

**Beyond Doctrines of Dominance: Conceptualizing a Path to Legal Recognition and
Affirmation of the Manitoba Métis Treaty**

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For my children.

I am sorry I couldn't do more.

You deserve better.

Abstract

In 1869-70 the Métis of the Red River region in Manitoba resisted the transfer of their homeland from the Hudson's Bay Company to Canada. The Métis people responded to this transfer by blocking Canadian surveyors, government officials, and taking control of the territory through the establishment of representative institutions. Eventually, the Métis negotiated favourable terms with Ottawa which, this thesis argues, represented according to law, and to the Métis, a treaty. This thesis argues that this treaty was intended to protect the Métis homeland and provide political and social protections. The Manitoba Métis Treaty was intended to guarantee the Métis a land base in Manitoba the total size of which was to be 1.4 million acres. The reservation of this land came with protective obligations so that the entire community would receive a benefit from such lands.

While Canada has developed a body of treaty law which will be used to interpret the Manitoba Métis Treaty, matters were convoluted by the enshrinement of this treaty agreement in the *Manitoba Act* of 1870, a document which would gain constitutional status a year later. The impact of this legislative history has led some researchers to link government obligations entirely to the *Act*, rather than to the negotiated agreement. Indeed, it would seem that the negotiations have been, for the most part, understood as nothing more than conversations. I reject that position and argue that *both* the negotiations and the *Act* must be taken into consideration when assessing the obligations undertaken by the Crown.

The unique history of the Manitoba agreement means that Canada was under both constitutional and treaty law obligations to uphold the negotiated agreement between itself and the Métis. This thesis argues that not only is the treaty the correct legal interpretation of the events of 1869-70 but that the government of Canada failed to honour its commitments in several

meaningful ways. The approach utilized in this thesis is designed to be reliant upon the basic structure and doctrines of Canadian law but to do so in a manner which gives weight to the Métis voice. It is neither a critique which is wholly internal to Canadian law nor is it completely dismissive of Canadian law. Instead, this thesis will illustrate that with only minor adjustments to the application and interpretation of colonial law, the Manitoba Métis Treaty could find a more receptive audience in Canadian legal thought. In the face of a reasonable alternative, such a project can allow other researchers to question *why* the courts have chosen a path which denies reception of Métis voice, community and culture in Canadian law.

Prologue

People of the Land

Our way of life has always depended on the land. We would go into the water from time to time. It was used for travel, trade, and fishing. But our land housed our communities, our language, our values. When the newcomers came we were pushed into the water. Many of us drowned. We became scattered by the currents. Occasionally, the newcomers would help our children out of the water. Only a few of them were seen again. Even then we only saw glimpses of those children ... in the distance. They would return, unexpectedly, to the shores of the water. They would look bewildered that they had traveled so far away from their people and yet returned to the same conditions.

You see, after we were forced into the water, the newcomers started to plant trees. They carved paths through those trees. They put bushes up in odd places to ensure that the paths were followed. When we were brought to shore, they insisted that we stay on the path. Despite the many turns, the carefully cared for surfaces and the planted bushes, those paths always return us to the water where we will inevitably drown.

Yet, the calls from the shore sound louder than ever. "Come, your salvation lies in your education!" "We will save you!" They wait for us to extend our hands before they throw the rope. And we do extend our hands for there is no real choice to be made. And, at the moment when they start pulling us to shore we relax, relieved that we no longer have to tread. At the shore, we are grateful to feel the earth beneath our feet. We can see light coming into this new forest. We bob our heads like parrots trying to see if we can catch a glimpse of our lands through the bushes. And they quickly get us moving. We go. One by one we travel their paths.

Those who call us and guide us seem like nice people. They have good intentions. And, they listen ... to most of what we say. They tell us what paths we should travel if we want to get

to our lands. Yet, we never do see those lands. For those paths always return us to the water to die. Strangely, these newcomers do not follow us down this last part of the road. I do not believe that they know what they are doing to us. The newcomers see how independent we have become. How accustomed to the paths we are now. And they no longer support our journey. They have faith in their paths. People are secondary.

I am a traveler of these paths. I have come to the shores before. I have travelled those paths and found myself back at the water. This time, I am not travelling down one of those paths. I understand their game now (even if they don't). I am going to look through those bushes. Surely, even in this new forest our lands are still there. I will find our homeland. It might mean that I follow the path only for a while. In fact, I will try to follow it as long as I can. For I want them to follow me. But they need to know that I will be cutting down a few bushes. I am going to show these newcomers that their forest, which was built to block and control us, has been hiding a secret. There is a way to our lands. I will find it.

INTRODUCTION

The introduction to this thesis will take the form of several notes. The first note, which is obligatory for all Métis studies, will explain the labels that I will be using throughout this thesis. The second note is a comment on Aboriginal scholarship in the legal discipline. Through this brief examination I hope to place my approach to research within the broader scholarly accounts of the Manitoba Métis. For reasons outlined in this note, I will not be undertaking a standard literature review in this thesis. The third and final note will serve as a brief introduction to the particulars of this study.

I. A Note on Labels

Terminology is always important when discussing both the law and Aboriginal people. My use of the term Métis might be contentious to some and it does not necessarily reflect an accurate historical understanding of that term. There are good reasons for this. In his study, Paul Chartrand applied the term “Métif” only to the French “half-breed” population. While phonetically and historically more accurate than my interpretation of the term “Métis”, “Métif” is not a term with legal application or constitutional status.¹ The term Métis appears in the *Constitution Act, 1982* and has been defined by the Supreme Court of Canada.² Also, I will show in this dissertation that the “half-breed” population which coalesced into a united political voice during the Manitoba Resistance was a distinct political community. While being divided to varying degrees by language and religious barriers the Red River “half-breed” community united during the Manitoba Resistance to form a government which represented the interests of

¹ Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, 1991) explains at 1 in footnote 3 that “Métif”: “reflects a spelling sometimes used around 1870 and which comes closer than ‘Métis’ to indicate the pronunciation ‘Michif’ or ‘Michiss’ used by the people designated by the term”.

² *R. v. Powley*, 2003 SCC 43, [2003] 2 SCR 207 (Canlii) at para. 12: “A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.”

the entire community (if imperfectly, but that is the norm for representative governments). It is under the authority of that political body that delegates were sent to Ottawa to negotiate with Canadian representatives to determine the terms of union. The terms which were established applied to all the people of Red River, and protected the unique cultural aspects of both the English and French “half-breed” communities. It is for that reason that a term needs to be used which applies to both the English speaking and the French speaking “half-breeds” of Red River. The most logical term is “Métis”.³ While not a historically accurate term in relation to the English speaking “half-breed” people of Red River, it is a modern legal term which would, no doubt, capture the entire “half-breed” population of Red River.

Since this is a legal analysis, I will (in this instance) sacrifice accuracy for pragmatism. Therefore, “Métis” will be used throughout this paper to identify the mixed-ancestry populations, regardless of language or religion, which united together during the Manitoba Resistance of 1869-70. There are Métis communities throughout western Canada which were not included in the Manitoba resistance. The Supreme Court of Canada’s definition is inclusive of these people. The term “half-breed” which was used predominantly in historical material from the late 19th century, will be used as it directly refers to legislation or primary source material. Because I am applying a broad definition of Métis, these terms will appear to be used interchangeably at times.

At times throughout this paper, distinction between English and French speaking Métis will be necessary. Such distinction will help to overcome some of the problems associated with an expanded, non-historically based, use of the term “Métis”. Peterson and Brown review the evolution of the term “Métis” and explain that the term was not originally applied to persons of non-French and First Nations ancestry. Instead, the term was originally reserved for a specific

³ Jacqueline Peterson and Jennifer S.H. Brown, “Introduction” in *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: The University of Manitoba Press, 1985) at 5 explain that the word “Métis” was originally used to refer to “the french- and Cree-speaking descendents of the Red River métis”.

population (persons with French and First Nations ancestry). By the 1970's the common usage of "Métis" had evolved to include people who were not connected to Red River and whose mixed ancestry was other than French/Cree. Brown and Peterson see this expanded usage as problematic:

...the substitution of the French-language "métis" for its English language counterparts, "halfbreed" and "mixed-blood," while semantically more accurate because it does not carry the freight of a phony and damning folk biology, would seem to confuse or muddle an historically based political and ethnic identity with the genetic attributes of individuals, regardless of their ethnic or cultural identities.⁴

Yet, the *Manitoba Act*, as we will see, was negotiated without distinction between these ethnic or cultural identities. Therefore, I am not using Métis to rely upon the "genetic attributes" but, rather, their political/legal affiliation. If a particular term is not clearly set out here, its application should be clear from the context.⁵

II. A Note On Scholarship and Colonialism

There is a general comment to be made here about racism, colonialism and legal research. Racism is an ideology of dehumanization designed to deploy or conceal the material content of dispossession.⁶ It functions by acknowledging, rejecting or creating conditions for a People so that the value that they have in something (most obviously land) can be ignored or undermined by others who seek to possess that thing. These forms of thought are carried through the colonial encounter to justify the theft of Aboriginal ways of life and the resources upon which those

⁴ *Ibid.* at 5.

⁵ Similarly, John E. Foster, "Some Questions and Perspectives on the Problem of Métis Roots" in *ibid.* at 73 where he writes: "The instances where the more limited and historical sense of the term *métis* is intended should be obvious from the context in which it is used."

⁶ This functional definition of racism can be found in "Racism: Back to the Basics" by Roland Chrisjohn. Part III of a talk by Dr. Roland Chrisjohn on the roots of racism as they pertain to Aboriginal People. This talk was recorded on March 14, 2002 as part of St. Thomas University's Native Awareness Days organized by the Native Student Council. Online at: <http://www.nativestudies.org/native_pdf/Racismbacktobasics.pdf> (accessed on July 25, 2011). For more on the merits of a functional definition of racism see Harry M. Bracken, "Philosophy and Racism," *Philosophia*, 8, 2-3: 241-260 at 241 where he explains: "I take racism to be the doctrine which a group may articulate in order to justify its oppression of another group by appealing to some putative flaw ... in the oppressed group." and H.M. Bracken, "Essence, Accident and Race", *Hermathena*, CXVI (Winter): 81 - 96.

cultures rely. Thinking without regard to Aboriginal worldviews, or simply framing issues uncritically, can lead entirely unintentionally to the adoption of these racist tactics. For example, Flanagan and Ens effectively eliminate any alternative interpretive framework by denying that the Métis claim is functionally or structurally any different than what each individual can make of it. The dehumanization occurs when Flanagan and Ens (probably unintentionally) neglect to mention or deny the value in the Métis People's Aboriginal difference or unique political status. It is not that they are turned from Métis into savages, but that they are turned from Métis into Euro-Canadians. At that point, Flanagan and Ens can use the values of Canadian society to judge the Métis or, more specifically, the government's treatment of the Métis. This technique is used despite a historical base set out by Ens which catalogues a collective interest being asserted throughout the history of Métis claims in Manitoba.⁷ This is to say that conscious intention is not necessary for racism to manifest itself. Indeed, it could be said that the most dangerous types of racism are found in the common assumptions, values, and worldviews that one culture imposes upon another.

Legal discourses continue to have problems with appreciating how things *function*. There is a pressure in legal research to articulate how things can be *fixed*.⁸ Legal researchers often assume that the law or other legalistic processes provide an appropriate answer, no matter what the problem.⁹ Therefore, it is necessary to state clearly that I am not here to catalogue a list

⁷ See generally, Gerhard Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996). Also see Thomas Flanagan, *Metis Lands in Manitoba* (Calgary: University of Calgary Press, 1991) Chapter 2. The work of Flanagan and Ens will receive more extended treatment in Appendix A.

⁸ In the publication process for D'Arcy G. Vermette, "Colonialism and the Suppression of Aboriginal Voice", (2009) 40.2 *Ottawa L. R.* 225-264 one of the mandatory changes that the journal editors asked for was a discussion of solutions. The editors may have been particularly influenced by one anonymous reviewer's "anticipation" that I would "extol the virtues of non-curial rights determination process (such as a renewed RCAP or the treaty tables of Saskatchewan and BC or the reinvigorated Indian Claims Commission) but no, the author does not move beyond colonialism and the courts." Anonymous review on file with author.

⁹ This results in pressure to find solutions. One such approach is the doctrine of "reconciliation" which has been articulated by the Supreme Court of Canada in Aboriginal rights jurisprudence. For more on how this is not, in fact,

of possible outcomes and to convince the readers that this can be supported in litigation. In fact, litigation is one of the problems just as it has always been for the Métis. In a sense this thesis is nothing more than a legal history of what I come to call the Manitoba Métis Treaty (MMT). It is not written to be “correct” in the sense that it might be utilized by courts and policy makers to suddenly stop oppressing Aboriginal cultures. Instead, it is written to provide a reasonable alternative interpretation of the law as we know it today. In so doing, I hope to illustrate that the Courts don’t need to blindly continue to justify the theft of Aboriginal lands. I acknowledge that some of my conclusions on fiduciary duties or constitutional responsibilities or even treaty law may not be palatable to the courts. But when is an Aboriginal voice palatable to the courts?¹⁰

There is also an indication by both Aboriginal and non-Aboriginal scholars that we live in a “post-colonial” era. I was at the Congress of the Humanities and Social Sciences in 2011, a huge national academic conference which was hosted that year in Fredericton. After a panel had ended one of the speakers (a well-known senior Aboriginal scholar) came up to the group I was having a discussion with and asked: “How does it feel to be post-colonial peoples?” I was flabbergasted. I would have assumed that the scholar was being sarcastic but for the fact that they had brought up the same notion in their formal presentation. How could this scholar believe something so patently untrue? Do Aboriginal peoples think that we are somehow past that little blip in history where foreign peoples insist on occupying our land, taking our resources and ensuring that the only way we can succeed in life is if we act like they do? I am glad that was over! I guess that from now on there is nothing but smooth sailing ahead. But the problems don’t begin or end with that scholar. In an anonymous review of an article I wrote for the

a solution or, indeed, “reconciliation” see D’Arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples” (2011) 29:1 Windsor Yrb. of Acc. to Jus., 243-260.

¹⁰ See Vermette, *supra* note 8 for some of the circumstances in which the courts find it convenient to use Aboriginal voice.

Ottawa Law Review, the reviewer stated that my article offered nothing new and that he or she hoped that we “as a legal community” had moved past the discourse on colonialism.¹¹ Really? Moved to where exactly? It would seem that that reviewer wanted to see an article which talked about something “new” like emerging models of dispute resolution. I have a good model for dispute resolution: give Aboriginal Peoples our lands back. Ah, but there it is. That is the one issue that people with the colonizer’s mentality don’t want to concede. They will educate us, they will make entrepreneurs out of us, they might advocate for clean drinking water, or even to have our rights to self-government or hunting, but there is a noticeable silence when it comes to land issues.¹² Crown counsel will present legal arguments that at their most basic level could be characterized as: “You made a bad deal. Live with it.” These arguments are then sanctioned by courts which don’t belong to us and which continue to make a practice of excluding us (ideologically if not physically). Arbitrarily moving beyond that subject matter as a “legal community” is an attempt to shut up and shut out Aboriginal scholars unless they espouse a view of the world which is consistent with the colonial intentions.¹³

How do we convince the legal community to back our cause, rather than stifle it? Well, we have to convince them that Aboriginal scholarship is important. We have to convince them that we can continue to write about colonialism *because it is a continuing problem* and, therefore, is not a debate that we can simply move beyond arbitrarily. Having said that, this

¹¹ Anonymous Review *supra* note 8 where the reviewer was asked seven questions. Questions 6 and 7, along with the reviewer’s answers were as follows (answers have been placed in italics): “6. Is the discussion of relevance to the Canadian legal community? *Not any more.* 7. Does the article lay a foundation for further debate? *No, this is a tired debate in relation to which we have hopefully moved on as a legal community.*”

¹² For example, one of Canada’s largest Unions, the Public Service Alliance of Canada (PSAC) has a campaign entitled “Justice for Aboriginal Peoples – It’s time”. The goals listed on their website make no mention of land. These focus areas are: Aboriginal Poverty, Education Funding Shortfall, Water Crisis, Violence Against Aboriginal Women. Online at Public Service Alliance of Canada: <<http://psac.com/issues/campaigns/aboriginal/aboriginalpoverty-e.shtml>>.

