GOVERNMENT LAWLESSNESS IN THE ADMINISTRATION OF MANITOBA LAND CLAIMS, 1870-1887

D. N. Sprague*

To suggest that land distribution in Manitoba did not follow according to law implies that some group of Manitobans were supposed to have received land as a matter of legal right and these rights were disregarded. Reference to the *Manitoba Act*[1] will show that the occupants of the province in 1870 did indeed receive rights regarding land; specific and detailed promises appeared in Sections 31 and 32.[2] Students of Dominion Land policy will hasten to point out, however, that these two sections of one Canadian statute cannot be considered separately from the *Dominion Lands Act*[3] or the rich stream of other laws "supplementary" to the Manitoba Act (About a dozen Canadian statutes were passed between 1873 and 1884[4]). In other words, the distribution of land in Manitoba between 1870 and 1887 may not have conformed *strictly* with that which had been promised in 1870 because the promises were revised by later laws, a course that was legal although questionable in its morality. But this line of argument disregards one of the first and most important amendments to Canada's constitution, the *British North America Act, 1871,*[5] which declares that the Parliament of Canada 'shall not be competent' to alter the *Manitoba Act* in any of its provisions.[6]

The British North America Act, 1871

The historical background to the passage of the *B.N.A. Act,* 1871, is, therefore, apparently worthy of closer scrutiny than it has received to date. As a beginning in this research, one must ascertain the true intent of the section by tracing the amendment back to its Canadian authors. Here one discovers that the purpose of the amendment had nothing to do with Parliament's competence to amend the *Manitoba Act* but everything to do with its power to enact constitutions for new provinces. Members of Parliament expressed doubts on this subject after the creation of Manitoba in May of 1870.[7] Since the *Manitoba Act* had at least the effect of creating a new province, the Prime Minister of the country, then John A. Macdonald, wrote the Earl of Kimberly asking him to submit a measure to the Imperial Parliament to amend the *B.N.A. Act, 1867,* to give Canada this power in clear and certain terms. The draft amendment which Macdonald proposed had only four sections. The first confirmed the *Manitoba Act* "legalizing whatever may have been done under it according to its true intent." The second section was for "empowering the Dominion Parliament from time to time to establish other provinces in the North Western Territory . . . and also empowering it to grant such provinces representation in the Parliament of the Dominion." Section three would empower the "Dominion Parlia-

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1. S.C. 1870, c. 3.
2. *See* Appendix A.
3. S.C. 1872, c. 23.
4. *See* Appendix B.
5. 34 & 35 Vict., c. 28 (U.K.), found in R.S.C. 1970, Appendix II, no. 11, at p. 289.
6. *Id.,* s. 6.
7. Letter from Prime Minister John A. Macdonald to the Earl of Kimberley (Dec. 29, 1870), Department of Justice Ministerial Letter Books, Public Archives of Canada (hereinafter cited as P.A.C.), RG 13, A3, at 225.

ment to increase or diminish limits of the Province of Manitoba or of any other Province of the Dominion with the consent . . . of such Province." The fourth and last section of the suggested act was intended to include British Columbia in the treatment which was stipulated for the "North Western Territory".[8]

Kimberly accepted Macdonald's suggestion for such an amendment and the British drafted a bill for their Parliament to alter Canada's constitution along the lines Macdonald had drafted. But this amendment was not exactly the statute the Canadians had requested. Sections 1 through 5 enacted all that Macdonald had hoped for in his original proposal. But the 6th Section which appeared at this time bore no relation at all to Macdonald's draft proposal:

> 6. Except as provided by the third section of this Act it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or any other Act hereafter establishing new provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province.[9]

The third section providing the one area of exceptional power pertained only to the adjustment of provincial boundaries, and such alterations were not to be undertaken without the consent of the affected provinces. Thus, on its own initiative, the British Parliament passed sweeping restrictions which should have prevented the Parliament of Canada from tampering with the constitution of Manitoba in the same way that the central legislature was excluded from acting on the constitutions of the original four provinces. Indeed, it could and has been argued that Section 6 prevented even the legislatures of the new provinces from altering their constitutions in all except three small ways: the qualifications of electors, qualifications of members of the legislative Assembly and laws regarding elections.[10] Section 6 certainly brings into question the validity of Parliament's alterations to Sections 31 and 32 of Manitoba's constitution.

Sections 31 and 32 of the Manitoba Act

Section 31 of the *Manitoba Act* provided a land bonus to all people of one specified ancestry, because of that ancestry. Section 32 assured all people, regardless of ancestry, that the lots they occupied in 1869 would not be jeopardized by an influx of newcomers expected to follow the transfer of Rupert's Land from the Hudson's Bay Company to Canada.[11] On this account, it would seem that Section 31 was discriminatory until it is remembered that the purchase of the west in 1869 extinguished only the Company's title. The purchase did not extinguish the aboriginal claim of the Indians. This remained to be done by treaty. But treaties with the Indians would not extinguish the *partial* claim to unoccupied territory which was vested in the partly Indian persons of the province by virtue of this

8. *Id.*, at 226-230.

9. *Supra* n. 5.

10. This argument was alluded to in *A. G. Man* v. *Forest*, [1980] 2 WWR 758 (S.C.C.), but as the case was decided on other grounds, the court found it unnecessary to decide the issue.

11. *See* Appendix A.

partly Indian inheritance. Thus, the two land-promise sections of the Manitoba Act served two completely different purposes. Section 32 was to secure the land of original settlers from interlopers. This section was to assure continuity. Section 31, on the other hand, was a payment in land to be distributed exclusively among partly Indian persons "towards the extinguishment of the Indian title", thus making a break with the past. For this reason, original white settlers were excluded from Section 31; but, along with partly Indian persons they were promised that they could gain letters patent confirming freehold title to the land they already occupied. Only partly Indian persons were supposed to receive the additional benefit, the Section 31 promise of a per capita allotment from a general reserve of 1.4 million acres.

Archibald's Proposal

The first governor of the province, Adams G. Archibald (a jurist from Nova Scotia), expressed precisely this interpretation of Sections 31 and 32 shortly after he assumed office in 1870. In his words, the intention of Section 31 was "to confer a boon upon the mixed race inhabiting the province" by granting allotments to "any person with a mixture of Indian blood in his veins, if resident in the Province at the time of the transfer."[12] He emphasized that this benefit extended to "every Half-breed resident" — men and women, children as well as adults. As for Section 32, it was Archibald's view that "the intention of the Act was to give assurance to all those who . . . held land . . . that their possession should be assured as proof of right . . . ."[13]

Archibald attempted to implement his interpretation of the land promises in the *Manitoba Act*. A just-completed census indicated that the partly Indian portion of the population was about 10,000 persons (in a province of slightly more than 12,000 overall). With the size of each share of the 1.4 million acres thus established at 140 acres, Archibald wrote to Joseph Howe in December of 1870 describing how such allotments might be drawn from the rectangular survey of ungranted land without disturbing the regularity of the pattern of 640-acre sections which he also advocated. Assuming that the government would approve of this plan, the Governor talked with Archbishop Taché regarding the best location for these grants and the two officials agreed that the allotments should come from sections immediately behind the river lots in the old settlement belt.[14] In this way, families could choose to develop their bonus lands and still remain fairly well concentrated near their old homesteads in the twenty-four parishes along the Red and Assiniboine rivers. (See map)

Archibald's plans for securing titles to the riverlots (the promise of Section 32) was equally straightforward. Archibald assumed that Manitoba was a province like the others regarding its jurisdiction over property and civil rights. To be sure, Section 30 of the *Manitoba Act* placed "all ungranted or waste lands in the Province" under the jurisdiction of the

12. Letter from A. Archibald to the Secretary of State (Dec. 27, 1870), P.A.C., RG 15, Vol. 229.
13. *Ibid.*
14. Letter from Archbishop Taché to Gov. Morris (Jan. 14, 1873), Morris Papers, Ketcheson Collection, Correspondence, Public Archives of Manitoba (hereinafter cited as P.A.M.).
15. *See* Appendix A.

Government of Canada "for the purposes of the Dominion."[15] But Archibald seemed to think that the riverlots in the settlement belt were neither ungranted nor unoccupied, thus not "wastelands" open to the rectangular survey and available for disposition as the Dominion saw fit. Consequently, in April, 1871, Archibald proposed to Joseph Howe that local legislation was the appropriate way to administer Section 32. "It would be easy to frame a local statute," he said, "whereby a party applying to be enrolled and treated as owner of a defined lot should put up certain notices of his intended application. In case no opposition to his claim should be made within a prescribed time, he would be considered as entitled."[16] Archibald said that such an approach would be in accord with "the useage of the country". So also was the method he proposed for settling conflicting claims: "one inquiry should be held; the facts reported, and the title declared according to the evidence."[17] In this way the whole problem could be disposed of in one year or two.

