

MANITOBA HYDRO, NORTHERN POWER DEVELOPMENT,
AND LAND CLAIMS PERTAINING TO NON-STATUS
ABORIGINALS IN NORWAY HOUSE AND CROSS LAKE

BY

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A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements
for the Degree of

MASTER OF ARTS

Department of History
University of Manitoba
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TABLE OF CONTENTS

| | |
|---|------------|
| Abstract | ii |
| Abbreviations | iii |
| Maps | iv |
| Chapter One: Introduction | 1 |
| a) The Legal Problem of Metis Lands in Northern Manitoba | 1 |
| b) Geography of The Nelson River Basin | 5 |
| c) The Metis in Western Canadian History | 7 |
| d) The Torrens System of Land Holdings | 10 |
| e) Theories of Legal History | 15 |
| Chapter Two: Canadian Legal Institutions and The Sources of Canadian Law | 22 |
| a) What Legal Institutions Exist and What Law Are They Applying? | 22 |
| b) Relevant Proclamations | 25 |
| c) Applicable Legislation | 29 |
| d) Common Law Case Precedents | 41 |
| Chapter Three: Administrative History of the Nelson River | 62 |
| a) Era of Canadian Legislative Control 1870 - 1930 | 62 |
| b) Manitoba Assumes Control 1930 - 1948 | 72 |
| c) Hydro-Electric Development 1963 - | 81 |
| Chapter Four: Conclusion | 99 |
| Bibliography | 107 |

ABSTRACT

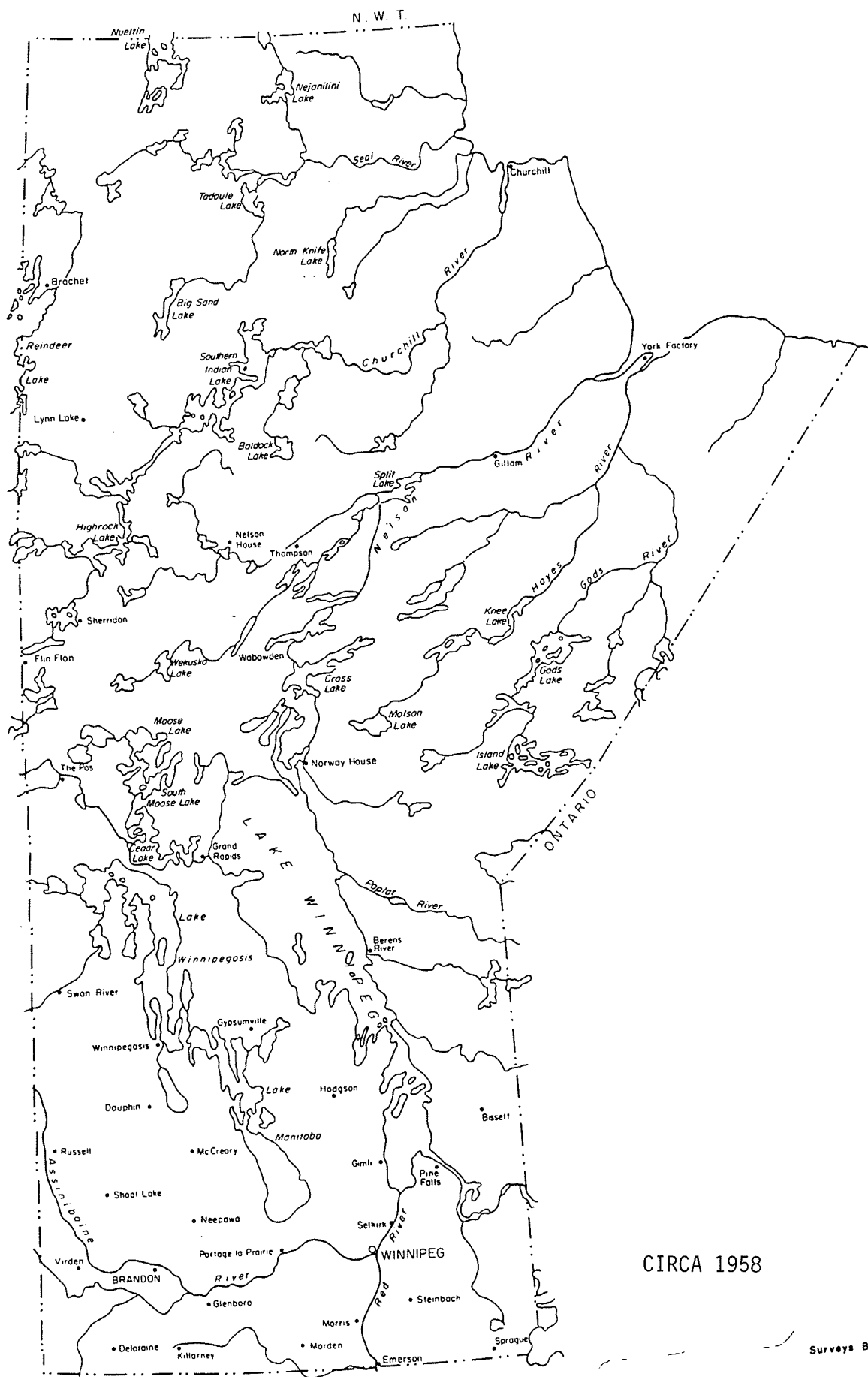
This thesis explores one aspect of the potential legal obligations which flowed from the extensive hydro electric projects undertaken in northern Manitoba in the 1970's. It addresses the history of the legal relationship between governments and non status aboriginal people in the affected areas, in particular those people in Cross Lake and Norway House. The thesis reviews charter, statute and case law on the topic from 1670 until 1993, concentrating on the period after 1930. The main argument of this thesis is that, although federal legislation applies to status Indians in the area, there are no specific legal obligations to non status aboriginals in northern Manitoba.

Abbreviations

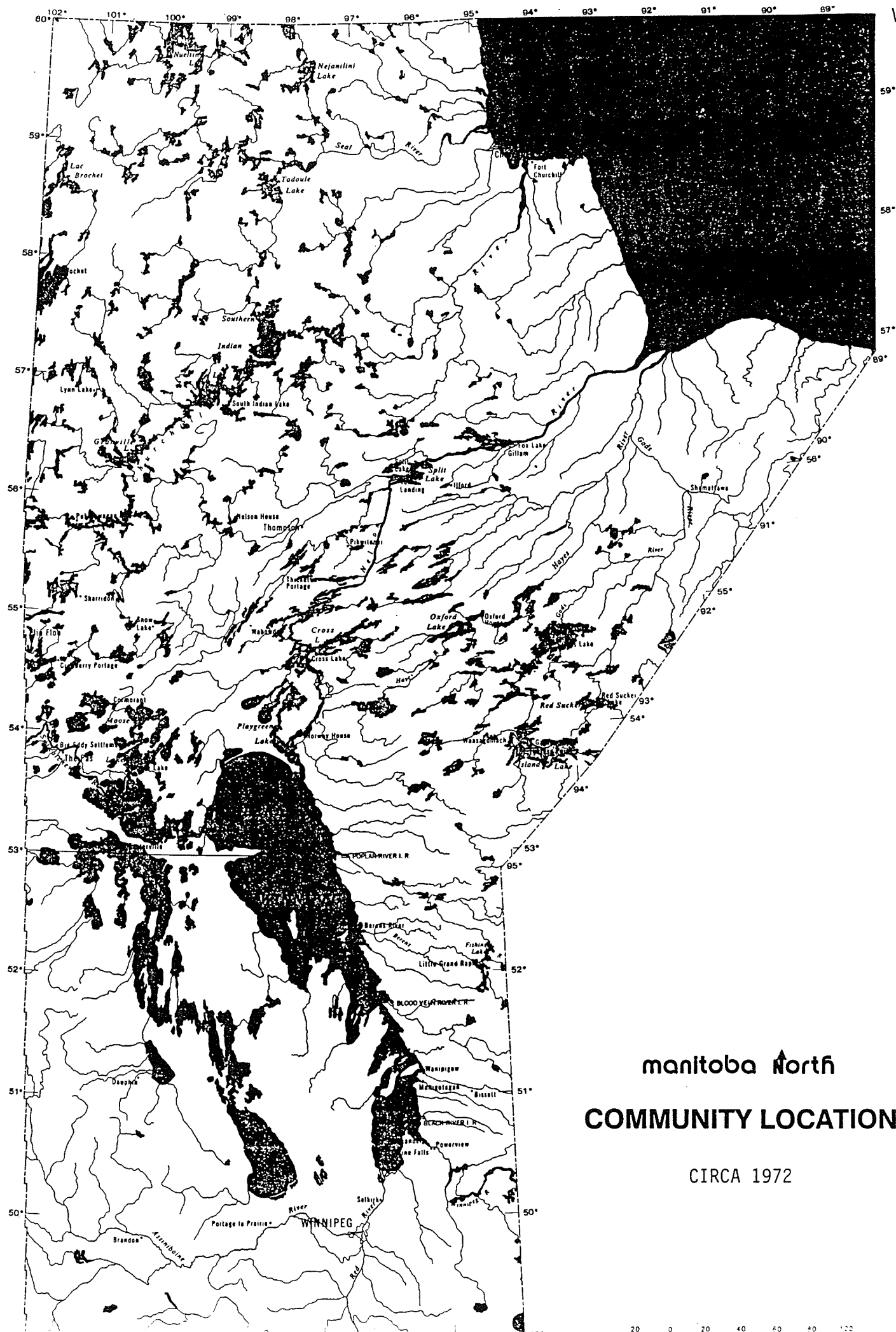
SCR - Supreme Court Reports (Canada)
DLR - Dominion Law Reports (Canada)
WWR - Western Weekly Reports
NR - New Reports (Canada)
FC - Federal Court Reports (Canada)
BC WLD - British Columbia Weekly Law Digest (Canada)
AC - Appeal Cases (UK)
ALL ER - All England Report (UK)

PC - Judicial Committee of Privy Council (UK)
EX CT - Exchequer Court (Canada) - Now known as Federal Court
MAG CT - Magistrate Court
TD - Trial Division
CA - Court of Appeal
SC - Supreme Court

MLL - Manitoba Legislative Library
PAM - Provincial Archives of Manitoba

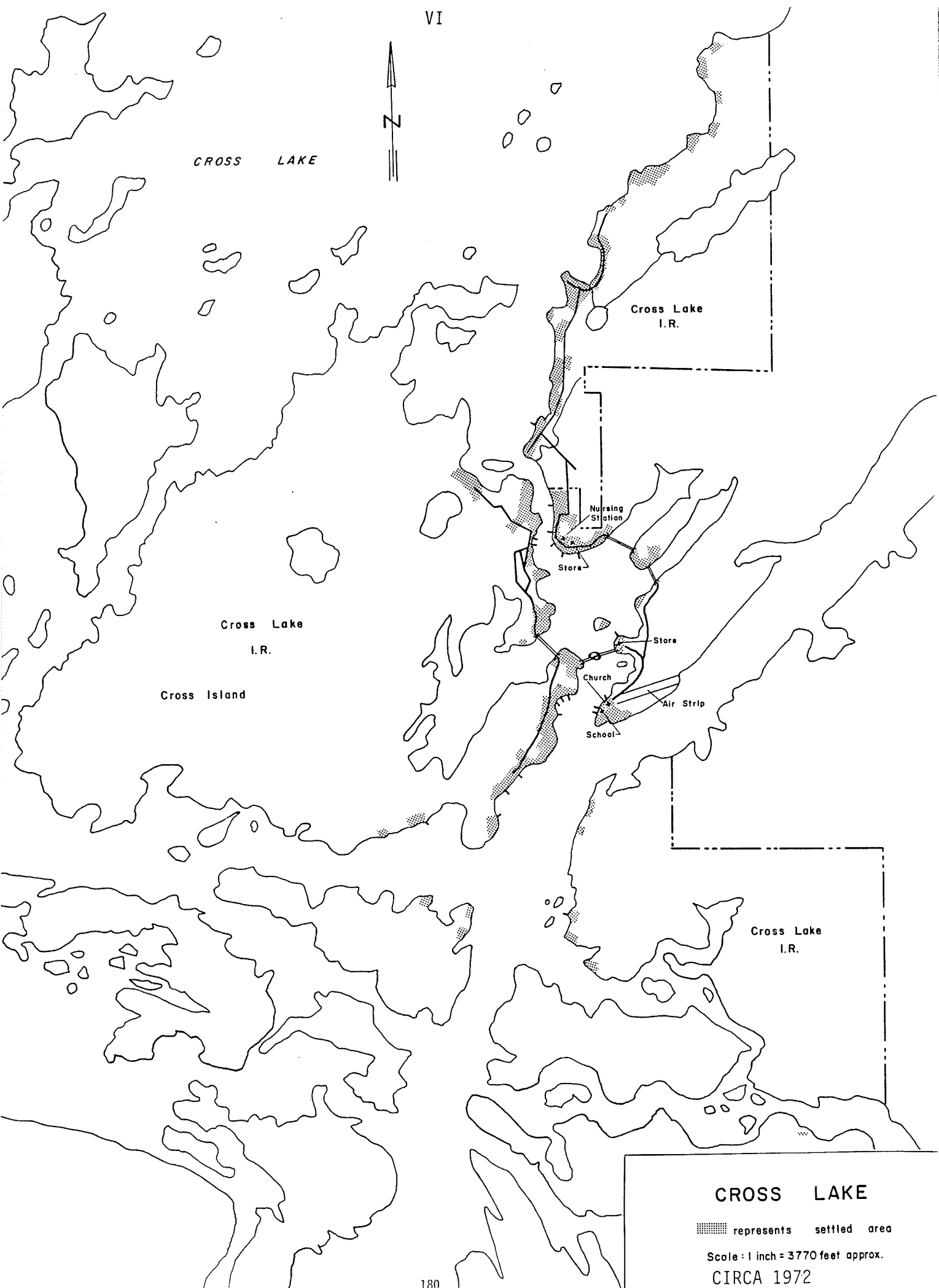


CIRCA 1958



manitoba north
COMMUNITY LOCATION

CIRCA 1972

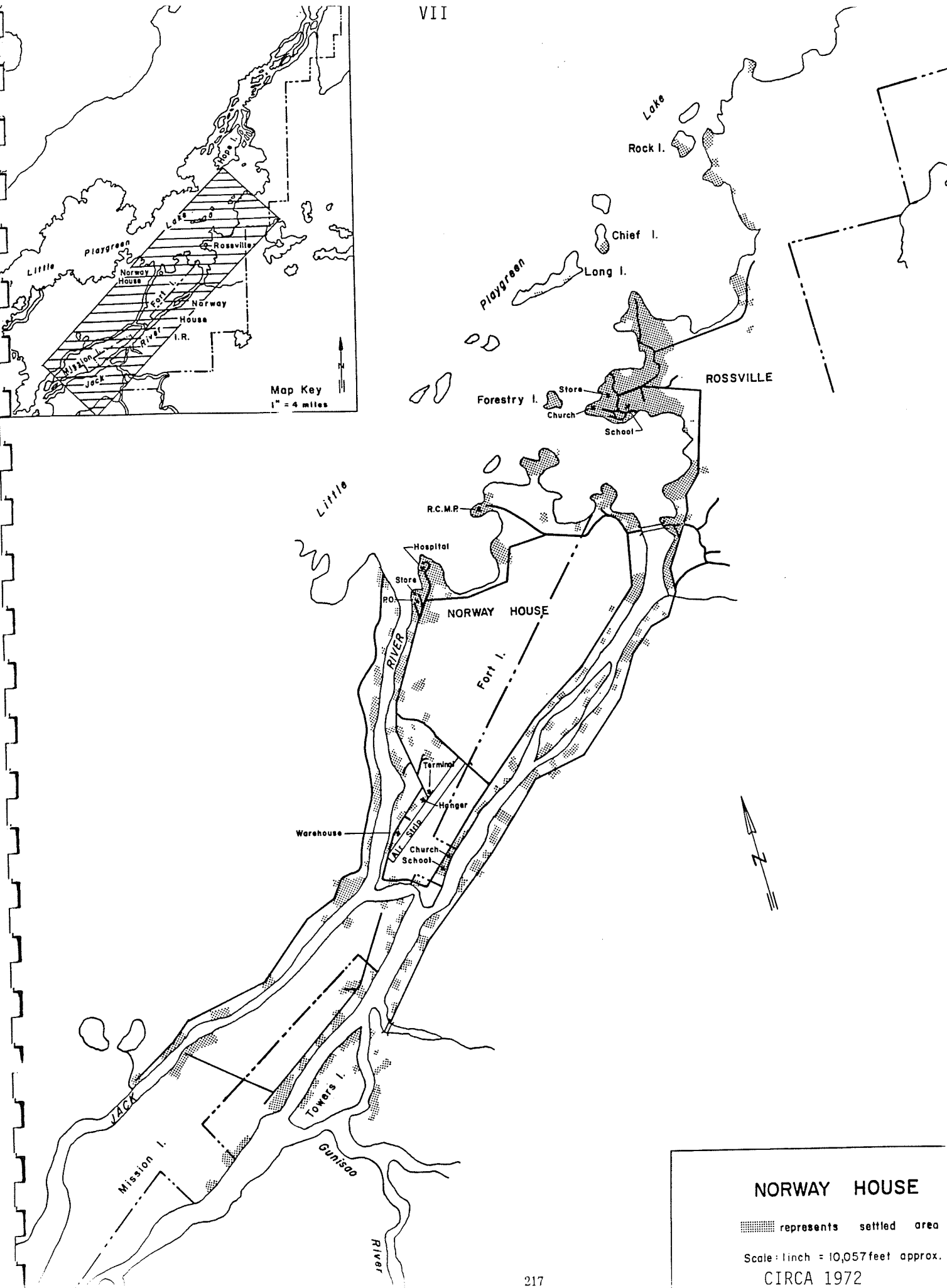
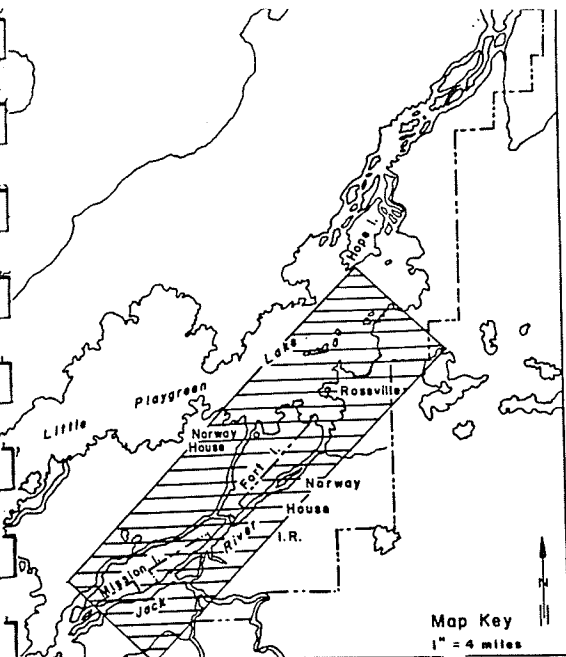


CROSS LAKE

represents settled area

Scale: 1 inch = 3770 feet approx.

CIRCA 1972



NORWAY HOUSE

represents settled area

Scale: 1 inch = 10,057 feet approx.

CIRCA 1972

CHAPTER ONE: INTRODUCTION

a) The Legal Problem of Metis Land in Northern Manitoba

This thesis explores certain aspects of the legal relations between Canada's people and its resources. The history of Canada's people has been marked by conflicts between expansionist white societies and Canadian aboriginals. These conflicts have intensified during disputes over the ownership and control of Canada's resources. The conflicts have also been made complicated by the emergence of a distinct group of people, the Metis, identified as neither aboriginal under law nor part of the expansionist white society. Historian J.R. Miller explains that "most of Canada's native peoples who were in the path of development found that they were ignored in the process of going after the resources and left out of the division of the proceeds of their sale".¹ From the time of Confederation in 1867, land and forestry resources have been a focal point of disputes. In the twentieth century, minerals and water resources have become contentious issues. In the last twenty-five years, conflict has often centred on resource development in Canada's north - the "last frontier" of conflict between the expanding needs of Canadian society and the land base of Canada's aboriginal people.

Canadian law established a unique position for aboriginals from a time well before Confederation. The restrictions on their lives and the obligations of governmental bodies to them have long been a part of Canadian law. At the same time, the legal system has attempted to adapt to the needs of a population which has often been obsessed with rapid expansion and development. Conflicts are inherent in a legal system which is trying to

1 Miller, J.R., Skyscrapers Hide The Heavens - A History of Indian-White Relations in Canada (Toronto, University of Toronto Press, 1989), p.251

accommodate these variant objectives.