¹³ For an example of how Aboriginal peoples are forced to accommodate colonial worldviews in order to secure their own ways of life see generally the decision of Chief Justice McLachlin in *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall*; *Bernard*]. Also see coverage of this same case in chapter five below.

thesis does not directly take up that cause. Rather it explores one brief facet of the history of colonialism which continues to have lasting implications upon the Métis of western Canada. For each generation of Aboriginal scholars it is necessary to learn about and to tell our stories. This is one of those stories. It is told in a particularly unattractive legal form, but it is a Métis story nonetheless. The particular forms of power (such as the recent court decisions on the MMF land claim)¹⁴ which are imposed upon us to control our thinking and our prosperity should not also be adopted in such a way as to stifle academic inquiry.

It might already be apparent that I am not making a formulaic legal argument in the sense of applying and interpreting rules in a specific fact situation in order to reach a projected result. This dissertation is a critique. It involves unpacking the colonial baggage which has surrounded this issue from the start and reframing it so that it makes (some) sense from an Aboriginal perspective. To that extent, I will be critiquing Canadian law as it may apply to the Métis of Red River and their descendents. In a sense, this thesis is one reflection upon how the law *could* be used – if Canada’s courts or policy makers were able to extract themselves from a colonial mindset – to address topics of concern to Aboriginal peoples. It is a compromised project and I recognize that that might leave everybody wanting more. My experience in law school taught me that immersing myself in legal doctrine came with a not so subtle request to abandon my Aboriginal self.¹⁵ That is what the discourses of colonialism are designed for. I fought the indoctrination every step of the way while in law school (and barely made it through) and I am not going to self-indoctrinate in this work. But I am not going to completely radicalize this

¹⁴ *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.* [2008] 2 C.N.L.R. 52 [MMF1]. The Appeal can be found at: *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2010 MBCA 71 [MMF2]

¹⁵ For more on this struggle see, D’Arcy Vermette, “Colonialism and the Process of Defining Aboriginal People” (Spring, 2008) 31 Dal. L. J. 211-46 at 212-15.

research either. While a middle ground might be unsatisfying to a great many readers, there is a point to be made by illustrating a path to different outcomes using current tools.

The work of Gordon Christie is especially important here. While his writings are not heavily relied upon in this thesis, his ability to tread upon doctrine, to judge it, and to place it in a context which is meaningful for Aboriginal peoples should serve as an example for Aboriginal legal scholars. It is that kind of resistance scholarship which helps to build awareness which Aboriginal and non-Aboriginal peoples can learn from so that we all understand the locations of our oppression. This thesis, however, has not lived up to that example.¹⁶ In my conclusion, I will discuss more thoroughly why I think this thesis is not as convincing as some of Christie's work. But one reason, that I will address here, is my attempts to illustrate for the Canadian legal community (and some historians) that there is a more reasonable way to approach these problems. I surprised myself when I took this tact and I hope that it isn't a sign that I am softening my resolve. Regardless, this thesis serves as an alternative; let's talk about ways that we can be more reasonable with each other. I am offering one path here.

Some of what I will write about is common sense to Aboriginal peoples. It may or may not be found in historical materials but Aboriginal history is not to be defined solely by the historical sources of colonialism. Even in a situation of relatively good documentation such as the Métis at Red River, we are still left with a severe lack of historical insight into the historical matters pertaining to, or written by, the Métis community.¹⁷ Thus, there is a need for some

¹⁶ Several examples of this work can be found in: Gordon Christie, "Justifying Principles of Treaty Interpretation?" (2000) 26 (1) Queen's L. J. 143 ["Justifying Principles"], and Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23 Windsor Y.B. Access Just. 17 ["Colonial Reading"].

¹⁷ J.M. Bumsted ed., *Reporting the Resistance: Alexander Begg and Joseph Hargrave on the Red River Resistance* (Winnipeg: University of Manitoba Press, 2003) at 6 he writes: "Despite a seeming wealth of information from Red River, not all groups in the settlement had their views equally represented. There was little material emanating from the Métis, for example, and none whatsoever from either the Anglophone mixed-blood community or the Aboriginal residents. The supporters of the Canadian Party were better represented, however."

commonsense interjection into a debate that has taken on an anti-Aboriginal tenor (this applies to all sides of the current legal debate on the Manitoba Métis land question). Indeed, because that debate is, in my humble opinion, almost complete and utter nonsense I have relegated a treatment of it, and the major players in that debate, to Appendix A.

It is typical in a project like this to give a brief overview of the current sources available. It is a normal procedure to write about how Sprague is too sympathetic to the Métis,¹⁸ how Flanagan lacks the ability to actually critique the history he writes,¹⁹ how Giraud's racism is too harsh,²⁰ how Stanley judges history with negative stereotypes about the Métis and so on.²¹ But I find that project mostly pointless and largely unhelpful. I perceive this task as pointless because I have yet to see a literature review which is helpful. The authors who undertake such tasks, for the most part, devote a paragraph or two to each of the key authors. They select the items that they disagree with and provide a criticism (presumably so that they can seem more insightful) and then move on to the next author. The point that is to be conveyed is that those previous authors haven't done it correctly and a proper academic treatment will follow. It should be taken for granted that authors feel that they have provided the proper answer and analysis or they wouldn't have published it (early career pressures notwithstanding).

Literature reviews also create apprehension, skepticism or sympathies *before* any arguments are actually presented. For example, I can't fully appreciate Sprague's account of Stanley's *Birth of Western Canada*. Upon reading his review of Stanley's work, I am left wondering what he really thinks of it. Clearly, he sees some flaws in Stanley's interpretation but

¹⁸ D.N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo, ON: Wilfred Laurier University Press, 1988).

¹⁹ *Supra* note 7.

²⁰ Marcel Giraud, *The Métis in the Canadian West* vol. I (Edmonton: University of Alberta Press, 1986) Trans. by George Woodcock. And, Marcel Giraud, *The Métis in the Canadian West* vol. II (Edmonton: University of Alberta Press, 1986) Trans. by George Woodcock.

²¹ George F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (USA: University of Toronto Press, 1961).

he doesn't tell the reader why Stanley's interpretation is flawed (although, I can glean some possibilities) or what Stanley's strengths are. In Sprague's review of *Birth of Western Canada*, I don't know why he chooses to focus on particular areas of Stanley's argument. Or why he decided to focus on the argument rather than on the quality of the research. By focusing on the research Sprague may have had a different view of Stanley's work. Stanley's interpretation of that research is where Sprague finds the flaws and so the only impression that we are left with is that Stanley's work is somehow irreparably damaged.²² As a result, a reader may not even pick up Stanley's work.

In contrast Flanagan reviews Stanley in very narrow terms. He argues that Stanley only devotes two pages to the "whole matter" of "the government's administration of the Manitoba Act." And it is here where you begin to doubt Flanagan, for he tells the reader that Stanley did not see the government's administration "as the cause of the emigration" of the Métis from Manitoba.²³ Yet, when we go to the page that Flanagan cites, we find that Stanley quite clearly (although not directly) links the delay of government administration to eventual emigration.²⁴ It's as if Flanagan is looking for other authors to confirm or deny his particular thesis. Stanley was not writing Flanagan's book so why would he answer the particular question that Flanagan set out to clarify? Rather than focus on Stanley's association of the delay to the emigration, Flanagan seems to read only the parts where Stanley is describing the actual departure of the Métis. A person must wonder what Flanagan's criteria are for judging people's work. One other example is his review of H. Douglas Kemp's *Land Grants under the Manitoba Act*. Here Flanagan explains that Kemp's "purpose was to provide a factual account of the government's actions...Kemp's work leaves the impression that the federal government, after losing time in

²² Sprague, *supra* note 18 at 2-4.

²³ Flanagan, *supra* note 7 at 3.

²⁴ Stanley, *supra* note 21 at 245.

some initial mistakes, implemented the Manitoba Act in an orderly, purposeful way.”²⁵ But he doesn’t tell us why or about the limitations of the research. The reader is again left wondering what the value of the *research* is to *Flanagan*. Bringing this review of literature reviews to a close, I will look at Flanagan’s account of Sprague’s work. This review casts even more doubt upon Flanagan’s judgment *before* he actually presents his argument. Flanagan states that Sprague

seems aware that the evidence is inadequate to sustain his thesis, resulting in convoluted sentences like this:

The presumption of benevolence is not appropriately replaced by one of consistent malevolence, but the exodus of the Métis from their original homeland and their difficulties in resettlement is more explicable by processes of formal and informal discouragement emanating from Canada than by alleged preference of the Métis for the wandering life of homeless hunters.²⁶

Well, that sentence isn’t “convoluted” in the slightest. It might be nuanced, not adopting an absolutist interpretation of the events that Sprague spent the previous 183 pages covering, but it is not in any way convoluted. Flanagan’s failure to interpret a fairly straightforward sentence properly and to see it as a skilled historian assessing the fullness of the history, reveals more about Flanagan than it does about Sprague. A reader should not go into a person’s work thinking that they are patently unreasonable (or untrustworthy) because they can’t interpret a clear, but nuanced, sentence properly.

Therefore, I will not engage in the meaningless process of historical review with this introduction. Instead, I will provide two recommendations. First, read Paul Chartrand’s book *Manitoba’s Métis Settlement Scheme of 1870*.²⁷ It is the only neutral scholarly account which has thoroughly canvassed the pertinent legal matters associated with the Manitoba Métis. It is insightful and it utilizes a different interpretive approach than my thesis. If my work is any

²⁵ Flanagan, *supra* note 7 at 4.

²⁶ *Ibid.* at 6 quoting Sprague, *supra* note 18 at 184.

²⁷ *Supra* note 1.

improvement upon his, it is only that it is updated. Chartrand's book is now twenty years old²⁸ and there have been developments in the case law which are worthy of updating. However, there is one particular aspect of his research to which this dissertation is devoted. At the end of his fifth chapter entitled "Group Rights Protected in the Constitution", Professor Chartrand spends ten pages looking at "The Manitoba 'Treaty'". I have decided to look at this aspect of the *Manitoba Act* and the Red River resistance in more detail.²⁹ The Manitoba Métis Federation (MMF) has, since the late 1980's, been involved in litigation relating to the distribution of the land grants made to the 'half-breeds' in the *Manitoba Act*. One aspect of that litigation was an argument focusing on whether the negotiations leading to the *Manitoba Act* should be construed as embodying a treaty. More work in this area is needed and I hope to contribute to the historical/legal scholarship by asking the basic question: Does the *Manitoba Act* embody a treaty agreement? If so, what are the consequences?

My second recommendation is to read Stanley's book. I found Stanley's *Birth of Western Canada* in a used-book store in Toronto shortly after I arrived at law school. It was instantly riveting. So much so that when I left the store I almost got hit by a street car in a failed attempt to read and walk. Stanley has been criticized because he frames the Métis cause in a "tragic stance".³⁰ But it is also acknowledged that Stanley provided "the first attempt at a balanced interpretation."³¹ Quite frankly his civilized/primitive dichotomy comes across as a touch racist. But if we look past that, his research is superb and skillfully woven together and his interpretation is not often far from the mark. There has already been a wide and thorough canvassing of the historical background covered in my thesis. Primary source material has been

²⁸ Published in 1991 Chartrand, *ibid.* at xii comments that his research "reflects the law as found in March 1988."

²⁹ *Manitoba Act, 1870*, 33 Victoria, c. 3 (Canada) [R.S.C. 1985, App. II, No. 8] [*Manitoba Act*].

³⁰ Sprague, *supra* note 18 at 2.

³¹ *Ibid.* at 4.

made available through the work of historians more capable than I. My limitations as a historian are crutched by this body of work and I will not duplicate those authors' efforts in this dissertation. Stanley's *Birth of Western Canada* will serve as a guidepost throughout my work.

III. A Note on the Scope of Study

The methodology of this study was relatively simple but arriving at it proved difficult. I followed the time honoured tradition of legal analysis which is read, think, write. But it did not always work in that order. I will admit from the start that I have a goal in writing this thesis. My goal is to create a conception of law which will receive and honour a Métis understanding of history. The Métis people have "lost" too much to simply turn our backs on the small opportunities that we do have to resist our oppression. I can't in good conscience regurgitate colonial doctrines of dominance when writing about our history. I can't waste my time (and the readers) by stopping at every turn to explain why particular forms of thinking (legal and historical) will no longer be followed. To systematically dismantle everything along the way would be to change the project. To argue that this case or that case is relevant in some important way and needs to be tackled directly, rather than indirectly is not an acceptable position. I am not a servant of colonial law. I am not here to tell Canadian legal scholars why everything they do is wrong. To get back to the Foreword to this thesis, I am not trying to tear down the colonial forest by doing a safety inspection on every path through that forest in order to show that each and every path should not be followed. I am trying to avoid writing such a reactionary piece. It is adaptive but not reactionary.

It is important to say that some of the closest material to this project has been recent MMF cases. I have seen how those cases have turned out and I know that those cases return us to the water. I will not react to those decisions any more than I react to other decisions. The fact

that they deal with some of the same issues does not give them primacy over the direction of this study. To systematically dismantle them is to let those cases define my own work. Aboriginal scholars, especially legal scholars, have to stop allowing ourselves to be controlled by the systems of thought management which are used to justify our oppression. This same rule applies to history. Some of the historical scholars who are best known for writing in this area of Métis history are not taken on in the body of this thesis. To do so would be to allow those scholars to control the direction of my work. To illustrate why their ways of thinking and analysis of material is not helpful I have, however, written an Appendix which is a critique of the work of other researchers in this area. The method and underlying assumptions found in those arguments make them largely immaterial to this thesis. I will use the Appendix to illustrate why that is the case so that such an illustration does not derail my own work. The reader can apply the criticisms in that Appendix to a wide variety of legal and historical work on Aboriginal peoples.

There is another note on the read, think, write methodology here. There has been a long history of historical works on the Métis of the Red River region. These works were either completed in the English language or translated into English. A large part of the historical record and some of the key documents were, however, originally written in French. My family no longer speaks French. My father can remember his Dad speaking French but for two generations now my family has been reliant upon the English colonial tongue. As a result, I have no choice but to reconcile the obligation to family and community (which means learning and writing about our history) with the reality that that same history is the reason that I don't speak French, by accessing the historical record through the work of other historians. Fortunately, those historians have been thorough in scavenging the historical record and translating the key

sources. For example, original French sources, such as Ritchot's journal, have been translated and made available to unilingual researchers such as myself. As a result, the historical record is sufficiently set out in English to generate a thorough appreciation of the available historical materials. While I can't say that I will leave no stone unturned, I am confident that I can conduct a thorough study on this topic with the available English source material.

Chapter one of this thesis draws a brief history, designed to give the reader an overview of some of the events which will be key to the examination of the legal issues that follow. My history will have many generalizations and omissions of detail. Generalizations take the place of detailed character development. I am not a big believer in using the motivations or psychology of historical actors as a means to gain understanding into the Aboriginal reality in Canada. Therefore, key figures are often underplayed. They are mentioned and noted but their personality quirks are, ultimately, unimportant. Detail is provided only as needed in order to get us to the law. An experienced reader of Métis history will, no doubt, be wanting more. I hope that for the average reader this is enough to get us started on the legal journey which makes up the bulk of this thesis. Much more thorough histories can be found in the work of Stanley, Sprague, Giraud or Morton.³²

Chapter two argues that the Métis as Aboriginal peoples stemming from British, French and First Nations backgrounds are best understood as being Aboriginal to *Canada*. And that the legal emergence of a Canadian state, provides the most compelling timeline for recognition of Métis title. As well, it is argued that the Métis title is inherited from their maternal ancestors and expressed through their unique occupation of land. These features provide an avenue to recognize Métis title in Canadian law. Since the "Indian title" of the Métis was supposed to be

³² Stanley, *supra* note 21, Sprague, *supra* note 18, Giraud, *supra* note 20, and W.L. Morton, *Birth of A Province* (Altona, Manitoba: D.W. Frieson & Sons Ltd., 1965).

extinguished in the *Manitoba Act*, it seems like a logical step to provide some understanding of the content of that “Indian title.”

Chapter three examines the negotiations between the representatives of the Red River Métis and Canada which took place in Ottawa in 1870. The purpose of this chapter is to understand the key terms that were agreed upon. That agreement was subsequently affirmed through the *Manitoba Act*, but the *Act* does not bear out the entirety of the Negotiated Agreement (NA). This argument is carried through into chapter four where I use Canadian treaty law to argue that the NA did, in law, represent a treaty between the Métis and Canada. It is argued in these two chapters that the treaty only represents the terms which deal with the Métis *as Métis*. As such, this thesis is devoted to section 31 of the *Manitoba Act*. In order to benefit families, section 31 set aside 1.4 million acres of land for the children of the half-breeds. This section is clearly aimed at the Métis community. While section 32 (which protected the previous holdings of Métis and non-Métis residents) might also deal with Métis claims (as individual land holders), I will only be covering that section to the extent that it interacts with section 31. The study of section 32 can be left for another day. There is enough work to do on section 31 that I do not feel like I am slighting the project by not including section 32. Further, most of the research associated with the *Manitoba Act* has had a tendency to put much more emphasis on the river lots that were supposed to be protected in section 32. My reasons for this scope of study will be made apparent in the early chapters when I define the features of the MMT.