Archibald's superiors in Ottawa, however, were not interested in prompt fulfillment of the promises contained in Sections 31 and 32. On the contrary, Joseph Howe replied to Archibald's land proposals informing the Governor that the cabinet did not like either suggestion. Howe said they could not condone "giving countenance to the wholesale appropriation of large tracts of country by halfbreeds."[18] They had other plans. Thus, Howe told the Governor to "leave the land department and the Dominion Government to carry out their policy without volunteering any interference."[19] Archibald was instructed to backaway from his earlier recommendations, and the government pursued its own course which included a long series of amendments to the *Manitoba Act*.[20]

Amendments to the Manitoba Act

Every acre of Manitoba was taken as Dominion Land and the policy for its distribution was altered by legislation on no fewer than eleven occasions between 1873 and 1884. More than half of these "supplementary" laws were actually amendments to Sections 31 and 32 in the sense that the supplemental bill altered substantive portions of the original statute. Two of the eleven were less dubious in their constitutionality but still doubtful since they provided means for delivering the promises of Sections 31 and 32 using proceedings that tended to rob both sections of their intended meaning. Only three of the eleven statutes were truly supplemental; only three did not erode or alter the meaning of the *Manitoba Act* in its original form.[21]

The consequences were enormous. Regarding Section 31, the number of people eligible for allotments was reduced from approximately 10,000 to less than six thousand. This was the result of the first amendment,[22] a law which excluded partly Indian heads of families from sharing in the

16. Letter from A. Archibald to J. Howe (Apr. 9, 1871), P.A.C., RG 15, Vol. 229.

17. *Ibid.*

18. Letter from J. Howe to A. Archibald, P.A.C., microfilm C-1834, at p. 729-745.

19. *Ibid.*

20. In the 1870's and 1880's, officials were not squeamish about calling these measures amendments. By the time of the second consolidation and revision of the Statutes of Canada, however, draftsmen found it more prudent to refer to the amendments as supplemental. Thus, the short title of the consolidation of the amendments in the Revised Statutes of Canada, 1906, was the *Manitoba Supplementary Provisions Act* (c. 99).

21. *See* Appendix B.

22. S.C. 1873, c. 38.

allotments of 1.4 million acres promised by Manitoba's constitution. By a second amendment in 1874,[23] however, the parents were dealt back in — but not to real estate. This amendment promised them a form of personal property, a scrip, which was supposed to be redeemable for land.[24]

In 1875, the government undertook a special survey (collecting affidavits) to determine who would be eligible to receive land allotments and who would get scrip. In 1876, the first issues of the heads of family scrip were distributed but since it was treated like money up to and including the point at which it was redeemed for land, it is impossible to say whether partly Indian persons who bought land bought it with scrip. Even more important, it is impossible to say whether the hundreds of persons who collected scrip at the Dominion Lands office in Winnipeg on grounds that they were the authorized agents of the rightful claimant did indeed have such authorization. (The Powers of Attorney were mysteriously burned in a mail fire en route to Ottawa.[25]) But these latter points are moot issues. The main fact is that partly Indian heads of family were entitled to *land* grants and the government chose to deny that in 1873. The substitution of personal property for real property meant that the claimants were not protected by any of the safeguards which normally applied to the assignment and registration of land. The purpose of Section 31 as it applied to heads of families was, therefore, not fulfilled.

Since the children's allotments were land grants they were handled with more care. Also, looking only at the surface of the distribution, there were no abuses in the sense of amendments tending to deny the children their rights. More than 6,000 allotments were granted. But this is not to say that 6,000 children received shares of 1.4 million acres.

Speculators

Early in the 1870's, before the exclusion of heads of family from Section 31, speculators began to collect assignments of rights. In 1873, the province of Manitoba enacted legislation "to discourage the traffic now going on in such rights." *The Half-breed Land Grant Protection Act*[26] provided in Section 1 that:

> No promise or agreement, verbal or in writing, made by any Half-breed, previous to the issue of the Patent . . . either for or without a money consideration, to convey to any person after the Patent shall issue, the title of such Half-breed . . . shall be binding on such Half-breed, and no damages shall be recoverable against him or her, either at law, or in equity, by reason of his or her refusing to carry out such promise or agreement.

Thus, the law protected the land of the allottees. To protect the monetary investment of the speculator, "the amount of consideration in money or in goods" was to be considered as a "debt owed by the Half-breed to the speculator."[27]

23. S.C. 1874, c. 20.

24. The scrip which was supposed to have been distributed to "Half-Breed Heads of Family" might have served as an appropriate substitute of actual allotments of land had it been treated like "Military Bounty Warrants". The latter were treated as real property, the former as personal estate. But the reasons for the distinction were never clarified, even though the Minister of Justice repeated this ruling on seven separate occasions between June 7, 1876 and June 1, 1880 (*See* P.A.C., RG 13, A3, Vol. 552, at 883-6; Vol. 578, at 574-7; Vol. 580, at 936; Vol. 585, at 967-8; Vol. 588, at 119-20; Vol. 596, at 526; Vol. 598, at 662).

25. P.A.C., RG 15, Vol. 176, H.B. file 792.

26. S.M. 1874, c. 44.

27. *Id.*, s. 2.

Governor Morris recommended disallowance on grounds that the law was "novel and retroactive in its character."[28] More specifically, the Governor feared that the wholesale cancellation of contracts put speculators in an impossible situation since there was no "machinery provided" to restore their investments automatically, and should they resort to the courts for restitution, they would likely be "embarrassed by the prices charged for goods being opened up for examination . . ."[29]

The Deputy Minister of Justice agreed that the bill was repugnant, but drew short of seeing to the law's disallowance. In his view, "in so far as purchasers of those rights are concerned, the bill proposes to protect them, and if the machinery in this respect be not sufficient it can be provided at a future Session of the Legislature."[30] With the suggestion for future amendment along these lines, the Minister of Justice therefore recommended Royal Assent on February 21, 1874 and the bill was assented to one week later, a year after its passage through the Manitoba legislature.

Now *The Half-Breed Land Grant Protection Act* was amended along the lines specified by the Canadian Minister of Justice. The new law provided that any "bargain, if in writing, shall be valid, and such Half-breed shall assign by a good and sufficient title to the purchasers . . . the said lands so granted within three months after the receipt of the patent from the Crown" unless the vendor returned to the purchaser the full consideration of the purchase within three months from the passing of the Act.[31]

At first, the Minister of Justice welcomed this amendment as the necessary protection for speculators that he had suggested earlier. It seemed to be a good way to avoid "much confusion".[32] But just as the period for Canadian review of the new provincial legislation began to run out, the Government of Canada disallowed the statute on grounds that the original law provided all the protection to speculators which was necessary.[33] The province responded by re-enacting the disallowed amendment in 1877.[34] This time the government in Ottawa sustained that of Manitoba.

More Amendments

In the next decade, the province enacted several more statutes regulating the dispossession of allottees.[35] All of these actions were sustained by the Government of Canada. Thus, by the mid-1880s, if a partly Indian person one year old in 1870, receiving an allotment in 1877, refused to recognize an assignment of land dated 1872, all the questions about trusteeship, property rights of minors and the responsibility of government to safeguard such estates which should have arisen did not come up because of the statutes which had been written especially for "half-breeds". This, in contrast to the careful protection which was provided for white children in similar circumstances. Consider the case of the son of Kenneth McGuinnis.

28. Report of the Minister of Justice (Feb. 21, 1874) P.A.C., RG 13, A3, Vol. 566, at 251-61.
29. *Ibid.*
30. *Ibid.*
31. S.M. 1875, c. 38, s. 1.
32. Letter from Minister of Justice to Governor Morris (Sept. 27, 1876), P.A.C., RG 13, A3, Vol. 580, at 385.
33. *See* N. E. Hodgins (ed.), *Correspondence*, Reports of the Minister of Justice and Orders in Council Upon the Subject of Dominion Provincial Relations (1896), 804-5.
34. S.M. 1877, c. 5.
35. *See* S.M. 1878, c. 20; S.M. 1879, c. 11; S.M. 1881, c. 19; S.M. 1883, c. 29; S.M. 1884, c. 24; S.M. 1884, c. 25; S.M. 1885, c. 30; S.M. 1885, c. 34.

Kenneth McGuinnis died in Manitoba without a will. His estate included a military bounty warrant which the Government of Canada deemed to be real estate. By the law of the Province of Manitoba, this real estate passed automatically to an infant son and the surviving spouse became the administratrix of the estate. But Mrs. McGuinnis was ignorant of such legal intricacies and sold the warrant for ready cash to one John Mair who located the scrip on land and then applied for a patent. Mair's request was refused since the Justice Department ruled that "the assignment executed by Mrs. McGuinnis as administratrix cannot be regarded as passing any right to the land and that the patent cannot be issued to the person or persons who by the Law of Manitoba would inherit the land."[36] In other words, the Government of Canada exhibited a willingness to defend the rights of the son of Kenneth McGuinnis from the ill-advised action of his mother. The same consideration, however, was not extended to partly Indian children in the safeguarding of their property. Here, Canada embraced a policy of "not recognizing assignments" only insofar as patents were concerned.[37] The assignments were in force in every other respect. This meant that the allotee, one year old in 1870, granted land in 1877, who claimed his patent in 1891, and refused to recognize an assignment or power of attorney executed by an all-advised parent or guardian during the years of the grantee's minority, was vulnerable to dispossession by judgement from the Manitoba Court of Queen's Bench.