Conflicts among Canadians over resource control and the place of the Metis have been prominent during the particular time addressed in this paper. Indeed, Manitoba entered Confederation in 1870 as a result of such conflicts. In the years immediately prior to that date and for the decade following the formation of Manitoba, land ownership and the rights of the Metis constituted the most significant issues in dispute. Aboriginal groups resented the influx of white immigrants, but ultimately were overwhelmed by them. Control of the desirable land in the province was the key to assumption of political and economic power by the new arrivals. Manitoba obtained legal ownership of its natural resources in 1930. This followed a number of years of legal negotiations between the Canadian and Manitoban governments. Manitoba considered control of its own resources to be critical to economic diversification, as the provincial government was dealing with a number of issues concerning pulpwood, mineral and water power development.

In the 1960's, a new philosophy of governmental involvement led to large scale hydro-electric development in Manitoba's north. An unprecedented level of control over resources was needed, as large portions of Manitoba's lands and waterways were altered considerably. When the development projects proceeded, conflicts arose with citizens of Manitoba's north, mostly aboriginals, whose homes and lifestyles had been altered drastically by the projects. These conflicts led to lengthy negotiations between governments which supported the development projects and northern Manitoba aboriginals who eventually obtained compensation for their loss of resource control. Details of these matters will be presented later in this paper.

In the mid 1960's, the Manitoba Government reserved a substantial tract of Crown land in northern Manitoba for the Nelson River Power Reserve.² Manitoba Hydro then began a scheme of water diversion which seriously affected land which was occupied by both status and non-status Indians as well as Metis. Provincial authorities recognized the effects of the flooding and, in 1977, completed the Northern Flood Agreement with the Canadian government, Manitoba Hydro and representatives of the five Indian Bands within the Nelson River Power Reserve.³

Those individuals who occupied parts of the affected land outside the scope of Treaties were not represented at the meetings leading to the agreement and they received no benefits under its terms. In particular, many people in the communities of Norway House and Cross Lake were descendants of individuals who had originally settled on their particular property as "squatters" without any formal legal title.⁴ The property in question had originally been acquired by Canada from the Hudson's Bay Company as part of the Rupert's Land Transfer in 1870.⁵ It was subsequently transferred to Manitoba in 1930.⁶

This thesis will investigate whether the descendents of the squatters at Norway House and Cross Lake have any claim to their lands which can

2 Complete Agreement found in Manitoba Hydro Collection-Legislative Library under "Agreement between the Government of Canada represented by the Minister of Energy, Mines and Resources and The Government of the Province of Manitoba, represented by the Minister of Public Utilities, February 15, 1966".

3 Northern Flood Agreement December 16, 1977

4 Squatter - Someone who occupies land without consent or licence. Squatter's title - title acquired by someone who has occupied land without paying rent or in any other way acknowledging superior title for so long that that person acquires indefeasible title. Dukelow, Daphne A. and Nuse, Betsy, The Dictionary of Canadian Law (Barrie, Thomson Professional Publishing, 1991), p.1018

5 (1868) 31-32 Victoria C. 105 (UK) (Found in RSC 1985 App. II No. 7)

6 S.C. 1930 c.29 SM 1930 c.30

be legally enforced at this time. In particular the questions which must be addressed are whether the Canadian government fulfilled any obligations which it may have had to such squatters between 1870 and 1930, whether the Province of Manitoba inherited any trust obligations to these people in 1930, whether Manitoba and Canada effectively extinguished any of these obligations by subsequent legislation, and whether the compensation provided by the Government of Manitoba since 1975 sufficiently fulfilled any obligations to the squatters at Norway House and Cross Lake.

This thesis is not focussed on aboriginals who are residing on reserve land. It will concentrate on non status aboriginals who are residing either on land registered under the Manitoba Torrens system or on Provincial Crown land.

A great deal of historical material exists concerning the question of native land claims, breaches of Treaty obligations, and the socioeconomic aspects of modern aboriginal life in Canada. Much of this material is quite current. There is a substantial body of historical work which traces the various problems which aboriginal groups have encountered with Governmental bodies and analyses have been made concerning the actual status of Treaties and similar agreements. In the past several decades, aboriginal issues have involved passionate arguments concerning whether the aboriginal "first nations" of Canada have, in fact, ever surrendered their sovereign status. Entitlement to an "inherent" right of self government has become a popular political issue.⁷

⁷ See Cassidy, Frank, Aboriginal Title in British Columbia: Delgamuukw v. The Queen (Winnipeg, Oolichan Books and The Institute For Research on Public Policy, 1992), Clark, Bruce Native Liberty, Crown Sovereignty - The Existing Aboriginal Right of Self-Government in Canada (Montreal, McGill-Queen's University Press, 1992) and Sprague, D.N., Canada and The Metis 1869 - 1885 (Waterloo, Wilfrid Laurier University Press, 1988)

The purpose of this thesis is not to enter political or socioeconomic debates that are so elaborately documented elsewhere, such as the works which have been cited. Similarly, it is not the purpose of this work to analyze in painstaking detail each of the various developments which have taken place regarding aboriginal land claims in Manitoba and elsewhere in Canada. This thesis will attempt to provide a coherent legal position which will address the question of whether there are any outstanding legal obligations of any governments owed to the non-status Indians in Cross Lake and Norway House whose ancestors originally were "squatters" on the property.

b) Geography of the Nelson River Basin

Knowledge regarding the geography of the area in question is essential in order to comprehend the process set in motion by the creation of the Nelson River Power Reserve.

The entire scheme was based on the objective of providing more water to the Nelson River in order to facilitate its flow from the northern end of Lake Winnipeg to the point where it empties into Hudson Bay. This was to be accomplished by two steps. The first step was to divert the Churchill River into the Nelson River. The Churchill River would be damned at the end of South Indian Lake, and diverted through the Rat River and Burntwood River into the Nelson River. The second step was to regulate the level of Lake Winnipeg. The Nelson River actually drains an area of approximately 414,000 square miles extending from the foothills of the Rocky Mountains to within twelve miles of Lake Superior.⁸ The Premier of Manitoba pointed

8 Lake Winnipeg, Churchill and Nelson Rivers Study Board Background

out in a subsequent letter to communities affected by the diversion that "the Nelson River is the single greatest natural source of electric power that the Province of Manitoba has".⁹ The biggest factor in its ability to generate power was that on its 410 mile route from Lake Winnipeg to Hudson Bay, the level of the river descended 713 feet.¹⁰ Ordinarily, its level was higher in the summer months than during the winter months. The idea of regulating the level of Lake Winnipeg at the point where it flowed into the Nelson River was to hold back some water in the late summer and fall and then allow it to flow into the Nelson River in the winter months when the demands for hydro-electric power were greatest. It is common sense that, if these objectives were accomplished, there were potential effects on communities surrounding the Nelson River.

In fact, a total of 528,000 acres of land in Northern Manitoba were flooded by the diversion of the Churchill River into the Nelson River and the increased outflow of Lake Winnipeg into the Nelson River. This included nineteen per cent of the land on the Indian Reserves of Cross Lake, Norway House, Split Lake, Nelson House and York Factory.¹¹

The community of Norway House is located on the east channel of the Nelson River approximately eighteen miles north of the natural outlet of Lake Winnipeg. In the early 1970's, the population was approximately 3000 of which roughly two-thirds were registered Cree Indians. The remaining 1000 people were non registered Indians and Metis except for a small group of transient professional persons, mainly in the media, health

Documents and Interim Reports, Technical Report, Appendix I, Preface

9 Premier Ed Schreyer to Residents of Cross Lake and Norway House - January 31, 1975, Manitoba Hydro Collection, Legislative Library

10 Lake Winnipeg, Churchill and Nelson Rivers Study Board, Technical Report, Appendix I #24 p.3 - 1

11 Northern Flood Agreement, A Summary of the Agreement, Issues & Obligations, Indian & Northern Affairs Canada, 5

and educational fields.¹² The community of Cross Lake is located on the southeast shore of the body of water which is also referred to as Cross Lake. It is located forty-five miles north of Norway House and seventy-seven miles south of Thompson, Manitoba. In the early 1970's the population of Cross Lake was approximately 2000 permanent residents, of which 1770 were registered Indians and the remaining 230 were non-registered Indians or Metis.¹³ The populated areas of Cross Lake were scattered throughout Indian Reserve #19 and adjacent Crown lands. The settlement basically extended for six miles along the east shore and four miles along the west shore of the Nelson River where it intersected with the lake.¹⁴

c) The Metis in Canadian History

Indians have always occupied a special legal status in western Canada from the time of Confederation. This will be explored in some detail throughout this paper. However, the position of people described as "Metis" in Canada has always been more unclear. The term itself has often been used quite loosely. Some historians have confined the term to the offspring of Indian mothers and French Canadian "voyageurs" who came to Western Canada in the pursuit of fur trading. These historians have used a number of other terms including "native born" and "country born" to describe the offspring of Indian mothers and English or English Canadian fur traders or settlers. In this paper the term Metis will be used to describe the

12 Lake Winnipeg, Churchill & Nelson Rivers Study Board
Canada/Manitoba 1971-75 Technical Report p.6 - 6. The terms concerning
aboriginals will be explained later in the paper.

13 *Ibid*, p.6-5

14 Cross Lake Community Profile Technical Report # 5, Manitoba
Department of Northern Affairs, June 1974

offspring of any unions between Indians and non-Indians. This more closely follows the definition of Metis in a leading Canadian legal dictionary which says that the term means "a person of mixed white and Indian blood having not less than one quarter Indian blood but does not include either an Indian or a non-Treaty Indian as defined in the Indian Act".¹⁵

In Manitoba, the original Metis were predominantly a product of French Canadian fathers and Indian mothers. This began to change after the 1821 union of the Hudson's Bay Company and the North West Company. A number of former Hudson's Bay Company employees remained in Manitoba after their employment with HBC ceased. When combined with the fact that a number of English speaking settlers were now permanent residents of the Red River Colony at the present day site of Winnipeg, this resulted in a larger number of Metis who were the product of Indian mothers and English fathers. By the time that Manitoba entered Confederation in 1870 there were approximately 9,700 Metis from a total population of approximately 11,300.¹⁶

This thesis will describe in detail the legislation adopted by governments to deal with Indians. In particular, the basic authority to legislate regarding Indians has remained with the Federal Government. The essential component of the Federal scheme of dealing with Indians has been the reserve system. Tracts of land, the legal title to which remain vested in the Crown, have been set apart by the Crown for the use and benefit of Indian bands. The more difficult topic, one which this paper addresses, concerns the rights of people with Indian blood who have not been able to

¹⁵ Dukelow, Dictionary of Canadian Law p.635. See also Foster, John E. "The Metis: The People and The Term" Prairie Forum, 3, 1978 pp. 79-90

¹⁶ Census results found in Sprague, D.N., Canada and The Metis 1869-1885, p.45

derive the benefits of the reserve system. The fundamental difference in attitude of governments towards Indians and Metis has been set out by noted Manitoba historian W. L. Morton, who said:

The Treaty Indian on reserve was the responsibility of the Federal government ... but Indians who left the reserves, as they were doing in some numbers, and the great bulk of the Metis, indistinguishable except in law from their blood relatives, the Indians, were a provincial responsibility, like any other citizens in distress.¹⁷

Despite Morton's assertion, the legal status of Metis has not actually been clearly accepted by the governments involved. Manitoba was created as a province where all "free men" were free to participate in a system of self government. Indians were classified differently. They were given land grants, i.e. reserves, and basically were placed in a different legal position. This thesis will describe that, although the Metis did not receive the legal status of Indians, their children did receive land grants under the Manitoba Act "towards the extinguishment of the Indian title".¹⁸

The Metis at Cross Lake and Norway House were not given reserve land or any other land pursuant to Indian title. They basically remained under the jurisdiction of the Government of Canada until the area became part of the Province of Manitoba in 1912. Many of them continued to live on Crown land which did not pass to Manitoba control until 1930. After that time, the Government of Canada assumed responsibility only for those individuals who had status under the Indian Act.¹⁹ Metis in the area were

17 Morton, W. L., Manitoba: A History (2nd ed.) (Toronto, University of Toronto Press, 1979), pp.493-494

18 Manitoba Act (1870) 33 Vict. C.3 S.31

19 RSC 1985, c.I-6

the responsibility of the Government of Manitoba.

Until the Constitution Act 1982²⁰ clarified that aboriginal peoples of Canada included Metis as well as the Indians and Inuit people, their situation was generally treated differently than Indians. Since 1982, it has become clear that legislation which purports to deal with aboriginal rights must also consider those of Metis people. This seems to stretch the definition of aboriginals, such as that contained in recent Canadian dictionaries, beyond the one presumed by society and law before 1982. Aboriginals have been defined as "the first original or indigenous inhabitants of a country".²¹ Indigenous people had been defined as those "living or occurring naturally in a particular region or environment".²² Nonetheless, it is clear that the treatment of Metis until 1982 has been significantly different from that of registered Indians. It is on the basis of this difference that the discussions in this thesis will proceed.

d) The Torrens System Of Land Holdings

This thesis deals in some depth with the legal position of people who are basically making claims for interests in land which are not registered. This situation must be assessed in light of the relevant real property law of Canada and Manitoba.

By virtue of the Real Property Act of 1885, which received assent on May 2 of that year²³, Manitoba came under the "Torrens" system of land holding. The system was named after Sir Robert Torrens, a 19th century

20 Constitution Act (1982) c. 11 (U.K.)

21 Dukelow, Dictionary of Canadian Law p.2

22 Webster's Ninth New Collegiate Dictionary (Markham Thomas Allen & Sons, 1985), p.614

23 S.M. 1885 C. 28

Australian who was a customs house clerk in South Australia. Although a non lawyer, he was able to devise a "simpler and more certain system of transfer of land ... than the old English practice of conveyancing then in vogue".²⁴ The system was adopted in Australia in 1856 and rapidly spread to New Zealand and all of Australasia. It was adopted in Great Britain in 1875²⁵ and by several Canadian provinces including Manitoba in 1885.²⁶

The two principal evils that the new system was to address were the length of time between the formation of the contract and the actual sale of the land and also the process of investigation which was required concerning the land title each time the property was sold or mortgaged. A scholar knowledgeable with the implementation of the system once explained that "the chief benefit of the system was the indefeasible nature of the title obtained, together with the speed and certainty of transfer and the abrogation of the necessity of abstracts of title".²⁷ In other words, once title has been obtained under the Torrens system, there can be no challenge to its legal validity.

A modern legal scholar has stated that there are basically three fundamental principles of the land holding system:

- 1) Indefeasibility of title;
- 2) Compulsory registration of all transactions regarding the land;
- 3) Compensation for loss of any rights as a result of failure of the system.²⁸

The concept of a title granted under the Torrens system as

²⁴ Jones, Herbert C., The Torrens System Of Transfer Of Land (Toronto, Carswell & Co. 1886), p.1

²⁵ 38-39 Vict.C.87

²⁶ S.M. 1885 c.28 Received Royal Assent May 2, 1885

²⁷ Jones, The Torrens System Of Transfer Of Land, p.1

²⁸ Sterk, John, Alberta Conveyancing Law & Practice (Toronto, Carswell Co. Ltd. 1981), pp.3-4

indefeasible is based on two ideas which are widely noted in legal circles as the "mirror" and "curtain" principles. The mirror principle stipulated that the certificate of title accurately reflects all interests regarding the property at a particular point in time and that "nothing incapable of reflection appears on the certificate of title, and it does not permit consideration of unregistered interests in the land even though they may be capable of registration".²⁹ The curtain principle "ensures that a prospective purchaser or person intending to acquire an interest in land can rely on the certificate of title as the sole source for determining the existing interests in the land and therefore he need not look beyond it".³⁰ In short, once property is brought under the Torrens system, the certificate of title on file in the particular registry office sets out all interests in the property at a particular time. Only those interests shown on the certificate of title are legally enforceable. No further investigations are required.

The foundation for the implementation of the Torrens system in Manitoba was established in 1883. In June of that year, Beverley Jones, a solicitor for the Canadian Permanent Loan and Savings Company, travelled to Winnipeg on behalf of an organization known as the Canada Land Law Amendment Association. Although it is stated that "the people and the bar of Manitoba knew little of the benefits of the proposed reform"³¹, it soon received warm acceptance by the authorities in Manitoba. A Manitoba branch of the Canada Land Law Amendment Association was soon formed and within two years legislation had been passed by both the Manitoba Legislature and the House of Commons. Manitoba Attorney General C. E. Hamilton was the driving force at the provincial level and Member of

29 Ibid, p.3

30 Ibid, p.4

31 Jones, The Torrens System of Transfer of Land, p.221

Parliament Dalton McCarthy took the federal initiative.

The Manitoba authorities were very open to any system which involved greater certainty in real estate transactions. Land was a valuable commodity, particularly with the influx of new settlers in what was in large part still a frontier society. At the federal level, it has been pointed out that the Canadian Government was pre-occupied with matters involving the Canadian Pacific Railway which resulted in a session of "undue length" so that the implementation of the Torrens land holding systems in Ontario and Manitoba did not receive detailed consideration and did not result in substantial debate.³²

An observer at the time noted that "by one stroke was the last vestige of the feudal system swept away from the virgin soil of our western prairies, and a cheap, easy and expeditious method of land transfer introduced".³³ A contemporary observer might well add that the introduction of the new system also assured control of the land against the Metis.

Once land has been brought under the Torrens system, it appears that any unregistered interest being claimed by a squatter or the descendant of any squatter would definitely be unenforceable. People wishing to establish claims through squatting or, as is more appropriately described, "occupancy", must base their claim on the time that the property was brought into the Torrens system after surveys were completed.

An examination of the provisions of the original Real Property Act of 1885 indicates that Section 127 is the key portion of that statute regarding the subject matter of this paper. That section reads as follows:

32 Ibid, p.223

33 Ibid, p.222

Any certificate of title issued upon the first bringing of land under the provisions of this Act, and every certificate of title issued in respect of the same land, or any part thereof to any person claiming or deriving title under or through the applicant owner shall be void as against the title or any person adversely in actual occupation of, and rightly entitled to such land or any part thereof, at the time when such land was so brought under the provisions of this Act, and continuing in such occupation at the time of any subsequent certificate of title being issued in respect of the said land, but every such certificate shall be valid and effectual as against the title of any other person whomsoever.³⁴

Quite clearly, this section indicates a title to property when the land was initially brought into the Torrens system is not valid against the interests of a person who actually occupied the property and was entitled to occupy it at the time that the land was brought under the Torrens system. The initial title under the Torrens system is valid against every other potential claimant.

The situation became even more clear at the time that the Manitoba Statutes were revised in 1913. The two relevant sections of that Real Property Act are 82 and 83 which read as follows:

- 82 Every certificate of title shall be void as against the title of any person adversely in occupation and rightly entitled to the land at the time when such land was brought under the new system and who continues in such occupation.
- 83 After land has been brought under this Act, no title thereto adverse or in derogation to the title of the registered owner shall be acquired by

34 S.M. 1885, C.28, S.127

any length of possession merely.³⁵

The relevant sections of the Real Property Act at the present time are quite similar to those contained in the 1913 revision. Section 61(1) and 61(2) of the present Real Property Act read:

61(1) Every certificate of title is void as against the title of a person adversely in actual occupation of, and rightly entitled to, the land at time the land was brought under the new system, and who continues in such occupation.

61(2) After land has been brought under this Act, no title thereto adverse to, or in derogation of, the title of the registered owner is acquired by any length of possession merely.³⁶

Any Manitobans attempting to bring real property claims on the basis of occupancy of the land must prove that their right to occupy was valid at the time that surveys were completed and the particular property was first registered under the Torrens system. Otherwise, claims brought on any basis other than the Torrens registration system have no basis.

As mentioned previously, the land in the area of Cross Lake and Norway House did not come under Manitoba control until 1912. Crown land in the region (in particular, reserve land) is still not subject to the Torrens system of registration. The other land in the area did become part of the Torrens system as soon as the surveys were completed.

e) Theories of Legal History

This paper seeks to present an historical problem on a legal basis. Modern Canadian legal history tends to expand the parameters of the topic

³⁵ RSM 1913, C.17, SS.82-83

³⁶ RSM 1988, C. R30, S.61

to a point where the foundation is often obliterated. Numerous authors have written and expounded at great lengths on the sociological aspects of this situation. It is crucial to conduct the debate with understanding of the legal basis.