Carrying the treaty argument forward chapter five is an examination of the treaty law and constitutional responsibilities that the government undertook when it entered into agreement with the Métis. Finally, chapter six puts those arguments into practice to determine if the federal

government met its duties and responsibilities. As chapter six will show, there are several important ways in which the federal government did not live up to its legal responsibilities.

In general terms, the argument put forward in this thesis is that there was a treaty negotiated between the Métis and Canada in 1870. That treaty was enshrined in the *Manitoba Act, 1870* which gained constitutional status in 1871.³³ That agreement and its legal status produced certain legal obligations on the part of the federal government. However, the federal government failed to adequately meet the vast majority of those responsibilities. I hope that you can find in this argument a reasonable alternative to the current state of colonial law in Canada.

³³ *The British North America Act, 1871*, 34-35 Victoria, c. 28 (U.K.) [R.S.C. 1985, App. II, No. 11] [*Constitution Act, 1871*]

CHAPTER ONE: MÉTIS OCCUPATION OF THE RED RIVER REGION

I. Introduction

Métis history is complex and contentious, with historical evidence often providing contradictory information. It is, therefore, difficult to find definitive answers to questions surrounding the Métis resistance of 1869-70 and its legacy. My version of history will reflect the legal approach employed throughout this thesis. As a result of the nature of the complexity of issues arising from the Métis resistance of 1869 and my focus on the legal context, my telling of history will be somewhat stunted. I bring this up only to ask the reader to keep in mind the questions that are being asked when considering the viability of the historical interpretation that follows. My version of Métis history is but one stroke of paint on a larger canvas of scholarship. But it should be remembered that the boundaries of that legal analysis limit the history I will present.

Central to any study of the Métis presence in the Red River region is a claim to land. A collectivity cannot be Aboriginal without being Aboriginal to a place. A regular dictionary definition of “aboriginal” displays this criterion: “indigenous, inhabiting the land from the earliest times, esp. before the arrival of colonists.”³⁴ The obvious problem which will be addressed below is that the Métis emerged precisely because of the fact of the arrival of non-Aboriginal peoples. Still, a failure to find a basis for Métis Aboriginal title would bring into question the reasons for including the Métis peoples in the *Constitution Act, 1982*.³⁵ This

³⁴ Della Thompson, ed. *The Oxford Dictionary of Current English*, Rev. 2nd Ed. (New York: Oxford University Press, 1996) “aboriginal” p. 2. Also see, “Indigenous” p. 449: “(often foll. by *to*) native or belonging naturally to a place.” And, “native”, p. 592: “– *n.* **1 a** (usu. foll. by *of*) person born in a specified place. **b** local inhabitant. **2** often *offens.* member of a non-White indigenous people, as regarded by colonial settlers... – *adj.*... **2** of one’s birth (*native country*)... **4** (esp. of a non-European) indigenous; born in a place.”

³⁵ *Constitution Act, 1982*, s.35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and

chapter will examine the nature of Métis occupation of the Red River region up to and including the events of 1869-70. As well as giving the reader a general historical background, this chapter will provide the set up for chapter two where I look at whether or not the Métis had Aboriginal title to the lands in the Red River region. It is necessary to examine Aboriginal title in connection to this occupation for us to understand the reasons for the extinguishment of Métis “Indian title” in the *Manitoba Act* of 1870.

It can be noted at the outset that the Crown officially acknowledged Métis “Indian title” in the *Manitoba Act* of 1870.³⁶ But was this recognition simply drawn from the minds of the negotiators to the *Manitoba Act*? Was the recognition of Métis “Indian title” based in fact? Or was it a reflection of mere political expediency? One of the reasons for looking beyond official Crown recognition is to establish whether or not the Métis had a moral right to negotiate terms of confederation as a People, or whether the concessions they gained were a result of the not-so-simple politics of armed resistance. That is to say, did the Métis have a rightful claim to their land and rights, or did they simply force Canada to acknowledge something that didn’t exist through the force of arms? If it was the latter, does this mean that the land concessions were spatially or temporally limited? For the reasons set out below, I would argue that the answer to this last question is a resounding no. Indeed, the nature of Aboriginal title is not immediately relevant to much of my argument. Nonetheless, it is a feature of Canadian law which underlies much of the debate on Métis issues. At the very least, such an exploration will prove useful in illustrating the lack of a coherent understanding on the part of the Canadian government of who the Métis were and it will help show how the law has changed. My argument is that the tests for

affirmed.”Section 35(2) describes the “aboriginal peoples of Canada” as including “the Indian, Inuit and Métis peoples of Canada.”

³⁶ Section 31 of the *Manitoba Act*, *supra* note 29 reads: “And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands of 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...”

Aboriginal title, as they are reflected in modern jurisprudence, do not mirror the understanding of either the Métis or the Canadian government at the time of the *Manitoba Act*, and that the *Manitoba Act* accurately reflects the historical understanding of Métis Aboriginal title. I will divide my investigation up into four key eras: the origins of the Metis at Red River, the era of competition between the Hudson's Bay Company and the Northwest Company, the period of HBC monopoly after the merger of these two competing companies, and finally, the period of the resistance itself in 1869-70.

II. Métis Title through Origins

Métis history in the Red River region prior to 1870 was short but dynamic. The Métis had resided in the Red River region with varying degrees of permanency, distinct cultural populations, and wide-array of lifestyles since at least the late 1700's.³⁷ The region surrounding the junction of the Red and Assiniboine Rivers became the home of many Métis. It can be simply stated that the Métis people grew out of the intermixing of their European and First Nations ancestors. While the Métis ancestors originated in two distinct cultures, any notion that these are "mixed blood" people must be recognized as racist for the simple reason that there is no such thing as different *races* of people.³⁸ There were other people whose parent's emerged from two cultures and yet these offspring could fit quite well within one, or both of, their parent's cultures. The key here is the emergence of a distinct cultural and political community and not a new or "mixed" *race* of the human species. Western Canada, which is the homeland of the

³⁷ For a genealogy of the Red River Métis, see D.N. Sprague and Ronald P. Frye, *The Genealogy of the First Métis Nation* (Winnipeg: Pemmican Pub., 1983). And, D. Bruce Sealey & Antoine S. Lussier, *The Métis Canada's Forgotten People* (Winnipeg: Manitoba Métis Federation Press, 1975) at 7 where they explain: "Distinctly Métis villages began to develop around many trading posts as early as the latter half of the eighteenth century."

³⁸ This is not, however, to discount the use of racist ideology historically or contemporarily. But to use that ideology simply because it has been put into use by others is to ignore rather than clarify the problem. This notion of blood is still employed by Canadian courts and academics. See MMF2 *supra* note 14 at para. 24. See, Bumsted, "Introduction", *supra* note 17 at 6 where he refers to the "anglophone mixed-blood community".

Métis in this study, was not necessarily more active in this cultural mixing than other regions in Canada. Some research has found that as many as forty percent of French Canadians had some level of Aboriginal ancestry.³⁹ The unique aspect of the western Canadian Métis was, as Dickason puts it, “a clearly defined sense of separate identity”.⁴⁰ But before that time, there were Métis people and communities elsewhere, most notably in the region of the Great Lakes. The fur trade was encouraging the growth of an independent Métis identity in this region. The fur trade was much more important in the interior than it was on the coast and the Métis were well-equipped to take advantage of it. These Métis developed a unique form of dress and culture but, in Dickason’s assessment, did not develop a collective sense of nationhood. Such a step, it is argued, was “forestalled by the rush of settlement.”⁴¹ Nationhood may be a particularly loaded term but the Great Lakes Métis certainly did have a collective sense of community difference, some of which was imposed by outsiders.

Peterson points out that the mixed-ancestry populations around the Great Lakes were one of the prelude populations to Red River. The Great Lakes Métis were unique in the eyes of travelers. Peterson produces examples of how outsider accounts carried the trappings of negative stereotypes and set the Métis apart from Europeans. One historical account of the mixed-ancestry populations of the Great Lakes region looked upon the Métis as “a miserable race of men.”⁴² Another account seemed reluctant to call these people human: “as motley a group of

³⁹ Jacques Rousseau as cited in Olive Patricia Dickason, “From ‘One Nation’ in the Northeast to ‘New Nation’ in the Northwest: A Look at the Emergence of the Métis” in Peterson and Brown, eds. *supra* note 3 at 19.

⁴⁰ *Ibid.* at 19.

⁴¹ *Ibid.* at 30. While there is some debate on the extent of Métis nationhood or distinct identity in the Great Lakes region, resolving that debate is not central to this thesis. For more on the unique identity of the Great Lakes Métis see, generally, Karen J. Travers “The Drummon Island Voyageurs and the Search for Great Lakes Métis Identity” in Ute Lischke and David T. McNab, eds. *The long Journey of a Forgotten People: Métis Identities and Family Histories* (Waterloo, ON: Wilfrid Laurier University Press, 2003) at 219-244.

⁴² William S. Keating as quoted in Jacqueline Peterson, “Many Roads to Red River: Métis Genesis in the Great Lakes Region, 1680-1815” in Jacqueline Peterson & Jennifer Brown, eds. *ibid* at 39.

creatures (I can scarcely call them human beings) as the world ever beheld.”⁴³ This perception of “group” difference was a result of the Great Lakes trading communities having a chance to establish themselves after 1763.

Partly in response to Pontiac’s “Rebellion”, and the Royal Proclamation of 1763, the colonial governments restricted settlement west of Lake Ontario. These colonial governments were also concerned that too many settlers would have a detrimental impact on the fur trade.⁴⁴ Peterson describes how these communities came to exist between two worlds:

These people were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between. By the end of the last struggle for empire in 1815, their towns, which were visually, ethnically and culturally distinct from neighbouring Indian villages and ‘white towns’ along the eastern seaboard, stretched from Detroit and Michilimackinac at the east to the Red River at the Northwest.⁴⁵

For the Great Lakes Métis, who numbered around ten to fifteen thousand near the end of the 1820’s trade rather than agriculture was the way of life which was valued and, as such, land carried little value⁴⁶ and mobility was a way of life which proved to be a detriment to the formation of group identity.⁴⁷ Peterson asserts that the personal and group identity of the Métis was “regionally and occupationally defined” rather than being specific to place.⁴⁸ However, other authors have rejected the notion that the Great Lakes Métis were merely a prelude population. For example, Karen J. Travers writes: “Historians have allowed the concept of Métis identity to be restrictively defined as western in nature and character, to the detriment of Métis in other communities who have different histories but who also have no less a sense of themselves

⁴³ Caleb Atwater as quoted in *ibid.* at 39.

⁴⁴ *Ibid.* at 40.

⁴⁵ *Ibid.* at 41.

⁴⁶ *Ibid.* at 63.

⁴⁷ *Ibid.* at 64 where she writes: “The geographic mobility of Great Lakes métis was crucial to the spread of the fur trade, but ultimately it was a profound liability. The very diffuseness of fur trade communities, whose members had married among and were related to more than a dozen tribes – Algonkian, Siouan and Iroquoian speakers – made group solidarity and combined action difficult to sustain under pressure. In the end, the identity of the Great Lakes métis, like the transnational economy which gave it life, was to prove a fragile construction.”

⁴⁸ *Ibid.* at 63.

as ‘distinct peoples’.”⁴⁹ This unique identity included distinct style of housing, dress, predominance of the French language and other celebratory cultural traditions largely “borrowed from their Scottish or French roots.”⁵⁰ Indeed, even the notion that land was of little value to the Great Lakes Métis community of the time can be brought into question through an examination of the Sault Ste. Marie Métis of the mid-1800s.⁵¹

The Métis of the Red River region were not the only distinct mixed-ancestry community. Foster notes that there are many different communities which might be called Métis but which remain distinct from each other.⁵² For example, Foster explains that the differing origins for those Métis from the Hudson’s Bay Company (HBC) system and those Métis from the Great Lakes region warrants subdividing these groups. So even as the Great Lakes Métis might have been a prelude to the Red River Métis, and the first Métis traders in the Red River region may have sprung from the Great Lakes trading network, these must be considered separate communities. Another distinction could be made “between the buffalo hunters of the prairie and parkland and the hunter-trappers of the boreal forest.”⁵³ This focus on economics and modes of production as the basis for identity makes sense. A People develops its sense of self based on the material conditions in which it finds itself. A group’s sense of identity is not created out of thin air. In analyzing the origins of a Métis population Foster notes that it is important to look at the point of view of those members of the group. He asks: “when did those populations who in time saw themselves as métis first begin to do so? What constellations of events and circumstances

⁴⁹ Travers, *supra* note 41 at 221.

⁵⁰ *Ibid.* at 224.

⁵¹ See, generally, Karle S. Hele, “Manipulating Identity: The Sault Borderlands Métis and Colonial Intervention” in Lischke and McNab, eds. *supra* note 41 at 163-190.

⁵² In *Powley*, *supra* note 2, at para. 10 the Supreme Court of Canada has defined the term “Métis” in the following manner: “The term ‘Métis’ in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit or European forebears.”

⁵³ Foster, *supra* note 5 at 79.

led these people to alter their view of themselves in relation to other communities?”⁵⁴ Foster offers the following summary as a way to understand the emergence of a new group identity: “The shared experiences in a particular population create the social group; the shared understandings arising from these experiences are expressed as behaviour that distinguishes the métis from others.”⁵⁵ And so, it is useful to analyze the development of a unique Métis identity specific to the context of the Red River region, rather than simply trying to follow some progression from the Great Lakes. The purpose of (briefly) mentioning the origins of the Great Lakes Métis people is to show that there were conditions under which distinct identities can arise, that the Red River Métis are not unique in this regard. This will become more apparent when some of these other Métis communities give rise to comparative examples later in this thesis.

III. Métis Title in Competition Era

The North West Company (NWC) was formed in 1783-84 when independent trading entities united.⁵⁶ Based in Montreal and initially taking up trade in eastern Canada, the NWC soon pushed their operations west and ran into direct competition with the HBC. This competition steadily increased in the latter part of the 18th century and, as Friesen explains, “the Montreal fur barons found natural allies in their company’s offspring, the metis of the northwest.”⁵⁷ With this strengthened position the NWC and its employees were able to react to the threat of colonization which arose in the early part of the 19th century. The Métis reacted to defend their interests, both as employees and as Aboriginal titleholders, which was a perception inflamed by the NWC. The NWC also saw increased colonization as a threat to the fur trade and

⁵⁴ *Ibid.* at 80.

⁵⁵ *Ibid.* at 82.

⁵⁶ Stanley, *supra* note 21 at 5.

⁵⁷ Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1984) at 69.

worked in conjunction with Métis leadership to dispel the settlers. Indeed, the relationship between the NWC and the Métis was so close that Stanley credits the emergence of a Métis “racial” consciousness to the NWC.⁵⁸ However, before getting to early Métis reactions to impending settlement, it is worth examining how the Métis were developing a unique sense of self.

III.a. *Emergence of Distinct Culture*

The emergence of a distinct culture will become important later on for it is in distinct cultures that the common law places claims to Aboriginal rights and title. The “racial” consciousness, as Stanley describes it, can be seen in the arts and crafts of the Métis.⁵⁹ Ted Brasser’s research has identified unique Métis designs for saddles, beadwork, blankets and garments. Tangible cultural markers such as these are important in recognizing that the Métis had a unique cultural occupation in the Red River district. As well, music, laws, language and customs also developed which were unique to the Métis. Indeed, the Métis were not offshoots of European or First Nations culture but instead represented a unique culture separate from both their First Nations and European ancestors.

It has been said that the critical factors which led to the emergence of a unique Métis identity in the Northwest were “isolation, slowness of settlement and the enduring importance of

⁵⁸ Stanley, *supra* note 21 at 11 where he writes: “At the door of the North-West Company must be laid the responsibility for rousing the racial consciousness of the métis. The Nor’Westers carefully fostered the idea of half-breed territorial rights and informed the credulous métis that the white settlers were interlopers who had come to steal the land from them...Under the leadership of Cuthbert Grant and Peter Pangman, two half-breed employees of the North-West Company, they began to assert their claim to an aboriginal title to the country and to demand compensation from the white settlers.”