By 1886, all of the 1.4 million acres had been alloted. Almost 90 percent had been patented. Over five thousand patents had been issued. But only 20 percent of these nominal owners still enjoyed the benefits of actual ownership. The rest had lost their title by the delayed effects of old assignments, powers of attorney and court orders.[38] The pattern was clear. To the Manitoba legislature, the members of which by now were mostly Ontario-born newcomers to the province, it was also clear that irregular assignments had been allowed because the government in Ottawa had decided not to prevent them. They wanted more positive sanction in law. The "cure" was a provincial statute, *An Act relating to the Titles of Half-Breed Lands*[39], one of the most sweeping such bills ever to have been written. The first section declared that

> In all cases where lands . . . belonging to infant Half-Breeds . . . have been sold . . . and whether the same shall have been executed by the parent or guardian or next friend or prothonotary of the court in behalf of the said infant . . . such conveyance shall be, and shall always be deemed to have always . . . been sufficient to vest in the grantee or grantees . . . all the estate thereby purported to be granted . . .

By one stroke, the legislature of Manitoba declared openly that which had only been a matter of secret ministerial ruling to date — there was one law for whites and one for partly Indian persons.

The discriminatory legislation of Manitoba which protected the dispossession of the children was not disallowed by officials in Ottawa even

36. P.A.C. RG 13, A3, Vol. 577, at 883-6. The same ruling was also made in two other similar cases, one involving assignment by Power of Attorney. *Id.*, at 891-3 and Vol. 578, at 574-7.

37. Order in Council, Mar. 23, 1876. And *see* P.A.C. RG 13, A3, Vol. 590, at 738-9.

38. *See* Appendix C, Table I.

39. S.M. 1885, c. 30.

though it could be argued that the law tended to interfere with the Dominion government's power to distribute section land.[40] The important point is that the interference was consistent with the federal government's policy of reducing grants to partly Indian persons as much as possible. Since the federal government had already excluded the parents from the operation of Section 31 of the *Manitoba Act,* they could not have been very disturbed by the province's exclusion of the children. Still, at this point, it should be stated that the acreage promised by Section 31 was not the land which was indispensable. The partly Indian population of Manitoba in 1870 might have lost every acre of the 1.4 million and still survived with relative comfort on their more important riverlot holdings if Section 32 of the *Manitoba Act* had been administered in accordance with the true intent of the law.

Section 32 Claims

There were five sub-sections to Section 32 which reflected the structure of the colonial society which had been created since the first large distribution of riverlots to Red River settlers by the Hudson's Bay Company in 1835.[41] Sub-sections 1 and 2 promised that persons who had received grants of land in freehold or grants of estates less than freehold from the Hudson's Bay Company prior to March 8, 1869 could apply to the Crown for letters patent confirming the grant as an estate in freehold. Sub-section 3 gave the same assurance to another class of settlers, persons who occupied land "with the sanction and under the license and authority of the Hudson's Bay Company" without such land having been formally granted. This was to protect persons who settled without prior grant but whose occupancy had not caused protest, and received tacit recognition in accordance with a provision for homesteaders adopted by the Council of Assiniboia in 1860.[42] Subsection 4 covered everybody else. Any resident of the province "at the time of the transfer to Canada" who was "in peaceable possession of tracts of land" not covered by subsections 1 to 3, had "the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council." All of the residents of Manitoba, therefore, received assurances that their claims to riverlots were covered by one clause or another. The fifth sub-section covered their claim to backlots, haylands which extended an additional two miles behind the inner portion of the lot on the river front. Subsection five promised that the Lieutenant Governor was authorized "to make all such provisions for ascertaining and adjusting on fair and equitable terms, the rights of Common and rights of cutting hay held and enjoyed by the settlers in the Province . . . ." Thus, even hay lands were provided for, especially if the patenting process had unfolded as Archibald originally proposed.

Rather than recognizing claims by deed poll, as Archibald suggested, the Macdonald government preferred to survey every lot in all twenty-four parishes and call for formal applications and then process each claim on an

40. The power of disallowance was ordinarily exercised whenever a province acted in a manner "likely to be practically inconvenient" or in an area in which legislation "should be exclusively by the Canadian Parliament" The Manitoba Statute which legalized assignments which the Dominion government had declared to have no force was tolerated on grounds of convenience. For the Dominion's position on all matters concerning unpatented land *see* P.A.C., RG 13, A3, Vol. 580, p. 398-9, 596-7, 831; also, Vol. 581, p. 93.

41. *See* Appendix A.

42. Old Settler's Petition (Red River Colony) 1887, P.A.C., RG 15, Vol. 492, file no. 138627-1.

EXTRACT From the Certified Copy of the Hudson's Bay Company's Land Register, in the Dominion Lands Office, Winnipeg, Ma., to accompany Paper

No. 25135/625 List No. 87 of Claims under the Manitoba Act, Recommended for Patent 15th April 187

No. of Lot.	NAME.	Folio of Register.	Actual Measurement of Lot. Acres.	Roods.	Poles.	Acres Granted by Earl of Selkirk. Grants.	Payable.	Acres Granted by Hon. H. B. Co. Grants.	Payable.	Total. Grants.	Payable.	Date of Grant.	Price per Acre.	Amount Payable and When Paid.	REMARKS.
136	Peter Corrigal (see No 562) Transferred to John Tait — 5 Oct 1857		60	2	9			50	—	50					Parallel lines running from the West Bank of the Red River N 56° W one hundred and fifty nine English chains or thereby with four chains frontage
37	John Monkman (see No 583) Transferred to Henry Cochrane; transferred to William Cochrane	23 July 69; 29 July 69	63	1	1			50	—	50	—				Do. N 56° W one hundred and fifty eight chains or thereby with four chains frontage

SURVEYS OFFICE, DOMINION LANDS,

WINNIPEG 28th [illegible] 187

Certified to be a true Extract,

A. H. Whitcher
Inspector of Surveys.

MANITOBA

EXTRACT from Surveyors' Returns of the Survey of the Parish of St Andrews

to accompany Paper No. 2513, 10625 List No. 87 of Claims under the Manitoba Act,

Recommended for Patent 28th April 1877

No. of Lot.	Right-Angled Width. — Chains.	Mean Depth. — Chains.	Area. — Acres.	OWNER AND OCCUPANT.	RESIDENCE AND P.O. ADDRESS.	No. in H.R. Co's Register.	OCCUPATION.					REMARKS.
									Land Cultivated. — Acres.	Land plough'd but not cropped last Spring. — Acres.	How long occupied. — Years.	
1	9.33	160.00	133.28	John Tait	St Andrews	136 137	2	4	24		12	

(Certified,) A. H. Whitelaw Inspector of Surveys

DOMINION LANDS.

GRANT

to

The Honourable Donald A. Smith

SITUATE IN THE

Province of Manitoba

[illegible] of lot No. 240 — in the Outer Two Miles the Parish of St. Andrews

[illegible] of Acres [illegible]

DATED 16th September 1879.

RECORDED 10th October 1879

W. A. HIMSWORTH,
Deputy Governor.

CANADA.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, &c., &c., &c.

To all to whom these Presents shall come—GREETING:

Z. A. LASH,
Deputy of the Minister of Justice,
Canada.

Whereas the Lands, hereinafter described, are part of the lands known as "Dominion Lands" and mentioned in an Act of the Parliament of Canada, passed in the thirty-fifth year of Our Reign and intituled: "An Act respecting the Public Lands of the Dominion,"

AND WHEREAS The Honourable Donald A. Smith, of Silver Heights in the Province of Manitoba, in our Dominion of Canada

has applied for a grant of the said lands and his claim to such grant having been duly investigated by Us he has been found duly entitled thereto.

Now Know Ye, that by these Presents We do grant, convey and assure unto the said The Honourable Donald A. Smith, his heirs and assigns for ever, all those Parcels or Tracts of Land, situate, lying and being in the Outer Two Miles or Hay Lands appertaining to the Parish of Saint Andrews in the Province of Manitoba in our Dominion of Canada, and being composed of

Land, dated 1st July 1877, Signed by John Stoughton Dennis Surveyor General of Dominion Lands and of record in that Branch of the Department of Interior known as the Dominion Lands Office

containing by admeasurement seventy one and seventy four one hundredths (71 74/100) acres, more or less.