It has been pointed out by one modern Canadian historian that a great deal of recent Canadian legal history concerns a debate regarding style. The key element of the debate is how legal history should be written. The two major options are what this historian refers to as the "traditional" one, with emphasis on doctrine and institutional description, and the second one which concerns itself more with the effect of political, economic and social change.³⁷ Another modern Canadian legal historian adopts an approach which draws a distinction between "internal" and "external" history. Internal history involves a study of sources which are legal in nature in order to describe or explain legal concepts. External history places the emphasis on the social context of the law and its social effects. The author in question, David H. Flaherty, presents a dualism which is quite relevant to the present discussion.³⁸ In their introduction to the book edited by Flaherty, his approach is very concisely described by Brendan O'Brien and Peter Oliver:

Professor Flaherty makes an important distinction between internal and external legal history. The former focuses on areas such as the legal profession, the judiciary and the analysis of judicial decisions which are unmistakably legal in nature, and

37 Reid, John Phillip, "The Layers of Western Legal History" in John McLaren, Hamar Foster and Chet Orloff, Law For the Elephant, Law for The Beaver-Essays in the Legal History of The North American West (Regina, Canadian Plains Research Center, 1993), p.23

38 Flaherty, David A. (ed), Essays in The History of Canadian Law (Toronto, University of Toronto Press, 1981)

analyzes them primarily in terms of strictly defined legal processes and concerns. External legal history is far more interested in the broader relationships between the law and the larger society, and at times legal history of the external variety shades into more general social or economic history.³⁹

Working within the confines of the Flaherty and Reid distinctions, this thesis attempts to provide a coherent "internal" legal history. It will also be quite "traditional" in its focus. In so doing, an attempt is made to fill a vacuum in the studies made in this area of research and to avoid unessential debates concerning aspects which are not entirely relevant.

One justification for this traditional and internal approach may be found in the work of R.C.B. Risk, another prominent Canadian legal historian. Risk has stated that "the problem with the leading twentieth century Canadian historians of the 1930 - 1970 era, however, is that the grand hypotheses they advanced to explain the origins of Canada essentially ignore the legal dimension".⁴⁰ He goes on to explain that the modern Canadian historians are paying "relatively little attention to our legal traditions".⁴¹ The explanation which he offers for this situation is that "major interpreters of the Canadian past regard the legal system as secondary and passive rather than an instrumental and dynamic aspect of historical development".⁴² This work hopes to address in part the concern raised by Professor Risk. There will be an examination of the relevant legal situation during different periods in Canadian history. The discussion of the

39 O'Brien, Brendan and Oliver, Peter N., Introduction to Flaherty, Essays in The History of Canadian Law, p.x

40 Risk, R.C.B., "A Prospectus For Canadian Legal History" (1973) 1 Dalhousie Law Journal 228, found in Flaherty, Essays in The History of Canadian Law, p.9

41 Ibid, p.10

42 Ibid

legal situation will take place within the context of the interplay between resource development and the problems confronting aboriginal people. The law will be shown as an active force in Canadian history.

Much of the debate concerning form in legal history centers around a sense of skepticism concerning the motive of the law itself. This in turn is fed by the particular political/economic philosophy of the historian. The accepted pioneer in legal history is J. Willard Hurst, who stated quite simply in his major book on the topic in 1950 that "no factors bore so powerfully upon the legal order or so much shaped its problems, as the main currents in the growth of the economy".⁴³ This seems to be the starting point for the debate.

In a leading work on legal history published in 1975 under the name Albion's Fatal Tree,⁴⁴ Professor Douglas Hay rendered the opinion that "the private manipulation of the law by the wealthy and powerful was in truth a ruling class conspiracy, in the most exact meaning of the word".⁴⁵ He went on to explain that "a ruling class organizes its power in the state. The sanction of the state is force, but it is force that is legitimized, however imperfectly, and therefore the state deals also in ideologies".⁴⁶

This view of the law found support among other modern historians, particularly those who view history through a Marxist perspective. Peter Linebaugh stated that "law had in itself ideological importance as well as functional purposes that largely served the class interests of the elite".⁴⁷

43 Hurst, J. Willard, The Growth of American Law: The Law Makers (Boston, Little, Brown & Co., 1950), p.446

44 Hay, Douglas, Linebaugh, Peter, Rule, John G. Thompson, E.P. and Winslow, Cal, Albion's Fatal Tree - Crime & Society in 18th Century England (London, University of London Press, 1975)

45 Ibid, p.52

46 Ibid, p.62

47 Linebaugh, Peter, "(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein" 60 New York University Law

Adrian Merritt stated that the "rule of law is a slogan - a part of the ideology of capitalism".⁴⁸ He went on to explain this reductionist view of law by claiming that:

to contrast the rule of law to arbitrary power indicates an acceptance of bourgeois ideology ... a view which does not envisage or desire the possibility of a society where the elimination of class and its antagonisms and imperatives will allow humankind to dispense with what we know as a legal system.⁴⁹

Another noted historian, Mortin Horwitz, states that the legal system became distorted when the entrepreneurial class "began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system".⁵⁰

A similar argument has been made for Canada by an aboriginal Canadian historian, James Youngblood Henderson. His claim is that the aboriginal peoples of Canada have been forced into acceptance of the Canadian legal system. Henderson bases his claim on the fact that the Canadian legal system was always incompatible for aboriginals. He reasons that:

any unitary view of judicial interpretation confuses the status of interpretation with the status of political domination. It legitimizes the use of force to maintain a certain privileged position. In the history of Canada the immigrant democracies

Review, p.243

⁴⁸ Merritt, Adrian, "The Nature and Function of Law: A Criticism of E. P. Thompson's 'Whigs and Hunters'" in the British Journal of Law and Society 7, 1980, p.208

⁴⁹ Ibid

⁵⁰ Horwitz, Morton, The Transformation of American Law 1780 - 1860 (Cambridge, Harvard University Press, 1977)

have held the indigenous people hostage. Although asserting a regulative function that permits a life of law rather than violence, the courts have ignored the terms of the aboriginal and treaty rights and indigenous legal order to wrap itself around the mantle of British political traditions and law.⁵¹

He says that, to the aboriginal peoples, law "is regarded by the indigenous mind as a spiritual force, like instinct to the animal world and gravity to the scientific community".⁵² In effect, the Canadian legal system was incompatible with aboriginal culture, and therefore should be set aside in favour of a system based on aboriginal traditions. The conclusion of legal historians like Henderson is aligned with the so-called "Genovese School" of legal historians who argue that law is "primarily the story of who rides whom and how"⁵³.

It seems to be pointless to conduct a debate concerning points such as these raised by critical modernists, because they judge the past by modern political and socio-economic preferences. What good can possibly be achieved for the advancement of aboriginal people as we approach the twenty-first century to lament the bases of the legal system of bygone years? The fact remains that Canadians must operate within the guidelines established by the legal system as we find it. Similarly, we must move beyond the conclusion of Professor Horwitz that the legal system is "an instrument for the direct promotion of economic growth".⁵⁴ It seems much more rational to adopt a conclusion of the historian, E. P. Thompson, also a

51 Henderson, James Youngblood, "First Nations Legal Inheritance" in University of Manitoba's Canadian Legal History Project #91-5, p.41

52 Ibid, p.35

53 Fox-Genovese, Elizabeth, and Genovese, Eugene, "The Political Crisis of Social History: A Marxian Perspective" in The Journal of Social History Volume 10, Winter 1976, p.219

54 Flaherty, David A. (ed), Essays in the History of Canadian Law, p.14

Marxist but of the humanist school, who stated that "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-inclusive claims, seems to me to be an unqualified human good".⁵⁵

It may be the case that no school of legal history is adequate to form a basis to advance the claims of the individuals in the region of Cross Lake and Norway House. If an attempt is made to say that Canadian law supports them, it is submitted that such a claim is invalid. If the claim is made that one should disregard the state of the law because the basis of the law is somehow perverted by the motives of the law makers, the debate becomes unsolvable. It serves to support the proposition that any solution to the problems of these people must come from an analysis of the sociological and economic considerations of the present time.

Nonetheless, history of any sort cannot be studied in a legal vacuum. An analysis of legal institutions, legislation and case law must be considered when trying to comprehend the general society of the period being studied. However, an argument concerning who was to benefit most from the particular state of the legal system at the time does not detract from the meaning, if not the justness, of the law itself.

The rest of this thesis will address the application of the Canadian legal system to the development of natural resources in Manitoba. This approach will determine the legal status of potential occupancy claims at Cross Lake and Norway House. We must first examine the characteristics of Canadian law and then focus on the historical developments concerning land, mineral rights and water resources in Manitoba.

⁵⁵ Thompson, E. P., Whigs and Hunters (London, Allen Lane, 1975), p.266

CHAPTER TWO: CANADIAN LEGAL INSTITUTIONS AND THE SOURCES OF CANADIAN LAW

a) What Legal Institutions Exist and What Law Are They Applying?

In a traditional, internal form of legal history, a basic understanding of the legal institutions is crucial. The civil law systems of the Canadian provinces, with the exception of Quebec, are similar. Trials take place with individual witnesses giving evidence before a judge in courts which are referred to as Provincial Supreme Courts or Courts of Queen's Bench. A party which is dissatisfied with a judgment rendered after a trial has a right to launch an appeal to the Court of Appeal in the particular province. At the Appeal Court level, cases are not retried. Written briefs are presented to a panel of three or five judges and counsel then present oral arguments based on their written submissions. The Court of Appeal will then render its judgment which is always accompanied by written reasons. Sometimes the judgment is unanimous. On other occasions a judge or judges who cannot agree with the majority decision will write a dissenting judgment. Although their comments are often interesting and influential, in ways which will be explained below, they do not form part of the precedent for which the judgment stands.

A party which is not satisfied with the decision of a Court of Appeal can seek leave to appeal to the Supreme Court of Canada. The right to such an appeal is not automatic. The Supreme Court will consider written submissions made by counsel for the various parties and will then determine whether the case should be tried by the Supreme Court of Canada in a full appeal. On a practical basis, Appeal Court decisions which have strong dissents are more likely to be heard by the Supreme Court of Canada if leave is sought. The existence of a strong dissent certainly indicates that

the particular Court of Appeal was not unanimous in its view of the particular law and the dissent certainly sets out the opinion held by certain members of the Court of Appeal on the subject. The format in the Supreme Court of Canada is virtually the same as in the particular Courts of Appeal. Ordinarily, panels consist of five, seven, or nine members of the Supreme Court of Canada. Judgments are sometimes unanimous. However, there are numerous situations in which one or more dissenting opinions are rendered. Although they do not form part of the precedent for which the case stands, they are often ammunition for future cases which relate to the same topic.

Until 1949, parties which did not agree with the decision of the Supreme Court of Canada had the right to appeal to the Judicial Committee of the Privy Council in Great Britain. The Privy Council was a large body whose members were appointed by the Prime Minister. The Judicial Committee consisted of those members of the Privy Council who were judges. The authority of the Judicial Committee extended back to the days of the British Empire when it was the final appeal court from every colony. Since 1949 in Canada, the Supreme Court of Canada has been the court of final resort.

These institutions apply the law in Canada, but what are the sources? According to Canadian jurisprudence, there are three sources of law, Royal Proclamations from the sovereign, legislation, and common law.

Proclamations are simply declarations from the sovereign power in the state. They were much more common prior to the twentieth century and were often used in Britain in times of war or with regard to colonial business.

Legislation refers to any creation of a law-making body, including

statutes passed by legislatures or parliaments, regulations passed pursuant to the terms of statutes, by-laws made by corporations created by provincial legislation, and also orders-in-council. The term order-in-council refers to any order made by the Lieutenant Governor of a province or the Governor General of Canada with the advice of his or her particular council. In the case of a provincial government, the council is referred to as the Executive Council. It consists of the premier and members of the provincial cabinet. In the Federal realm, the council is referred to as the Privy Council. It consists of the prime minister and federal cabinet ministers as well as other individuals who are members primarily for ceremonial purposes.

Common law refers to precedents established by decisions of the courts following trials or appeals. It is contrasted to statute law. Common law relies for its authority on the decisions of the courts and is recorded in the law reports as decisions of judges together with the reasons for their decisions.

Of the three sources of law, legislation and proclamations must be considered primary in determining the legal situation at any point in Canadian history. The common law is applicable only in the absence of direct legislation on the subject. One Canadian legal historian has noted:

the cornerstone of the English and Canadian legal systems is the supremacy of Parliament. Thus the common law governs only so long as Parliament has not spoken directly to a given point, but when Parliament does speak, its definition of the law governs.⁵⁶

Accordingly, this work will first review proclamations and statutes and then

⁵⁶ Clark, Bruce, Native Liberty, Crown Sovereignty - The Existing Aboriginal Right of Self-Government in Canada, p.33

it will examine the common law.

b) Relevant Proclamations

There is one proclamation of the British Sovereign which relates directly to the region in question. The entire present day Province of Manitoba was part of the large area ceded by King Charles II of Britain by way of Letters Patent to the Governor and Company of Adventurers of England, Trading Into Hudson's Bay, otherwise known as the Hudson's Bay Company. The Letters Patent issued on May 2, 1670 granted:

unto the said company and their successors the sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks, and sounds in whatsoever latitude they should be, that lay within the straits commonly called Hudson's Straits together with all the lands and territories upon the countries, coasts and confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid.⁵⁷

In effect, the Hudson's Bay Company received a grant of all the lands whose waters drained into Hudson Bay, and the land remained the property of the Company for two hundred years.

There has been a great deal of discussion concerning the applicability of the Royal Proclamation of 1763, occasionally referred to as the "Indian Bill of Rights", to various situations involving aboriginal issues. It is clear, however, that this proclamation, issued at the end of the Seven Years War, did not apply to any part of the property which had been granted to the

⁵⁷ Set out in the Rupert's Land Act (1868) 31-32 Victoria C.105 (U.K.) p.22, C.2

Hudson's Bay Company and which became known as Rupert's Land. The relevant portion of the Proclamation reads as follows:

and we do further declare it to be our Royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection, and Dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new Governments (ie Quebec, east Florida or west Florida) or within the limits of the territory granted to the Hudson's Bay Company (ie Rupert's Land).⁵⁸

As if the Proclamation was not clear enough, the question of its application to Rupert's Land was dealt with in 1966 by the Supreme Court of Canada in the case of Sigeareak E1-53 v. The Queen⁵⁹. In a unanimous decision, the Supreme Court held that the Royal Proclamation never applied to any part of Rupert's Land. Speaking for the Court, Mr. Justice Hall stated that:

The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question was within the area granted to the Hudson's Bay Company. Accordingly, the Proclamation does not and never did apply to the region in question and the judgments to the contrary are not good law.⁶⁰

Historically, the Company had been legally responsible for all aspects of the administration of the area and was authorized, in the words of one recent Canadian legal historian, "to make, ordain and constitute such and so

⁵⁸ Royal Proclamation of 1763 Found in RSC 1970 Appendix II No. 1 p.127

⁵⁹ [1966] SCR 645

⁶⁰ Ibid, p.650

many reasonable laws, constitutions, orders and ordnances as ... shall seem necessary and convenient for the good government of the said company, and of all governors of colonies".⁶¹ As time went on, status of "the law" in Rupert's Land was peculiar. As described succinctly by one recent Canadian legal historian, "in truth, the Hudson's Bay Company was less an agent of London than a law unto itself or, at least, the generator of an autonomous system of customary law".⁶²

It appears to be accepted by Canadian legal historians, therefore, that the British laws of 1670 applied to Rupert's Land until such time as they were amended. The Canada Jurisdiction Act of 1803 was passed in order to extend the jurisdiction of the Court of Justice in the Provinces of Lower and Upper Canada to neighboring regions which formed part of British North America.⁶³ The focus was the administration of criminal law. However, the legislation was very vague regarding chartered rights and the territories of the Hudson's Bay Company. In any event, the legislation was never enforced in Rupert's Land. It should be noted that this legislation was passed during a time when there was rampant abuse of the criminal law in the period when the Hudson's Bay Company was battling the North West Company for control of the fur trade.

In 1815 the Hudson's Bay Company codified the criminal law in Rupert's Land in a form identical to the criminal law of England. This was deemed necessary by virtue of the fact that the Hudson's Bay Company had granted a large tract of land in the Red River Valley to Lord Selkirk in order that he could form a settlement. Part of the terms of the transaction was

61 Bindon, Kathryn M., "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54" in David A. Flaherty, Essays in The History of Canadian Law, p.50

62 Reid, John Phillip, "The Layers of Western Legal History", p.31

63 Canada Jurisdiction Act 1803 43 George III (1803) C.138 (U.K.)

that Lord Selkirk had to provide land for retired Hudson's Bay Company employees.⁶⁴

Following the union of the Hudson's Bay Company and the North West Company in 1821, the British Crown awarded a trading monopoly to the amalgamated company for a further twenty-one year period on the basis that the company undertook to improve the condition of Indians involved in the fur trade and to punish all criminal offences committed by Company employees.⁶⁵ In 1822, the Hudson's Bay Company passed a series of regulations which deemed the Governors of the Northern and Southern departments of Rupert's Land and the Governor of Assiniboia to be competent to administer justice with their counsellor. Each region was to have a sheriff.⁶⁶ In 1838, the British Crown granted a further twenty-one year monopoly to the company and included a clause in the agreement specifically requiring the company to promote settlement.⁶⁷

In 1851, legislation was passed to clarify that the law of England as of that time (ie. the time of the start of the reign of Queen Victoria) applied in Rupert's Land.⁶⁸ This code was revised in 1862.⁶⁹

The administration of the legal system in Rupert's Land was substantially updated in 1839 when, for the first time, a full time position of recorder was created. The recorder was the first individual with formal legal training to be involved in the administration of justice in Rupert's Land.

64 Found in Bindon, Kathryn M., "Hudson's Bay Company Law..." pp.44-45

65 *Ibid*, p.46

66 "Resolutions Passed At A General Court of The Hudson's Bay Company" May 29, 1822 and accepted by Colonial Secretary Lord Bathurst May 31, 1822. Found in Bindon, Kathryn M., "Hudson's Bay Company Law", pp.46-47

67 *Ibid*, p.49

68 *Ibid*, p.63

69 *Ibid*, p.76

Because of his unique background, it has been stated the "he thus acted not only as legal advisor but also as formulator of court rules, general counsel and author of ordinances".⁷⁰ According to legal historian Kathryn M. Bindon, both the company and the residents had particular reasons for applauding a more organized legal system. She pointed out why this was so:

the Company required a more regular judicial system for the maintenance and protection of its monopoly over the fur trade. The community, on the other hand, was sensitive to its own internal social needs and saw the institution of a more traditional legal administration as a means of curbing the Company's authority.⁷¹

Despite the fact that the Hudson's Bay Company remained in complete legal control, the basis was established for the implementation of a British system of justice.

c) **Applicable Legislation**

The first applicable legislation involved the Hudson's Bay Company's surrender to the Queen of its entire grant of land by virtue of the Rupert's Land Act of 1868.⁷² According to Section 3 of the Act, the transfer would not be effective until the property could be conveyed to Canada. This would take place when Her Majesty approved the terms embodied in an address from both Houses of the Canadian Parliament pursuant to Section 146 of the British North America Act 1867.⁷³ Under the provisions of The

70 Ibid, p.50

71 Ibid, p.43

72 (1868) 31-32 Victoria C. 105 (U.K.)

73 Ibid, S.10

Temporary Government of Rupert's Land Act passed in 1869, all existing laws remained in force subject to the "terms and conditions of such admission approved of by the Queen".⁷⁴ By virtue of an Imperial order-in-council of June 23, 1870, Rupert's Land was admitted into and became part of Canada effective July 15, 1870.⁷⁵

The order in council is a concise seven page document. It sets out the legal status of the negotiations involving Rupert's Land and the North-Western Territory which were held with the United Kingdom and Canada. The document attaches three schedules. The first, Schedule A, is an official request to Her Majesty from both houses of the Canadian Parliament dated December 16, 1867 and December 17, 1867 respectively. The request is to unite Rupert's Land and the North-Western Territory with the Dominion of Canada. The second, Schedule B, contains the negotiations among the United Kingdom, Canada, and the Hudson's Bay Company for the terms of surrender of Rupert's Land after passage of the Rupert's Land Act. The negotiations started March 8, 1869 and culminated in a request to Her Majesty from the Canadian House of Commons on May 29, 1869 and from the Canadian Senate on May 31, 1869 that Rupert's Land be united with Canada according to the terms agreed to in the negotiations. The third, Schedule C, is the deed of surrender of the letters patent of the Hudson's Bay Company to the Crown dated November 19, 1869.

On the basis of the existing legal situation, including the terms contained in the schedules, the order in council then made two declarations. First, it united the North-Western Territory with Canada according to the

⁷⁴ (1869) 32 & 33 Vict. C.3 (Canada), Found in RSC 1985 Appendix. II No. 7

⁷⁵ Rupert's Land and North-Western Territory Order RSC 1985, Appendix No.9

terms contained in Schedule A. Second, it admitted Rupert's Land into the Dominion of Canada upon fifteen terms and conditions. The unions of the North-Western Territory and Rupert's Land with Canada were to take effect July 15, 1870.

The order in council summarized the existing legal status quite simply. The British North America Act 1867 provided for union of Rupert's Land and the North-Western Territory with Canada. Schedule A contained a formal request for such a union from the Government of Canada. The Rupert's Land Act provided for the surrender of the letters patent of the Hudson's Bay Company to the Crown subject to agreement being reached on Rupert's Land being united with Canada. The Rupert's Land Act also provided that union of Rupert's Land with Canada could be accomplished by an order in council. Schedule B contains the negotiations of acceptable terms for the union. A draft surrender was received July 5, 1869 and formal surrender on November 19, 1869. It was approved by Her Majesty on July 22, 1870. The order in council was completed on June 23, 1870. The unions were to be effective July 15, 1870.