⁵⁹ Ted J. Brasser, “In Search of Métis Art” in Jacqueline Peterson & Jennifer Brown, eds. *supra* note 3 at 221 where he writes: “If a particular group of people in a particular period is shown to have acquired an ethnic and cultural identity of its own, then we may assume that these people also expressed their identity in a distinctive style of arts and crafts.”

the fur trade.”⁶⁰ Indeed, isolation from competing, and more socially dominant, cultures was central to the cultivation of a distinct Métis identity:

It was in Western Canada, ... where the intermixture took place in an area geographically and socially isolated from a dominant European society, that the Métis grew in numbers, flourished and began to think of themselves as neither European nor Indian but as a distinct and separate people.⁶¹

This unique culture began to develop around the trading posts of the fur trade which the Métis were associated with economically.⁶² This economic connection to their homeland would help coalesce the Métis into a political force.

III.b. *Emergence of Distinct Language*

Michif is recognized as a language unique to the Métis but it consists of different variations depending in part on the amount of French which is incorporated into its use. This variation can be seen between families. Still, as John Crawford points out, “there is a great deal of regularity in Michif.”⁶³ Although Michif is often described as a mixture between Cree and French, it is clearly distinct from both of these languages. Crawford writes that “Michif looks like a dialect of Cree, albeit an unusual one because of its special language contact characteristics.”⁶⁴ However, Crawford also shows that Michif is unique: “Whether Michif is considered a creole or a dialect of Cree, its strong identification with a cultural structure which is neither completely Indian nor European has made it behave in some ways like an independent language.”⁶⁵ As a multilingual People the Métis sought protection for both the French and

⁶⁰ Dickason, *supra* note 39 at 30.

⁶¹ Sealey & Lussier, *supra* note 37 at 3.

⁶² *Ibid.* at 8 where they write: “At every little trading post the number of Métis increased dramatically, so that by 1800 most posts had a number of Métis homes grouped around the walls. The Métis were assisted in their spread throughout the west by the misfortune of the Indians who were decimated time and time again by contact with European diseases – especially smallpox and measles.”

⁶³ John C. Crawford, “What is Michif?: Language in the métis tradition” in Peterson & Brown, eds. *supra* note 3 at 233.

⁶⁴ *Ibid.* at 240.

⁶⁵ *Ibid.* at 239.

English languages. The absence of protection for Michif (or Cree) in the *Manitoba Act* should not signal its lack of importance. Michif can be seen as just another of the many rights and interests which went unnegotiated in the *Manitoba Act*. Whether perceived or real, there was a political divide between the French and English speaking Métis communities which ensured that equality for these two camps needed to be pursued in any negotiations with Canada. Nonetheless, Michif was a language unique to the Métis.

Michif is also significant for the implications that its use represents. Peter Bakker explains that “Michif is spoken today in communities that already existed in the 1840s, which also points to the emergence of the language early in that century.”⁶⁶ Its construction also does not support the obvious presumption that the language emerged as a trading language: “we know from other cases of trade relations in the world that these contacts lead to simplified forms of the language of one group or to a simplified compromise between the languages of both groups.”⁶⁷ Instead, Michif combines “the most complex parts of both languages.”⁶⁸ What this tells us is that Michif has deep roots in the Red River region. While this study is primarily focused on the Red River region where it junctions with the Assinboine River, Bakker notes that the use of Michif was spread further along the River system to the south near Pembina, North Dakota.⁶⁹ That is to say that it was a regional language rather than a niche language only spoken by a few. And the emergence of Michif also reflects the emergence of a unique Métis culture. That is, the Métis developed a language which was perfectly suited to and most reflective of their ways of life. I will again refer to Bakker:

The Métis speak a mixed language because they have a mixed identity. They do not feel that they belong to either of the groups whose languages they speak. They are a new ethnic group, born out

⁶⁶ Peter Bakker, *A Language of Our Own: The Genesis of Michif, the Mixed Cree-French Language of the Canadian Métis* (Cary, NC: Oxford University Press, 1997) at 278.

⁶⁷ *Ibid.* at 277.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 278. Although here he states that Pembina is “on the Red River in Minnesota”.

of the meeting of two very different peoples: French Canadian fur traders and Amerindian women. They identify themselves as Métis, and although they recognize their European and Amerindian ancestry, they do not feel a part of either. Their traditional culture combines elements from both, but it also shows numerous innovations unique to the Métis as well.⁷⁰

I do not have time in these pages to provide an in-depth analysis of Michif⁷¹ (nor am I qualified to do so) but the implications of the emergence of this language are a significant indicator of the development of a unique Métis culture.

III.c. *A Settlement and a Fight*

The Métis were not the only people developing settlements in the Northwest. Lord Selkirk, a Scottish Earl with a desire to establish Scottish settlements in North America and, a shareholder in the HBC, received a large HBC land grant centred in present day Manitoba for the purpose of developing a Scottish agricultural settlement.⁷² The first settlers arrived in 1812, and another group arrived the following year. They established themselves two miles north of the junction of the Red River and the Assinboine River.⁷³ The Métis were not initially predisposed to evict the new settlers. Indeed, Giraud describes many examples of the Métis directly assisting the settlers in establishing their colony. One example cited by Giraud is the “halfbreed, Isham, who helped the settlers as soon as they arrived, supervised the preliminary work of breaking the soil, and soon became the interpreter for the new colony, while his son was employed as hunter at wages of £15 a year.”⁷⁴ During the first two years when no crops were successfully harvested, the Métis provided the settlers with provisions through the winters.⁷⁵

⁷⁰ *Ibid.* at 279.

⁷¹ For such purposes, I recommend Peter Bakker’s book, *ibid.*

⁷² Background in Selkirk’s motivations is available in Giraud, Vol. I, *supra* note 20 at 359-364. For a detailed historical account of this period in Métis history, see 359-487.

⁷³ D. Bruce Sealey, *Statutory Land Rights of the Manitoba Metis* (Winnipeg: Manitoba Metis Federation Press, 1975) at 17.

⁷⁴ Giraud, Vol. I, *supra* note 20 at 391.

⁷⁵ Sprague and Frye, *supra* note 37 at 13.

While the settlers were having food shortages, the NWC was stockpiling pemmican during the summer months for distribution to their outlying posts. The governor of Selkirk's colony, which was now called the District of Assiniboia, Miles Macdonell reacted to this apparent imbalance in food supply by issuing "a proclamation which prohibited the export of pemmican except by license from himself."⁷⁶ Along with being a threat to the ability of the NWC to supply their outlying posts, the governor was viewed by the Métis as an outsider meddling in their affairs.⁷⁷ Macdonell gained no allies among the Métis a few months later when, in July 1814, he issued another proclamation "which forbade the running of the buffalo."⁷⁸

With the NWC providing propaganda and support to discontented Scottish settlers, the Métis who were loyal to the NWC took action:⁷⁹ "Under the leadership of Cuthbert Grant and Peter Pangman, two half-breed employees of the North-West Company, they began to assert their claim to an aboriginal title to the country and to demand compensation from the white settlers."⁸⁰ Stanley credits the NWC as the main motivating factor behind the Métis resistance to settlement. He wrote that it was the NWC which stirred up the "natives of the country, imbuing them with the idea that they were the true owners of the soil and that the whites...were

⁷⁶ Sealey, *supra* note 73 at 18.

⁷⁷ Giraud, Vol. I, *supra* note 20 describes the NWC as being, in many ways, the logical choice for free traders in the West. From this vantage point, the restrictions being attempted by Macdonell would appear as even more of a threat. See, generally, Chapter 10, 379-417.

⁷⁸ Sealey, *supra* note 73 at 19. Also see Giraud, Vol. I, *supra* note 20 at 425-428.

⁷⁹ Sprague and Frye, *supra* note 37 at 14 where he writes: "...the Scot settlers were told that better land and a more hospitable climate awaited them in Canada. About three quarters (more than 140 persons) took advantage of the Nor'wester's offer of transportation to the alternative promised land in June. The remaining part were harassed by the Métis who trampled their crops on horseback." Also see, Stanley, *supra* note 21 at 11: "At the door of the North-West Company must be laid the responsibility for rousing the racial consciousness of the métis. The Nor'Westers carefully fostered the idea of half-breed territorial rights and informed the credulous métis that the white settlers were interlopers who had come to steal the land from them. The métis were easily convinced." Giraud, Vol. I, *supra* note 20 is more direct in his evaluation of Métis character. For example, at 386, he writes: "In drawing out for the Métis the lessons of the events that were unrolling, in exploiting their susceptibility, their impressionable character, their lack of will, the partners had little difficulty triumphing over the sympathy they showed toward the settlers."

⁸⁰ Stanley, *supra* note 21 at 11.

intruders...”⁸¹ However, the NWC cannot be credited with solely generating Métis opposition to settlement. Other factors were involved, such as the aforementioned Governor of Assiniboia’s prohibition on pemmican export: “The Pemmican Proclamation of 1814 seriously threatened the economic livelihood of the Metis because they depended on the pemmican trade for their own livelihood.”⁸² That is to say that there was a real threat to oppose. It was not merely the Métis reacting as pawns of the NWC. And the Métis had the leadership necessary to oppose this threat.

Through the leadership of Cuthbert Grant, the Métis anger was spearheaded into a national cause. They argued that it was their land, not Lord Selkirk’s, and it was beyond the power of an outsider to pass laws over them.⁸³ To enforce the new pemmican rules, Governor Macdonell attacked a NWC post, impounded their pemmican, and placed guns along the Assiniboine river to halt traffic.⁸⁴ Grant was positioned well to fight for both the NWC and the Métis. Just as the pemmican supply was necessary to the welfare of his company so to was the running of the buffalo necessary to the lifestyle of the Métis. The new national sentiment among the Métis coalesced in an armed effort to harass the Governor and the remaining settlers. As a result, Governor Macdonell surrendered his post and was sent to Canada.

With the departure of Macdonell there was an opportunity to set a new tone between the settlers and the Métis. The interim Governor who followed, Peter Fidler, entered negotiations with the “four Chiefs of the Halfbreeds” (listed below) which resulted in the following agreement:

1. All settlers to retire immediately from this river, and no appearance of a colony to remain.
2. Peace and amnesty to subsist between all parties, traders, Indians, and freemen, in future, throughout these two rivers, and on no account any person to be molested in his lawful pursuits.

⁸¹ *Ibid.* at 12.

⁸² “The Battle of Seven Oaks” Online at Métis Resource Centre: <<http://www.metisresourcecentre.mb.ca/history/oaks.htm>> accessed on April 5, 2005.

⁸³ Sealey, *supra* note 73 at 20.

⁸⁴ *Ibid.* at 21.

3. The honorable Hudson's Bay Company will, as customary enter this river with, if they think proper, three to four of their former trading boats, and with four to five men per boat as usual.
4. Whatever former disturbance has taken place between both parties, that is to say, the honorable Hudson's Bay Company and the Halfbreeds of the Indian territory, to be totally forgot and not to be recalled by either party.
5. Every person retiring peaceable from this river immediately, shall not be molested in their passage out.
6. No person passing the summer for the Hudson's Bay Company, shall remain in the buildings of the Company but shall retire to some other spot, where they will establish for the purpose of trade.

Cuthbert Grant
 Bostonais Pangman
 Wm. Shaw
 Bonhomme Montour
 The four chiefs of the Halfbreeds
 James Sutherland
 James White

Red River Indian Territory, Forks, Red River, 25 June 1815.⁸⁵

Of note here is that this agreement referred to the territory as "Indian Territory" rather than HBC territory or "Halfbreed" territory. It would appear that the agreement was focused on removing the settlers and ensuring that trade would continue, rather than asserting any understanding of title. However, article 4 does refer to the "Halfbreeds of Indian territory". This clause can be viewed as a recognition of the situation at hand which was that a "Halfbreed" collective had established themselves as a recognizable political entity capable of negotiating for or enforcing their interests. But the clause seems to more likely distance itself from recognizing "Halfbreed" title. Instead, it seems to be worded in such a way as to acknowledge that the "Halfbreeds" reside in *Indian* territory. There is, however, the possibility that the two terms were not inconsistent with each other. That is, the Métis may have been seen to have "Indian" title. Today, we would

⁸⁵ Fidler's Journal, June 25, 1815, Public Archives of Manitoba as cited in Sealey, *ibid.* at 24. Where, in section 2 the treaty refers to the "traders, Indians, and freemen" the Métis could have been represented in all three categories for different reasons. However, the bulk of Métis specific interests would have been represented by those traders employed by the North West Company and those freemen who essentially acted as intermediaries or suppliers. For more background on these negotiations see Giraud, Vol. I, *supra* note 21 at 434-437. Also see, the use of "Indian Territory" in the *Royal Proclamation of 1763, R.S.C. 1985, Appendix II, No. 1 George III, United Kingdom, October 7, 1763* Online at Early Canadiana Online: <<http://www.canadiana.org/view/42695/0030>> accessed on December 19, 2011.

understand such historic use of “Indian” as being interchangeable with “Aboriginal”. Indeed, the latter understanding, as we will see below, does coincide with the way in which Indian title was understood decades later when, in 1869, the Métis raised arms and formalized their government in defence of their interests.

Despite the agreement, the exiting settlers soon returned when they met a new group of incoming settlers. And with this new start to settlement, a new governor named Robert Semple again attempted to exert his will upon the Métis. March of 1816 saw Semple seize a NWC post at Red River which gave him control over the transit of goods through the rivers.⁸⁶ The Métis responded a few months later by intercepting HBC pemmican. Then, in June of 1816, armed conflict arose between a determined group of remaining settlers, who were now led by Robert Semple, and the Métis of Cuthbert Grant. Sprague describes the conflict as follows:

... the Métis had become equally determined to protect their prior claim that was apparently undisputed by the Indians of the area (perhaps because the Métis were allies in the continuing struggle against the Sioux). The result of the Métis hostility to the Scots’ invasion was intensified conflict in 1816. On June 19 a group of about 35 led by Cuthbert Grant approached Semple’s fortress. Semple responded by riding out to meet them with twenty-six of his own men and attempted to address the natives like a schoolmaster shouting at a gang of unruly children. In the course of his speaking, he reached for someone’s gun, a shot was fired, and the shooting became general. In the melee that followed, Semple himself and 21 of his fellows were struck dead, mutilated, and stripped naked. Thus, the first manifestation of the political consciousness of the Métis resulted in bloodshed. They served notice to intruders that they were the people who owned the land and were prepared to back that claim by force if necessary. To the Métis, the “Battle of Seven Oaks” was a heroic moment of self-defence and self-affirmation. To the HBC, however, the action was an episode of brutal mass murder – a massacre.⁸⁷

Despite the Métis victory, Lord Selkirk was not willing to abandon his settlement ambitions. Selkirk would later return to the colony with armed soldiers and “a new spirit”.⁸⁸ It appears that the Battle of Seven Oaks would later be accepted as an accident. The Métis weren’t looking for that particular battle but also were not willing to walk away from it when confronted. In this

⁸⁶ Sealey, *ibid.* at 26.

⁸⁷ Sprague and Frye, *supra* note 37 at 14. One other, similar, description of the battle, see Stanley, *supra* note 21 at 11-12 where he writes: “Seven Oaks was only the first of several demonstrations by the half-breeds against the settlement of their country by whites...”

⁸⁸ Sealey, *supra* note 73 at 31.

understanding, and Selkirk's lack of infringement upon Métis lifestyle, we can see the reconciliation that followed the Battle of Seven Oaks.⁸⁹

Still, for the Métis the Battle of Seven Oaks was an extremely important unifying event.

Gerald Friesen describes the fallout for the Battle of Seven Oaks as follows:

But the battle did affect the metis, who had clearly been moulded into a community by the events of 1814-1816. Before these struggles they had simply been traders and hunters and employees, family members and relatives, but now they were a collective force, an association larger than a family and with more important bonds than a company; they were, as they described it, a new nation...Seven Oaks sealed their unity...Their political interests would henceforth be defined as the right to run buffalo and to live freely according to the custom of the country. They insisted that they could claim the benefits of their maternal heritage...The importance of the campaign to the French-speaking metis of Nor'Wester origin can not be overestimated. Seven Oaks was their ordeal by fire. It gave them a sense of nationhood...⁹⁰

While the Métis occupation of the Red River region, both physically and culturally, began prior to the Battle of Seven Oaks, it can be said that their political occupation took shape in 1816.⁹¹

While Stanley notes the importance of the Battle of Seven Oaks as being the first half-breed demonstration against settlement, he also sees it as the forerunner to the troubles of 1869-70 and 1885. Indeed, Stanley writes that “[o]n each of these occasions the underlying *cause* of the trouble was this spirit of half-breed nationalism and the conviction...” that the whites had come to plunder the country.⁹² In that sense it serves as a beginning of both Métis political consciousness and Métis land claims.