To have and to hold the said Parcels or Tracts of Land, unto the said The Honorable Donald A Smith, his heirs and Assigns for ever; SAVING AND RESERVING, NEVERTHELESS, unto Us, Our Successors, and Assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that now are or may be hereafter found on or under, or flowing through or upon any part of the said Parcels or Tracts of Land. Also reserving thereout all travelled roads Crossing the same, existing as such on the 15th day of July 1870 which by and under the Laws of Manitoba were or may be held to be legally "Public Highways" And also reserving thereout such portions thereof as may be required for the right of way of the Pembina Branch of the Canadian Pacific Railway

GIVEN under the Great Seal of Canada: — **Witness,** — WILLIAM ALFRED HIMSWORTH, Esquire, Deputy of Our Right Trusty and Well Beloved Councillor, SIR JOHN DOUGLAS SUTHERLAND CAMPBELL, (commonly called the Marquis of Lorne), Knight of Our Most Ancient and Most Noble Order of the Thistle, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, GOVERNOR GENERAL OF CANADA, and Vice-Admiral of the same.

AT OTTAWA, this Sixteenth day of September in the year of Our Lord one thousand eight hundred and SEVENTY-NINE, and in the Forty Third year of Our Reign.

Ref. No. 14986.
Reg. No. 7475.

BY COMMAND.

Com. Grant - N° 255.

EDOUARD J. LANGEVIN,
UNDER SECRETARY OF STATE.

J. S. DENNIS,
DEPUTY OF THE MINISTER OF THE INTERIOR.

individual basis through a commission of Manitoba judges.[43] By September, 1873, the field work of the parish surveys was finished and officials were thus prepared to receive claims for consideration. A public notice, dated September 10, 1873, began to appear in Manitoba newspapers directing "all persons who claim titles under section 32" to send applications "describing the situation and condition of the lot, and setting forth the particulars under which the patent thereto is claimed" to J.S. Dennis, Surveyor General.[44]

From the Sessional Papers it is known that more than 2,000 persons responded to the notice at once.[45] There are also indications that many of these applicants were turned away pending a departmental ruling on the special class of claims by occupancy in which these cases fell.[46] The problem was deficiency of proof. Some claimants could demonstrate that their cases were supported by Hudson's Bay Company land records. Claimants by occupancy did not have HBC confirmation of a grant but the surveyors had noted the presence of riverlot occupants at the time of the parish surveys between 1871 and 1873. The difficulty was that the land surveyors had called a lot vacant if there were only slight improvements to it. Thus, the claims of persons passed over by the Dominion Land Surveyors were, for the time being, delayed.[47]

The issuance of patents to owners claiming land under subsection 2 should have been the largest and simplest to accomodate since these claimants were seeking only to confirm grants by the Hudson's Bay Company, the confirmation of which was a matter of collecting affidavits to draw a chain of title between themselves and the last grantee (listed by lot in the Hudson's Bay Company Land Register). But the government feared such a procedure would encourage fraudulent and conflicting claims. Therefore, a third item of information, a certificate from the Inspector of Surveys, was included in each file (See photocopies of sample documents).

When officials at the Dominion Lands Office in Winnipeg were satisfied that the two certificates and the affidavit of an owner confirmed his claim, the file was forwarded to Ottawa for consideration by the Department of Interior. The Deputy Minister of Interior then confirmed the work of his Winnipeg agents and sent the files to the Department of Justice with requisitions for Patents. When the Deputy Minister of Justice agreed that the claims were in order, he endorsed the requisitions, the files were returned to the Department of Interior, and the Deputy Minister of Interior sent the requisitions to the Secretary of State for Letters Patent. By this means, most of the claims of persons who occupied lots granted from the Hudson's Bay Company were processed by the end of 1878.[48]

43. This was the major reason for *An Act respecting claims to lands in Manitoba for which no Patents have issued*, S.C. 1873, c. 6.

44. *Manitoba Free Press*, Jan. 3, 1874.

45. Report of J. S. Dennis, Surveyor General for 1874 in Sessional Papers (1875), no. 8.

46. Central Registry File, Department of Justice, file 13/1873.

47. *See* Appendix C, Tables 2-5.

48. *See* Appendix C, Table 2.

Highways and Hay Lands

Recognized settlers could usually get a Patent confirming that they had been granted land. The primary frustration of this group was their inability to secure Patents which covered their whole lot (see reservations noted on photo copy of sample patent). In 1871, provincial legislation declared that the foot paths and cart trails which ran from farm to farm were "Public Highways". All were set at a standard width of 66 feet.[49] But in 1872 an amendment[50] declared that the trails along the rivers were Great Highways and set their widths at 120 feet. Farmers were promised that they would be compensated from the public treasury for this inconvenience. But in 1875, provincial authorities hoped to avoid this expense by having the Minister of Interior make the necessary adjustments before issuing patents.[51] The Minister of the Interior referred the question to the Minister of Justice, who advised that the expropriation without compensation would require an act of Parliament.[52] The act was drafted, introduced and passed early in the Spring of 1876. In this way, every patentee in the old Settlement belt lost a band of property at least 120 feet wide. But in many cases, the road allowances ran diagonally and took a great deal more. It was suggested by one Kildonan farmer that the road allowances scheme ruined at least one fourth of the farms in Kildonan since so many people found that the Great Highway on their land encompassed houses and stables as well as cultivated land. For these persons, all that remained of a lot were two triangular patches at each end of the farm.[53]

An equally important injury to recognized settlers was the loss of their outer two miles of hay land. In 1871, the government took the view that the hay rights were only an "easement", therefore, no one had "exclusive" right to them. Such lands were vacant and might be taken up for settlement by newcomers. Unfortunately, this invitation was equivalent to inviting on-the-spot conflict between new settlers and old. Trouble began in the spring of 1872, and the occurance of such conflict was raised as a question by Alexander Mackenzie in the House of Commons. Mackenzie said that "a large number of people emmigrated from the old province of Canada" and settled on apparently vacant land only to be "driven from the ground . . . by . . . Half-breeds . . . ." He asked John A. Macdonald what the government planned to do to protect them in the future. Macdonald answered that such newcomers had the protection of an Order in Council which assured such settlers free grants and he apologized for these "outrages" promising that they "were not likely to occur again."[54]

But the opposition leader was not the only person worried about inter-settler conflict. The Governor of Manitoba telegraphed Macdonald, on May 29, 1873, anticipating trouble as the hay-cutting was about to begin: "urge speedy decision of Hay question. Everyday is complicating matters. See my views in memorandum . . . Constant irritation and should be set-

49. *The Highway Act*, S.M. 1871, c. 13.
50. S.M. 1872, c. 12.
51. Minutes of Council of the Government of Manitoba (Feb. 14, 1876), P.A.C., RG 15, Vol. 235.
52. Department of Justice, Central Registry Files, file 8/1876.
53. *Manitoba Free Press*, Jan. 27, 1875.
54. *H. of C. Deb.*, Apr. 16, 1872.

tled."[55] In the Governor's opinion, it had been wrong to have opened the outer two miles before original settlers' claims had been adjudicated. On this advice, a commission of judges and land surveyors was formed to look into the matter but the hay lands were still left open for homesteading, even though commissioners began to write in advance of their report that this would prove "most embarrassing."

Colonel J.S. Dennis, a surveyor member of the Hay Commission, took the liberty of giving the Secretary of State advance notice that he was not going to like what had been discovered. Dennis suggested withdrawal of the hay lands from settlement and also that the suppression of the forthcoming findings was necessary to avoid embarrassment.[56] Aikins was unruffled: "Why withdraw two mile hay strip if Commission can determine value for which scrip might be issued?"[57] "Not necessary that land report of commissioners' is confidential"[58] Still certain that the hay rights were nothing more than an easement, Aikins was more interested in the political implications of withdrawal: "If the hay strip is withdrawn will not claim now set up be pressed more strongly?" Furthermore, in his reading of the Act, subsection 5 only promised compensation for the land, not the land itself: "the Act does not cover it and no Act could be carried to cover it."[59]

But in the meantime, the Commission had learned that Aikins was wrong. Access to the hay lands was more than an easement or a privilege. It was "the Exclusive right during a certain period in each year that the owner or occupant of each front lot had of cutting the hay on the two miles immediately in rear of his lot."[60] In this light, the "fair and equitable" adjustment would be recognizing that the land in the rear was an integral part of the land in front; and, at a minimum, concede rights of pre-emption defined in subsection 4 of Section 32. But in many places, this would require the ejectment of homesteaders. And this was the embarrassment: the government had opened the land to homesteading before "ascertaining" the correct nature of the rights in question. Clearly, they had violated the spirit and also the letter of the *Manitoba Act.*

But the government in Ottawa refused to face the embarrassment of ejecting homesteaders from the outer two miles. As a result, trouble developed in the summer of 1873 as in the year before. As previously, the Governor telegraphed the Secretary of State to tell him that the old settlers intended to cut their hay as usual. "Cutting commences Friday — what course do you advise?"[61] The government decided to place newcomers first. The clerk of the Privy Council telegraphed an immediate reply: "The government has no power to permit old settlers to cut on lands homesteaded . . . Old settlers alluded to in your message must be dealt with accordingly."[62] Thus, it came as no surprise, one week later, when the