Three of the fifteen terms of the order are relevant to the subject matter of this paper. Clause ten states that all titles to land "conferred by the Company" up to March 8, 1869 "are to be confirmed".⁷⁶ Clause fourteen relieves the Hudson's Bay Company from all responsibility for any claims of Indians to compensation for lands required for settlement. This responsibility was placed on the Canadian and British Governments. Clause fifteen authorized the Canadian Government to arrange any details necessary to carry out these terms.

The initial request from the Canadian Parliament (Schedule A)

76 Ibid, p.6

indicated that, upon assuming control of its new territories, the Canadian Government would provide that "the legal rights of any corporation, company or individual within the same shall be respected, and placed under the protection of courts of competent jurisdiction".⁷⁷ It further stated that "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".⁷⁸

The terms of negotiations (Schedule B) included the provisions which led to clauses ten, fourteen and fifteen of the order. The only additional statement relevant to this thesis is an acknowledgement by the Canadian Government that "it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well being are involved in the transfer".⁷⁹

The deed of surrender (Schedule C) also includes provisions which led to clauses ten, fourteen, and fifteen in the order.

The legal obligations relevant to this thesis which the Canadian Government assumed by virtue of the order are quite simple. Title to property conferred by the Hudson's Bay Company up to March 8, 1869 must be honoured. A court system administering a British system of justice must be available for all people in the region. Indian tribes whose interests and well being were effected by the transfer would be protected by the Canadian Government. Their claims to compensation for lands required for settlement would be resolved according to British justice.

The crucial provisions of the order are the fifteen conditions. The

77 Ibid, p.8

78 Ibid, pp. 8-9

79 Ibid, p.13

terms contained in the schedules are interpretative tools. The order in council was authorized by statutes which formed part of the Canadian constitution. The provisions of the order in council "have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland".⁸⁰ In other words, the order in council has the same legal status as a statute. There is no legal authority which gives the order in council constitutional status.

The Province of Manitoba was carved out of Rupert's Land and came into being on the same day that Rupert's Land entered Confederation. This was pursuant to the Manitoba Act of 1870,⁸¹ affirmed retrospectively by the United Kingdom through the British North America Act 1871⁸². The provisions of Section 5 validated both The Temporary Government of Rupert's Land Act of 1869 and the Manitoba Act of 1870 as if they were enactments of the Imperial Government. By virtue of Section 30 of the Manitoba Act, all ungranted or wastelands in the province became vested in the Crown to be administered by the Government of Canada for the purposes of the Dominion.⁸³ In other words, contrary to the original four provinces in Confederation, the lands and resources remained vested in the Federal Crown.

The area including Cross Lake and Norway House was not contained within the original limits of the Province of Manitoba. It was included in the Territory of Keewatin which was governed by the Lieutenant Governor of Manitoba pursuant to the provisions of the Keewatin Act⁸⁴ and was within

80 *Ibid*, p.1

81 (1870) 33 Vict. C.3 (Canada), Found in RSC 1985 Appendix II No. 8

82 1871 34-35 Victoria C. 28, (UK) S.5, Found in RSC 1985 Appendix II No. 11

83 (1870)33 Vict. C.3

84 SC 1876 C.21

the jurisdiction of the Provincial Courts of Manitoba.⁸⁵ The northern boundary of Manitoba was extended to the 53rd parallel by the Manitoba Boundaries Extension Act of 1881 and it was then extended to the 60th parallel by the Manitoba Boundaries Extension Act of 1912.⁸⁶ The area including Norway House and Cross Lake was brought within the boundaries of Manitoba by the 1912 legislation. Section 6 of the Act made it clear that the Federal Crown held title to the land and Section 5 gave the Provincial Government an annual stipend in lieu of ownership. Aboriginal peoples were not mentioned in this legislation.

By an agreement dated December 14, 1929, the Government of Canada transferred to the Government of Manitoba all of the ungranted Crown lands within the province.⁸⁷ This was approved by Manitoba⁸⁸ in legislation later contained in the Manitoba Natural Resources Act⁸⁹. Canada approved the transfer by the Manitoba Natural Resources Act⁹⁰. This was affirmed by the Parliament of the United Kingdom in the British North America Act 1930.⁹¹ This transaction took place at the same time as similar agreements were made for Saskatchewan, Alberta, and British Columbia. It is significant to note that Section One of the BNA Act 1930 reads as follows:

The agreements set out in the schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the BNA Act 1867, or any Act amending the same

85 Morton, W.L., Manitoba A History (2nd Ed), p.291

86 1912 2 George V 32 (see also SC 1881 44 Vict. C.14)

87 Contained in Schedule to the BNA Act 1930 - 20-21 George V C. 26

88 SM 1930 C.30

89 RSM 1954 C.180

90 SC 1930 C.29

91 1930 20-21 George V C.26 (U.K.), Found in RSC 1985 Appendix II No. 26

or any Act of the Parliament of Canada, or in any order in council or terms or conditions of union made or approved under any such Act as aforesaid.⁹²

In effect, the 1930 legislation precluded any argument that the transfer of natural resources was invalid because of the provisions of any prior Canadian legislation.

The legal position concerning the land on which Cross Lake and Norway House are located is quite simple. The property remained vested in the Government of Canada until 1930. Thereafter, it fell within the jurisdiction of the Government of Manitoba.

The other major area of legislation which must be addressed is that pertaining to Indians in Canada. By virtue of the British North America Act 1867⁹³ and, in particular, Section 91 (24), the Government of Canada had exclusive jurisdiction to legislate regarding "Indians and lands reserved for the Indians".⁹⁴ In the years immediately after Confederation, the administration of aboriginal issues fell under the jurisdiction of the Secretary of State. In 1873 this authority was transferred to the Department of the Interior. In 1876 the first Indian Act of Canada was legislated and, when it was revised in 1880, a separate Department of Indian Affairs was created. Minor changes in the Indian Act were made in 1884 and 1885 and then there was a major revision in 1951 which placed the Act essentially in its present form.⁹⁵ The Federal Government transferred jurisdiction of Indian Affairs to the Department of Mines and Resources in 1936 and then in 1950 to the Department of Citizenship and Immigration. From 1953 until 1966,

92 Ibid, S.1

93 1867 30 Vict. C. 3 (U.K.)

94 Ibid, S.91 (24)

95 Frideres, James, Native Peoples in Canada - Contemporary Conflicts (3rd Edition) (Scarborough, Prentice-Hall Canada Inc., 1988), p.21

aboriginal issues were dealt with by the Department of Northern Affairs and Natural Resources. From 1966 until the present time they have been administered by the Department of Indian and Northern Affairs.⁹⁶

In order to come under the jurisdiction of the Indian Act, each individual aboriginal has to be registered. The qualifications are quite complex but their fundamentals are set out in Sections 11, 12 and 13 of the Indian Act.⁹⁷ Registered Indians have full legal status under the Indian Act. In most cases, they are entitled to live on reserve land. They have historically been under the jurisdiction of the Federal Government. Non registered Indians have historically been treated in the same legal fashion as Metis.

When the Hudson's Bay Company surrendered its grant and the property became vested in the Government of Canada, the agreement was clear that the Company had no further obligations regarding land claims for any settlers on former Company property, including aboriginals. Article 14 of the Order in Council dated June 23, 1870 stated:

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.⁹⁸

When the Province of Manitoba was created, the Manitoba Act dealt with questions involving aboriginal land rights in Sections 31 and 32.⁹⁹ The effect of the provisions of Section 31 of the Act is that approximately 1.4

⁹⁶ Ibid

⁹⁷ RSC 1985 C. I-6

⁹⁸ Found in Ollivier, Maurice, British North American Acts and Selected Statutes 1867-1962 (Ottawa, Queen's Printer, 1962), pp.157-173

⁹⁹ Manitoba Act (1870) 33 Vict. C.3

million acres of land was to be distributed among the children of Metis families. The basic effect of Section 32 was to allow those individuals already living on land in the Red River Settlement to obtain title for their lots from the Government of Canada. A great deal of controversy arose during the first two decades of Manitoba's emergence as a Canadian province.¹⁰⁰ The subject will be dealt with at a later point in this paper.

Obviously the property in the region of Cross Lake and Norway House was not settled in the same way as the Red River Colony. The Government of Manitoba played no active role in land ownership questions in this area. The Government of Canada became involved since it signed Treaties with Indian tribes throughout the present prairie provinces in the 1870's and 1880's. The part of Manitoba including Cross Lake and Norway House was included in Treaty 5 which was signed with the Federal Government in 1875.¹⁰¹ Some amendments which are not material to the matters at issue in this paper were made in 1908 and 1910 and were included under the heading of Treaty 5a.¹⁰²

The intention of governments towards the area in question was articulated by Alexander Morris at the beginning of Manitoba's provincial development. Morris, the Lieutenant Governor of Manitoba, the Northwest Territories and Keewatin, pointed out that "it was essential that the Indian title to all the territory in the vicinity of the lake should be extinguished so that settlers and traders might have undisturbed access to its waters, shores, islands, inlets and tributary streams".¹⁰³ The Treaty stated that "it

100 See footnote #114

101 Found in Waldram, James, As Long as the Rivers Run: Hydro Electric Development and Native Communities in Western Canada (Winnipeg, University of Manitoba Press, 1988), Appendix "I" pp.185-190

102 Ibid, pp.190-191

103 Morris, The Honourable Alexander, The Treaties of Canada With The Indians of Manitoba and the North-West Territories Including The

is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet" the entire area of land.

Under the Treaty the Indians surrendered all title to the lands. In exchange, the Indians in the Cross Lake region were located on a reserve established on the west side of Cross Lake and received 160 acres per family of five and a five dollar annuity. The Indians at Norway House were given the opportunity to relocate on a a reserve established on the west side of Lake Winnipeg at Fisher River. Each family of five would receive 100 acres and a five dollar annuity. Those wishing to remain at Norway House would retain their existing houses and gardens, until such time as the Crown wished to purchase them for value. Morris admitted that many of the Norway House Indians had serviced the Hudson's Bay Company as boatmen, but had lost their occupations owing to supplies being brought in by way of the Red River.¹⁰⁴

Each band member also received the right to pursue hunting and fishing throughout the unoccupied Crown lands except that they could be required to give up such rights pursuant to Crown Regulations if the Federal Government required land for settlement, lumbering, mining or other purposes. The Government of Canada received the right for free navigation of all of the lakes and rivers involved in the area as well as free access to the shores.¹⁰⁵ It has been stated by one historian sympathetic to the plight of the Indians of the area that, at the time the Treaty 5 was signed, the Indians "had fallen upon harsh times, in light of the collapse of the fur trade and requested Treaties as one way of alleviating their plight."¹⁰⁶ The area

Negotiations on Which they were Based and Other Information Relating Thereto (Saskatoon, Fifth House Publishers, 1991), pp.143-144

104 Ibid, p.143

105 Waldram, As Long As The Rivers Run, pp.186-188

106 Ibid, p.43

was becoming depopulated.

The status of the reserve Indians in the area appears to be quite clear. They were relocated to reserves, they had access to unused Crown lands, and the provisions of the Indian Act made it clear that the reserve property could be surrendered to the Federal Government¹⁰⁷ or expropriated¹⁰⁸.

The overall intent of the legislators also appears to be clear. A memorandum which Prime Minister Sir John A. Macdonald wrote on January 3, 1887 appears to state the position as succinctly as possible: "the great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit for the change".¹⁰⁹ Federal Minister of Public Works William McDougall was even more blunt. He stated on December 4, 1867 that the objective of the Canadian government was that "the whole expanse from the Atlantic to the Pacific would be peopled with a race the same as ourselves".¹¹⁰ Therefore, the signing of Treaties and creation of reserves were measures to further the expansion of white society at the expense of the aboriginals.

As mentioned previously, most of the settlers in the area were not status Indians, with the majority of those people being Metis in some form. Yet, no further legislation specifically clarified their status in relation to

107 Indian Act RSC 1985 C I-6 SS 37-41

108 Ibid, S. 35 Expropriate - to take land without the consent of the owner and ... includes diverting or authorizing the diversion of a water course where such diversion affects land of an owner other than the person diverting or seeking the authorization to divert the water course. (Dukelow, Dictionary of Canadian Law), p.360

109 Montgomery, M., "The Six Nations Indians and the MacDonald Franchise", Ontario History, 57, No. 1, 1965, p.13 - Contained in Bruce Clark, Native Liberty, Crown Sovereignty - The Existing Aboriginal Right of Self Government in Canada, p.152

110 Scrapbook Debates December 4, 1867 - Ottawa Times and Toronto Globe. Found in Sprague D.N., Canada and The Metis 1869-1885, p.26

Indians until the Constitution Act of 1982 was passed with its accompanying Charter of Rights.¹¹¹ The relevant sections of the Act are Sections 35 and 25. Section 35 (1) reads "The existing aboriginal and Treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".¹¹² Section 35 (2) clarifies that the aboriginal peoples of Canada include Indians, Inuit and Metis people. The effect of the provisions of Section 35 are that all people of aboriginal blood can rely on the protections of the statute and that whatever rights were in existence as of 1982 are affirmed and cannot be altered without amending the Constitution Act.

Section 25 of the Constitution Act comes within the Charter of Rights. It reads as follows: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, Treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada".¹¹³ In other words, aboriginal rights are supreme to any rights which may flow strictly from the Charter of Rights and the Constitution Act.

There appears to be no doubt that the legal position of both the status and non status Indians as well as the Metis in Cross Lake and Norway House was crystalized at the time of the proclamation of the Constitution Act 1982. There has been no alteration of the legal position following that time. The key question which must be determined is the status of these people at the time that previous legislation was passed which had the effect of altering substantially their way of life.

There is more legislation which must be considered, but it must be considered in light of the legal situation established by the legislation which

111 Constitution Act 1982 C. 11 (U.K.)

112 Ibid, S. 35 (1)

113 Ibid, S. 25

has been mentioned. For instance, there was legislation passed in the 1870's and 1880's which created controversy concerning the ability of aboriginals in Manitoba to enforce their rights granted under the Manitoba Act. The validity of some of this legislation has been questioned by some historians.¹¹⁴ However, it can be argued fairly that a decision of the Supreme Court of Canada in 1890 should serve to clarify this situation.¹¹⁵ This court decision will be discussed later in the paper.

Similarly, following the transfer of the land and natural resources to Manitoba in 1930, there was legislation passed which affected the position of all people whose claim to property was based on "squatters' rights".¹¹⁶ Legislation of Canada and Manitoba from 1948 until the late 1960's affected numerous property holders in northern Manitoba when the Government of Manitoba was given substantial authority to affect real estate and waterways in order to develop hydro electric projects. The validity of this legislation as it relates to the question at hand must be determined by focusing on the earlier legislation as interpreted by the Courts.

d) Common Law Case Precedents

In order to determine clearly the legal status of the descendants of squatters in the area of Cross Lake and Norway House, it is necessary to

114 See Sprague, D.N., "Government Lawlessness in the Administration of Manitoba Land Claims 1870 - 1887" Manitoba Law Journal, 10, 1980, pp.415-441, "The Manitoba Land Question 1880-82" Journal of Canadian Studies, 15, 1980, pp.74-85, St. Onge, Nicole J.M., "The Dissolution of a Metis Community: Pointe a Grouette 1860 - 1885" Studies in Political Economy, 18, 1985, pp.149-173

115 Fonseca v. Attorney General (1890) 17 SCR 612

116 See footnotes #219 - 227

look at the third major source of Canadian law, namely the case precedents which form the common law. The major purpose of the case precedents is to clarify the legal status of the subjects in question based on the background of the Royal Proclamation of 1670 and the statute law previously referred to.

The first major court decision concerning aboriginal rights after Confederation was made in 1888 by the Judicial Committee of the Privy Council in the case of St. Catherine's Milling and Lumber Co. v. The Queen¹¹⁷. The Province of Ontario sought to restrain a milling company from cutting timber on certain lands. It is significant to note that in Ontario all Crown land was transferred to the province by the Federal Government at the time of Confederation in 1867. At that time the land in question was occupied by Indians. Their interest was surrendered to the Crown in 1873 when a Treaty was signed. In 1883, the Federal Government purported to grant a timber licence to the milling company on this particular land.

The Privy Council held that the Federal Government had no right to grant a timber licence on this property. The basis for the decision was that the Federal Crown had a certain proprietary interest in the land which went to the Province of Ontario following Confederation by virtue of the terms of Section 109 of the British North America Act 1867. The Indian title was simply a burden on the property which could be extinguished at the pleasure of the sovereign. In this case, the effect of the Treaty was that the Indians surrendered their rights to the Crown and the legal estate was vested without question in the Government of Ontario.

The Privy Council held that "the Indian title was a mere burden"¹¹⁸ on

117 (1888) 14 AC 46

118 Ibid, p.58

the property. It was not a legitimate estate in the real property due to the fact that their interest could only be alienated to the Crown, it could be unilaterally revoked by the Crown and it could only be inherited by other Indians. In the most widely quoted part of the decision, the Privy Council held that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the sovereign".¹¹⁹ The Privy Council determined that the origin of the aboriginal title in the property in question was found in the terms of the Royal Proclamation of 1763. In the absence of specific legislation or proclamation by the sovereign, no rights existed.

The St. Catherine's case remained the basis of the Canadian legal position for eighty-five years. In particular, it was accepted by the Canadian courts that there was no valid concept of "inherent" aboriginal rights.¹²⁰ Rather, all such aboriginal rights existed at the pleasure of the sovereign and could be extinguished by such method as pleased the sovereign. Treaties served to extinguish this personal right and to transfer all beneficial interest in the land covered by the Treaty immediately to the particular Crown.

The first major challenge to this legal position took place in 1973 in the case of Calder v. Attorney General British Columbia et al.¹²¹ In that case the Nishga Indian Band sued for a declaration that their aboriginal title was still in existence on approximately 1,000 square miles of land in northwestern British Columbia. The Band lost at trial¹²² and again lost at the British Columbia Court of Appeal.¹²³ Both British Columbia courts held

119 Ibid, pp.53-54 Usufruct-the right to reap the fruits of something belonging to another, without wasting or destroying the subject over which one has that right. (Dukelow, Dictionary of Canadian Law, p.1126)

120 Inherent - a power that is not derived from statutory authority. (Dukelow, Dictionary of Canadian Law, p.514)

121 [1973] SCR 313

122 (1970) 71 WWR 81 (BCSC)

123 (1970) 74 WWR 481 (BCCA)

that the Royal Proclamation of 1763 did not apply to the property in question. No other legislation provided the Indians with any rights to the land. Legislation which opened up the province for settlement prior to British Columbia's entry into Confederation in 1871 effectively extinguished any potential claims based on occupancy. The decision of the British Columbia Court of Appeal was unanimous. The Band then appealed the case to the Supreme Court of Canada.

The Supreme Court of Canada judgment in this case has been quoted widely in Canadian legal and political circles. It is crucial to examine the exact nature of the Supreme Court decision so that proper legal conclusion can be drawn. The appeal was heard by seven Justices. By a four to three margin, the Supreme Court dismissed the appeal thereby depriving the Nishga Indians of a declaration that they had any aboriginal title which had not been lawfully extinguished. This is the authority for which the Calder decision must stand.

Mr. Justice Pigeon dismissed the appeal on a technicality on the basis that the Plaintiffs had not received a fiat, or official decree allowing the action to proceed, from the Lieutenant Governor of British Columbia. Mr. Justice Judson also wrote a judgment which dismissed the appeal and his reasons were concurred in by Mr. Justice Martland and Mr. Justice Ritchie. There was a dissenting judgment written by Mr. Justice Hall which was concurred in by Mr. Justice Spence and Mr. Justice Laskin. Although the comments from the dissenting judgment may be interesting, they certainly do not provide the basis for any legal authority in Canadian jurisprudence.

Mr. Justice Judson concluded that any rights which the Indians had to the land in question were "dependent on the good will of the

sovereign".¹²⁴ The legal basis for the aboriginal rights was the Royal Proclamation of the 1763. Mr. Justice Judson stated quite clearly that any aboriginal rights had been surrendered by the actions of the Crown which held the paramount estate in the property. He concluded that:

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.¹²⁵

It is significant to note that Mr. Justice Judson also stated that "there is no right to compensation for such claims in the absence of a statutory direction to pay".¹²⁶ In effect, the Indian title to the property in question had been extinguished by Government proclamations in the 1860's which authorized the sale of land to colonists. A unilateral act by the Crown could extinguish the aboriginal rights.

In his dissenting judgment, Mr. Justice Hall reasoned that aboriginal title to the property in question existed in common law irrespective of the Royal Proclamation of 1763. He conceded that it could be extinguished unilaterally by the Crown so long as the Crown showed a "clear and plain intent to do so".¹²⁷ The basis for Mr. Justice Hall's allowing the appeal was that in this case the aboriginal rights had not been effectively extinguished by the Crown due to the fact that it had exhibited no specific intent to do so.