The dispute over Lord Selkirk's settlement land died when he died in 1820. However, in 1817 Selkirk used a treaty with the Saulteaux and Cree to attempt to shore up the claim to the land that his colony was settling on. This treaty purported to grant lands to Lord Selkirk which

⁸⁹ Friesen, *supra* note 57 at 79 where he writes: “The colonists would eventually accept that the events of Seven Oaks were the result of an accident; in this understanding lay the later reconciliation of metis and colonists, of Grant and the Scotsmen, and thus the peaceful coexistence of these communities in the following half-century.”

⁹⁰ *Ibid.* at 79-80.

⁹¹ Sealey and Lussier, *supra* note 37 at 51 where they write: “The Battle of Seven Oaks can be considered as the incident that focussed the developing sense of nationalism among the Métis. It was through this episode that the Métis began to see themselves as a unique group in the Northwest. More and more métissage, the intermarriage within their own group, occurred and this furthered the growing sense of identity.”

⁹² Stanley, *supra* note 21 at 12 [Emphasis added].

were primarily located two miles on either side of the Red and Assiniboine Rivers starting in the south at Red Lake river and extending north to Lake Winnipeg.⁹³ Flanagan points out that this treaty can be challenged on the grounds of Saulteaux Aboriginal title as well as consent (Chief Peguis later denied that he made any such grant). After Canada made entry in to the territory, it went about the numbered treaty process with no regard for the existence of the Selkirk Treaty. However, it may be that this treaty can serve to explain the terms of the *Manitoba Act* of 1870. Flanagan explains that for the HBC the treaty was valid and to support his contention he notes that “[t]he company paid its quit rent of tobacco, made grants of land within the two mile ‘settlement belt,’ and never made grants of land outside it.”⁹⁴ So, from the HBC’s perspective the Aboriginal title to this land was duly extinguished.

Selkirk was the main proponent of settlement in Rupert’s Land and his death removed the main impediment to a union between the NWC and the HBC. In 1821 the companies merged under the HBC banner. Both companies felt that colonization would hamper trade and so, upon the merger, colonization was no longer pursued. The merger meant that the HBC was now faced with redundant trading posts and an excess of employees. So, it was at the encouragement of the HBC that the Métis chose to move to Red River in the early 1820’s:

Those who wished to settle were allowed lands on their own terms; others were taken into the service and employed in every possible way they could be made useful; while such of them as were able hunters received every encouragement, got advances, and were fitted out with everything necessary for the plains, to be paid for at their own convenience.⁹⁵

A large number of Métis chose to settle at Pembina. This settlement was tested when hostilities escalated with the Sioux. The families who moved to the Red River area were eventually given land and about fifty families settled just west of the Red River and Assiniboine River junction in

⁹³ See map 1 “The Selkirk Treaty” (NAC, National Map Collection, 6067) in Flanagan, *supra* note 7 at 14.

⁹⁴ *Ibid.*

⁹⁵ Ross, A. *The Red River Settlement, Its Rise, Progress and Present State* (London: Smith Elder Co., 1856) as cited in Sealey, *supra* note 73 at 35.

what is now St. Francois Xavier.⁹⁶ Bruce Sealey sums up the early nineteenth century thrust of immigration and Métis settlement as creating a community where “in all the British North America, it was the only place where to be of mixed blood was to be of the majority group and therefore socially acceptable.”⁹⁷ This majority maintained their claims to the land and while living in concert with the HBC interests, would also challenge HBC authority in the following years.⁹⁸

IV. Métis Title in the HBC Monopoly Era

In 1821, when the HBC and the NWC merged, 700 people were out of work.⁹⁹ The HBC offered current employees and those that were laid off, many of which had local families, free rent in the dwindling Selkirk colony at Red River. Only a few Scottish settlers from the original settlement were still around in 1821. Of those left unemployed by the merger, around 15 percent settled at Red River.¹⁰⁰

For 50 years after the merger of the trading companies, the Red River settlement was undeniably Métis homeland. The Métis farmed their own land, controlled the distribution and occupation of lands around Red River, and organized their own hunting expeditions (including laws to govern those expeditions) which, over the years, grew larger and larger. In 1820, just prior to the merger of the rival trading companies, 540 carts set out for the buffalo hunt, 10 years later this number increased to 820 carts and in 1840 that number was 1,210.¹⁰¹ The HBC did not control this hunt. Indeed, the Métis were employees of the HBC, not its subjects. Although the

⁹⁶ *Ibid.* at 36.

⁹⁷ *Ibid.* at 37-38.

⁹⁸ For a Marxist analysis of the resistance of 1869-70 see Ron G. Bourgeault, “The Indian, the Métis and the Fur Trade: Class, Sexism and Racism in the Transition from ‘Communism’ to Capitalism”, *Studies in Political Economy*, v. 12, 1983, 45-80.

⁹⁹ Philip Goldring, “Papers on the Labour System of the Hudson’s Bay Company,” in Parks Canada, *Manuscript Report Series*, no. 362, pp. 32-33 as cited in Sprague, *supra* note 18 at 21.

¹⁰⁰ *Ibid.* See, footnote 12.

¹⁰¹ Stanley, *supra* note 21 at 13.

intensity of farming was low, the occupation of land at Red River displayed regular land use. Farming was limited for several natural reasons extending beyond choice of lifestyle, but perhaps due to these limitations, the French Métis began to focus more on the hunt:

In addition to the periodic natural catastrophes – flood, drought, and grasshopper infestation – there were three perennial problems: the marshy state of much of the prairie, the absence of grain varieties adapted to the short growing season, and the absence of suitable farm implements to break the tough prairie sod...HBC census statistics show that in 1835 the average family farm had only about six acres under cultivation. The rest of the land was used for hay and pasture and as a source of timber. Farming did not become significantly more intensive with the passage of time. Indeed, in the French parishes it became less intensive as the Metis devoted increasing effort to the plains economy: hunting buffalo, making pemmican, trading robes and furs, and manning the boat brigades and cart trains. They prospered by doing so; in the 1850s and 1860s, the French Metis were able to raise larger families with lower infant mortality than the English half-breeds.¹⁰²

But farming was not abandoned. Instead, the Métis used it in conjunction with the hunt. Antoine Vermette, who was born in the Red River region in the 1830's, recalled that "it was customary to plant barley and wheat in the clearings along the Red River in the spring, and this was harvested after the return from the hunt."¹⁰³

This choice of lifestyle was also influenced by a lack of available opportunities. In addition to the difficulties of farming large crops, those Métis with education or experience were unable to advance up Company ranks.¹⁰⁴ The HBC considered the Métis a cheap source of labour and with its trading monopoly the Métis were left with few alternatives for employment. The Métis reacted by thwarting the HBC's assertions of a trading monopoly. Indeed, it was often "[t]he best alternative for able young men ... to embark on a trading career outside the monopoly company, a path that was followed by several in the 1820s and 1830s."¹⁰⁵ When the

¹⁰² Flanagan, *supra* note 7 at 16-17.

¹⁰³ "Antoine Vermette, Red River Pioneer" (Aug. 26, 1910) at p. 9 in Charles D. Denney Papers, Glenbow Archives, Calgary. File 229,000.

¹⁰⁴ Friesen, *supra* note 57 at 99 where he writes: "When we recall that the population of the Northwest was overwhelmingly native – there were almost no 'European' children in the territory – and that almost all the officers were imported from outside, the frustration of the metis takes on some importance."

¹⁰⁵ *Ibid.*

HBC reacted strongly to this extra-monopoly trade, its tenuous position of power was revealed.¹⁰⁶

Métis land claims must be understood by the exercised jurisdiction over their land. The buffalo hunt is an obvious example of such an exercise; a massive organized hunt with established laws for the occasion.¹⁰⁷ Of more value for Métis claims are examples where Métis exercise of authority overrides the claimed authority of the HBC. Although he frames them as “periods of unrest in Red River”¹⁰⁸, Stanley identifies two such examples. The most famous of these examples, is the Sayer Trial of 1849. Shortly after the HBC trading license was renewed in 1838 by the British government, which reestablished the HBC’s exclusive right to trade, the HBC attempted to enforce this colonial authority by taking measures to crack down on the trade that was flowing across the border. Stanley reports that in 1840, armed HBC officers broke into the cabin of a Métis trader and confiscated his furs. The Métis were, however, undeterred and the trade continued. In 1844, Governor Christie, in an attempt to put pressure on residents of the Red River colony who were engaged in the fur-trade, imposed a 20 percent duty on maritime imports to Red River.¹⁰⁹ Residents could be exempted from the new duty if they did not traffic in furs. In August of 1845, a group of half-breeds, led by James Sinclair (who had previously openly stated his intention to defy the HBC Charter and regulations and engage in free trade of furs) asked for an explanation. Irene Spry points out that the Métis resistance to this fur trade duty was made up from “diverse origins: Canadian, Irish, métis and mixed-blood.”¹¹⁰ They

¹⁰⁶ *Ibid.* at 100 where he writes: “In a world where metis hunters constituted the single most powerful military force, the company’s hegemony had become a hollow shell.”

¹⁰⁷ For a first hand description of these laws see the interview with Antione Vermette, *supra* note 103.

¹⁰⁸ Stanley, *supra* note 21 at 44.

¹⁰⁹ *Ibid.* at 45.

¹¹⁰ Irene M. Spry, “The Métis and Mixed-bloods of Rupert’s Land before 1870” in Peterson & Brown, eds., *supra* note 3 at 109 where she refers to Garrioch Journal, March 1 and 9, 1845, PAM.

were met with a reply that would have been wholly unsatisfactory. Stanley describes it as follows:

The Governor replied, a week later, that the half-breeds possessed no rights superior to those of other British subjects, and that they had ample opportunity of knowing the law of the land as laid down in the charter and in the enactments of the Council of Rupert's Land.¹¹¹

And with that, the HBC stance was made clear. Their Charter gave them the power to govern and they were going to use it to protect their monopoly. It was equally clear that the Métis were opposed to the monopoly but the question was: how active would they be in enforcing their position?

The HBC attempted to enforce its position when, in 1849, Guillaume Sayer and three other people were arrested. It appeared that the HBC was going to force the Métis into compliance with the HBC's charter. At trial Sayer was found guilty of trafficking furs. However, that conviction was followed by his immediate release. There was, no doubt, some fear that the two to three hundred Métis that "converged on the courthouse after lunch, waving their rifles, shouting defiance, and even threatening to shoot or ride down the court officials"¹¹² were prepared to free Sayer by force if necessary.¹¹³ Instead, Sayer's emergence from the Courtroom was met with cheers of "Le commerce est libre, le commerce est libre, vive la liberté."¹¹⁴ With no way for the HBC to actually punish the purported offenders, the free trade of furs continued and expanded.¹¹⁵ Surely, the HBC realized that they could not govern against the desire of the residents. The Sayer trial showed that the Métis were capable of exerting control

¹¹¹ Stanley, *supra* note 21 at 45.

¹¹² Friesen, *supra* note 57 at 100-101

¹¹³ 300 British soldiers were stationed at the settlement temporarily between 1846 and 1848 in anticipation of potential hostility spreading north of the American border. However, as Friesen, *ibid.* points out at 100, at the time of the Sayer Trial, these troops were replaced by "pensioned soldiers and their families who were neither awesome nor affluent".

¹¹⁴ Thom to Ballenden, June 5th, 1849: Winnipeg Inward Correspondence 1823-71 as cited in Stanley, *supra* note 21 at 47.

¹¹⁵ Friesen, *supra* note 57 at 101-102 where he writes: "From Fort Alexander on the Winnipeg River to the Qu'Appelle lakes, Fort Edmonton, and even Athabasca, company officers reported the activities of the merchants."

over the law of the land. With this confrontation of authority settled, the free trade in furs continued unabated. The next ten years were “tranquil”.¹¹⁶

The turbulence of the Sayer Trial also illustrated the unity between different factions within the Red River settlement. Irene Spry has analysed the relations between the French and English Métis at Red River. Despite their differences they were not diametrically opposed to each other.¹¹⁷ Through an examination of marriage records Spry finds that approximately five percent of these marriages united a French and English Métis.¹¹⁸ Spry also looks at the composition of freighting and carting expeditions, buffalo hunts and business relationships to discover that the French and English Métis factions worked together on many fronts.¹¹⁹ This cooperation became clearly evident in the events surrounding the Sayer Trial.

It appears that the HBC had little bite to enforce its decrees that were in opposition to Métis land title or Métis lifestyle. But this did not mean that the Métis were totally opposed to HBC governance for other purposes. The HBC’s Governor and Council of Assiniboia asserted a jurisdiction of fifty miles radius around the Red River Settlement and Council assumed responsibility over petty cases. In 1837 the area was divided into three judicial districts (from a previous four districts). Over the years the number of magistrates increased, as did the frequency of sittings of the courts, to coincide with an increasing population.¹²⁰ During the 1850’s, the Métis acquired seats on the Council of Assiniboia. This representation on the Council was a response to the demands of the Métis community, which in the late 1840’s had directed several

¹¹⁶ Stanley, *supra* note 21 at 47.

¹¹⁷ A contrary view which stands alone in its voracity is Frits Pannekoek, *A Snug Little Flock : The Social Origins of the Riel Resistance of 1869-70* (Winnipeg, Man. : Watson & Dwyer Pub., 1991).

¹¹⁸ Spry, *supra* note 111 at 103.

¹¹⁹ *Ibid.* at 104-107.

¹²⁰ Stanley, *supra* note 21 at 16-17.

petitions to the British Government to establish proportional representation.¹²¹ These petitions bore the names of both French and English Métis communities. One of these petitions was drawn up by the French Métis and carried 977 signatures.¹²² The Métis desired that “the institutions of the Colony should reflect its ethnic composition.”¹²³ Stanley’s assessment, however, denies that the Métis were seeking or even understood what they were asking for. He writes:

This was the only demand on the part of the settlers for a system of representative or responsible government. Neither the Memorial nor the instructions to the delegates in England made any mention of a desire for representative institutions; nor was it likely that the French half-breeds who signed the petition had the slightest conception of the political implications of their demand. The real issue was not one of self government, but of freedom of trade in furs.¹²⁴

It seems to me, however, that self-government *was* the issue. The region was governed, at least partially, by a *company*. The regulations that were being opposed in the free trade dispute were imposed to help the company retain its profits. They were not made for the people’s benefit. Stanley seems to favour an interpretation that denies a complexity to Métis motives, or intention. Instead, throughout his work he credits the influence of the American, Roman Catholic Church and other agitators for spurring Métis uprisings. A more contextualized interpretation of these petitions is provided by Morton:

The settlement was an Anglo-French colony, a European-Indian community, and the métis, excluded from public office like the English half-breeds, were only demanding that the institutions of the Colony should reflect its ethnic composition. In so doing they spoke for the English half-breeds as well as for themselves, as they were to do again in 1869.¹²⁵

¹²¹ See, Spry, *supra* note 110 at 109 where she notes that in 1846 two petitions were sent to England in which the residents of Red River demanded “free trade and representative government.” Giraud, vol. II *supra* note 20 at 238 describes the seats being given to the Métis as Métis rather than as residents: “In finally admitting the most qualified representatives of the Métis group to seats on the Council of Assiniboia, the Hudson’s Bay Company made a new concession to the national claims of the Métis.”

¹²² Stanley, *supra* note 21 at 46.

¹²³ W.L. Morton, Introduction in Rich, ed., *Eden Colville’s Letters*, lxxxix as cited in Spry, *supra* note 110 at 109.

¹²⁴ Stanley, *supra* note 21 at 46-47.

¹²⁵ *Supra* note 123.

Indeed, this was no small issue. Yet another petition was presented to Governor Simpson in June of 1849.¹²⁶ It was clear that the Métis were willing to work with the HBC in governing the territory. After all, the HBC was the primary employer in the region. Working together would serve both parties' interests. With seats on the Council the Métis had a direct voice in HBC's governance activities. Clashes of authority became much less likely. The Métis could adopt British structures to administer over their territory, while the HBC could pursue its trading interests. With direct input into the governance of the settlement it is not surprising that twenty years after the Sayer trial, Louis Riel told the Council "that his party were perfectly satisfied with the present Government, and wanted no other."¹²⁷ It was a practical response. Where appropriate, the Métis were not averse to taking up HBC institutions and using them for their own purposes.