55. Telegraph from Gov. Morris to John A. Macdonald (May 29, 1873), Morris Papers, Lieutenant Governor's Collection, P.A.M.
56. Letter from J. S. Dennis to J. C. Aikins (Jan. 3, 1873), P.A.C., RG 15, Vol. 229, file 1877.
57. Telegraph from Aikins to Dennis (Jan. 13, 1873), Morris Papers, Lieutenant-Governor's Collection, P.A.M.
58. Telegraph from Aikins to Dennis (Jan. 18, 1873), id.
59. Telegraph from Aikins to Morris (Jan. 25, 1873), id.
60. Report of Commission on Hay and Common Rights, *id.*
61. Telegraph from Morris to A. Campbell (July 18, 1873), *id.*
62. Telegraph from E. A. Meredith to Morris (July 22, 1873), *id.*

Minister reiterated the point that the homesteader could not be interfered with and continued to define the situation as a conflict in which the plaintiffs were not even competing settlers. In his characterization, they were "former occupants".[63]

To give this dispossession by administrative fiat the cover of law, a public notice was approved on September 27, 1873 for the placement in Manitoba papers after that date. The notice cited clause 5 of Section 32 of the *Manitoba Act* and declared that the government was now prepared to appoint three persons to act as Commissioners for "ascertaining and adjusting on fair and equitable terms the rights of . . . cutting hay . . ."[64] After this new Commission reported, the government announced a policy which sounded generous. Recognized settlers in the older parishes could claim their hay lands in freehold, but only where the outer two miles was not taken up in any way.[65] In other words, the injustice of opening lands for settlement before determining if they were vacant was admitted, but the government was still not prepared to "interfere with homesteaders". A recognized settler with homesteaders on his back-lot was promised compensation, but only in scrip redeemable in land elsewhere.

The loss of the outer two miles was a frustration to some and a crippling blow to others. Historically, Manitobans who tried to make a living off the produce of their riverlots were primarily ranchers: they had more livestock than acres under cultivation, more harrows than plows, and more stables than barns.[66] For these settlers, the outer two miles of prairie were an indispensable source of fodder. The interruption of their operations by expropriation for highways or railways, and the loss of the outer two miles to interlopers was more than discouraging. An appalling number of old settlers sold out and moved on.[67]

A New Federal Government

Non-persistence of people who claimed land by "occupancy" or "peaceable possession" (under subsections 3 and 4 of Section 32) is explained by a different kind of discouragement. These claimants had difficulty persuading the government to hear any part of their claims. The reason was that a new administration coming to power in November, 1873 decided to ignore subsection 4 of Section 32 altogether.

The new government placed one of the most outspoken critics of Manitoba land claims in the uncomfortable position of administering them. The new Minister of Interior, David Laird, was fearful that indiscriminate recognition of rights under Section 32 would lead to concentration and consolidation of "Half-Breeds" in the settlement belt. Laird wanted this land saved for persons whom he believed to be more interested in farming. He preferred to see the present occupants displaced from their riverlots, moved north to the lakes to become fishermen or to encamp near places where their

63. Letter from A. Campbell to Gov. Morris (July 31, 1873), Morris Papers, Ketcheson Collection, Correspondence, P.A.M.

64. *See* letter from Campbell to Morris (Sept. 27, 1873), Morris Papers, Lieutenant-Governor's Collection, P.A.M.

65. *See* letter from D. Laird to Gov. Morris (Apr. 20, 1874), *id.*

66. *See* R. Frye and D. Sprague, Land Use and Population Growth in the Red River Colony, 1824-1870 (to be published by the Manitoba Record Society).

67. *See* Appendix C: Table 3.

labour might be useful in public works.[68] Before judging any of their claims under subsection 4, therefore, he persuaded his fellow members of the government that the *Manitoba Act* had to be altered, constitutional restrictions notwithstanding.

Laird's first amendment to the *Manitoba Act*[69] dissolved the distinction between "peaceable possession" and "occupancy" which was inherent in subsections 3 and 4 of Section 32 because subsection 4 safeguarded the tenancy of about 1500 families Laird wanted removed.[70] They were the people who wintered on riverlots in the outer parishes and pursued a variety of non-farming occupations in the rest of the year: freighters, tripmen, buffalo hunters, fishermen. All were jobs which kept people on the move and away from home for considerable periods of time. Also, none of these occupations required improvements of the home lot which the *Dominion Lands Act*[71] demanded of homesteaders. Basically, all one needed for home-base was a little shelter and fuel. For this purpose, a shanty in a grove of trees near the river served well enough. But according to the custom of the country, useage of the land for this purpose conveyed ownership.[72] If nobody objected to a man taking shelter on a lot in this way, the land was his. In Laird's view, such "occupancy" could not convey "possession". Since subsection 4 did not specify minimum improvements as a necessary precondition for consideration, hundreds of such cases had come forward. The solution to this difficulty was to nullify the offending sub-clause of the *Manitoba Act.*

On May 23rd, 1874, the government "repealed" half of Section 32 of the *Manitoba Act* and substituted this paragraph in its place:[73]

> Be it enacted, that 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 peaceable possession thereof on the eighth day of March, One thousand eight hundred and sixty-nine, shall be entitled to receive letters patent therefor, granting the same absolutely to them respectively in fee simple.

A year later, the date for "satisfactorily establishing undisturbed occupancy . . . and . . . actual peaceable possession" was changed to July 15, 1870.[74] Then a bizarre process of orderly administrative lawlessness began. Claimants would attempt to file applications for patents under subsections 3 and 4 of Section 32 of the *Manitoba Act.* If the facts appeared to comply with the new provisions of Section 32,[75] applications were accepted. If the applicant failed this test, his application was refused on the spot by a clerk in Winnipeg. After clearing this first obstacle, affidavits

68. David Laird Letter Book 1874, P.A.C., MG 27, IO.

69. S.C. 1874, c. 20, s. 3.

70. *See* Appendix C: Table 4.

71. S.C. 1872, c. 23.

72. This point was confirmed even by people who despised the custom. Thus, Alexander Ross wrote that 'the half-breeds are. . .squatters. . .who have from time to time dropped off from the fur trade. . .on the first vacant lot they find handy, which they make no scruple of calling their own." According to "the existing regulations" such occupancy conveyed ownership. Later, as the occupant decided to move, "the new comer has to pay him for his improvements." Alexander Ross, *The Red River Settlement* (reprinted 1972) (1st ed. n.p. 1857) 198-200.

73. S.C. 1874, c. 20, s. 3. The original text of Bill 51 *(An Act respecting the appropriation of certain Dominion Lands in Manitoba)* "repealed" ss. 4 of Section 32. After second reading, this phrase was dropped but without changing the meaning of the clause which was intended to replace it.

74. S.C. 1875, c. 52.

75. *Ibid.*

passed to the Department of Interior for scrutiny by the Deputy Minister. When he was satisfied that affidavits were in order and the survey certificate confirmed a minimum level of improvements (something the surveyor described as occupancy), the Deputy Minister of Justice studied the documents "in regard to the necessary legal formalities . . . ."[76] Every claim by occupancy had to conform with the new provisions. In all of the reports of such cases, from August, 1876 to March, 1879, Z.A. Lash, the Deputy Minister of Justice, did not refer to subsection 4 of the *Manitoba Act* once. "The only statute under which . . . [Mr. X, Y or Z] could make any claim is Ch: 52 of the statutes of 1875 . . . ."[77]

If the claimant cleared the dubious legal formalities posed by the bureaucracy, a patent would issue. But the acreage thus granted, was usually, as a matter of policy, only a small portion of the lot drawn by the Dominion Surveyor, usually the "dwelling, etc. of the claimant, but not for any greater extent of the land."[78] Normally, claimants by occupancy were not supposed to receive grants which encompassed more than 80 acres. They were not entitled to their outer two miles. And they also lost houses and barns if they encroached on a Great Highway. But that was the award of successful applicants. Hundreds of others had been told that they had no claim. Their applications were either refused in Winnipeg[79] or later at one of several of the other hurdles along the line at higher levels of administration.[80]

Such wholesale disallowance of claims might have led to embarrassment and trouble if claimants had been allowed to take their grievances to the "Claims Court" provided by an earlier statute[81] but such a development was anticipated in 1875 and eliminated. In 1875, the government repealed this statute, which had promised due process to all claimants, and replaced it with a conflicting claims law[82] which limited hearings to conflicting claims in which the contestants were both settlers. Thus, Laird guaranteed that he was able to keep cases against the Crown within the Department.[83]

The Girard Amendment

Manitoba Senators opposed this secrecy. In 1878, Girard and Sutherland complained that "we hear of confiscation everywhere." They wanted to know why so many improvements are requisite when the law merely requires peaceable possession . . . ." Girard asserted that most of the victims of ejectment had wintered on their land for years prior to the

76. P.A.C., RG 13, A3, Vol. 571, at 414.

77. This particular quotation comes from the ruling on Hugh Grant's claim on the Rat River (P.A.C., RG 13, A3, Vol. 593, at 444-447). But the same standard was applied ruthlessly in all such claims. *See* P.A.C., RG 13, A3, Vol. 571, at 414; Vol. 579, at 26-29, 30-33, 34-37, 38-41, 46-48, 52-57, 65-69, 90-92, 191, 249, 256, 263, 264, 265, 332. *See also* Central Registry Files withheld by the Department of Justice, packet number 21/1877. Here the Minister of Justice applied 'undisturbed occupancy" and "actuall peaceable possession" (the language of S.C. 1875, c. 52) with absurd consequences. Settlers in Ste. Agathe had built their houses on a high side of the river to avoid flooding. The acreage they farmed, however, was the fertile land subject to frequent flooding on the opposite low shore. Their claim to this farmland was denied because they did not live on it.