¹²⁴ Calder v. Attorney-General British Columbia et al [1973] SCR 313 p.328

¹²⁵ Ibid, p.344

¹²⁶ Ibid

¹²⁷ Ibid, p.404

The Calder case did serve to generate substantial publicity for the subject of aboriginal land claims. The judgment of all three courts which heard the case was that the Indian Bands did not have valid land claims. However, the dissenting judgment of Mr. Justice Hall became the basis for those who claimed that aboriginal land claims should be considered more favourably.

Obviously the legal position in Canada concerning aboriginal rights was altered by the proclamation of the Constitution Act 1982. As mentioned previously, aboriginal rights were definitely extended to include all Metis people. It also indicated that all aboriginal rights which existed in 1982 were recognized and affirmed. There appears to be no doubt that any alteration of the aboriginal rights affecting Metis people which existed in 1982 would have to be done by specific Federal legislation which was deemed to be constitutionally proper.

The key question to be determined by Canadian jurisprudence in the years following 1982 is what rights actually existed at the time that the Constitution Act 1982 was proclaimed. Groups representing Canadian aboriginals had even taken the novel route of suing for a declaration in the British Courts to the effect that the British Crown still had responsibility for the Canadian Indians. This was dealt with by the British Court of Appeal in 1982 in the case of The Queen v. Secretary of State for Foreign and Commonwealth Affairs et al.¹²⁸ The appeal of the aboriginal groups was dismissed with Lord Denning writing on behalf of the Court of Appeal. He stated that the original British obligations to the Canadian Indians were created by the Royal Proclamation of 1763. However, all British obligations in this regard were transferred to Canada by the Statute of Westminster,

1931. In particular, he pointed to section 4 of the Statute of Westminster which stated that no Act of the United Kingdom was to extend to any of the Dominions unless the Dominion specifically requested this. He was not persuaded by the argument advanced by the Indian groups that Section 7(1) of the Statute of Westminster stated that "nothing in this action shall be deemed to apply to the repeal, amendment or alteration of the BNA Acts 1867 - 1930". Lord Denning reasoned that any obligations of the Crown pursuant to the Royal Proclamation of 1763 "are now to be confined to the territories to which they related and binding only on the Crown in respect of those territories".¹²⁹ The Treaties of the 1870's were also to be confined to the specific territories to which they are stated to relate.

The first major decision of the Supreme Court of Canada regarding aboriginal rights which took place following 1982 was in the case of Guerin et al v. The Queen.¹³⁰ This was a claim brought by the Musqueam Indian Band relating to reserve land in the City of Vancouver. The Band had agreed to surrender part of the property to the Crown so that it could be leased to a golf club. Some important terms of the lease were thought to be different from the original intentions of the Indian Band members. They then sued the Crown, alleging a breach of trust.

The Trial Division of the Federal Court found the Crown in breach of trust,¹³¹ but the Federal Court of Appeal set aside the judgment.¹³² The Plaintiffs appealed to the Supreme Court of Canada. The majority decision of the Supreme Court was written by Mr. Justice Dickson. He stated quite clearly that "it is my view that the Crown's obligations vis-a-vis the Indians

129 Ibid, p.128

130 [1984] 2 SCR 335

131 [1982] 2 FC 385

132 (1982) 143 DLR (3d) 416

cannot be defined as a trust".¹³³ He did indicate that the Crown has "an equitable obligation, enforceable by the Courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty".¹³⁴

Mr. Justice Dickson then went on to describe the nature of the fiduciary duty which he believed was owed to the Indians by the Crown. He rendered the following description:

The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when it is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.¹³⁵

Mr. Justice Dickson was very clear that prior to the surrender of the property by the Indians, the Crown did not hold the land "In Trust". Similarly, a trust did not crystallize at the time that the land was surrendered. He clarified that his opinions in this regard were not restricted to the facts of the particular case which were related to the interests of an Indian Band on a reserve. He said that the same principles would apply to unrecognized aboriginal title in traditional tribal lands. He also made it clear that the fiduciary obligation owed to the Indians by the Crown was sui generis. In other words, it existed on its own merits in the absence of any specific legislation or proclamation. On the facts before the court, Mr.

¹³³ Guerin et al v. The Queen [1984] 2 SCR 335 p.375 Trust-a relationship between two people in which the trustee holds property for the benefit of the beneficiary. (Dukelow, Dictionary of Canadian Law, p.1105)

¹³⁴ Ibid, p.376 Fiduciary - The activities involved in acting as managing agent of an estate or a property for or on behalf of any person. (Dukelow, Dictionary of Canadian Law, p.384)

¹³⁵ Ibid, p.382

Justice Dickson found that the Crown was in breach of its fiduciary duty which was "to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited".¹³⁶

The Guerin decision is authority that aboriginal or Indian title has the effect of creating a fiduciary relationship between the Crown and the Indians. The Crown must deal with the land for the benefit of the Indians. The fiduciary obligation of the Crown is based on the common-law of aboriginal title. This title predates colonization by Britain and survived the British claims of sovereignty to the land as a "burden on the radical or final title of the sovereign".¹³⁷ However, Indians could not make any claim that they had an actual interest, in the form of a trust relationship, in the land.

The first occasion that the Supreme Court of Canada had to rule on the provisions of Section 35(1) of the Constitution Act 1982 took place in the case of Sparrow v. The Queen.¹³⁸ In that case, Sparrow, a member of the Musqueam Indian Band of British Columbia, was charged under the Fisheries Act of Canada of fishing with an illegal net. At the time in question, he was fishing sixteen kilometers from the reserve property "where his ancestors had fished from time immemorial". Sparrow objected to the charge on the basis that he was exercising his aboriginal rights to fish and that the net restriction in the band's licence was inconsistent with the provisions of Section 35(1) of the Constitution Act, and was therefore invalid. Under the Fisheries Act the Band had a licence to fish for food for themselves and their families at certain times, in certain areas, and with certain equipment.

136 Ibid, p.383

137 Roberts v. Canada [1989] 1 SCR 322 p.340

138 [1990] 1 SCR 1075

The trial judge convicted Sparrow,¹³⁹ and the conviction was upheld by the British Columbia Court of Appeal.¹⁴⁰ Sparrow appealed to the Supreme Court of Canada. Chief Justice Dickson held that the existing rights which were referred to in Section 35 (1) were those which were in existence when the Constitutional Act of 1982 came into effect. Any rights which had been extinguished prior to that time were not revived by the proclamation of the Constitution Act. He determined that a retrial must take place pursuant to certain guidelines which he laid down.

It is crucial to note the nature of Chief Justice Dickson's reasoning in this case. He pointed out that the Crown's position was that the Musqueam Band's aboriginal right to fish had been extinguished by the Indian Act. The Chief Justice found that "The test of extinguishment to be adopted in our opinion is that the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right".¹⁴¹

In this case the Crown was not able to prove a proper extinguishment. The Chief Justice cited the Guerin case as authority for the proposition that the Government has to act in a fiduciary capacity when dealing with aboriginal rights. He stated that "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship".¹⁴²

The Chief Justice reasoned that Section 35(1) of the Constitution Act afforded aboriginal peoples a degree of Constitutional protection against provincial legislative power. He pointed out that this section was not subject to the provisions of Section 1 of the Charter of Rights but that this

139 [1986] BC WLD 599

140 (1986) 36 DLR (4th) 246

141 Sparrow v. The Queen [1990] 1 SCR 1075 p.1099

142 Ibid, p.1108

did not make any law or regulation affecting aboriginal rights invalid. The Chief Justice stated quite clearly that legislation interfering with aboriginal rights will be valid if "it meets the test for justifying an interference with a right recognized and affirmed under Section 35(1)"¹⁴³.

It must be noted that the Chief Justice was not concluding that the Indians held any actual legal estate in the land. He indicated that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown".¹⁴⁴

The Chief Justice pointed out that the Federal Government retained its power over aboriginal affairs pursuant to Section 91(24) of the Constitution Act 1867 and that those powers had to be read together with the provisions of Section 35(1) of the Constitution Act 1982. The facts of each case must be examined and the proper test to be applied is twofold. First, does the legislation in question interfere with an existing aboriginal right and secondly, if there was interference, was it justified?¹⁴⁵

The first part of the test is obviously much simpler. It simply involves an assessment of whether the effect of the legislation was to create an unreasonable limitation or undue hardship which denied to aboriginals their preferred means of exercising a right. The Chief Justice stated that "the onus of proving a prima facie infringement lies on the individual or group challenging the legislation".¹⁴⁶

If interference is established, the second aspect of the test comes into play. Namely, is the interference justified? According to the Chief Justice, there are four aspects to this test, namely:

143 Ibid, p.1109

144 Ibid, p.1103

145 Ibid, pp.1111 - 1113

146 Ibid, p.1112

- 1) Is there a valid legislative objective and is the particular regulation necessary to attain the objective?
- 2) Does the regulation comply with the fiduciary duties and responsibilities of the Crown?
- 3) Has there been as little infringement as possible to obtain the desired result?
- 4) Has there been consultation with the Aboriginals which is fair and complete?¹⁴⁷

The Sparrow decision is an important precedent. It clarifies the nature of the rights which are in existence following the Proclamation of the Constitution Act 1982. It reconfirms that the relationship between the Crown and aboriginals is not a trust of any sort. However, the Crown must act in a fiduciary capacity with regard to aboriginal rights. It holds the legal title to all aboriginal lands but any interference with existing aboriginal rights must be brought within the terms of reference of the "justification test".

The most recent Canadian decision which has impacted on the law of aboriginal rights is the case of Delgamuukw et al v. The Queen.¹⁴⁸ In that case, Chief Justice McEachern of the British Columbia Supreme Court dealt with a claim brought by thirty-five Indian Chiefs who claimed ownership and the right to govern ninety-eight separate territories in northwestern British Columbia, and thirteen Chiefs of another tribe claiming ownership and the right to govern thirty-five territories also in northwestern British Columbia. The total area being claimed in the case was in excess of 22,000 square miles, basically consisting of Crown land.

Chief Justice McEachern dismissed the Plaintiffs' claim and found that

¹⁴⁷ Ibid, p.1113

¹⁴⁸ (1991) 79 DLR (4th) 185

the extent of their rights was that they could obtain a declaration permitting them to use vacant Crown land for aboriginal purposes subject to Provincial legislation. They had no ownership or right to govern the territory. Title was long ago vested in the British Crown and the aboriginals then had a limited right of occupancy. The area in question was not subject to the Royal Proclamation of 1763 and the aboriginal rights were created by the length of time that the land had been used by them.

The basis for Chief Justice McEachern's dismissal of the claim was that he found that the aboriginal rights in question only existed at the pleasure of the Crown. They had been effectively extinguished by pre-Confederation colonial enactments which opened the province for settlement. He talked of aboriginal rights which, he stated:

arise by operation of law and did not depend upon statute, proclamation or sovereign recognition. Such rights existing at the date of sovereignty exist and continue at the Crown's pleasure. Unless surrendered or extinguished, aboriginal rights constitute a burden upon the Crown's title to the soil.¹⁴⁹

He further rendered the opinion that "the law of nations and the common law recognize the sovereignty of European nations which established settlements in North America".¹⁵⁰

He explained the extent of the Crown's obligations which were that "the Province has a continuing fiduciary duty to permit Indians to use vacant Crown land for aboriginal purposes. The honour of the Crown imposes an obligation of fair dealing in this respect upon the Province which is enforceable in law".¹⁵¹

149 Ibid, p.194

150 Ibid, p.195

151 Ibid, p.198

In order for the Crown to extinguish the rights, the extinguishment had to be pursuant to legitimate Crown objectives, there should be no "undue interference" with aboriginal rights and appropriate priority must be given to competing consistent activities. He concluded that it was "impossible for aboriginal peoples unilaterally to achieve the independent or separate status some of them seek".¹⁵²

The Plaintiff appealed the decision to the British Columbia Court of Appeal. In an unusual format, five justices sat on the appeal tribunal to hear five weeks of argument. The decision of the British Columbia Court of Appeal was filed and released on June 25, 1993. The judgment with indexes is well over 300 pages.¹⁵³ Because of the complicated nature of the Appeal Court's decision, it is important to analyze what actually occurred and what the legal effect of the judgment likely will be. Media reports have clouded the issue because of their selective quotations from portions of the judgments of the various justices. The precedent is important since this is the leading recent authority in Canadian law on the question of the nature and scope of aboriginal rights.

The majority judgment was written by Mr. Justice MacFarlane. It was concurred in by Mr. Justice Taggart. The results were concurred in by Mr. Justice Wallace. However, his reasoning in arriving at his decision was somewhat different, with the result that he wrote a separate judgment. A dissenting judgment was written by Mr. Justice Lambert, who profoundly disagreed with the results arrived at by the majority. Another dissenting judgment was written by Mr. Justice Hutcheon, who dissented in part from the decisions of the majority.

¹⁵² *Ibid*, p.454

¹⁵³ [1993] 5 WWR 97

It is crucial to examine the actual conclusions which were arrived at by the majority.¹⁵⁴ The Plaintiffs' claim for a declaration that they had a right of ownership and jurisdiction in the form of self government over the territory in question was dismissed. Furthermore, any claims of the Plaintiffs that they had any right to govern the territory through their own political, legal and social institutions was dismissed. Any suggestion that any native laws would prevail over laws of general application in cases of conflict was dismissed. Similarly, the claim of the Plaintiffs that the Province of British Columbia had no authority to make any grant, issue licences, leases and permits based on provincial ownership of lands, mines, minerals and royalties was dismissed. The Plaintiffs' claim for a declaration that they were entitled to damages from the Province of British Columbia on the basis of wrongful appropriation and use of the territory by the Province was dismissed. In each of those instances, the decision of the majority judgment of the British Columbia Court of Appeal upheld the judgment of Chief Justice MacEachern at trial.

However, the majority judgment of the British Columbia Court of Appeal was not in agreement with Mr. Justice MacEachern's findings on another point.¹⁵⁵ The trial court judgment had stated that any aboriginal rights which the British Columbia natives may have had were effectively extinguished by pre-Confederation colonial enactments which opened the province for settlement. The majority judgment of the Court of Appeal stated that not all of the Plaintiffs' aboriginal rights were extinguished before 1871. In fact, they still had unextinguished aboriginal rights, even if these rights do not include ownership or property rights in the area which

154 Ibid, pp.180-181

155 Ibid, p.180

they were claiming. These rights were of a sui generis nature.¹⁵⁶ The Court of Appeal held that it was unable to make a ruling on the scope, content and consequences of these aboriginal rights of "use and occupation"¹⁵⁷ until the matter was properly brought before the Court with adequate pleadings. Similarly, the Court could make no finding on the effect of section 35 of the Constitution Act 1982 on such questions as grants or renewals of grants, licences, leases or permits regarding any resource rights within the area until a proper claim with adequate pleadings was advanced before the court.¹⁵⁸

It is significant to note that the Court of Appeal made no comment on the opinion of Chief Justice McEachern that the Plaintiffs had the right to use unoccupied or vacant crown land for sustenance purposes until such time as the lands were required for another purpose by the Province. This decision of Chief Justice McEachern was based on the fiduciary duty of the Crown. On this basis, Mr. Justice McFarlane, concurred in by Mr. Justice Taggart, determined that since no appeal was taken from that part of the trial nor was any argument presented to the court, then no opinion could be stated concerning this matter by the Court of Appeal.¹⁵⁹ It was on this point that Mr. Justice Wallace disagreed. He upheld the decision of Chief Justice McEachern that the Plaintiffs did have a non-exclusive aboriginal right of traditional occupation and use of the property in question. These rights would be confined to uses for sustenance purposes which were "integral to the Plaintiffs' native culture and their traditional way of life at

156 Sui Generis, (Latin) - of one's own class or kind. (Dukelow, Dictionary of Canadian Law), p.1044

157 Delgamuukw v. The Queen [1993] 5 WWR p.180

158 Ibid

159 Ibid, pp.181-182

the time of sovereignty".¹⁶⁰

With the exception of this last point, three of the five justices of the British Columbia Court of Appeal agreed on the other items at issue in the appeal. In fact, that because none of the parties involved in the appeal directed themselves towards the provisions of this last point, there will be no significance to the discrepancy between the judgments of Mr. Justice MacFarlane and Mr. Justice Wallace. With regard to the other points mentioned previously, the three justices are in accord and their decision is clear. This is the most recent Canadian authority on these points.

In his dissenting judgment, Mr. Justice Lambert drew some very different conclusions.¹⁶¹ He stated that he would allow the appeal of the Plaintiffs and made a number of very interesting findings. He said that the Plaintiffs at the time that British sovereignty was asserted in 1846, had aboriginal title to occupy, possess, use and enjoy a good deal of the territory in question. He said that they may have had aboriginal sustenance rights over some other portions of it. He went on to state that it was his view that the Plaintiffs also had the right of aboriginal self government and self regulation at the time that British sovereignty was asserted. Furthermore, the aboriginal title and aboriginal sustenance rights were protected by the common law after the assertion of British sovereignty. Since 1846, they have not been extinguished by any specific legislation and they still exist at this time. Similarly, the rights of aboriginal self government and self regulation were incorporated into and protected by the common law after 1846 and they have not been extinguished. Therefore, they exist at the present time "as components of the whole of contemporary

160 Ibid, p.235

161 Ibid, pp.371-375

Canadian culture and society".¹⁶² They could have been extinguished by specific legislation up until 1982 but they had not been. According to Mr. Justice Lambert, the aboriginal rights of self government and self regulation included the specific rights being claimed by the Plaintiffs in this action. In his view they "include rights of self government and self regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity".¹⁶³

Mr. Justice Lambert declared that, in his view, these decisions and orders which he was making would be final. However, there should be a new trial in respect of the specific boundaries of the property for which the Plaintiffs have aboriginal title, the boundaries of the property where the Plaintiffs would have aboriginal sustenance rights, the exact breakdown of the aboriginal title between the various groups of the Plaintiff, the specific scope and content of the aboriginal rights of self government and all questions relating to damages.

The judgment of Mr. Justice Hutcheon was similar in essence to the judgment of Mr. Justice Lambert. He indicated that he would allow the appeal and found that all of the aboriginal rights of the Plaintiffs were not extinguished before 1871. They continued to have aboriginal rights to some undefined portions of land within the territory and they had a "right of self regulation" which they could exercise through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity. He also found that proceedings should be stayed for two years in order to allow the British Columbia Supreme Court to determine the specific lands in respect of which the Plaintiffs had aboriginal rights, the scope of

162 Ibid, p.373

163 Ibid, p.374

the rights which they exercised on the land, the scope of their rights of self regulation, and the question of damages.¹⁶⁴

Obviously, the two dissenting judgments are significantly different from the majority decisions on a number of crucial points. Nonetheless, the law holds that

- 1) no right of ownership and self government has been established;
- 2) the Plaintiffs have no right to govern their affairs through their own institutions;
- 3) the Province has the right to make grants, issue licences, leases and permits based on provincial ownership of lands, mines, minerals and royalties within provincial territory;
- 4) Aboriginal rights were not extinguished at the time that the British exercised sovereignty;
- 5) The aboriginal rights which the Plaintiffs continue to enjoy are of a sui generis nature but they do not include ownership or property rights.

That is the state of the law in light of the decision of the British Columbia Court of Appeal in the Delgamuukw case. The Supreme Court of Canada has granted leave to the Plaintiffs to appeal to that Court. In an unusual move, all further proceedings have been placed on hold for fifteen months in order to allow sufficient time for all parties concerned to reach a negotiated settlement.

Several Canadian cases established a precedent regarding a particular point which is relevant to this paper. It should be noted that the Judicial

164 Ibid, p.397

Committee of the Privy Council determined in the 1897 case of Attorney General Canada v. Attorney General Ontario¹⁶⁵ that Treaty entitlement cannot be a trust to which the Province's property in water is subject. Provinces were not prevented from passing legislation pursuant to their water resource rights on the basis that the effects of the statutory provisions contravened trust rights of Treaty Indians. In a 1946 decision of Brodie v. King, the Exchequer Court of Canada determined that the expropriation provisions contained in Section 35 of the Indian Act provided a Federal statutory authority to flood Indian lands.¹⁶⁶ In effect, the Treaty rights were superseded by these statutory provisions.

Even though the Federal Government has jurisdiction over Indians and Indian Reserves, the Supreme Court of Canada has held that provincial legislatures still have the right to pass laws of general application which will apply to status Indians as well. The court stated in the 1974 case of Cardinal v. Attorney General Alberta that "there were no enclaves within a province within the boundaries of which Provincial legislation could have no application ... even though Indians or Indian Reserves might be affected by it".¹⁶⁷ This decision was upheld by the Supreme Court of Canada in 1979 in the case of Four B. Manufacturing Ltd. v United Garment Workers of America¹⁶⁸ in which it was held that "the enclave theory has been rejected by this court in Cardinal and I see no reason to revive it even in a limited form".¹⁶⁹

Canadian legal institutions have not established law which supports occupancy based on squatters' claims at Cross Lake or Norway House. The

165 [1897] AC 199

166 [1946] 4 DLR 161

167 [1974] 1 SCR 695 p.703

168 (1979) 30 NR 421

169 Ibid, p.429

next chapter of this work will develop the implications of this crucial interpretive point in greater detail.