While the Sayer trial itself displayed the power of the Métis community, the larger struggle for political representation was undertaken by a combination of French and English Métis. Even after inclusion on the Council of Assiniboia more petitions and letters were crafted by the Métis leadership in 1850, 1851 and 1857. Each of these showed a unity of the Métis communities.¹²⁸ Spry concludes "[t]hese data, fragmentary and incomplete as they are, cannot be conclusive, but, as far as they go, they do suggest an intermingling of mixed-bloods and métis, fellow feeling and cooperation between the two groups, not separation or hostility."¹²⁹ Spry doesn't deny that there was tension at Red River. However, she sees two reasons for this tension:

The first was a division between the well educated and well-to-do gentry, the officers and retired officers of the Hudson's Bay Company and those of their progeny who had achieved

¹²⁶ Spry, *ibid.* at 110.

¹²⁷ Minutes of a Meeting of the Governor and Council of Assiniboia, October 25th, 1869: C.S.P. 1870, Vol. V, No.12 as quoted in Stanley, *supra* note 21 at 48.

¹²⁸ Spry, *supra* note 110 at 108-111.

¹²⁹ *Ibid.* at 111.

respectability, the clergy, and the prosperous merchants, in contrast to the mass of unlettered, unpropertied natives of the country – the ‘engagés’ of the Hudson’s Bay Company and of the Nor’Westers before them and their descendants....The second was the division between professional farmer and the hunter and plains trader, between the sedentary population and those to whom the freedom of a wandering life out on the plains was more important than economic security and material comfort.¹³⁰

Conceptually this makes sense. The coming together of the French and English Métis in 1869 would be hard to achieve if the French and English had a long history of being at odds. However, there were real divisions within the community which, if nothing else is just a reflection of a vibrant community. However, Gerhard Ens in his support for a similar line of division (land owners vs non-land owners) has argued that such division would emerge as a “fault line” in the support for Louis Riel’s leadership in 1869.¹³¹ I find his data to not be illustrative of a “fault line” however, there is no denying that class certainly played a part in the politics of the Red River Métis. Indeed, Ens’ portrayal is just one facet of how the divisions outlined by Spry manifest materially.

IV.a. Land and Government

The Métis believed that they possessed rights in accordance with their Indian ancestry. This prompted them to act as though they were the true governors of the land. In one instance, a half-breed who had taken timber from another person’s land, argued that the rights retained by the Indians when they granted the land to Lord Selkirk, extended to himself as a half-breed. The case was lost and although Sealey does not explore the reasons for judgment, he explains that “there can be little doubt that he represented the Metis view that they had right of use of the land except for the agricultural use which had been treated for with the Indians.”¹³² In another

¹³⁰ *Ibid.* at 112.

¹³¹ See, generally Ens, *supra* note 7. The “Fault line” reference is found at 137.

¹³² *McDermott v. Fanyant el al.*, General Quarterly Court of Assiniboia, Feb. 18, 1847 as cited in Sealey, *supra* note 73 at 42-43.

instance, in 1845, the Métis took the bold step of establishing a peace treaty with the Sioux.¹³³

This treaty process supports the notion, held by the Métis that: “Not only did the Metis consider that they, as a group, owned the entire Northwest, but also claimed individual titles to specific acreages.”¹³⁴ These acreages took the form of long rectangular river lots, which consisted of a small portion of river front property extending several miles away from the water. This allowed each family access to the main transportation method and enough land to grow hay or crops.

When it came to setting out title to land, the Métis were not beholden to HBC formalities. Although the HBC had established a process of granting leases to land, the Métis were not readily accepting of the HBC’s claimed title. So it is of little surprise that:

in 1857, when Professor Hind visited the settlement in command of the Canadian Exploring Expedition and made inquiry amongst the settlers for title deeds, which he desired to assist him in ascertaining certain lines of sections, he could get no information at all from them. He tells us that he had heard that the Company had granted a certain form of lease, a copy of which he had seen ‘through one of the resident clearly,’ but not ‘in the hands of any one of the settlers of whom I made inquiries could I find any Half-breed, in possession of a farm, acquainted with its existence. In very many instances the settlers did not know the number of their lots, and had no paper or document of any kind to show that they held possession of their land from the Company, or any other authority They knew they had paid a certain sum for their land or it had been given them in return for services, or that they had squatted upon it, and that they were in possession, but of title deeds or receipts they knew nothing. These remarks refer only to those from whom the information was sought for the purpose mentioned above.’

As a matter of fact it would appear that in the great majority of cases no formal conveyance of any kind was given, only in those where it was asked for it is likely that it was granted, and the great bulk of the early settlers being in the humblest walks of life and very illiterate they would not be sufficiently alive to their own interests to demand what they were justly entitled to; in fact the writer had been assured by many old settlers that such was the case.¹³⁵

Gerhard Ens notes that the “aboriginal rights position ... had been worked out ... in 1860, when it seemed likely that Red River would become a Crown Colony, a possibility which raised questions about Indian title, Hudson’s Bay Company jurisdiction, and individual land rights in

¹³³ For an account of these negotiations see, Sealey, *supra* note 73 at 43-49. Sealey’s account is taken from Alexander Ross, *The Red River Settlement: Its Rise, Progress, and Present State* (Edmonton: Hurtig Publishers, 1972) at 324-330.

¹³⁴ Sealey, *ibid.* at 50.

¹³⁵ *Ibid.* at 41-42.

Red River.”¹³⁶ In 1861 when the HBC threatened to charge the Métis for their land holdings, the threat

...provoked an indignant reaction in several parishes where the Métis reaffirmed that no monies would be paid, that the HBC had no right to the land (never having purchased it in the first place), and that it was the Métis themselves who had a very palpable right to it, being the “descendants of the original lords of the soil.” While arguably minor incidents, these indignation meetings illustrate that the traditional Métis leadership had worked out a theory of aboriginal rights as early as 1861 and were already using it to defend their land claims in Red River. It was a position that owed nothing to the Canadians in Red River, and it was this theory that Dease reiterated in July 1869.¹³⁷

As we saw previously, the roots of this position took hold decades earlier. And as we will see later, when the Métis successfully rebuffed Canadian efforts to acquire the territory directly from the HBC and insisted on their rights being dealt with directly, it was the Métis “Indian title” which became the central characteristic of the negotiations.¹³⁸

Land title was the subject of another conflict of authority between the HBC and the Métis. Land in the Red River Settlement was sold, by the HBC, to settlers with certain conditions.¹³⁹ The Company, Stanley notes, was not successful at making sales under its terms. Indeed, such lack of sales “may be accounted for by the fact that the majority of the settlers were half-breed squatters, who maintained the view that the land was theirs by natural law and that there was no need to bother about the Company’s title.”¹⁴⁰ The Company recognized that the half-breeds gave no weight to HBC title,¹⁴¹ but did not disturb Métis possession.

¹³⁶ Gerhard Ens, “Prologue to the Red River Resistance: Pre-liminal Politics and the Triumph of Riel,” *Journal of the Canadian Historical Association*, Vol. 5, No. 1, 1994 at 115 as cited in Manitoba Métis Federation, Plaintiff’s Final Argument in the case of MMF1, *supra* note 14 at para. 98 [MMF Final Argument].

¹³⁷ Ens, *ibid.* at 116. Also cited (with errors) in MMF Final Argument *ibid.* para. 99.

¹³⁸ Section 31 of the *Manitoba Act, 1870*, *supra* note 29 set aside 1.4 million acres to the “children of the half-breed heads of families” for the purpose of “extinguishment of the Indian Title to the lands in the Province”.

¹³⁹ Stanley, *supra* note 21 at 14 where he writes: “In return they demanded from the lessee that he should bring at least one-tenth of his land under cultivation within five years, refrain from trading or dealing with the Indians or trafficking in furs and peltries except under licence, obey the Company’s laws, contribute to the public expenses, and neither dispose of nor assign the lease without the Company’s assent.” Stanley notes that these land allocations were generally leased for 999 years.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

The question of who governed Red River provides a sometimes convoluted answer. The answer will depend on how we understand government. At a basic level government can be represented by the effective organization of society. This can be formal or informal. In order to get at a working definition of government I will use the following: “The structure of principles and rules determining how a state or organization is regulated.”¹⁴² In a situation where there are competing notions of government, one must also keep in mind the desires of each party. That is, what were the goals behind their rules of government and were they implemented effectively? On the one hand, it can be said that the HBC governed. It was the HBC who appointed a local Governor and members of a Council to govern and operated under the authority given to it by a Royal Charter. As shown above, in the last few decades of HBC tenure, the Company seemed to be attempting to meet the desires of the population when making these appointments.¹⁴³ Indeed, when examining the tenure of the HBC the effectiveness or ineffectiveness of its organization and vision upon the settlement can be seen through the formalized structures that one would expect to see from a colonial government. On the other hand this jurisdiction was limited in its physical area (primary authority was limited to the two miles on either side of the Red and Assinboine Rivers),¹⁴⁴ its scope of crimes covered by HBC courts, and most importantly the effectiveness of HBC authority (of which the Sayer trial is but one example). It was in the best interest of the Company to provide as effective a government as possible because there was

¹⁴² “Government”, *Black’s Law Dictionary*, Seventh Ed. Bryan A. Garner, Editor in Chief (St. Paul, Minn., West Group, 1999) at 703.

¹⁴³ See, Taché to Dallas, December 15th, 1862: Enc. in Dallas to Fraser, December 20th, 1862, London Inward Correspondence from Winnipeg, 1862, HBC as cited in Stanley, *supra* note 21 at 16 where Bishop Taché writes: “It is well known that these Nominees are chosen among the most respectable and the most intelligent of the place. Moreover the Company has, even in this choice, evinced generosity, as several Members of the Council have personal interests diametrically opposed to the commercial interest of the Company. To my knowledge the Company went so far as to consult those interested, and the greater number of the Councillors have been appointed because such appeared to be the desire of the population in general.”

¹⁴⁴ See Thomas Flanagan, Exhibit 18, Report submitted by Attorney General of Canada, 1998 in the case of MMF1, *supra* note 14 at 27 and 30.

always a possibility that the HBC would lose power if the Crown decided to establish a Crown colony.¹⁴⁵ But no Crown colony was created in the Northwest and so “Government in the Northwest hung on a legal thread, the sovereignty of the British Crown and the charter of 1670.”¹⁴⁶ This thread which recognizes potential legal consequences arising from the assertion of sovereignty represents the barrier to a modern recognition of Métis title. And, the reliance upon these formalized structures blinds us to the parties who were actually making the rules and regulations for the broader settlement.

But more than a turn of words was required for *effective* government, and for the majority of the HBC tenure the Company lacked muscle to enforce its rule.¹⁴⁷ Indeed, Governor Simpson wrote in 1854 that “No force of officers & men we could assemble..., would in my opinion justify measures likely to involve a collision with the half-breeds.”¹⁴⁸ For it was Simpson’s assessment that “[w]e cannot conceal that they are now so numerous that we exist in the country almost by their sufferance.”¹⁴⁹ This was especially noticeable in regards to land. The HBC land policies were acceded to wholly by consent, and were effectively optional.¹⁵⁰ But the ineffectiveness of HBC government extended to its primary purpose of trade as well. Indeed, Simpson again commented in 1856 that “[t]he Company’s charter, so far as exclusive right of trade goes, is almost a nullity...”¹⁵¹ The Royal Canadian Rifles were sent to the settlement between 1857 and 1861, to counter the American influence (rather than to shore up the

¹⁴⁵ Friesen, *supra* note 57 at 114 where he writes: “...if the Hudson’s Bay Company rule on behalf of the crown had ceased to be effective, the British government might, with reluctance, adopt the strategy it had employed for British Columbia and Vancouver Island: that is, it might create a crown colony in the northwest.”

¹⁴⁶ *Ibid.*

¹⁴⁷ See generally, Giraud, Vol. II, *supra* note 20 at 211-254.

¹⁴⁸ D. 4/82, p. 44: Simpson to A. Colville. Lachine, 1 Apr. 1854 as cited in Giraud, Vol. II, *ibid.* at 242.

¹⁴⁹ *Ibid.* at 590.

¹⁵⁰ See generally, Giraud, *ibid.* at 221-223 and at 222 where he wrote: “In the face of hostility from the population, most of the regulations he [Governor Simpson] had formulated remained virtual dead letters, and the abuses continued.”

¹⁵¹ D 476 a, p. 795: Simpson to H.H. Berens, 18 July 1856 as cited *ibid.* at 242.

government of the HBC), but their departure “marked the end of effective company authority and a return to the uncertain legal situation of the days of Guillaume Sayer.”¹⁵² Freisen has argued that with the departure of the Royal Canadian Rifles “the company had no power to enforce its decrees, a political and legal vacuum existed in the territory.”¹⁵³ But this is not so clear. More likely is that Freisen is equating politics and legality only with those formalized institutions established by the HBC. Through much of the history of the distinct Métis community at Red River, we see a situation where enforcement of political strength depended, in part on the military might present but more importantly upon the cooperation of the local Métis population. The failure of the Hudson’s Bay Company to enforce their Royal Charter speaks as much about the limitations of their government as it does about the effective power of an assertion of Crown sovereignty. It also represented a lack of respect for the authority of the Royal Charter by the residents of Red River and abroad. On this point Governor Simpson wrote: “[t]he Company’s rights are treated by the Americans and half-breeds as fictions of law which we cannot and dare not attempt to enforce, and in our present position this is correct.”¹⁵⁴ As limited as it might have been, HBC government provided a practical service to the Red River community. This service was one which the Métis could accept, even benefit from, so long as it didn’t interfere with Métis lands, livelihood, or lifestyle. Further, for the HBC the primary concerns were economic. They were, after all, a company and not a government in the proper sense. The HBC’s focus on profits allowed the Métis to interact with the company in a flexible manner. Under such circumstances, there is no reason to equate Métis cooperation with HBC authority to a relinquishing their own autonomy.

¹⁵² Friesen, *supra* note 57 at 114.

¹⁵³ *Ibid.* at 115.

¹⁵⁴ D 4/76a, p. 795: Simpson to H.H. Berens, 18 July 1856 as cited in Giraud, *supra* note 20 at 584, see footnote 94.

It can be deceiving to look at the various enactments, Charters, and extensive correspondence of the HBC which are reproduced in historical accounts. The historical record gives the impression upon cursory examination that the HBC was effectively governing the people in their territory. However, upon closer examination it has been shown that the HBC governance was not terribly effective on the ground. This can be displayed through an examination of HBC attempts to establish English law in the settlement. Here the work of H. Robert Baker is helpful. Baker looks at the HBC's attempt to bring rigid structures of justice to the settlement after 1835. Such goals were not a priority before the company began viewing the settlement as a perceived threat to its trading monopoly.¹⁵⁵ However, as Baker points out there was not an absence of law before this time.¹⁵⁶ The extent of law brought to Rupert's Land prior to 1835 was primarily limited to company servants or trading relationships.¹⁵⁷ However, in 1835 the HBC decided to introduce formal legal institutions at Red River despite the fact that there was no obvious need for them.¹⁵⁸ The goals for this project were created by Governor Simpson; "who found both the reason and the will to create a permanent judiciary. He did so in a conscious attempt to impose order on a growing settlement that was a potential threat to the Company's trade monopoly".¹⁵⁹

¹⁵⁵ H. Robert Baker, "Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51" *Law and History Review*, Vol. 17, No. 2 (Summer, 1999) 209-246 at 219.

¹⁵⁶ *Ibid.* at 214-215 where he writes: "There was no absence of law and custom in eighteenth-century Rupert's Land – only an absence of formal legal machinery and rules that governed anyone but Company servants. In effect, the Company left no institutional legacy or substantive body of law for the Red River colonists."

¹⁵⁷ *Ibid.* at 214. And, at 213-14 Baker writes: "Until 1835 legal institutions in Rupert's Land had at best a patchwork tradition. In order to reconstruct their history, one would have to knit together a small number of cases held over three different centuries with almost no common thread – hardly a history at all. In reality the Company erected 'courts' on an ad hoc basis and rarely initiated formal legal proceedings within its territory. The Company never established a regularly convening judicature either on the shores of the Bay or at the inland post during the eighteenth or nineteenth centuries."