78. Letter from D. Laird to Privy Council (Apr. 17, 1876), P.A.C., RG 15, Vol. 235, file 5537.

79. *See* Letter from Whitcher to Dennis (Nov. 19, 1873), Department of Justice, Central Registry Files, Packet no. 13/1873.

80. *See* Appendix C: Table 5.

81. S.C. 1873, c. 6.

82. S.C. 1875, c. 53.

83. Letter from D. Laird to Gov. Morris (Apr. 30, 1875), Morris Papers, Ketcheson Collection, Correspondence, P.A.M.

transfer and wanted to know why such people were not protected by the fourth subsection of the Section 32 of the *Manitoba Act.*[84]

Senators defending the government replied that all "reasonable claims" were receiving fair consideration. "It is only in the cases where there has been no expenditure of muscle" that disallowance occurs. This was necessary, they said, to head off speculators. It is the "speculators that the Crown is not bound to recognize."[85]

Girard replied that if speculation was the crime, people should be allowed to state their case in open court, to have an opportunity to prove that their interest was in survival rather than speculation. "What I complain of," Girard concluded, "is the government assume the right of deciding these matters for themselves." The claimants are denied the right to clear their case before "a legal tribunal."[86]

Publicity was exactly what the government hoped to avoid, however. In 1878, just before the general election in which Mackenzie's Liberals were defeated, Girard confronted his fellow Senators once again with the demand for due process for claimants whose contest was against the Crown. The government had introduced an amendment to the conflicting claims law[87] to give the claims commissioner the same power to compel attendance of witnesses in his court as was vested in courts of law considering other civil cases.[88] Girard's amendment was intended to broaden this jurisdiction to make the conflicting claims commission an appellate court for cases refused by the bureaucracy. Thus, he proposed that the "cases of claims, in respect of which it has not been established to the satisfaction of the Minister . . . that there has been peaceable possession and undisturbed occupancy . . . shall come within the purview of this act as if they were adverse or conflicting claims."[89]

Apparently, government spokesmen feared that quite a number of refused cases were *bona fide* claims under subsection 4 of Section 32 of the *Manitoba Act,* and feared that a public tribunal would have to recognize them under this statute since the main argument against the Girard amendment was that "it would not do to give away the public property right and left."[90]

Senator Campbell, a former Minister of Interior, defended Girard's proposal saying that it was more important to be "fair and reasonable" than stingy. Developing the theme further, Campbell said that "the majority could say, 'you shall not be heard because your possession is very slight and your usages and customs are different from ours,' but that would be inflicting an injustice upon those people, and wounding them in a manner from which they would not recover." The amendment passed, 22 to 18.[91]

84. *Sen. Deb.*, Mar. 8, 1878.
85. *Ibid.*
86. *Ibid.*
87. S.C. 1875, c. 53.
88. S.C. 1878, c. 14.
89. *Sen. Deb.*, Apr. 11, 1878.
90. *Ibid.*
91. *Ibid.*

The House of Commons took up the amended bill one week later and rejected the Girard amendment on grounds that the government's bureaucracy could decide cases "more expeditiously, efficiently, and cheaply" than a quasi-judicial body. The House, therefore, insisted that the conflicting claims commission should continue to be limited to cases of conflicts between settlers and the bill was returned to the Senate. A majority of Senators agreed to concur in the objection and the Girard amendment failed.[92]

The failure of the Girard amendment in 1878 was the beginning of the end of the Manitoba land claims issue in the Canadian Parliamentary Debates. Mackenzie's government was defeated in September and the return of Macdonald's Conservatives did not lead to a revival of the cause. Both parties had a record of amending the *Manitoba Act* while in power, therefore, both had proved themselves to be good friends of Ontario; neither party could attack the other for being soft on "Half-breeds". Also, the bureaucracy was finding Manitoba land claims to be increasingly tedious, therefore, the Deputy Ministers of Justice and Interior were both increasingly unlikely to find problems which required new Parliamentary initiatives. On the contrary, after 1878, both Deputies were more likely to seek legislation declaring that all valid claims had been recognized. By 1878, Z. A. Lash and J. S. Dennis both wished that they had never heard of Manitoba.

Basket after basket of files of land claims crossed the desks of Lash and Dennis in apparently endless succession. If a new facet of the hay question reopened, Lash could not be bothered to explore its legal intricacies. He would complain to Dennis about "a large bundle of papers" and refer him to other reports of previous years saying that he was too busy to wander in "an old and complicated matter like this."[93] Here the issue would falter as the Deputy Minister of Justice grew tired of writing lengthy reports. Lash was becoming equally tired of reporting on the titles of riverlots. Earlier his reports of each case had been lengthy letters running to several pages for each claim.[94] By 1877, they had shrunk to a single paragraph or sentence in some cases. Also, Lash began to complain that many of the cases forwarded to Ottawa should have been disallowed by lesser officials in Manitoba. In April, 1877, Lash told Dennis that he wanted the Department of the Interior to be quite careful only to send him cases which "have already been investigated by the Dominion Lands agent at Winnipeg and have been recommended by him for patent . . . ."[95] A year later, Lash suggested even more should be done at the Dominion Lands Office in Winnipeg: "It cannot be expected that the officers of the Department in Ottawa can judge as to the credibility of statements in papers made by persons in an *ex parte* manner and about whose veracity nothing is known." Lash said that "Great reliance therefore must be placed on the reports of agents on the spot

92. Journal of the House of Commons, Apr. 20, 1878.

93. Letter from Z. A. Lash to J. S. Dennis (Mar. 28, 1877), P.A.C., RG 13, A3, Vol. 584, at 446.

94. This was especially so with reports on claims under subsection 2 of Section 32, the claims disposed of first. *See* P.A.C., RG 13, A3, Vol. 574, at 2, 3-4; Vol. 576, at 749-53; Vol. 579, at 62-4, 87-8, 93, 94-6, 130-43. These were reports in 1875 and 1876. Compare with later reports, such as the six cases disposed of on April 16, 1877. P.A.C. RG 13, A3, Vol. 584, at 701-06.

95. Letter from Z. A. Lash to J. S. Dennis (Apr. 16, 1877), P.A.C., RG 13, A3, Vol. 584, at 701-06.

. . . ."[96] By 1880, Lash was refusing to report at all: "Send some intelligent and efficient person to make inquiries," do not bother me, Lash protested. Later, he said that he did not know how to handle these cases: "[N]o person without a knowledge of the character and credibility of those making the affidavits can decide what statements are true . . . ."[97]

Robert Lang

The result of the admission that the bureaucracy in Ottawa was not competent to handle claims honestly and justly was delay and corruption. The Department of Justice refused to act on a large number of claims without more evidence and Robert Lang, the clerk in Ottawa responsible for preparing dossiers for final scrutiny, gathered that which was lacking. He selected files of claimants with the strongest chance of success and passed this information to associates in Manitoba. A. Mathewman and A. G. B. Bannatyne, Lang's co-conspirators, informed the expectant landowners that their claims were really quite weak but by providing additional bits of information a "man in Ottawa" would clear every obstacle for certain considerations. The price was usually half the land — to be assigned to some designated third party after patenting.[98]

As far as Lang's superiors, Dennis and Lash, were concerned, all was well with the Dominion Lands Branch because claims were being settled. Indeed, by the spring of 1880, Dennis suggested to Lash that since most of the claims had been disposed of, the government should be encouraged to bring in one last amendment to limit the time for making claims under the *Manitoba Act* and acts amending it. Lash agreed. Soon the draft bill prepared by the Deputy Minister of Justice came before Parliament.[99]

