as used in the B.N.A. Act. The government would, therefore, also have the legal authority to pass special legislation for other groups of native aborigines such as non-status Indians, disenfranchised Indians, Inuits, or the Metis and half-breeds. Indeed it could be legitimately argued that the federal government has assumed certain obligations for native pelple under the provisions of Section 146 of the B.N.A. Act for all native people. Since it is only discharging those obligations for some of the native people, it still has obligations to the other native people which it must assume and discharge on a fair and equitable basis.

There is no other federal or provincial legislation which specifically deals with Indian people. There are, however, provisions for Indian people in legislation or regulations administered by departments such as health and welfare, Manpower, DREE, C.M.H.C., Forests and Fisheries, and Secretary of State. The Department of the Secretary of State, C.M.H.C. and Forestry use a broader definition of native people than other departments which define Indian as defined in the Indian Act and who treat everyone else as non Indians. Secretary of State has a native citizens program covering all native people. Central Mortgage and Housing Corporation has a native housing program which applies primarily to non-status native people. Forestry has several acts, namely the migratory birds and the fisheries acts which also cover both status and non-status Indian people.

A number of provinces have passed legislation covering native people. This is particularly true in the western provinces where there has been legislation such as the Alberta Metis Betterment Act and Saskatchewan which had the Indian and Metis Act. All three prairie provinces have special provisions in their Game Acts, covering hunting and fishing by Indian people. All of this

VII Subsequent Indian Acts and other Legislation (Cont'd.)

provincial legislation is silent on the question of defining precisely who is an Indian, except the Manitoba Game Act. This province has attempted to tie the definition of Indian to the Indian Act definition.

Legal experts agree that provinces cannot define in legislation terms used in constitutional documents, so that the terms mean something different than intended in the constitution. Therefore, the Manitoba definition is considered to be ultra vires of the B.N.A. Act. However, this definition has not been to date contested in court at a level which would test its validity.

Further legislative action by the federal government which recognized the fact that halfbreeds were Indians was taken in the Manitoba Act and the Dominion Land Act which make specific reference to the "Indian Title of the Halfbreeds". This recognition is re-enforced by numerous orders in councils which were designed to implement the provisions of these acts which all also refer to "Indian title". One must conclude that if mixed blood people had Indian title, they had to be Indians.

VIII Non Legislative Recognition by Politicians and Government Officials

The earliest reference we can find to the question of the Indian Title of the halfbreeds was raised by MacDonald when he was negotiating the entry of Manitoba into confederation, with the delegat s from the Red River. According to Richott's diary record, MacDonald, in discussing the land rights of the Red River settlers, took the position that since the halfbreeds wanted to claim full citizenship rights, they should not expect to have their Indian title recognized. Richott replied by saying that the two issues were separate and that the one did not affect the other. This exchange is of interest (and will be pursued later in this paper) since the Bill of Rights presented by the Rupertsland delegates

VIII Non Legislative Recognition by Politicians and Government Officials (Cont'd.)

made no reference to the Indian title of halfbreeds. Because of that, it is also puzzling as to why this term was used in the Manitoba Act and later the Dominion Land Act.

In House of Commons debates in 1869, the residents of the west are referred to as "Indians" numbering from 180,000 to 500,000. Halfbreeds were not identified as a separate group. In the same debate, the House acknowledged its responsibility to "extinguish Indian titles". In a debate the same year, MacDonald referred to the halfbreeds as the main representatives of the original Indian tribes and therefore entitled to land grants by virtue of their Indian ancestry. MacDonald repeated this position on several occasions during the course of the debate on the Manitoba Act. This same proposition was again debated in the late 1870's, this ti time under the leadership of a Liberal government, when provisions were made for halfbreeds outside Manitoba to have their Indian title recognized by way of amendments to the Dominion Land Act. The question was also debated in 1885 and following. Respective governments always took the official position that halfbreeds had "Indian title" because of their Indian ancestry.

It is, however, well to note that the House of Commons members were at no time unanimous on this question, some members arguing that halfbreeds had no Indian rights because when Indian and white blood was mixed the offspring ceased to be Indian and became white. Other arguments such as the citizenship question were also raised.

Some government officials in reports and documents supported the position that the halfbreeds had Indian title. For example, the Indian Commissioner in his report to the Superintendent General in October of 1879 commented as follows:

VIII Non Legislative Recognition by Politicians and Government Officials (Cont'd.)

"By the treaties concluded this day with the Indians, no steps have as yet been taken in reference to the position of the halfbreeds. The common law settles that matter.

From the second clause of 19 of the Act 31, Vic. Cap 42, are to be considered Indians "all persons residing among those Indians of whom their parents from either side were descended from Indians, or reputed Indians, belonging to the Nation, Tribe or particular people of Indians interested in real estate or their descendants."