¹⁵⁸ *Ibid.* at 218 writes: "Thus by 1835 the Red River settlement had functioned for over a decade without any formal courts of law, and the extant records indicate little need for such institutions. Conflict was not the primary force shaping the law, nor was it the potential reason for the establishment of a judicature."

¹⁵⁹ *Ibid.* at 219. Baker continues that "It was an ambitious program designed to implement the law as a disciplinary instrument."

However, the Company had a problem. The HBC wanted to impose law but a strict interpretation of its *Charter* left the company in the odd position of having to enforce the laws of 1670 upon the settlement in 1835 and beyond.¹⁶⁰ In addition to the restrictions of the 1670 *Charter*, the HBC had to contend with the reality that “the inhabitants resisted any overt imposition from above.”¹⁶¹ The effective result was that the institutions were taken by the inhabitants and used for their purposes and according to their own norms. The HBC effectively gave them the framing and the inhabitants built the house.¹⁶² Baker summarizes HBC law as follows:

Litigants, not Adam Thom [the Recorder for Rupert’s Land from 1839-1851] nor the Company, brought disputes to the court for resolution. Settlers, not Company officials, staffed the juries. Rather than applying strict rules and recording those rules for future litigants, the court heard simple claims for redress and recorded all the evidence necessary to prove or dismiss claims. The jury weighed the evidence, deliberated, and presented its own verdicts to a court that routinely concurred with the jury. Within the court record lay the substantive component of Assiniboia’s legal system – a record initiated by litigants who came before the court and determined by the juries who settled their disputes.¹⁶³

And it is in the HBC’s limited vision as a corporate entity, in the perceived limitations of the *Charter* of 1670, and in the reality of power within the settlement that we find the reasons why HBC control over the settlement is tenuous at best: the Company had neither the influence nor the ability to control the resident population. In 1857, after the new legal initiatives had been supplanted, the HBC Governor, George Simpson, did not have any pretense about the Company’s control over the resident Aboriginal populations. The following exchange, in 1857, was taken from Simpson’s appearance before the Select Committee of the British House of Commons on the Hudson’s Bay Company:

¹⁶⁰ *Ibid.* at 234-35.

¹⁶¹ *Ibid.* at 244.

¹⁶² *Ibid.* at 243 writes: “[a]lthough, he [Governor Simpson] provided an extensive outline for the law’s machinery, he failed to give even a sketch of its substance. Therefore, the Red River community inherited the hollow shell of a legal system that it could, and did, fill on its own.”

¹⁶³ *Ibid.* at 246.

Mr. Grogan: What privileges or rights do the native Indians possess strictly applicable to themselves?

Simpson: They are perfectly at liberty to do what they please; we never restrain Indians.

Grogan: Is there any difference between their position and that of the half-breeds?

Simpson: None at all. They hunt and fish, and live as they please. They look to us for their supplies, and we study their comfort and convenience as much as possible; we assist each other.

Lord Stanley: You exercise no authority whatever over the Indian tribes?

Simpson: None at all.¹⁶⁴

As long as the HBC kept to its trading interests (without limiting the occupations of the residents) the people of the settlement were willing to work with the HBC in matters of governance. Otherwise, as was the case with the Sayer trial, the people would resist HBC oppression.¹⁶⁵ Simpson's testimony and the lack of regular acts of community resistance are indicative of a situation of general cooperation rather than antagonism. Nonetheless, even in the Company's waning years the Governor did not make any indication that they ruled over the Indian or "half-breed" population.

V. Métis Title in Resistance

In 1869, Canada, Britain, and the Hudson's Bay Company negotiated a compensation package intended to relieve the Hudson's Bay Company of their interest in the vast territory known as Rupert's Land. Title and responsibility for governing the new territory was to be transferred to the Canadian Dominion. This governing authority would mark the first time that the Crown would take direct responsibility for governing the Northwest. The people living in the

¹⁶⁴ Report of the Select Committee on the Hudson's Bay Company (London: House of Commons, 1857), Minutes of Evidence, 91 in Kent McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) 37 (spring/summer) *Manitoba History* 2-8 at 6.

¹⁶⁵ Baker, *supra* note 155 at 245 explains that the success of the law in Rupert's Land "hinged on the community's notions of reason and equity expressed through the jury and depended on the community assent to the jury's decisions. Settlers conceived of both governance and law in largely local terms, looking to the Company for paternal guidance but resisting overt oppression."

territory were not consulted on this transfer and as a result, before Canada could acquire the territory, the Métis stepped in and demanded that their interests also be acknowledged.

Stanley's introduction to the 1869-70 unrest describes it as centered around land and lifestyle issues:

The half-breeds had been the first inhabitants of the country, and, unreasonable as the claim may appear in view of their small numbers, they felt that the country was theirs...A primitive people, the half-breeds were bound to give way before the march of a more progressive people. It was the recognition of this fact and the gradual realization of their inability to adjust themselves to the new order that kindled the spark of half-breed resentment which unfortunate circumstances fanned into the flame of insurrection.¹⁶⁶

Stanley's characterization completely ignores the prior occupation of First Nations people but accurately captures the sentiments of the broader Métis community.¹⁶⁷ Louis Riel also recognized Métis vulnerability to swift change and noted that the Métis had concerns because they "were uneducated, and only half civilized, and felt, if a large immigration were to take place, they would probably be crowded out of a country which they claimed as their own."¹⁶⁸ Although the resistance would prove to be a volatile time, Riel captured the sentiments and the confidence of the majority of his people, and proved to be President of Red River's first democratic government. To prevent being crowded out of their own country, the Métis took control of the territory and set out to negotiate an agreement with Canada. The negotiations are covered in detail in chapter three, but showing Métis control of the territory is also relevant to assertions of Aboriginal title. This control can be illustrated in two ways: first, the Métis showed that they had the ability to exercise effective exclusive control over the territory by excluding Canadian officials from their land. On this same point, it is equally pertinent to show Canada's lack of authority over the territory during the Métis resistance. Second, the Métis established a

¹⁶⁶ Stanley, *supra* note 21 at 49.

¹⁶⁷ Also see Giraud, *supra* note 20 at 221-223.

¹⁶⁸ Minutes of a Meeting of the Governor and Council of Assinboia, October 25th, 1869: C.S.P. 1870, Vol. V, No.12 as quoted in Stanley, *supra* note 21 at 49.

representative government to advance their cause and govern the territory, thereby showing, in terms easily cognizable to the Canadian authorities, that the Métis exercised jurisdiction over the Red River region.

V.a. Métis Exclusive Occupation and the Crown's Impotent Claims

The protection of Métis land was central to the cause of the Métis in 1869-70. The Métis had been growing distrustful of a troublesome Canadian population making waves in the settlement, and there was a growing fear that the Canadian settlers were coming to steal Métis lands. Métis lands were ripe for the picking because: “[t]he majority of the population, it will be remembered, were only squatters who had cultivated for years lands to which they held no title. Moreover, lands had passed from hand to hand and little account had ever been kept of the transactions.”¹⁶⁹ But it was clear that the Métis felt that they had title to their lands despite being without formal *written* title from the Hudson’s Bay Company. However, this was the only form of title that Canada was initially willing to guarantee.¹⁷⁰ In preparation of recognizing these titles and to organize land for incoming settlers, Canada sent a surveying team to Red River.

When the Canadian government sent surveyors to Red River in July of 1869 (months before the official transfer to Canada was scheduled to take place), a group of Métis residents stopped the surveyors and claimed the land “as the property of the French half-breeds, and which they would not allow to be surveyed by the Canadian Government.”¹⁷¹ This title was at least apprehended, if not fully acknowledged, by the surveyors. Prior to commencing the survey, Colonel Stoughton Dennis, the superintendent of the surveys, met with the HBC Governor

¹⁶⁹ Stanley, *supra* note 21 at 55.

¹⁷⁰ PAC, Macdonald Papers, Incoming Correspondence, p. 40208, “Draft Order in Council for Uniting Rupert’s Land and the North-Western Territory to the Dominion of Canada” in Sprague, *supra* note 18 at 33 where he writes that in the “Draft Order in Council for Uniting ...the North-Western Territory to the Dominion of Canada”, Article 10 set forth that “All titles to land up to the 8th March 1869 conferred by the company are to be confirmed.”

¹⁷¹ Dennis, Memorandum of Facts and Circumstances Connected with the Active Opposition of the French Half-Breeds in this Settlement to the Prosecution of the Government Surveys as quoted in Stanley, *supra* note 21 at 57.

William Mactavish who informed Dennis that “as soon as the survey commences, the half breeds and Indians will come forward and assert their right to the land, and possibly stop work till their claim is satisfied.”¹⁷² In response, Dennis wrote to the Minister of Public Works, William McDougall: “I have again to remark the uneasy feeling which exists in the half-breeds and Indian element with regard to what they conceive to be premature action taken by the Government in proceeding to effect a survey without having first extinguished the Indian title.”¹⁷³ His concerns were dismissed, and the surveys continued, until the Métis put a stop to it.

Colonel Dennis was under the impression that the Red River occupants recognized river lots of 2 miles each. The actual amount of land was 4 miles. While the inner two miles were used for farming and resources, the outer 2 miles of each lot was used, in common, for hay. So when Dennis’ crew inadvertently ventured on to Métis land, a confrontation ensued.¹⁷⁴ Louis Riel spoke English and, therefore, became the frontman in this operation. A.C. Webb, the leader of the survey crew did not resist, instead he just asked for everyone’s name, wrote the names down, and left.¹⁷⁵ Colonel Dennis responded by demanding that the HBC authorities punish those who stopped the survey. Louis Riel resumed his role of speaking on behalf of those who intervened. He stated their position that Canada “had no right to make surveys ...without the express permission of the people of the Settlement.”¹⁷⁶

The Governor of Assiniboia recognized that the Métis, from the beginning, wanted to negotiate for what they felt was their title to land:

The men who have thus interfered say they know the survey could proceed without injury to anyone, but that stopping it is always a beginning; and they are desirous to let the Canadian Government know that it is not wanted by them; that they consider, if the Canadians wished to

¹⁷² George Stanley, *Louis Riel* (Toronto, 1963) at 57 as cited in Sprague, *supra* note 18 at 34.

¹⁷³ Dennis to McDougall, August 28th, 1869: C.S.P., 1870, Vol. V, No.12 as quoted in Stanley, *supra* note 21 at 56.

¹⁷⁴ Sprague, *supra* note 18 at 39. Sprague points out that that Stanley, in *Riel*, *supra* note 173 at 68-69 describes this first encounter as occurring on the property of André Nault.

¹⁷⁵ Sprague, *ibid.* at 39.

¹⁷⁶ Stanley, *Riel*, *supra* note 173 at 59 as cited in *ibid.* at 39.

come here, the terms on which they were to enter should have been arranged with the local government here, as it is acknowledged by the people in the country.¹⁷⁷

At this point, the Métis appeared, at least superficially, to be in control of the territory. Sprague makes clear that the Métis were not rejecting the Canadian surveyors in an attempt to sanction the administration of the HBC, instead “the existing government could be tolerated because in most respects it was powerless, and therefore irrelevant to their real concerns.”¹⁷⁸ Interrupting the surveys displayed the Métis intentions, but if they wanted their concerns addressed they would need to organize the broader community in support of their common cause. Five days after interrupting the surveyors the French Métis gathered at Father Ritchot’s house. Ritchot was the priest of the parish of St. Norbert and would prove to be one of Riel’s most trusted allies. This meeting seemed to be for the benefit of establishing an organization for their cause. Stanley writes that the “semi-military lines of the buffalo hunt” were how the Métis organized themselves.¹⁷⁹ With John Bruce as President and Louis Riel as Secretary of the “Comité National des Métis”, the Métis set out to prevent Canada’s designated Lieutenant-Governor, William McDougall, from entering the territory.

Canada ratified the terms of their transfer agreement with Britain and the HBC and set the date of transfer at December 1, 1869.¹⁸⁰ However, as William McDougall (former Minister of Public Works) was on his way to his new post as Lieutenant-Governor of Canada’s newest territorial acquisition, he was greeted in Pembina by the following order:

A Monsieur McDougall.

¹⁷⁷ Mactavish to Smith, October 12th, 1869: London Inward Correspondence from Winnipeg, 1869 as quoted in Stanley, *supra* note 21 at 57-58.

¹⁷⁸ Sprague, *supra* note 18 at 35.

¹⁷⁹ Stanley, *supra* note 21 at 69.

¹⁸⁰ See, *Rupert’s Land Act, 1868*, 31 & 32 Vic., c. 105 (U.K.); R.S.C. 1970, App. II, No. 6 and the Deed of Surrender, Schedule (C) to the June 23, 1870, Order in Council: R.S.C. 1970, App. II, No. 9 as cited in Kent McNeil, *Native Rights and the Boundaries of Rupert’s Land and the North-Western Territory* (Saskatoon: Native Law Centre, 1982) at 1.

Monsieur – Le Comité National des Métis de la Rivière Rouge intime à Monsieur McDougall l'ordre de ne pas entrer sur le Territoire du Nord-Ouest sans une permission spéciale de ce Comité.

Par ordre du président.

John Bruce

Louis Riel, Secrétaire.

Daté à St. Norbert, Rivière Rouge,

Ce 21e jour d'octobre, 1869.¹⁸¹

From Canada's point of view they had already acquired title to the Northwest. A rejection of their Governor-to-be placed them in an awkward position. This situation was most awkward for McDougall who, after being expelled by the Métis, became unable to fulfill his orders. He was stranded in the United States and was ridiculed by the local press for his impotence:

A King without a Kingdom is said to be poorer than a peasant. And I can assure you that a live Governor with a full complement of officials and menials from Attorney-General down to cooks and scullions without one poor foot of territory is a spectacle sufficiently sad to move the hardest heart.¹⁸²

McDougall wrote to the Council of Assiniboia but they were in no position to take meaningful action on his behalf. Despite attempts to convince the Métis to avert their course of action, the Council of Assiniboia had no manpower or moral power to influence the Métis. Any influence that the Council had remaining with the Métis would not be well-served by marrying the Council to the Canadian cause. The Council wrote to McDougall advising him that it would be best if he returned to Canada. But McDougall had his official instructions and did not follow their advice.

It is clear that McDougall did not appreciate the extent of the Métis resistance. Shortly after being refused entry to the territory, McDougall's assessment was "I am not frightened & don't believe the insurrection will last a week...."¹⁸³ Equally unimpressed by the initial rising of the Métis, Prime Minister Macdonald dismissed it as "some little opposition".¹⁸⁴ It is not

¹⁸¹ *Correspondence and Papers connected with Recent Occurrences in the North-West Territories*, C.S.P. 1870, Vol. V, No. 12 as quoted in Stanley, *supra* note 21 at 43.

¹⁸² "Spectator" to the *St. Paul Press*, November 4th 1869: U.S. Senate Documents, 33, 41st Congress, 2nd Session, Serial 1405 as quoted in Stanley, *ibid.* at 75.

¹⁸³ PAC, Macdonald Papers, Incoming Correspondence, pp. 40752, 40754, McDougall to Macdonald, 31 October 1869 in Sprague, *supra* note 18 at 41.

¹⁸⁴ PAC, Macdonald Papers, Letter Books, vol. 13, p. 481 Macdonald to McDougall, 20 November 1869 *ibid.* at 41.

surprising that McDougall felt he could remedy the situation by exerting his self-perceived authority. McDougall was taking advice from Canadian loyalists in the Red River settlement, and he made arrangements to issue a proclamation in the name of the Queen. This proclamation was meant to advise the residents of the transfer and inform them that he was in charge as Lieutenant-Governor. In contradiction of the advice given by the Council of Assiniboia, McDougall was advised by the Canadian loyalists at Red River not to return to Canada and that if he issued his proclamation it would “be responded to by five hundred men.”¹⁸⁵ In the meantime, Riel and his followers had strengthened their position by taking possession of Fort Garry on November 2. McDougall remained undeterred. Following the advice of the Canadian loyalists at Red River, and believing that the transfer would take effect on that day, McDougall issued the proclamation on December 1. McDougall had reservations about issuing a proclamation without official notice of transfer from the Queen because he did not have any authority in the territory without an official transfer. Still, he had not received a response from officials in Canada and he felt he needed to act. In the proclamation of December 1, McDougall used the Queen’s name to remind the residents that a transfer of the territory had taken place. Sprague describes the events of December 1:

In the small hours of the morning, McDougall crossed the border and shouted the proclamation of his gubernatorial power into the frosty silence of the darkened prairie. For the benefit of the live audience, printed copies of the proclamation went up all over the Red River Settlement later in the day. Ironically, the proclamation of the transfer had a tonic effect on the council of delegates that had been lost in pointless wrangling since first meeting on November 16.¹⁸⁶

It was in response to McDougall's proclamation that the Métis representatives drafted a list of rights. However, this original list of rights, although accepted in principle by both the French and English Métis was to be a short lived list of demands. The quick to rise Métis government of

¹⁸⁵ Mair to McDougall, November 8th, 1869: C.O. 42/678; C.S.P., 1870, Vol. V, No. 12 in Stanley, *supra* note 21 at 76.