Bruce Clark is an experienced Canadian lawyer who has long been noted for his involvement in the pursuit of aboriginal rights. In his recent book on the subject, he concedes that there is no valid basis in Canadian law for the concept of an inherent right of aboriginal self government. He renders the opinion that "this then is the pragmatic reality: the domestic common law basis for the aboriginal right of self government is a false hope: at best an exercise in futility, at worst a threat to the constitutional integrity of aboriginal peoples' sovereignty".¹⁷⁰

Clark develops a thesis that there is a basis for an inherent right of self government found in some of the early imperial proclamations and Legislation. He goes on to argue that these imperial enactments were never validly overridden by Canadian legislation. He concedes that this argument has not been accepted by Canadian courts. In effect, it has no basis in Canadian law which seems clear in its view that an inherent right of self government cannot be found on a legal basis.

170 Clark, Bruce, Native Liberty, Crown Sovereignty, p.35

CHAPTER THREE: ADMINISTRATIVE HISTORY OF THE NELSON RIVER

a) Era Of Canadian Legislative Control 1870-1930

This chapter applies Canadian law to the case of development in the Nelson River region. Through this process, we can determine the status of any people in the area of Cross Lake and Norway House who have potential land claims based upon occupancy. The development projects which directly affected the areas in question originated in the mid 1960's. However, the legal basis was established by a number of developments which took place from the time that Manitoba entered Confederation in 1870. It is essential to review the significant legal developments during the first one hundred years of Manitoba's history in Canada which are relevant to the questions which we are examining in this paper.

The years immediately following Manitoba's entry into Confederation were marked by a large influx of white immigrants and numerous disputes over landholding rights. Legislation provided land grants to aboriginals and then tried to eliminate any uncertainties so that the land was quickly available for settlement by the newcomers. The concept of homesteading was introduced and provision was made for surveying. By 1885, the Torrens system of landholding was introduced so that a central registry could properly record all interests in land. Further legislation was passed to clarify the situation involving water rights. With the introduction of the existing boundaries in 1912, provision was made for surveys in the area in question which were soon completed. Real property law effectively organized the province for settlement.

From 1870 until 1930, the Crown lands in Manitoba remained under

the jurisdiction of the Government of Canada. With the exception of the Real Property Act of 1885 which introduced the Torrens system of landholding to the province, the legislation affecting property was passed by the federal government. This period started with Manitoba's entry into Confederation. The applicable legislation made guarantees of land grants and rights for landholders. As the period evolved, changes were made to the applicable legislation and time limits and restrictions were placed on potential claimants. By the time that the real property and natural resources were surrendered to Manitoba in 1930, there were virtually no remaining opportunities to potential claimants who did not have registered interests.

In Manitoba, the legal situation must take into account the provisions of the Manitoba Act which came into force on July 15, 1870.

Section 30 of the Act identifies the administrative treatment of Manitoba land. It reads:

All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown and administered by the Government of Canada for the purposes of the Dominion, subject to and except so far as the same may be affected by the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty.¹⁷¹

Section 32(3) is concerned with title to land and it reads:

All titles by occupancy with the sanction and under the licence and authority of the Hudson's Bay Co. up to the 8th day of March aforesaid, of land in that part of the Province in which the Indian title has been extinguished shall, if required by the

171 Manitoba Act (1870) 33 Vict. C.3,S.30

owner, be converted into an estate in freehold by grant from the Crown.¹⁷²

Finally, Section 32(4) deals with access to aboriginal land and it reads as follows:

All persons in peaceable possession of tracts of land at the time of the transfer to Canada in those parts of the Province in which the Indian title has not been extinguished shall have the right of pre-emption of the same on such terms and conditions as may be determined by the Governor in Council.¹⁷³

In summary, the Government of Canada was placed in control of all ungranted lands in the new province. Any occupancy based (ie. squatters') titles which were licenced by the Hudson's Bay Company up to March 8, 1869 could, if requested by the owner, be converted into a valid title recognized by Canada in those parts of the province where Indians had surrendered their land claims. In those parts of the province where Indian title had not been abandoned (ie. in effect, Cross Lake and Norway House), the Government of Canada had the authority to establish the terms and conditions for those squatters who wished to validate their claims. These provisions complied with the relevant requirements of the 1870 order in council.¹⁷⁴ Subsequent treaties and federal legislation served to comply with the Canadian Government's obligations under the order to provide land needed by the Indian tribes for settlement.

In 1874 and 1875, there was a substantial body of legislation passed by the Government of Canada which touched upon some of these provisions. In 1874, Canada passed a statute entitled "An Act Respecting

172 Ibid, S. 32(3)

173 Ibid, S.32(4)

174 RSC 1985 Appendix No.9

the Appropriation of certain Dominion Lands in Manitoba".¹⁷⁵ By virtue of Section 3 of this Act,

persons satisfactorily establishing undisturbed occupancy of any lands within the Province prior to, and being by themselves or their servants, tenants or agents, or those through whom they claim, in actual and peaceable possession thereof on March 8, 1869, shall be entitled to receive letters patent therefore, granting the same absolutely to them.

In 1875, a Canadian statute under the title "An Act Respecting the Appropriation of Certain Lands in Manitoba" was passed.¹⁷⁶ Its significance to the situation at hand is that, in Section 3 of the statute, it changed the operative date from March 8, 1869 to July 15, 1870. A Canadian statute passed in 1880¹⁷⁷ made reference to the 1874 and 1875 legislation. It stated that their purpose had been to facilitate claims made under sections 32(3) and (4) of the Manitoba Act. It then went on to state that it was expedient to limit the time for such claims and to remove people unlawfully occupying these properties after that date. On this basis, Section 2 stipulated that all such claims had to be proven to the satisfaction of the Minister of the Interior no later than December 1, 1882.

There is no doubt that the statutes of 1874 and 1875 changed the operations of the Manitoba Act regarding the appropriate operational date for those seeking titles on the basis of prior occupancy. There is a school of thought that the relevant provisions of the Manitoba Act require a constitutional amendment in order to be altered. In effect, the Canadian statutes and Orders in Council which were passed in the course of

175 (S.C.1874) 37 Vict. C.20

176 (S.C. 1875) 38 Vict. C.52

177 SC 1880 C.7

implementing the land provisions of the Manitoba Act in the 1870's and 1880's would be unconstitutional. Therefore, all of the land transactions which took place pursuant to the authority of such legislation would be invalid.¹⁷⁸

There is no Canadian legal authority which supports such an argument. In fact, it is significant to note the decision of the Supreme Court of Canada in the 1890 case of Fonseca v. Attorney General.¹⁷⁹ That case dealt with the validity of certain land transactions which took place subsequent to the passing of the Canadian legislation which came into effect April 8, 1875 and which amended the effective date of Section 32 of the Manitoba Act from March 8, 1869 to July 15, 1870. The Supreme Court made its determination without mention of any question of invalidity. In fact, the Supreme Court made references to "The Manitoba Act, as amended by 38 Victoria Chapter 52" and "The Manitoba Act 33 Victoria Chapter 3 as amended by 38 Victoria Chapter 52"¹⁸⁰. The Supreme Court of Canada was effectively endorsing the 1875 legislation as a means of amending the provisions of the Manitoba Act. The Fonseca decision is authority for the proposition that the Federal legislation of the 1870's and the 1880's which altered or clarified certain provisions of the Manitoba Act relating to land ownership was valid. Therefore, transfers of land which took place pursuant to these pieces of legislation were also valid. Arguments to the contrary are not supported legally. Similarly, the 1880 legislation was valid and those occupancy based claims which were not established to the satisfaction of the Minister of the Interior by December 1, 1882 were invalid.

178 Sprague, D.N., Canada and The Metis 1869 - 1885

179 (1890) 17 SCR 612

180 Ibid, p.630

Section 31 of the Manitoba Act refers to the question of extinguishing the "Indian Title" to land. In this regard, 1,400,000 acres of property were set aside for the children of "half-breed heads of families".¹⁸¹ The distribution of this land was to be "in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine".¹⁸² The Government of Canada obviously had the right to pass Orders in Council setting out the terms and conditions of this program. The program set out by Section 31 established compensation for those of Indian blood who were not on reserves "to finally settle any possible claims to Indian title".¹⁸³ It is pointed out that "this extinguishment cleared Crown title to public lands in the province for the Dominion".¹⁸⁴ This section was repealed in 1886.¹⁸⁵

Section 32 of the Manitoba Act "dovetailed" with the provisions of the Deed of Surrender by stating that all grants made by the Hudson's Bay Company up to March 8, 1869 would, if required by the owners, be confirmed by a grant from the Crown. Additionally, if grants of any estates less than a freehold estate had been made by the Hudson's Bay Company up to March 8, 1869, the owner of such an estate could have it converted into a freehold estate by a grant from the Crown.¹⁸⁶

Section 32 (3) and 32 (4) of the Manitoba Act relate directly to the question of squatters in the area formerly owned by the Hudson's Bay Company. They require not only occupancy with the sanction of the

181 Manitoba Act (1870) 33 Vict. c.3, s.31

182 Ibid

183 Chartrand, Paul L.A.H., Manitoba's Metis Settlement Scheme of 1870 (Saskatoon, Native Law Centre-University of Saskatchewan, 1991), p.4

184 Ibid

185 An Act Respecting the Revised Statutes of Canada RSC 1886 C.4 S.5 & Schedule A p.2280

186 Ibid, S. 32

Hudson's Bay Company, but also the licence and authority of the HBC, if they were in areas where treaties had dispensed with aboriginal title. If the "squatters" were in areas where treaties had not extinguished aboriginal rights, their occupancy based claims were specifically limited by "such terms and conditions as may be determined by the Governor in Council."¹⁸⁷ This was the situation in the area including Cross Lake and Norway House.

The provisions of Section 35 of the Manitoba Act provide the authority for the Lieutenant Governor of Manitoba to become the Lieutenant Governor of that area of Rupert's Land not included in Manitoba at that time. This relates directly to the area including Cross Lake and Norway House.

Those people who based their claims to property on the basis of occupancy obviously had the right to obtain title to that property upon application to the Crown. Historian D. N. Sprague, who is sympathetic to the legal, political and social rights of these people, has indicated:

Metis squatters retained only the right to present the facts of their cases to the Department of the Interior. The claims that were consistent with new settlement duty criteria received clear titles. Claims that did not meet the criteria of the Department of the Interior were denied and there was no right of appeal.¹⁸⁸

Those people who either did not make such claims, or had them rejected, had no further claim to the property.

The requirements for those people making claims based on occupancy were set out by the provisions of the Dominion Lands Act of 1872.¹⁸⁹

¹⁸⁷ *Ibid*, S. 32(3) and 32(4)

¹⁸⁸ Sprague, D.N., Canada and The Metis 1869-1885, p.183

¹⁸⁹ SC 1872 c. 23

Section 33 (5) of that Act reads as follows:

Every person claiming a homestead right from actual settlement must file his application for such claim, describing the land settled, with the Local Agent within whose district such land must be, within thirty days next after the date of such settlement, if in surveyed lands; but if in unsurveyed lands the claimant must file such application within three months following such land shall have been surveyed: and in either case proof of settlement and improvement shall be made to the Local Agent at the time of filing such application.¹⁹⁰

Section 105 of the Act allows the Federal Minister to "make such orders as he may deem necessary to carry out the provisions of this Act". Section 108 states that all proceedings "properly taken" under Orders in Council from 1871 "are hereby confirmed" and shall "remain in force" unless inconsistent with the Act. It appears that this statute was passed pursuant to the provisions of the Manitoba Act and legitimately set out the method by which occupancy based claims had to be resolved. Most of the rejections were based either on the claimants' inability to prove continuous occupation or improvements to the property. Some lands were not covered by the Hudson's Bay Company survey of 1876.¹⁹¹

The Dominion Land Survey of the areas in question was completed in 1916. Subdivisions were created which included the personal residences and surrounding areas of all occupants, including squatters. Subsequently, the occupants were notified that they could purchase their property from the Canadian Government for a set price per acre. Those people who did

¹⁹⁰ *Ibid*, S. 33(5)

¹⁹¹ Sprague, D.N., Canada and The Metis 1869-1885, p.133

not pursue this right had no further claim to their property.

On December 19, 1924, an Order in Council was passed endorsing an agreement between the Canadian Government and the Hudson's Bay Company and it was stated that the "agreement in question is intended as a final settlement on the questions in dispute as between the company and the Crown".¹⁹² Section 12 of the Order in Council stated quite clearly that the agreement constituted a "full and final settlement" of all claims by the Hudson's Bay Company against the Crown under the provisions of Section 5 of the Deed of Surrender for compensation under that agreement and any statutes affecting it.¹⁹³ The agreement sought to ratify all exchanges of land made between the Hudson's Bay Company and the Crown up to that point in time.

It is crucial to review the relevant legislation which relates to water rights generally and which may be directed specifically toward the question of water rights in conjunction with hydro-electric projects.

As we have seen, Treaty 5 reserved to Her Majesty the free navigation of all lakes and rivers and free access to the shores thereof. The purpose of this Treaty as well as all similar Treaty documents was to encourage agriculture among the Indians and to allow hunting and fishing where the land was not required for other purposes. It is common sense that lands reserved for the Indians under any Treaty would be useless without some use of the accompanying waterways. This extends to both irrigation and transportation use. It has been pointed out that "at common law, as in Indian traditional law, water itself was not the subject of property

¹⁹² Order in Council Dec. 19, 1924, referred to in Ollivier, Maurice, British North American Acts and Selected Statutes 1867-1962

¹⁹³ Ibid

or ownership."¹⁹⁴ It has been further clarified that the surrender provisions of the Treaties "did operate as an extinguishment of rights to the water except to the extent indicated in the Treaties".¹⁹⁵

The particular legislation directly relating to water rights is the Northwest Territories Irrigation Act¹⁹⁶ passed by the Government of Canada in 1894, with particular emphasis on Sections 4 - 9. Section 7 provided that any water right not authorized by licence by July 1, 1896 would be forfeited to the Canadian Government. According to one student of this area of history:

It does not appear that the Department of Indian Affairs applied for any licences to protect Indian water rights in the prairies. Accordingly, Indian treaty and riparian rights to water appear to have been confiscated by federal legislation shortly after having been granted.¹⁹⁷

This author also concluded that "the effect of the statute was to abrogate the common law notion that water was not the subject of ownership and the common law concept of riparian rights".¹⁹⁸ When the 1912 statute extending the Northern boundaries of Manitoba came into effect, it provided in part that "the interest of the Crown under the Irrigation Act in the waters within such territory, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada".¹⁹⁹ The term riparian rights has been defined by a recent author on the subject as including the following aspects:

194 Bartlett, Richard H., "Indian Water Rights on the Prairies", Manitoba Law Journal, 11, 1980, p.62

195 Ibid

196 SC 1894 C.30, amended SC 1895 C.33

197 Bartlett, Richard H., "Indian Water Rights on the Prairies", p.70

198 Ibid, p.69

199 Manitoba Boundaries Extension Act, SC 1912 C.32 S.6

- 1) right of access to the water;
- 2) rights of drainage;
- 3) rights relating to the flow of water;
- 4) rights relating to the quality of water;
- 5) rights relating to the use of water;
- 6) rights of accretion.²⁰⁰

No occupancy based claims in Cross Lake and Norway House can be advanced on the common law concept of water rights. These rights have effectively been eliminated by statute.

b) Manitoba Assumes Control 1930 - 1948

In 1930, Manitoba obtained ownership of the Crown land and natural resources in the province from the Government of Canada. Between 1930 and 1948, the Manitoba Government passed legislation which laid the basis for the creation of the Nelson River Power Reserve in the 1960's. It was supplemented by federal legislation where necessary. As a result, the authorities were in a position to proceed with the measures deemed necessary for hydro-electric development in the region in the 1960's and 1970's. There have been no challenges to the validity of any of this legislation.

Premier John Bracken of Manitoba had been negotiating with the Government of Canada in order to obtain provincial control of the natural resources. Opportunities existed for pulpwood developments in the Lake Winnipeg area²⁰¹, mineral developments around Flin Flon²⁰², and hydro-

²⁰⁰ Bartlett, Richard H., "Indian Water Rights on the Prairies", p.67

²⁰¹ Kendle, John, John Bracken - A Political Biography (Toronto, University of Toronto Press, 1979), pp. 54 - 58

electric developments on the Winnipeg River, particularly around Seven Sisters.²⁰³ Control of the resources was considered crucial as Manitoba attempted to diversify its economy. Legislation passed subsequent to 1930 substantiated provincial control of water rights. Legislation passed concurrently by the Manitoba and Canadian governments in 1948 completed the legal authority necessary for the hydro-electric developments of the 1960's.

We have determined the legal situation at the time of the transfer of natural resources from the Federal Crown to the Provincial Crown in 1930. That transfer was accomplished by a Natural Resources Transfer Agreement which became part of the Constitution Act of 1930.²⁰⁴ Beneficial ownership of the land and natural resources in Manitoba was obtained by the Provincial Crown with the understanding that the Province had to make available to the Federal Government unoccupied Crown land so that Canada could fulfil any outstanding land entitlements required under Treaties with Indians. The Indians also obtained rights for hunting, trapping and fishing on unoccupied Crown land in the province. The Federal Government continued to own and operate the Indian Reserves within the Province. These were obligations of the Canadian Government under the 1870 order in council.²⁰⁵ The agreements came into effect on July 10, 1930.²⁰⁶

It is important to note that part of the preamble to the British North America Act 1930 which bore the subtitle "An Act to confirm and give effect to certain agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba,

202 Ibid, pp. 58 - 63

203 Ibid, pp. 70 - 84

204 (1930) 20-21 George V C. 26 (U.K.)

205 RSC 1985, Appendix No.9

206 Ibid

British Columbia, Alberta and Saskatchewan respectively" reads as follows:

A transfer would be made by Canada to the Province of the unalienated natural resources within the boundaries of the Province subject to any trust existing in respect thereof and without prejudice to any interests other than that of the Crown in the same. ²⁰⁷

Section 1 of the Act reads as follows;

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 or terms or conditions of union, made or approved under any such Act as aforesaid.²⁰⁸

Section 4 of the Act reads as follows;

All persons in peaceable possession of tracts of land at the time of the transfer to Canada in those parts of the Province in which the Indian title has not been extinguished shall have the right of pre-emption of the same on such terms and conditions as may be determined by the Governor in Council.²⁰⁹

It is significant to note that these provisions apply only to those individuals who were in "peaceable possession" of land at the time of transfer to Canada in 1869. This land must not be reserve land.

Schedule I to the Act is the agreement between the Federal Government and the Government of Manitoba. It basically involves the transfer from Canada to Manitoba of the Crown land and natural resources

207 Ibid, Preamble

208 Ibid, S.1

209 Ibid, S.4

within the Province. The first clause of the actual agreement regarding Manitoba stipulates that there was a transfer of the interest in the Federal Crown of all Crown lands, mines, minerals and royalties derived therefrom within the Province "subject to any trusts existing in respect thereof and to any interest other than that of the Crown in the same".²¹⁰

Section 2 of the Agreement is important because of the amendments to it made by subsequent legislation. It originally read as follows:

The Province will carry out in accordance with the terms thereof every contract to purchase or lease any crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or insofar as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the province or to any interest therein, irrespective of who may be the parties thereto.²¹¹

Section 11 of the Agreement clarifies that the Indian reserves remain the property of Canada and that the Province is obliged at the request of the Federal Government to set aside out of the unoccupied Crown lands such further areas as Canada may need to fulfil any Treaty obligations.