Most officials, however, were either silent on the matter, as was the case with Donald Smith, or opposed such as policy as was the case with MacDougall or were openly skeptical of the recognition of Indian Title as was the case with Archibald. Archibald, for example, in a lengthy report to MacDonald shortly after taking up his position as Lt.-Governor of Manitoba, commented that he questioned whether many of the halfbreeds in the Red River could claim any Indian title to the area in which they were now settled since they were descendants from tribes all over the northwest. He stated that he assumed that the land grants were not really meant to extinguish any Indian title possessed by the halfbreeds but to confer a boon on them.

IX Thrust of Federal Government Policy

Although respective Canadian governments have tended to define the term "Indian" very broadly when delinating their responsibility for native people, they have been equally anxious to divest themselves as quickly as possible of responsibility for native peoples. The early Indian Acts were referred to as "An Act Respecting the Civilization and Enfranchisement of native people". The emphasis was on enfranchisement with the policy being one of encouraging the deculturization and assimilation of Indian people

IX Thrust of Federal Government Policy (Cont'd.)

into the general population with full citizenship rights. The procedures for enfranchisement were carried through in all subsequent Indian Acts up to 1959. The intent of the enfranchisement procedures was to get Indian people to accept full citizenship rights and in the process give up all claim to Indian status in return for their share of band funds and a modest payment of treaty money.

In the 1869 debate on the Indian enfranchisement bill, government members were quite open in their statements that the intent was to educate Indians to where they would want to be full citizens and give up their Indian rights. The assumption was that eventually all Indians would be assimilated removing the need for Indian lands and on Indian policy and administration. The tying of Indian rights to citizenship rights as part of Canadian government policy was a consistent thrust of government policy up to 1959, when the Indian Act was amended to remove this provision and to extend voting rights to all native people.

It is not clear where the assumption that if one enjoyed full citizenship rights, then one had to forfeit ones Indian rights, originated. It does not appear to have originated in British practice. The concept of aboriginal rights as developed by De Vitoria entailed full citizenship rights. There is nothing in the Royal Proclamation on which such a policy could be based. Section 146 of the B.N.A. Act gives no hint of such a policy. Such a policy was not followed in the U.S.A. where the application of British law and practice relating to Indians has been most fully developed.

One can speculate that the origins of the policy are based on French colonial practice. It is consistent with the French policy of francisization and Catholicization leading to full French citizenship rights. The concept of enfranchisement also first appeared in an Indian Act passed in Lower Canada in 1850

IX Thrust of Federal Government Policy (Cont'd.)

some 17 years prior to confederation. One can further speculate that Canadian authorities adopted the policy not out of deference to the French but because it was a convenient way to limit government responsibility for native people.

Whatever the reason for the policy, it was repeatedly raised by government officials and politicians in their dealings with the halfbreeds. It was raised by MacDonald in negotiations with the Red River delegates, as indicated above. Alexander Morris and other treaty commissioners consistently used the argument when signing treaties with the Indians as the basis for not dealing with the halfbreeds. MacDonald again used the argument in 1883 and 1884 to justify the lack of government action in dealing with the claims of the halfbreeds in the northwest, as provided for in the 1879 Dominion Land Act.

Government officials such as Archibald, Dennis, Dewdney, McMiken and others all at various times advanced the argument that halfbreeds had no special rights since they had been granted full citizenship. They made the assumption that being granted citizenship brought about some instant and mystical transformation in one's status as a human being where one suddenly ceased to be an Indian and became a white man.

X Summary

In conclusion, it is clear that in approaching the question of who was an Indian and therefore entitled to Indian title, the Canadian authorities used a broad working definition which included both Indians and their mixed blood offspring. It is further clear that the Canadian government attempted to limit and dispose of its responsibility in a number of ways. One thrust was the extinguishment of "Indian title" either conditionally as in the case of the Indians or an absolute extinguishment of "Indian title" as was attempted in the case of the halfbreeds. The second thrust was to

X Summary

be the question of Indian title to full citizenship rights, with a condition of such rights being that one forfeited forever one's claim as an Indian person if one accepted citizenship. This was believed to have happened immediately on the allocation of a land grant in the case of halfbreeds and on enfranchisement in the case of an Indian.

Indians who did not seek full citizenship status retained some residual rights (the right to hunt and fish on certain lands), an inalienable land reserve, various payments and services in return for giving up possession and claim to their traditional hunting grounds and certain exemptions from taxes.

However, even though the government tried to limit its responsibility for native people, there can be little doubt that halfbreeds were recognized as being of Indian ancestry and therefore entitled to the same rights and benefits as full blooded Indian .