The bill for final settlement of Manitoba land claims was not debated in the House. The measure also cleared the Senate without amendment. But Senator Girard condemned it. His objection was that many claims had been filed and in many cases remained unanswered. Section 2 of the bill declared that claims not proved to the satisfaction of the Minister by the future limiting date "shall be barred as fully and effectively as if such claims had not been made." Girard suggested that the intent of the bill was to diminish or destroy the rights which were part of the *Manitoba Act* by proposing a new standard of satisfactory proof — settlement before May, 1882.[100]

Government spokesmen defended their bill on grounds that all of the claims which would be ruled out in this manner were of a "very frail character". Girard replied that the onus to prove this was on the government and moved that his previous amendment should be adopted. He wanted these claims to be submitted to a proper tribunal. Senator Sutherland seconded Girard's motion noting that there were a great number of claims remaining unsettled and that a number of them were probably valid. It was ludicrous to allow them to pile up in Ottawa for eight years, set

96. Letter from Z. A. Lash to J. S. Dennis (Oct. 23, 1878), P.A.C., RG 13, A3, Vol. 591, at 752-3.
97. Letter from Z. A. Lash to J. S. Dennis (Dec. 18, 1880), P.A.C., RG 13, A3, Vol. 600, at 400-01.
98. *See* reports on Lang and his own explanation of the affair in P.A.C., RG 15, Vol. 232, file 2447.
99. Letter from Z. A. Lash to J. S. Dennis (Mar. 12, 1880), P.A.C., RG 13, A3, Vol. 597, at 704.
100. *Sen. Deb.*, Apr. 20, 1880.

a date after which they were automatically null and call this a "settlement" But they persuaded no one and the amendment failed.[101]

The effect of the final settlement bill[102] was exactly as Girard and Sutherland predicted. Robert Lang continued to push the cases in which he had an interest, but all the claims which were still undecided by May 1st, 1882 were thereby nullified. The Department of Justice declined to touch any case which was a claim not decided by the limiting date.[103] Objections were raised and the Department of Interior began an investigation in 1884 to determine why so many cases had been barred on this technicality. Lang blamed the Department of Justice. A new Deputy Minister of Justice and a new Deputy Minister of Interior decided to settle the controversy over delays by blaming Lang. It was asserted by both Deputies of the blameless departments that everyone but Lang had wanted to settle these claims on just and equitable terms; but the clerk in charge of the dossiers had spoiled the operations of the whole system by his corrupt advancement of some cases to the detriment of the others. Lang denied the charge of corruption and ridiculed the idea that one clerk could tie up the whole government saying "one man cannot do more than the works of one man"[104]

The government responded (while the dispute between Lang and his superiors was still in progress) by amending the previous final settlement bill in 1884. Thus, date for final settlement which had passed two years previously (in 1882) was extended until 1886.[105] No tribunal such as Girard wanted was conceded but dead files became temporarily active again for a period of two years. The generosity thus extended was not large. The number of patents granted in these years was insignificant. In 1887, 1200 petitioners came forward protesting that sixteen years had passed since their country became a part of the Dominion of Canada. They complained that more problems had been created than solved, "in a very great degree caused by reason of the action of the agents of the Federal Government . . . ." They demanded that claims-consideration resume this time to be placed before "a Commission empowered with full authority to open up and enquire into all claims brought before them." They also suggested that at least two of the commissioners should be fellow Manitobans, "conversant with the nature of the grievances herein submitted by their association therewith for a lifetime."[106]

Conspiracy Revealed

A. M. Burgess, the Deputy Minister of Interior, was given the task of answering the petition, a task which was necessary because internal investigation had just revealed that a "conspiracy" of Bannatyne, Mathewman and Lang had been running their extortion racket on a very large scale.[107] Investigators working in Winnipeg in 1886 had been able to

101. *Ibid.*

102. S.C. 1880, c. 7.

103. Letter from R. Lang to D. L. Macpherson, Minister of Interior (Dec. 27, 1884), P.A.C., RG 15, Vol. 232, file 2447.

104. *See* letter from A. M. Burgess, Deputy Minister of Interior, to D. L. Macpherson (Jan. 21, 1885) and Lang's reply (Jan. 29, 1885), P.A.C., RG 15, Vol. 232, file 2447.

105. S.C. 1884, c. 26.

106. *Supra*, n. 42.

107. Letter from A. H. Smith, Dominion Lands Commission, Winnipeg to T. White, Minister of Interior (Mar. 9, 1886), P.A.C., RG 15, Vol. 232, file 2447.

document many instances of such wrong doing and suspected that there were a great deal more.

Fortunately for the government, Lang had fled the country and the Justice Department said his offence was not extradictable. Also G. W. Burbidge, the Deputy Minister of Justice, had found a clever way to prevent scandal arising from a trial of Mathewman or Bannatyne. Burbidge assured Burgess that these "conspiracies were directed not against the Government or the public but against private persons" and the Deputy Minister of Justice was not "under any obligation to become private prosecutor . . . ." It was up to the victims to "put the law in motion."[108]

Had a Royal Commission been established in 1887, as the petitioners had requested, a scandal even more embarrassing than the trial of the conspirators would surely have arisen "casting doubt upon the validity of every title hitherto granted by the Crown to claimants under the *Manitoba Act.*"[109] Burgess therefore wrote to the petitioners saying that he had been with the Department of Interior for over eleven years and knew as much about Manitoba land claims as anybody in the country. He therefore felt free to "take the liberty of saying that . . . there is no good public reason existing why any commission . . . should be empowered to reopen and again inquire into this matter." There were no just grievances. "I respectfully submit," said Burgess, "that the officers of the Government of Canada who are now dealing and who have . . . dealt with . . . the petitioners, have been in every way qualified to deal, and have dealt, with them intelligently and generously . . . ."[110] To be sure, there had been six amendments of dubious constitutionality, denial of due process, and a cover-up of one of the most highly placed extortion rackets in Canadian history. But, the lawlessness was legal because these were actions in law and the misdeeds of individuals were of no concern to the government since they injured private persons rather than the public. "It will thus be seen that there is no foundation whatever for the complaints of the petitioners . . . ."[111] In this, as in so many other matters of state, the truth that emerged was the thing believed rather than the world as it was and is.

108. Letter from G. W. Burbridge to A. M. Burgess (Sept. 8, 1886) in P.A.C., RG 15, Vol. 232, file 2447.

109. Letter from A. M. Burgess to Minister of Interior (May 28, 1887), P.A.C., RG 15, Vol. 492, file 138627-1, p. 10.

110. *Id.*, at 9.

111. *Id.*

Appendix A: Sections 30-32 *Manitoba Act*

30. 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 and 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.

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

32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:

    1. All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1969, shall if required by the owner, be confirmed by grant from the Crown.
    2. All grants of estates less then freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
    3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth 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 owner, be converted into an estate in freehold by grant from the Crown.
    4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province which the Indian Title has not been extinguished, shall have a right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.
    5. The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting on fair and equitable terms, the rights of Common, and of cutting hay held and enjoyed by the settlers in the Province, for the commutation of the same by grants of land from Crown.

Appendix B: Statutory Alterations to the *Manitoba Act*

Date Assented To	Title	Type[1]	Most Significant Features
May 3, 1873	*An Act respecting claims to Lands in Manitoba for which no Patents have been issued,* 36 Vict., c. 6, S.C. 1873.	I	provided for distribution of river lot patents by a Manitoba based judicial proceeding.
May 3, 1873	*An Act to remove doubts as to the construction of Section 31 of the Act 33 Victoria, Chapter 3, and to amend Section 108 of the Dominion Lands Act,* 36 Vict., c. 38, S.C. 1873.	III	excluded partly Indian heads of families from sharing in the land allotments promised in Section 31
May 23, 1873[2]	*An Act to authorize Free Grants of land to certain Original Settlers and their descendants, in the territory now forming the Province of Manitoba,* 36 Vict. c. 37, S.C. 1873.	I	provided allotments of land to original white settlers in the same way that they were promised to partly Indian persons by Section 31
May 26, 1874	*An Act respecting the appropriation of certain Dominion Lands in Manitoba,* 37 Vict., c. 20, S.C. 1874.	III	promised partly Indian heads of family personal property amounting to $160 in lieu of the land allotments they were denied by 36 Vict., c. 38; also, repealed ss. 3 and 4 of Section 32 and substituted a more stringent definition of peaceable possession as the prerequisite for claiming a riverlot.
April 8, 1875	*An act to amend 'An Act respecting the appropriation of certain Lands in Manitoba',* 38 Vict., c. 52, S.C. 1875.	III	altered the date for establishing occupancy to claim a riverlot from March 8, 1869 to July 15, 1870.

1. I = reasonable supplement to *Manitoba Act*
   II = supplement of dubious legality since procedures were instituted which tended to rob Sections 31 and 32 of their intended meaning
   III = *ultra vires* alteration of substantive portions of Sections 31 or 32 of the *Manitoba Act*

2. The date to be found in the House of Commons debates is May 23, 1873. The date printed in the Statutes of Canada is May 3. May 3 is clearly impossible, however, since the measure did not pass through Parliament until May 14.