Section 13 of the Agreement with Manitoba stipulates that provincial laws will apply to the Indians except that the Indians could hunt, trap and fish for food all year on unoccupied Crown lands or other land to which the

210 Ibid, Schedule I s.1

211 Ibid, Schedule I s.2

Indians may have a right of access.²¹²

The provisions of Sections 11 and 13 indicate the Manitoba Government's assumption of Federal responsibilities assumed under the 1870 order in council.²¹³

Subsection "a" of Section 18 of the agreement reads that nothing in the terms of the transfer should affect "any lands for which Crown grants have been made and registered under the Real Property Act of the Province".²¹⁴

The provisions of Section 24 are important. The Section reads as follows: "the foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province".²¹⁵

The agreement with Manitoba came into effect on July 15, 1930. The legal situation created as a result of the BNA Act 1930 has been clarified by some of the recent decisions of the Supreme Court of Canada. For instance, when the transfer to the provinces is stated to be "subject to any trusts existing in respect thereof",²¹⁶ the decision in the Guerin case²¹⁷ clarifies that the relationship between the Indians of Canada and the Crown is not a trust relationship. Rather, a fiduciary relationship is created with respect to the property on which the Indians reside. By virtue of the Sparrow decision, the aboriginal rights existing with respect to the property can be disposed of by the Crown provided that the Crown states its intention clearly.²¹⁸ On the basis of these recent decisions, it appears clear

212 Ibid, Schedule I s.13

213 RSC 1985, Appendix No.9

214 Ibid, Schedule I s.18

215 Ibid, Schedule I s.24

216 Ibid, Preamble

217 [1984] 2 SCR 335

218 [1990] 1 SCR 1075

that the provisions of the British North America Act 1930 do not prevent subsequent legislation from affecting the rights of the descendants of squatters in the area in question. We have also seen that people who had potential claims based on occupancy were subject to a great deal of federal legislation which determined their legal positions long before 1930.

The provisions of Section 24 of the Agreement came into play when the Canadian and Manitoba Governments entered into subsequent agreements. The first agreement of significance was signed between the respective Departments of Mines and Natural Resources on April 19, 1948. It was ratified by both the Canadian Parliament and the Manitoba Legislature. The Federal statute was entitled "The Manitoba Natural Resources Transfer (amendment) Act, 1948". Its subtitle was "An Act to Amend the Manitoba Natural Resources Act". It was assented to on June 30, 1948.²¹⁹ The Manitoba statute bore the subtitle "An Act To Ratify A Certain Agreement Between The Government Of The Dominion Of Canada And The Government Of The Province Of Manitoba". It was assented to on April 22, 1948.²²⁰

Significantly, additions are made to paragraph 2 of the original agreement contained in the schedule to the British North America Act 1930. The provisions of the original section placed the Province under certain requirements with regard to commitments made previously by the Federal Crown to other parties regarding such interests as mineral rights. The Province of Manitoba was prohibited from affecting the rights of any such parties unless the consent was obtained of all the parties involved other than the Federal Crown or unless the legislation applied generally to lands,

219 SC 1948 C.60

220 SM 1948 C.1

mines or minerals in the province. The provisions of the 1948 agreement added dramatically to the exceptions and gave the province sweeping power in the creation of such undertakings as the Nelson River Power Reserve. The provisions are lengthy but should be studied closely. Added to the end of paragraph 2 are the words "or except insofar as any legislation"

a) Is legislation relating to the control and regulation of the generation, development, transformation, transmission, utilization, distribution, supply, delivery, dealing in, sale and use of electrical power and energy in Manitoba, and of the flow and the right to the use, for the generation and development of such power and energy, or any other purpose connected therewith, of the water at any time in any river, stream, water course, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh or other body of water within the province and the taking, diversion, storage or pondage of such water for any of the said purposes whether by restriction, prohibition or otherwise and whether generally or with respect to any specified area therein

or

b) Is legislation providing for the taking, acquisition and purchase by agreement or compulsorily or otherwise or by expropriation of any indentures, agreements, arrangements, permits, interim permits, final licences, licences, interim licences, leases, interim leases, rights, liberties, privileges, easements, benefits, advantages or other concessions of every person of whatever nature, in relation to the flow and right to the use of the said water or the taking, diversion, storage or

pondage thereof for the generation and development of electric power and energy, the utilization, transmission, distribution and sale of such power and energy, the occupation and use of crown lands of the province for the maintenance and operation of hydro electric and other works of any person and any other rights, liberties, privileges, easements, benefits, advantages and concessions connected therewith or incidental or appurtenant thereto

or

c) Is legislation providing for the taking, acquisition and purchase by agreement or compulsorily or otherwise or by expropriation of any property, works, plant, lands, easements, rights, privileges, machinery, installations, materials, devices, fittings, apparatus, appliances, and equipment of any person constructed, acquired or used in the generation, development of or transmission of such power and energy or in the taking, use, diversion, storage or pondage of said water and whether generally in the said province in any specified area therein.²²¹

The general effect of these lengthy provisions is significant. By authority of an agreement between the Manitoba and Canadian Governments which was made pursuant to a specific provision in the British North America Act 1930, the province has the right to invoke sweeping powers in affecting the rights of property holders if the province is doing so in connection with the development of hydro-electrical power. The creation of the Nelson River Power Reserve clearly fits within the parameters of the authority granted to the province by virtue of the 1948 legislation.

221 Ibid, S.24

With regard to water rights, Section 10 of the 1930 statute clearly provides an obligation on the part of the Province of Manitoba to set aside out of unoccupied lands such further areas as the Federal Government may require to fulfil any Treaty obligations of the Indians.²²² With regard to any further obligations which the Province may have had, the Manitoba Government very quickly passed the Water Rights Act which provided a two year period to obtain licences for previous uses of water. Otherwise "no right to impound, divert, or use water for any purpose ... shall exist by virtue only of a riparian ownership of land".²²³ According to the provisions of Section 11 of the Provincial Lands Act passed later in 1930, there was an absolute bar placed upon any Crown disposition of water rights except in accordance with provincial water rights legislation.²²⁴

Manitoba was quick to adopt legislation similar to federal laws which had previously been applicable. For instance, under the provisions of the Dominion Lands Act of 1908, the Federal Government could make regulations for the development of water power on Dominion lands subject to any rights under the Irrigation Act. Section 2(a) of this Act made it directly applicable to Manitoba.²²⁵ According to the provisions of the Dominion Water Power Act of 1919, water power on any Dominion lands including Crown land in Manitoba was the subject. Section 4 stated in part that "the property in and the right to the use of all Dominion water-powers are hereby declared to be vested and shall remain in the Crown".²²⁶ There was an exception for previous Crown grants. Section 6 provided for

222 (1930) 20-21 George V C.26 (U.K.)

223 SM 1930 C.47 s.9(2)

224 SM 1930 C.32

225 SC 1908 C.20.

226 SC 1919 C.19

expropriation of "any land or interest therein" so required.²²⁷

In order to ensure that there was no uncertainty, the Manitoba and Canadian Governments completed The Natural Resources Agreement Act 1938.²²⁸ This confirmed that the 1930 Natural Resources Transfer included all water and water powers within the Province as defined in the Irrigation Act and the Dominion Waters Act. Although it is clear under the provisions of the Transfer Agreement of 1930 that reserve land is the subject of prohibition regarding Crown grants of water power, it must be remembered that section 35 of the Indian Act provides for application of Provincial expropriation authority where the Provincial Government consents.²²⁹ All of this legislation confirms the ability of the Manitoba Government to pass subsequent legislation concerning hydro-electric development on the Nelson River.

c) Hydro-Electric Development 1963 -

By the early 1960's, significant changes in Manitoba's political climate created the necessary atmosphere for large scale hydro-electric development. The Liberal-Progressive coalition which had governed Manitoba since 1922 was defeated in the 1958 election. Its successor was a Progressive Conservative government headed by Duff Roblin, an aggressive young Winnipeg businessman. The previous government had freed the province from debt. Historian W. L. Morton analyzed the operations of the Roblin government and concluded that "the key to its programme was the resolve to borrow against future development to meet

²²⁷ Ibid, S.6

²²⁸ SM 1938 C.27, clarifying The Water Power Act, SM 1930 C.46

²²⁹ RSC 1985 C.I-6 S.35

present needs".²³⁰ Unlike his predecessors, Roblin saw no virtue in abstaining from borrowing. He considered prudent borrowing for industrial growth as "investments in development which would yield the revenues to service and retire debt".²³¹ Morton described this attitude as "the thinking of the aggressive businessman and of the economist who believed in social investment".²³² Another historian, Alex Netherton, has described this approach as Keynesian because "the full weight of public power was used to foster economic growth."²³³ The New Democratic Party government under Edward Schreyer, which governed from 1969 to 1977, "only marginally changed the role of the government in the economy", according to Netherton and another scholar, James McAllister.²³⁴

The process leading to the large scale development of the Nelson River Reserve started in 1963. At that time Manitoba and Canada entered into an agreement for a joint study of the power potential and development program for the Nelson River.²³⁵ It was introduced to the Manitoba legislature by Premier Duff Roblin.²³⁶ A further agreement along the same lines was made in 1964.²³⁷ By 1966, both levels of government agreed that the development of the Nelson River power potential should proceed. As a result, an agreement between the Canadian and Manitoba

230 Morton, W. L., Manitoba - A History (2nd ed), p.485

231 Ibid

232 Ibid

233 Netherton, Alex, "The Shifting Points of Politics: A Neo-Institutional Analysis" in Brownsley, Keith and Howlett, Michael (ed), The Provincial State - Politics in Canada's Provinces and Territories (Toronto, Copp-Clark Pitman, - 1992), p.181

234 Ibid, p.187, and McAllister, James A., The Government of Edward Schreyer - Democratic Socialism in Manitoba (Montreal, McGill - Queen's University Press, 1984)

235 Lake Winnipeg, Churchill & Nelson Rivers Study Board, Background Documents and Interim Reports, Technical Report Appendix I

236 Debates of the Manitoba Legislature #8 - 1963, p.50

237 Ibid

Governments was signed on February 15, 1966.²³⁸ Premier Roblin emphasized its economic potential when introducing the agreement to the legislature.²³⁹ The Government of Canada was represented by the Minister of Energy, Mines and Resources and the Government of Manitoba was represented by the Minister of Public Utilities. This agreement forms the basis of the power development that occurred in Northern Manitoba since that time.

Both levels of government agreed to co-operate in the development of the hydro-electric potential of the Nelson River and they stated in the preface to the agreement that "the parties envisaged in any such development the conversion of the massive natural resource presented by the Nelson River into a power base for industrial and economic development in the province and for sales outside the province".²⁴⁰

The preface concluded by stating that both levels of government agreed to undertake forthwith "construction of the facilities necessary to give effect to the development of the hydro-electric potential of the Nelson River".²⁴¹

The obligations of the respective parties are clearly set out in the agreement. Manitoba was obligated to construct a hydro-electric generating station at Kettle Rapids on the lower Nelson River by no later than November 30, 1971.²⁴² Manitoba and Canada were to agree jointly on the

238 Complete agreement found in Manitoba Hydro Collection, Legislative Library under "Agreement Between the Government of Canada Represented by the Minister of Energy, Mines and Resources and the Government of the Province of Manitoba, represented by the Minister of Public Utilities, February 15, 1966."

239 Debates of the Manitoba Legislature #12 - 1966, pp.233 ff

240 Agreement between Canada and Manitoba February 15, 1966, Preamble

241 Ibid

242 Ibid, Clause 2

routing, design and arrangement for the construction of transmission facilities from the northern sites to Southern Manitoba and to the provincial borders.²⁴³ It was Canada's obligation to design, construct and to place in service the transmission facilities for the power with the first portion to be completed no later than November 30, 1971.²⁴⁴ Once the transmission facilities were operative, Manitoba would lease them from the Federal Government and would be responsible for their operation, maintenance and control.²⁴⁵ It was a joint responsibility to agree on all matters regarding what was necessary for the transmission facilities.²⁴⁶

Both levels of government appointed agents to perform their respective obligations. The Federal Agent was Atomic Energy of Canada Ltd.²⁴⁷ The Provincial Agent was Manitoba Hydro.²⁴⁸ The provisions regarding the creation of the Nelson River Power Reserve are set out in clause four of the Agreement. Due to the subject matters referred to in this paper, it is essential to examine this clause in its entirety:

Manitoba shall acquire all lands not owned by Her Majesty The Queen in right of Manitoba which, together with lands in the Province already vested in the Crown, are in the opinion of Canada and Manitoba, necessary or necessarily incidental to the construction and operation of the transmission facilities, and shall transfer to Canada the administration and control of all such lands or portions thereof as are required exclusively for the construction, operation, maintenance and use of the

243 Ibid, Clause 3
 244 Ibid, Clause 5
 245 Ibid, Clause 14
 246 Ibid, Clause 9
 247 Ibid, Clause 7
 248 Ibid, Clause 8

transmission facilities. Unpatented lands vested in Her Majesty the Queen in right of Manitoba shall be transferred to Canada at no cost to Canada. Lands required to be acquired by Manitoba shall be transferred to Canada at the cost of acquisition thereof by Manitoba except that in the case of lands acquired by Manitoba from Manitoba Hydro, they shall be transferred to Canada at the cost of acquisition thereof by Manitoba Hydro. Patented lands vested in Her Majesty the Queen in right of Manitoba for which public monies had to be spent for acquisition shall be transferred to Canada at the cost of acquisition thereof by Manitoba. Lands which are required for the construction, operation, and maintenance and use in common of both station or the terminus and the transmission facilities and additions thereto, shall remain vested in and under the administration and control of Her Majesty the Queen in right of Manitoba, or Manitoba Hydro.²⁴⁹

The acquisition and administration of lands mentioned in the clause refer strictly to land which is essential for the construction and operation of the transmission facilities. These facilities are definitely essential to the hydro-electric development scheme. The development is viewed as a very positive move by both federal and provincial authorities. The clause falls within the requirements set out by recent court decisions.

A further clause in the Agreement indicated that following November 30, 1971, Manitoba may purchase and acquire the transmission facilities and the lands referred to in clause four for the amount which Canada had

249 Ibid, Clause 4

spent on its development plus an agreed rate of interest.²⁵⁰ Clause twenty-six of the Agreement stated that a review committee consisting of three representatives from each of Canada and Manitoba had to be established by November 30, 1971 "for the purpose of reviewing the performance of this Agreement".²⁵¹

The underlying optimism concerning the potential of power sales becomes very obvious when reading clause twenty-nine of the Agreement:

Manitoba shall use its best endeavours to sell to electric power utilities outside the province the maximum amount of power and energy surplus to Manitoba's needs which is available from Nelson River sources, provided always that Canada may purchase from Manitoba for sale to electric power utilities outside the province, power and energy generated on the Nelson River which is surplus to Manitoba's needs.²⁵²

Manitoba needs were stated to include any obligations for sale outside the province which Manitoba had entered into.²⁵³ The proceeds from the sale of energy to outside sources were to be split pro rata based on each government's level of investment at the time of the sale.²⁵⁴ A further clause indicated that Manitoba must account at the end of each power year for all the electricity produced so that the potential for further sales would become obvious.²⁵⁵ The optimism of both parties was further evidenced by the clauses which stipulated that if Manitoba received demands for further electrical sales then it would become the obligation of

250 Ibid, Clause 25

251 Ibid, Clause 26

252 Ibid, Clause 29

253 Ibid

254 Ibid, Clause 17

255 Ibid, Clause 22

the Canadian Government to build more transmission facilities to any of Manitoba's borders including the International Border.²⁵⁶ Provision was made for supplementary agreements regarding further construction if greater demands did take place.²⁵⁷

In effect, the major obligation of Canada under the Agreement was to build the transmission system which was to be leased to the Province during the repayment period. It was Manitoba's obligation to construct a dam and generating system at Kettle Rapids on the Nelson River, to construct the works which were necessary to divert water from the Churchill River to the Nelson River and to construct the works which were necessary to permit the level of water on Lake Winnipeg and its outflow to the Nelson River to be controlled and regulated.

The first major controversy of the program erupted in 1968 when Manitoba Hydro applied for a licence to proceed with a high level diversion of the Churchill River through South Indian Lake. After a great deal of public discussion, this procedure was turned down on the basis that there was "anticipated environmental damage".²⁵⁸

In 1970, the Government of Manitoba issued a licence to Manitoba Hydro pursuant to the provisions of The Water Power Act²⁵⁹ which allowed Hydro to divert the Churchill River and to regulate the level of Lake Winnipeg within certain parameters.²⁶⁰ This was authorized by a Provincial Order in Council.²⁶¹ The diversion of the Churchill River through South

256 *Ibid*, Clause 27

257 *Ibid*, Clause 28

258 Lake Winnipeg, Churchill & Nelson Rivers Study Board, Technical Report Appendix 1-J, p.3

259 RSM 1970 c. W70

260 Lake Winnipeg, Churchill & Nelson Rivers Study Board, Technical Report Appendix 1-C

261 Order-in-Council 757/71

Indian Lake was at the so-called "low level". The regulation of Lake Winnipeg was to be between 711 and 715 feet above sea level.²⁶² The rate of diversion of waters was not to exceed 30,000 cubic feet per second.²⁶³ The licence granted for the diversion of the Churchill River was on an interim basis and it was not finalized until December, 1972.²⁶⁴

The diversions and regulations which affected the communities of Norway House and Cross Lake were not done in the absence of consideration for the residents of those communities. Under the terms of the Canada Water Act 1970,²⁶⁵ Canada and the provinces were obliged "to jointly participate in research, planning and implementation of programs relating to the conservation, development and utilization of water resources."²⁶⁶ Top priority was given to the development of the Nelson River.

On September 23, 1970, the Manitoba Government and Manitoba Hydro announced that Hydro proposed to affect control of Lake Winnipeg by 1974 and to follow with the Churchill River Diversion in 1975 or 1976. In the meantime, they were going to launch a three year study to examine the environmental and social implications of these actions.²⁶⁷ A Canada/Manitoba Advisory Committee was formed under the authority of the Canada Water Act and on September 9, 1971 an agreement was signed to examine officially these implications. Its mandate was:

To determine effects that regulation of Lake Winnipeg,

262 Lake Winnipeg, Churchill & Nelson Rivers Study Board, Technical Report, p.2-1

263 Ibid

264 Ibid, pp.2-5

265 Canada Water Act RSC 1970 c.5 (1st Supplement)

266 Lake Winnipeg, Churchill & Nelson Rivers Study Board, Technical Report p. I-J

267 Ibid, p.4

diversion from the Churchill River, and development of the hydro-electric potential of the Churchill River Diversion Route are likely to have on other water and related resource uses and to make recommendations for enhancing the overall benefits with due consideration for the protection of the environment.²⁶⁸

This report was sanctioned by legislation from both Canada and Manitoba and was to be completed by April 30, 1975.²⁶⁹

The Provincial Government also had advice from other bodies. The Manitoba Water Commission was created in order to be "responsible for determining and recommending to the Minister the most acceptable and practical range of regulation of Lake Winnipeg water levels in the best social and economic interests of the people of the Province".²⁷⁰ During the early 1970's some thirteen reports were prepared for the Commission.²⁷¹ Similarly, in September of 1971, the Lake Winnipeg Management Board was created to be "responsible for establishing parameters for the pattern of regulation of Lake Winnipeg".²⁷²

It is crucial to understand the role of Manitoba Hydro in these dealings. Aside from being the designated agent of the Provincial Government in its dealings with Atomic Energy of Canada, Hydro is the Crown Corporation responsible for providing the electricity necessary to meet the demands of the people and of the economy of Manitoba. Under the provisions of the Manitoba Hydro Act,²⁷³ its mandate is "to provide for

268 *Ibid*, I - B at 2 - 3

269 Order in Council PC 19701, 1776 Order In Council 757/71. Found in Lake Winnipeg, Churchill & Nelson Rivers Study Board, Technical Report Appendix I, p.1

270 *Ibid*, Appendix I-J, p.11

271 *Ibid*

272 *Ibid*, p.12

273 RSM 1970 C.H190

the continuance of a supply of power adequate for the needs of the province and to promote economy and efficiency in the generation, distribution, supply and use of power".²⁷⁴

Manitoba Hydro's utilization of water resources in the province and the construction of any necessary works for the generation of hydro-electric power require the issuance of the necessary licences by the Provincial Government. In that way, there is always direct Governmental control of any major initiatives desired by Manitoba Hydro.

The governmental bodies had to deal with two different levels of administration when considering the communities of Cross Lake and Norway House. The registered Indians in the communities who lived on Reserve #19 elected a Chief and a Band Council. These were supported by the Government of Canada through the Department of Indian Affairs and Northern Development. Under the provisions of the The Commissioner of Northern Manitoba Affairs Act 1970,²⁷⁵ the non-registered Indians were able to participate in the election of a Mayor and Council so that they had an official voice. Prior to that they just relied on non-official "head men".²⁷⁶ The report prepared for the Provincial Government concerning the community of Cross Lake pointed out that it was essential to understand that both levels of local administration had to be considered. It went on to state that "the most distinctive feature of the Cross Lake leadership is its duality".²⁷⁷ The authorities apparently felt that this duality was long standing in the community and attributed it to the creation of the reserve under Treaty #5. The report stated that "this essentially separated Indians

274 Ibid, S.2

275 RSM 1970 c. N100

276 Cross Lake Community Profile Technical Report #5, p.105

277 Ibid, p.114

from Metis and placed the Treaty Indians under the paternalistic supervision of the Federal Government".²⁷⁸ The further effect was that this "created a rift between the Indians and Metis groups. The Metis were neither regarded as Indians nor accepted as white".²⁷⁹

There is no doubt that the Governmental authorities legitimately believed that the diversion and regulation schemes were necessary to fulfil an economic objective of generating substantially more hydro-electric power. There is also no doubt that they realized that communities such as Cross Lake and Norway House would be adversely affected by the results of these schemes. In fact, the report specifically completed for the Cross Lake Community stated bluntly that "the community of Cross Lake has been and will continue to be affected by the Lake Winnipeg, Churchill and Nelson River hydro-electric power development".²⁸⁰

The technical report prepared to address the social and economic impact of the Nelson River Hydro Development on a number of communities emphasized that the end of the South Indian Lake controversy did not signal an end to concerns for other northern areas. A portion of the report stated:

In addition to the social and economic impact on the community of South Indian Lake, the diversion of the Churchill River and the regulation of Lake Winnipeg will affect people living in the communities of Nelson House, Cross Lake, Norway House, Ilford, Wabowden, York Landing, Split Lake, Gillam, Bird Pikwitonei, and Churchill.²⁸¹

²⁷⁸ *Ibid*, p.20

²⁷⁹ *Ibid*, pp.21-22

²⁸⁰ *Ibid*, p.4

²⁸¹ Social & Economic Impact of the Nelson River Hydro Development Technical Report # 7 Manitoba Department of Northern Affairs, June, 1973, p.127

The same report prepared for the Provincial Government concluded that, once the diversion area and regulatory scheme was set up, the effect would be substantial on Lake Winnipeg in that "in winter the levels would generally be 1 - 1 1/2 feet higher than under unregulated conditions, while in summer, the levels will be 1 1/2 to 2 1/4 feet lower than under unregulated conditions".²⁸²

The intentions of the governments and their knowledge of the potential adverse affects were very succinctly stated by Premier Ed Schreyer in the letters which he addressed to both Cross Lake and Norway House residents on January 31, 1975. Early in the letters he stated that "there is no doubt that Lake Winnipeg regulation will have some negative effects on your community".²⁸³ He justified the entire regulatory scheme by stating that "this project is being built because of the need for more electric power especially at a time of growing uncertainty regarding alternative supplies of oil and other fuels".²⁸⁴ Premier Schreyer further indicated that his Government was committed "to take all possible and reasonable steps to see to it that no unnecessary inconveniences will occur".²⁸⁵ His commitment went beyond this when he stated "a compensation program will be available to assist anyone who may suffer a loss of income or whose property or equipment is damaged as a result of the project".²⁸⁶

These "commitments" obviously extended to both Treaty Indians and non-status Indians who were not living on a reserve. However, it does not address the legal question of whether people whose title to property was

282 Ibid, p.10

283 Premier Ed Schreyer to Residents of Cross Lake and Norway House, January 31, 1975

284 Ibid

285 Ibid

286 Ibid

based on squatters' rights would have any legitimate claim under the program. It seems reasonable to assume that the "commitments" referred to by Premier Schreyer probably formed the extent of any obligations owed to these people. Schreyer subsequently spoke in the legislature on the issue of compensation obligations and the provisions of the Northern Flood Agreement, which this thesis will explore in greater detail. He said that, "basically there are two aspects to this agreement. One is relating to compensatory requirements and one is deemed to be unrelated to compensatory obligations but is rather of a broad economic thrust".²⁸⁷ He then questioned the Finance Minister as to whether the money requested for payments under the Agreement was part of the "compensatory" feature or "general economic development provisions".²⁸⁸

The process involved in the formation of the Churchill River Diversion project and the resulting agreement of December 1977 appear to be consistent with the statutory requirements. The Manitoba Government, the Manitoba Hydro Electric Board and the five Indian Bands together with the Government of Canada, established principles of compensation for the adverse effects of flooding on the reserves involved. The Government of Canada stated that it wanted to ensure that the special rights of Indians, especially those arising from Treaty #5, were adequately protected and set forth the basis of the compensation which they were offering. The Indians were assured their right of navigation and maintenance of navigability of waterways affected by the project, protection of burial places and cultural artifacts, first priority to all wildlife resources and equivalent compensation for damage to traditional hunting, trapping and fishing.²⁸⁹

287 Debates of Manitoba Legislature No.26, 1978, p.5099

288 Ibid

289 Northern Flood Agreement, December 16, 1977, Indian and Northern

The adequacy of the compensation may be debated at some length, but the process appears to be properly constituted and no statutory obligations appear to have been overlooked. In particular, the Province has been involved in fulfilling its requirement to set aside land. There is no statutory provision requiring the Province to set aside any water rights incidental to land which is provided.

The most modern legislation which appears to be relevant to the questions at issue is the Crown Lands Act of 1970 and, in particular, Section 51F of the Act which permits the Provincial Government to "raise or lower the levels of a body of water adjacent to the land, regardless of the effect upon the land, but subject to the payment of compensation for permanent improvements".²⁹⁰

The Government of Canada, Government of Manitoba, Manitoba Hydro and the Northern Flood Committee Inc. signed an economic development agreement on September 1, 1977²⁹¹ and then executed the Northern Flood Agreement on December 16, 1977.²⁹² The documents were ratified by the membership of the five Indian Bands from Cross Lake, Norway House, Nelson House, Split Lake and York Factory on March 15, 1978.²⁹³ They supported the Agreement by almost a two to one margin. In Cross Lake, there was a 57 per cent approval rate, while in Norway House, the approval rate was 70 per cent.²⁹⁴ These agreements attempted to alleviate the plight of the Indian people affected by the Nelson River

Affairs Canada

290 RSM 1970 c. C340

291 Economic Development Program, September 1, 1977, Indian and Northern Affairs Canada

292 Northern Flood Agreement, December 16, 1977

293 "Development of the Lake Winnipeg Regulation Churchill/Nelson River Diversion Project and the Northern Flood Agreement", Indian & Northern Affairs Canada, p.8

294 Debates of Manitoba Legislature No.26 - 1978, p.5

Developments and also sought to enhance the long term economic and social conditions in the five communities involved. The Governmental bodies acknowledged that the entire scheme "has substantively altered the surrounding environment and led to adverse effects on the communities living along the waterways".²⁹⁵ The Governments had obligations to members of these communities which stretched all the way back to the 1870 order in council which placed Rupert's Land under the jurisdiction of the Government of Canada.²⁹⁶

The Northern Flood Committee Inc. was incorporated by the five Indian bands involved. It was a vehicle to further the interests of the particular band members. In the preamble to the Northern Flood Agreement, it was conceded by all parties that "it is not possible to foresee all the adverse results of the project nor to determine all those persons who may be affected by it".²⁹⁷

The Agreement defined a person as being any individual who was a member of one of the Indian bands involved or any group whose membership was wholly or substantially comprised of these individuals.²⁹⁸ A community was defined as including all persons resident on a reserve.²⁹⁹ A settlement was defined as including the community plus:

All non treaty Indians and Metis, collectively, whose principal residences are adjacent to a community and within the area commonly described by the name of the community, notwithstanding that the location of such residence may also

295 "Development of the Lake Winnipeg Regulation", p.9

296 RSC 1985, Appendix No. 9

297 Northern Flood Agreement, December 16, 1977, Preamble Section E

298 Ibid, Article 1.12

299 Ibid, Article 1.6

be described by some other, more particular name.³⁰⁰

The Agreement specifically stipulated that no clause of the document should be deemed to extend Canada's obligations to any people who are not defined as Indians within the meaning of the Indian Act.³⁰¹ From the time of the 1870 order in council,³⁰² specific Government obligations were limited to Indians. The obligations to other residents were generally confined to granting them access to a competent court system which dispersed British justice.

Under the terms of the Agreement, the Indian band at Cross Lake granted to Manitoba Hydro an easement in the reserve for all land up to 690 feet above sea level which was contiguous to the Nelson River.³⁰³ The Norway House band granted Manitoba Hydro similar rights to all reserve land below 717.5 feet above sea level which was contiguous to the Nelson River.³⁰⁴ In both cases there was an expressed stipulation that "the easement is granted to Hydro solely for reasons directly associated with the project and does not grant to Hydro any other right in the easement land".³⁰⁵ In exchange, the Indian bands received four acres for every acre which was affected by the project.³⁰⁶

Article 18 of the Agreement sought to explain the motives of the parties involved in signing the Agreement and the related schedules. According to the provisions of Article 18.1, both Canada and Manitoba were attempting to provide the greatest benefit possible through the project without unduly prejudicing the present and potential development of the

300 *Ibid*, Article 1.17

301 *Ibid*, Article 2.2

302 RSC 1985, Appendix No. 9

303 *Ibid*, Article 3.6 - 3.61

304 *Ibid*, Article 3.6 - 3.62

305 *Ibid*, Article 3.93

306 *Ibid*, Article 3.1

affected water bodies for other resource uses and users. Article 18.2 clarified that the project was intended to benefit all Manitobans and Canadians but that "it is in the public interest to ensure that any damage to the interests, opportunities, lifestyles and assets of those adversely affected be compensated appropriately and justly".³⁰⁷

With regard to the non-status Indians and Metis in the areas affected, it is important to note the provisions of article 18.3, which reads "Canada and Manitoba, to the extent it is practical to do so will seek to avoid creating inequities within any settlement that would adversely affect the relationship between a community and other residents of a settlement".³⁰⁸ Pursuant to the provisions of Article 16, the parties involved signed a community development plan for the five communities. The plan was attached as schedule E to the actual Northern Flood Agreement. It is significant to note that the terms of paragraph 3 of the Plan state that it will be developed in concert with the residents of the communities and that "residents in this context shall include, without prejudice to the jurisdiction and obligation of Canada, non-treaty residents and their representatives who may, at their option, participate equally and benefit equally from the community planning process".³⁰⁹ This is the most significant portion of the documents in question as related to affected occupiers who were not status Indians.

Article 24 of the Northern Flood Agreement sets up a process for arbitration of various forms of dispute which may arise under the provisions of the Agreement. Since 1977, many claims have been presented to the arbitrator. On a number of occasions, Manitoba Hydro objected to the

307 Ibid, Article 18.2

308 Ibid, Article 18.3

309 Ibid, Schedule E S.3

jurisdiction of the arbitrator to hear particular disputes on the basis that some or all of the claimants were not status Indians who were members of the particular bands.³¹⁰ Although the arbitrator was never forced to make a ruling on those particular points and it does not appear that there was ever a court challenge on this question, Manitoba Hydro on a number of occasions did settle claims and advance monies in instances where non-status Indians and Metis were claimants.³¹¹

The Manitoba government has fulfilled legal obligations which it may have to descendants of squatters in the affected areas. We have previously established the legal validity of the development scheme itself. No legal challenge has successfully undermined the fundamentals of the project. The only realistic attacks must centre on inadequate consideration of the project's effects. The distinction between the legal and the socio-economic impact of the Nelson River Project was, of course, continually and carefully maintained by such proponents as Edward Schreyer. Sympathy for existing conditions led to the creation of economic development programs. Such sympathy must not be confused with legal obligations. Compensatory funding came from the Government of Canada to meet statutory and Treaty obligations to Indians.³¹² Legal obligations did not extend beyond this funding.

310 Northern Flood Agreement, Status Report Re: Arbitration Claims 1977-1987, Indian & Northern Affairs Canada, Claims No.35, 45, 46, 47 and 48

311 Ibid, Claims No.35, 45 and 48

312 Debates of Manitoba Legislature No.26, 1978, pp.5143 ff

CHAPTER FOUR: CONCLUSION

The legal basis for the present day debate concerning rights of inhabitants of Cross Lake and Norway House appears to be quite clear. Under valid international law of the day, the British Crown exercised authority over the area in question and granted rights to the Hudson's Bay Company which lasted for two hundred years. These rights were then transferred to the Government of Canada by the provisions of the order in council of June 23, 1870³¹³ and, in part, these obligations were transferred to the Province of Manitoba by the provisions of the 1930 Natural Resources Transfer Agreement.³¹⁴ If the interpretation in this thesis of the relevant law is correct, the legislation and case law up to the present time do not justify a legal basis for the claims of the people who are descendants of squatters in the area of Cross Lake and Norway House. These people may have claims which are deemed to be just by Canadians, but they cannot be based on faulty legal grounds.

At the time of the sale of Rupert's Land from the Hudson's Bay Co. to Canada, the only legal obligations owed to the inhabitants of Rupert's Land were those provided for by the Crown. Canadian jurisprudence does not support the concept of any inherent rights of self government or land ownership. However, the law of Canada does make it clear there was a fiduciary relationship between the Crown and the aboriginal peoples with regard to their land holding interests. This relationship only extends to those individuals in the area in question who could be defined as "Indians" under the terms of the Indian Act. With regard to any non-status Indians or

313 RSC 1985, Appendix No. 9

314 Contained in Schedule to the BNA Act 1930, 20-21 George V, c.26

Metis of any type in the Cross Lake or Norway House region, they would have protection only to the extent of legislation which applied to them.

This interpretation of the legal position leads to the conclusion that Canadian legislation both at the Federal and Provincial levels definitely superseded any aboriginal land rights that may have existed at one time. As we have seen, there is an abundance of Canadian legislation which is inconsistent with the concept of aboriginal land rights. Even an observer sympathetic to aboriginal self government, Bruce Clark, has conceded that "such a supersession might have been legally possible if the basis for the aboriginal right had only been domestic common law".³¹⁵

It is not the point of this thesis to review the many land transactions which took place in Manitoba following its entry into Confederation. Numerous other works have detailed the instances of fraud and other misdealings in relation to the aboriginal people including non-status Indians and Metis.³¹⁶ If individuals were deprived of their legitimate land holdings through fraud or other illegality, they obviously should have a good cause of action in reclaiming what was rightfully theirs. However, these incidents of misconduct do not detract from the fact that the Federal and Provincial Governments enacted legislation which could have been used by squatters in Cross Lake and Norway House in order to protect their real estate interests through proper registration.

Pursuant to the provisions of the Manitoba Act, all squatters who were in possession of their land prior to Manitoba's entry into Confederation, had the right to have their interest converted into a registered freehold estate. The precise terms and conditions would be set

³¹⁵ Clark, Bruce, Native Liberty, Crown Sovereignty, p.9

³¹⁶ Sprague, D.N., Canada and The Metis 1869-1885, and Chartrand, Paul L.A.H., Manitoba's Metis Settlement Scheme of 1870

by the Federal Government. This complied with the provisions of Section 15 of the 1870 order in council.³¹⁷ As has been documented elaborately in studies of Manitoba history of the 1870's and 1880's, numerous legislation was passed which touched on how such registrations were to take place. Those occupiers of property in the Cross Lake and Norway House regions who did not avail themselves of these rights lost them over time.

Similarly, unregistered occupiers of property surrounding Cross Lake and Norway House were granted rights under the Dominion Lands Act of 1872 which were to become applicable after the land in question had been surveyed. The survey was basically completed in 1916 and, in fact, the Canadian Government subsequently notified occupiers of property in the region that they could purchase the land from the Federal Government at a set price per acre. Again, examples of such occupiers being "cheated" from their property due to the fact that they were taken advantage of by more sophisticated individuals or by the fact that they were unable to read the appropriate notices do not detract from the fact that the governments in question provided legal rights which they had the option to exercise.

The occupiers of the property in question also had the right to apply for registration of their water rights. This was granted by the Canadian Government under the Northwest Territories Irrigation Act and was later confirmed by the Water Rights Act. Concerns that the occupiers may not have understood their legal rights at that time must not detract from the fact that the legislation in question was passed validly, the occupiers did have an opportunity to exercise their rights according to the terms of the legislation, and the deadlines passed in many cases without any exercise of the rights taking place.

317 RSC 1985, Appendix No. 9

It must be remembered that the creation of the Nelson River Power Reserve and the subsequent diversionary schemes formed part of a provincial and national attempt to harness hydro electric power for the benefit of Canadians and, in particular, Manitobans. The chronology of legislation involved fails to point out any legal irregularity by the governments in question. Under the provisions of the Dominion Lands Act, 1908, the Canadian Government could make regulations for the development of water power on Crown lands. Under the Dominion Water Power Act of 1919, the Crown could expropriate any land or interest in land that was required for the development of water power. Under the Water Power Act of 1930, the Manitoba Government clearly stated that Crown rights under the two previous Federal Acts were now in Manitoba jurisdiction. The Natural Resources Agreement Act of 1938 clearly confirmed that Manitoba now had jurisdiction over all water and water powers within the province. Under the Indian Act, provincial expropriation is endorsed.

Leading Canadian court decisions in this area of law support the notion that the governments have acted legally in the hydro-electric development schemes in northern Manitoba. The Hudson's Bay Company received a valid charter from Great Britain in 1670 and basically ruled the region for the next 200 years. The Supreme Court of Canada determined in the case of Sigeareak E1-53 v. The Queen³¹⁸ that the Royal Proclamation of 1763 did not apply to territory which was granted to the Hudson's Bay Company. The HBC was entitled to make laws for the area which included land grants.

The status Indians in the region of Cross Lake and Norway House
 318 [1966] SCR 645

surrendered all title to their lands pursuant to the provisions of Treaty 5 in 1875. Many of them were relocated to the area which became reserve #19 which remained under the jurisdiction of the Government of Canada after the natural resource transfers of 1930. The non status Indians and Metis "squatted" on unoccupied Crown land which was under the jurisdiction of the Government of Canada from 1870 until 1930 and then was under the jurisdiction of the Government of Manitoba from 1930 until the present time.

The St. Catherine's case³¹⁹ became authority for the proposition that "the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the sovereign".³²⁰ This could be unilaterally revoked by the Crown at any time. This statement of the law was upheld by the Calder decision of the Supreme Court of Canada in 1973.³²¹ The majority judgment of Mr. Justice Judson concluded that any rights which the Indians had in the land in question were "dependent on the goodwill of the sovereign"³²² and that the sovereign had, in effect, taken away these rights when it opened up the property in question for settlement. He went on to conclude that "there is no right to compensation for such claims in the absence of a statutory direction to pay".³²³

The Guerin decision of the Supreme Court of Canada³²⁴ is authority that the Crown's obligations to the Indians "cannot be defined as a trust".³²⁵ The Crown simply has a fiduciary duty to act in the Indians' best interest when dealing with the land. The Indians' interest in the land was

319 (1888) 14 AC 46

320 Ibid, pp. 53-54

321 [1973] 2 SCR 335

322 Ibid, p.328

323 Ibid, p.344

324 [1984] 2 SCR 335

325 Ibid,p.375

sui generis.

The decision of the Supreme Court of Canada in the Sparrow case³²⁶ is authority for the proposition that the Crown can indeed extinguish aboriginal land rights provided that it exhibits a clear and plain intention to do so. The Chief Justice of the Supreme Court of Canada rendered the opinion that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown".³²⁷

Legislation interfering with aboriginal land rights was subject to a twofold test. The first element of the test was whether an existing right was interfered with. Clearly in the case of the residents of the Cross Lake and Norway House areas, their long standing right to occupy the property was interfered with by the hydro-electric development.

This leads to the second part of the test. The first question to be asked in this part of the test is whether there is a valid legislative objective and whether the particular interference was necessary in order to attain the objective. Clearly the Nelson River Power Reserve and the diversionary schemes were deemed necessary to harness the hydro-electric potential of the Nelson River. The second question was whether the regulation complied with the fiduciary duties and responsibilities of the Crown. It appears obvious that the two levels of Government as well as Manitoba Hydro complied with this obligation. They formed a number of committees which investigated all aspects of the scheme and negotiated a compensation package. The third question was whether there had been as little infringement as possible to obtain the desired result. In each instance, the

326 [1990] 1 SCR 1075

327 Ibid, p.1103

governmental bodies declined to pursue higher level flooding on the basis that there was concern over the increased environmental damage that would result. The fourth question was whether there had been consultation with the aboriginals which is fair and complete. The negotiations with the Northern Flood Committee and the resulting Northern Flood Agreement and economic development plan would seem to comply with this aspect of the test.

The Delgamuukw decision³²⁸ is authority for the proposition that the Crown has a fiduciary duty with regard to aboriginal land rights but that the Crown could act in a unilateral manner to take away rights to particular property so long as there was a valid reason for doing so. The provincial ownership of lands, mines, minerals and royalties within provincial territory allowed the province to make grants and issue licences in accordance with its ownership rights.

The legal analysis of the question at hand leads to the conclusion that there is no firm legal basis for any claim that non status Indians in the territory in question have legal obligations owed to them by any level of government. This does not detract from Canada's obligations to address the economic and social plight of the people involved. Canadian society may demand that action be taken to alleviate the living conditions of many of Canada's aboriginal people. However, such obligations should not be dependent on an improper analysis of the legal situation. Any form of historical revisionism which tends to distort the correct legal position is a dangerous precedent to follow. If obligations to disadvantaged groups in

328 (1991) 79 DLR (4th) 185 (BCSC)
[1993] 5 WWR 97 (BCCA)

Canadian society are based on incorrect legal foundations, once those foundations are destroyed, the obligations to those groups may be destroyed with them. The correct legal conclusion is that there is no solid basis for any obligation to the descendants of squatters in Cross Lake and Norway House. This must be the starting point for any discussion concerning present day injustices.

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