Appendix B (Continued)

Date Assented To	Title	Type	Most Significant Features
April 8, 1875	*An Act respecting Conflicting Claims to Lands of Occupants in Manitoba,* 38 Vict., c. 53, S.C. 1875.	II	removed the consideration of riverlot patents from the jurisdiction of a Manitoba based open judicial proceeding and placed the responsibility under Ministers in Ottawa; denied due process to claimants whose claims were disallowed by the secret workings of this federal bureaucracy; provided for a Manitoba based judicial proceeding to adjust conflicts between claimants in cases selected by the Minister but left the Minister free to decide on his own
April 12, 1876	*An Act respecting Roads and Road Allowances in Manitoba,* 39 Vict., c. 20, S.C. 1876.	II	distinguished between several classes of roads, empowered minister to withhold these portions of riverlots from the patenting process, empowered the Minister to award compensation for land thus lost at his discretion
May 10, 1878	*An Act to amend 'An Act respecting Conflicting Claims to lands of occupants in Manitoba',* 41 Vict., c. 14, S.C. 1878.	I	gave commissioners in conflicting claims cases the same power to compel attendance of witness as was vested in courts of law considering other civil cases.
May 15, 1879	*An Act to explain and amend the Act respecting the appropriation of certain Dominion Lands in Manitoba,* 42 Vict., c. 32, S.C. 1879.	III	defined the meaning of 'family' for cases of deceased family heads, and provided that the personal property promised by 37 Vict. Chap. 20 should go to the heirs of deceased family heads according to the law of inheritance governing personal property in Manitoba.
April 29, 1880	*An Act for the final settlement of claims to lands in Manitoba by Occupancy under the Act thirty-third Victoria, Chapter three,* 43 Vict., c. 7, S.C. 1880.	III	required all occupants of land described in ss. 3 and 4 of Section 32 to apply for patents by May 1, 1882 and provided for the removal of unsuccessful applicants or non-compliant occupants after that date
April 19, 1884	*An Act to extend the limitation of time under the Act forty-third Victoria, chapter seven intituled 'An Act for the final settlement of claims to lands in Manitoba by occupancy, under the Act thirty-third Victoria, chapter three',* 47 Vict., c. 26, S.C. 1884.	III	reopened the consideration of Section 32 claims until May 1, 1886

Appendix C: Statistical Tables

Table 1: Patents and Alienations of Children's Allotments

Years	Number of Patents	Number of Alienations*
1874	1	
1875		
1876		
1877	987	450
1878	1,234	630
1879	1,041	730
1880	232	1,000
1881	1,084	560
1882	386	470
1883	175	180
1884	68	130
1885	101	170
1886	203	220
1887	145	230
1888	65	130
1889	72	140
1890	38	40
1891	30	50
1892	22	10
1893	15	10
1894	15	10
1895	11	30
1896	5	
1897	165	10
1898	3	10
1900 and later		40
TOTALS	6,099	5,260

*Projections based on a random sample of 658 allotments, 32 of which were cancelled before patents were issued

Sources: Issuance of patents recorded in Half-Breed Allotments No. 1 and 2, Public Archives of Canada, RG 15, Volumes 1476-1477; alienations recorded from Abstract Books in the Winnipeg, Portage la Prairie and Morden Land Titles Offices.

Table 2: Riverlot Patents, Old Settlement Belt,* 1875-1883

	PATENTS**				
YEARS	D.L. Grant (33 Vic.)	Grant	D.L. Grant	Special Grant	
1875	224		1		
1876	166				
1877	209				
1878	1	187	1		
1879		89			
1880		33	12		
1881		3	94	1	
1882		5	164	2	
1883			58	1	
TOTAL	600	317	330	4	1,251

*Parishes included in the Hudson's Bay Company plan of survey of 1835, namely: St. Francois Xavier, St. Charles, St. Boniface, St. Vital, St. Norbert, Headingly, St. James, St. John, Kildonan, St. Paul, St. Andrew, and St. Clement.

**Until 1878, special forms were used for each kind of patent issued. "D. L. Grant (33 Vic.)" distinguished *Manitoba Act* grants from all others. After 1878, however, the distinction was not continued, possibly to cover doubts about the chain of title in these kinds of grants. All of the pre-1878 patents name an 1870 occupant; none of the later patents provide this information. (See Public Archives of Canada, microfilm reels C-3992,3994,3996).

Source: Alphabetical Index, Parish Land, Manitoba from February 16, 1875 to July 13, 1883, Public Archives of Canada, microfilm reel M-1640

Table 3: Parishes by Persistence of Original Population

PARISH	A) Number of Families* in 1870 Census	B) Number of 1870 Families Named by Surveyors	(B/A) %	C) Total Number of Occupants Named by Surveyors	D) Number of Patents Issued to Cases in C	(D/C) %	Persistence Rate PR = (B/A)(D/C) %
St. Laurent	52	15	29	28	18	64	19
Baie St. Paul	58	31	53	173	32	18	10
St. Francois Xavier	361	131	36	244	73	30	11
St. Charles	84	28	33	129	61	47	16
St. Boniface	235	21	9	83	45	54	5
St. Vital	74	18	24	38	13	34	8
St. Norbert	212	86	41	211	99	47	19
Ste. Agathe	59	16	27	141	35	25	7
Ste. Anne	54	30	56	77	33	43	24
Portage la Prairie**	95	28	29	87	38	44	13
High Bluff	27	25	93	50	24	48	45
Poplar Point	128	44	34	56	38	68	23
Headingly	56	37	66	58	40	69	46
St. James	87	38	44	77	45	58	26
St. John	146	6	4	9	2	22	less than 1
Kildonan	117	42	36	106	80	75	27
St. Paul	73	34	47	131	70	53	25
St. Andrew	353	109	31	305	64	21	7
St. Clement	109	58	53	115	18	16	9
St. Peter	212	0	0	4	1	25	less than 1
TOTALS	2,592	797		2,122	829		

*Whole population, all ethnic groups, excluding only solitaries. Mean rate of persistence = 17 percent
**and White Mud

Sources: Census of Manitoba, 1870, Public Archives of Canada; Parish Registers, Crown Lands Branch, Department of Renewable Resources and the Environment, Province of Manitoba; Abstract Books, Winnipeg Land Titles Office

Table 4: Parishes by Population, Ethnicity and Probability of Occupants Being Passed Over by Surveyors

PARISH	Number of Families*	Percent Metis	Number of Lots Protected By Documentation in LRB
St. Laurent	52	81	
Baie St. Paul	58	81	
S.F. Xavier	361	82	270
St. Charles	84	79	109
St. Boniface	235	53	132
St. Vital	74	77	57
St. Norbert	212	82	142
Ste. Agathe	59	78	
Ste. Anne	54	80	
Portage L.P.**	95	93	
High Bluff	27	82	
Popular Point	128	75	
Headingly	56	71	53
St. James	87	72	93
St. John***	146	73	
Kildonan	117	66	93
St. Paul	73	71	112
St. Andrew	353	69	319
St. Clement	109	86	52
St. Peter	212	74	
TOTALS	2,592		1,432

*Whole population, all ethnic groups, excluding only solitaries

**and White Mud

***All of the files on the distribution of lots in the Parish of St. John are missing from the otherwise nearly complete collections at the Crown Lands Branch, Department of Renewable Resources and the Environment, Province of Manitoba

Sources: Population data from the Manitoba Census of 1870, Public Archives of Canada, data on Hudson's Bay Company documentation of occupancy from the Survey Certificates in the files cited above. Sample Survey Certificate in text.

Table 5: The Population of Metis Male Heads of Families*
Enumerated by Various Government Officials, 1870-1875

PARISH	1870 Census	1871-73 Land Survey	1875 HB Commissioner
St. Laurent and Oak Point	42	15	44
Baie St. Paul	47	29	413
St. Francois Xavier	295	115	19
St. Charles	66	24	53
St. Boniface	124	15	150
St. Vital	57	12	51
St. Norbert	173	78	158
Ste. Agathe	46	14	108
Ste. Anne	43	20	52
Portage la Prairie**	88	15	62
High Bluff	22	18	80
Poplar Point	96	35	4
Headingly	40	21	39
St. James	63	22	39
St. John	107	2	24
Kildonan	78	4	116
St. Paul	52	24	42
St. Andrews	243	83	189
St. Clement	94	48	66
St. Peter	157	0	27
TOTALS	1,933	594	1,726

*Includes only Metis males who were also parents with children; excludes solitaries and excludes cases whose ethnicity is not recorded

**and White Mud

Sources: Manitoba Census, 1870, Public Archives of Canada; Parish Registers, Crown Lands Branch, Department of Renewable Resources and the Environment, Province of Manitoba and Surveyors' Field Notes, Public Archives of Manitoba; Affidavits of Half-breed Heads of Families, Public Archives of Canada, RG 15, Volumes 1319-1324.