¹⁸⁶ Sprague, *supra* note 18 at 44.

the territory combined with Macdonald's unwillingness, and lack of immediate means, to engage the Métis militarily meant that negotiations needed to proceed.¹⁸⁷ This meant that McDougall, who was now viewed as a liability, would have to be replaced as Canada's point man in resolving the grievances of the residents of Red River. And, with fresh representation from Canada, the Métis would draft a new List of Rights.

It was on December 6 that McDougall discovered that his proclamation was meaningless. In a communiqué from Canada, McDougall was informed in a letter dated November 19: "as matters stand, you can claim or assert no authority in the Hudson's Bay Territory, until the Queen's Proclamation, annexing the country to Canada, reaches you through this office."¹⁸⁸ McDougall found out several days later that such a Proclamation was not made by the Queen on December 1. Macdonald wrote to McDougall on November 27 instructing him: "You ought not to swear that you will perform duties that you are, by the action of the Insurgents, prevented from performing."¹⁸⁹ Due to Macdonald's delay in sending these new instructions, and his negligence¹⁹⁰ in sending the instructions via regular mail, McDougall did not receive Macdonald's instructions before the original date of transfer had passed and his proclamation had been issued.

¹⁸⁷ The Canadian residents of Red River convinced McDougall to appoint Colonel Dennis to the task of engaging English speaking allies. However, the French Metis learned of the plan and, on December 7th, quickly arrested about 50 of the conspirators. Colonel Dennis withdrew to the United States and later that month he and McDougall were both on their way back to Ottawa. Sprague, *ibid.* at 45.

¹⁸⁸ Howe to McDougall, November 19th, 1869: C.O. 42/678; C.S.P., 1870, Vol. V, No. 12 in Stanley, *supra* note 21 at 77.

¹⁸⁹ PAC, Macdonald Papers, Letter Books, vol. 13, p. 614, Macdonald to McDougall, 27 November 1869 as cited in Sprague, *supra* note 18 at 43.

¹⁹⁰ See, Sprague, *ibid.* at 43 where he writes: "If Macdonald wanted the message to reach McDougall in time, he would have to had to send the information by telegram as far as Fort Abercrombie (south of Pembina on the Red River), and to have had it carried the rest of the way by riders on fast horses. (Macdonald had learned on November 25 that the best ordinary mail connection required at least twelve days by railway and ox cart). Consequently, when the Prime Minister chose to send his important dispatch of November 27 by ordinary mail, he had to know that the letter could not arrive at Pembina in to make a difference on December 1..." [Footnotes omitted].

Canada had refused to carry out the transfer, insisting that the British government deal with the Métis claims. When Prime Minister Macdonald wrote to McDougall he advised him not to issue the proclamation he was planning and informing him that: “[w]e have thrown the responsibility on the Imperial Government.”¹⁹¹ Canadian officials were of the opinion that “Canada cannot accept transfer unless quiet possession can be given.”¹⁹² British officials were of a differing opinion and, as mediator between the HBC and Canada, Lord Granville, the Colonial Secretary, expressed his frustration:

I see no grounds for the Dominion to repudiate the agreement which has been formally made. They had no business to send a Governor-designate to Red River unless they considered the agreement as substantially concluded. Delay, moreover, will now be most inconvenient and injurious to all parties.¹⁹³

Lord Granville also forwarded the problem to the British law officers who wrote the following opinion:

We are of the opinion that if the surrender is accepted by the Crown and the proposed Order in Council is passed within a month of that acceptance, Canada is bound to accept the territory...The Executive Government of Canada have, in our views, no power to invalidate a proceeding of the Canadian Legislature which has been acted upon by the Hudson's Bay Company and by the Crown in pursuance of powers conferred by the Imperial Legislature.¹⁹⁴

Still, it was evident to all parties to the transfer that a delay was necessary to peaceably sort out the rising tensions in Red River. Canada was concerned about armed conflict, not only with the “insurgents” but also with those aggressively inclined adventurers in the United States.¹⁹⁵

¹⁹¹ McDonald to McDougall, confidential, November 27th, 1869: C.O. 42/678 in Stanley, *supra* note 21 at 78.

¹⁹² Young to Granville, telegram, November 26th, 1869: C.O. 42/677; P.P., 1870, L.(C. 207) as quoted in Stanley, *ibid.* at 78.

¹⁹³ Granville, Minute, November 25th, 1869: C.O. 42/683 as cited in Stanley, *ibid.*

¹⁹⁴ Collier and Coleridge to Granville, December 10th, 1869: C.O. 42/679 as cited in Stanley, *ibid.* at 79.

¹⁹⁵ Cabinet Minute, Copy of a Report of the Privy Council, Canada, December 16th, 1869: C.O. 42/678: P.P., 1870, L. (C. 207) as cited in Stanley, *ibid.* where it is written: “Any hasty attempt by the Canadian Government to force their rule upon the Insurgents would probably result in armed resistance and bloodshed. Every other course should be tried before resort is had to force. If life were once lost in an encounter between a Canadian force and the inhabitants, the seeds of hostility to Canada and Canadian rule would be sown, and might create an ineradicable hatred to the union of the Countries, and thus mar the future prosperity of British America. If anything like hostilities should commence, the temptation to the wild Indian tribes, and to the restless adventurers, who abound in the United States (many of them with military experience gained in the late Civil War) to join the Insurgents, would be almost irresistible.... No one can see the end of the complications that might thus be occasioned, not only as between Canada and the North-West, but between the United States and England. From a sincere conviction of the

The consequence was that when McDougall issued his proclamation he had no authority in the territory and he certainly had no authority to use the Queen's name as liberally as he had. It is for this reason that Stanley describes the proclamation as "not only worthless but illegal."¹⁹⁶ McDougall's interdiction didn't end with the issuance of his proclamation. On December 1, McDougall assigned Colonel Dennis with the title of "Lieutenant and Conservator of the Peace". His assignment was to "raise, organize, arm, equip and provision, a sufficient force" with the intention to:

attack, arrest, disarm, or disperse the ... armed men so unlawfully assembled and disturbing the public peace; and of that purpose, and with the force aforesaid, to assault, fire upon, pull down, or break into any fort, house, stronghold, or other place in which the said armed men may be found.¹⁹⁷

Dennis' attempts to enlist men were largely unsuccessful and even after resorting to a call to "all loyal men of the North-West Territories to assist me, by every means in their power...."¹⁹⁸

Dennis did not have sufficient resources to launch an attack on the Métis establishment. Keep in mind that, at that time, no transfer had taken place. Without authority in the territory these actions were highly improper if not illegal. Indeed, so long as they were acting under Canadian authority they could be properly characterized as rebels or insurgents.

After initially meeting with Dennis, a number of the Canadian supporters gathered at Dr. Schulz's store where provisions were held. Dr. Schulz was one of the more prominent Canadian agitators at Red River. The intention of the Canadian supporters was to hold off a Métis attack and keep the provisions away from the Métis.¹⁹⁹ To the Métis it appeared as if the Canadian

gravity of the situation, and not from any desire to repudiate or postpone the performance of any of their engagements, the Canadian Government have urged a temporary delay of the transfer."

¹⁹⁶ Stanley, *ibid.* at 80.

¹⁹⁷ Commission of Colonel Dennis, December 1st, 1869: C.O. 42/684; C.S.P., 1870, Vol. V., No. 12 as cited in Stanley, *ibid.* at 81.

¹⁹⁸ Dennis Proclamation, December 6th, 1869; C.O. 42/684; C.S.P., 1870, Vol. V., No. 12 as cited in Stanley, *ibid.* at 82.

¹⁹⁹ Stanley, *ibid.* at 83-84.

supporters were preparing to attack. Colonel Dennis, in a letter to the Canadian rebels,²⁰⁰ tried to convince them to disband and avoid conflict with the Métis. His request was refused because the Canadian sympathizers had every confidence in their force: “under the circumstances (that we have seventy men and sixty-five good arms on the premises), we have a strong position, and could resist successfully a strong attack.”²⁰¹ The Canadian sympathizer’s had clearly overestimated their strength or had underestimated Métis resolve. On December 6, Colonel Dennis was informed by Bishop Machray that the Métis had over six hundred well-armed men.²⁰² Two hundred Métis and a cannon from Fort Garry, were enough to convince the Canadian rebels to surrender. On, December 7, the Métis took 45 prisoners to Fort Garry.

Dennis called off his supporters on December 9 asking “the loyal party in the North-West Territory, to cease further action under the appeal to arms made by me.”²⁰³ This call had obviously come too late for some of his overzealous supporters. The Métis had solidified their position of authority. Now, the leadership of what was still largely a movement of the majority

²⁰⁰ I use the term “rebels” to indicate a) that, at this point in time, there was a legitimate government of the People and b) that the Canadians were planning on directly overthrowing that government. These qualifications are rough guides for legally characterizing a “Rebellion”. For example, see Waitangi Tribunal, *The Taranaki Report Kaupapa Tuatahi* (Waitangi Tribunal: Wellington, New Zealand, 1996) at 129 where the Tribunal writes: “But what was rebellion? It was not rebellion, for example, to resist an unlawful attack and so to defend oneself and one’s home, as Professor Brookfield has explained. Resistance became rebellion only when it extended to some act of counter-aggression. This rule of the common law applied, despite the inference in section 5 that anyone who carried arms against Her Majesty’s forces was in rebellion.” Also see, Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Waitangi Tribunal: Wellington, New Zealand, 1999) at 122 where the Tribunal defines rebellion as: “organised opposition to the Government. There is a necessary element of corporate intent to have the Government defeated or overthrown. It is usually associated with recourse to arms. However, to define it as any recourse to arms against official forces would cast the net too wide” It is also for these reason that the Métis are not properly characterized as “rebels” during the resistance of 1869-70. One other point to consider in evaluating whether the Métis were “rebels” is the actual control that the Crown had on the ground in either 1869-70 or 1885. On a similar point, the *Taranaki Report* states the following at 132: “It becomes pertinent to ask whether a charge of rebellion against the Queen’s authority can be fairly levelled when the Queen’s authority was not established, in fact, on the ground. It is further relevant that the Maori may have seen themselves not as opposing the Queen but, more prosaically, as opposing their treatment.”

²⁰¹ Boulton to Dennis, December 4th, 1869; C.O. 42/684; C.S.P., 1870, Vol. V, No. 12 as cited in Stanley, *supra* note 21 at 83.

²⁰² Machray to Dennis, December 6th, 1869; C.O. 42/684; C.S.P., 1870, Vol. V, No. 12 as cited in Stanley, *ibid*.

²⁰³ Dennis, Proclamation, December 9th, 1869; C.O. 42/684; C.S.P., 1870, Vol. V, No. 12 as cited in Stanley, *ibid*. at 82.

population in Red River, the French Métis, sought to bring the other elements of the settlement into the resistance. This was done by creating a representative body to represent the concerns of the community as a whole. Ultimately, this would lead to the creation of a Provisional Government.

V.b. Métis Government

Although the Métis had made it clear that their permission was required to make surveys, it remained to be seen how this permission was to be given. Fortunately for the Métis, they had experience in organizing. Sprague describes how the Métis relied on their traditional practices to form a cohesive government:

How, though, were the 'people of the settlement' to express such permission? No representative assembly existed under company auspices. The nearest approximation to an elected government was the apparatus that came into existence each spring to govern the hundreds of families who still participated in the buffalo hunt, travelling as one or two expeditions southwest to the location of the herds. Within each were groups of families that formed particular teams. Each chose a captain. The captains chose their principal leader and he presided over the council of captains, the body that set regulations and met each day to handle offenders against the community's laws. The captains of the hunt were true representatives of the people; their council was a genuine though extra-legal government. Even after the hunt declined in economic importance, its political organization had social significance that continued.

The traditional organization of the hunt gave the Métis a political structure with which to resist the surveys. The new importance of farming gave them their motive. As the protest broadened, each group of concerned families selected its captain. They met in St Norbert as the council of the whole people, declared on October 16 that they were the National Committee of the Métis, and chose a president, John Bruce. Since the expected struggle was to be a contest of speechmakers, the committee elected a secretary, Louis Riel.²⁰⁴

John A. Macdonald understood that without formal transfer of the territory, the Métis had the right to establish their own government. In writing to McDougall on November 27, Macdonald explained:

An assumption of the Government by you, of course, puts an end to that of the Hudson's Bay Company authorities ... There would then be, if you were not admitted into the country, no legal Government existing and anarchy must follow. In such a case ... it is quite open by the Law of Nations for the inhabitants to form a Government *ex necessitate* for the protection of life and property, and such a Government has certain sovereign rights by the *jus gentium* which might be very convenient for the United States but exceedingly inconvenient for you. The temptation to

²⁰⁴ Sprague, *supra* note 18 at 39. [notes omitted].

an acknowledgment of such a Government by the United States, would be very great and ought not to be lightly risked.²⁰⁵

This point was again asserted, by Macdonald, in a minute of the Privy Council: "... a legal status might be given to any Government *de facto* formed by the inhabitants of the protection of their lives and property."²⁰⁶ The same opinion was not shared by the Imperial law officers who felt

that the apprehensions of the Canadian Government are unfounded, and the insurgents or rioters (by which term they may be properly designated) will not be improved or strengthened by the transference of the territory from the Hudson's Bay Company to the Canadian Government.²⁰⁷

This is partly true. The Métis position was equally strong regardless of whether the Dominion or Imperial government was asserting jurisdiction. The Métis had the physical ability to control the territory and were in a position to ensure that their demands were taken into account. However, the law officers were clearly incorrect in asserting that the Métis were "rioters" or "insurgents". Both of these terms imply that the Métis were opposing another authority at Red River. But there was clearly an absence of meaningful Crown authority during the resistance. The Red River region was the Métis homeland. They deserved to have their needs answered.

Métis occupation is best displayed for the common law, in permanent, largely stationary, settlement. One of the clear signs of such occupation is recognizable structures of government. This would also be the most effective vehicle for advancing Métis interests with Canada. In order to set out Métis demands, Riel sent out a public notice on November 6, 1869 asking for the English speaking people in the settlement to "send twelve representatives ... in order to form one body,...to consider the present political state of this country, and to adopt such measures as may be deemed best for the future welfare of the same."²⁰⁸ The English Métis took up the invitation

²⁰⁵ Macdonald to McDougall, confidential, November 27th, 1869; as cited in Stanley, *supra* note 21 at 84-85.

²⁰⁶ Copy of a Report of the Privy Council, Canada, December 16th, 1869 as cited in Stanley, *ibid.* at 85.

²⁰⁷ Collier and Coleridge to Granville, December 21st, 1869; C.O. 42/679 as cited in Stanley, *ibid.*

²⁰⁸ Co. 42/678; C.S.P., 1870, Vol. V, No. 12 as cited in Stanley, *ibid.* at 72.

from the French Métis and the delegates all met on November 16 as requested.²⁰⁹ The Convention of parish delegates who met to discuss the strategy for negotiating with Canada, clearly displayed such a governing structure. This is displayed in both the selection of the representatives and in the ensuing discussion. The delegates for this convention were selected by their parishes. The Red River settlement was divided into river lots and these river lots were each in the vicinity of a local church. These parishes served as the conduits for distributing information around the settlement. For example, when a buffalo hunt was being planned people would stand outside the parish church and spread the news.²¹⁰ It was therefore, a natural fit to have each of these parishes select a representative to form a cohesive Métis voice. Each representative was selected to represent their parish and in turn form a broad representation of the community during the convention.

At the meeting of November 16, a Proclamation, from Governor Mactavish, protesting the actions of the French Métis and characterizing them as unlawful, was presented to the delegates. James Ross, an English Métis, asserted that Fort Garry must now be relinquished or the Métis would be considered to be in rebellion. Riel clearly didn't agree.²¹¹ The French and English Métis were at odds over how to best have their grievances heard. The English wanted to allow William McDougall to enter the territory and then relay their concerns to him. The French

²⁰⁹ Stanley, *ibid*.

²¹⁰ See, "Antoine Vermette, Red River Pioneer", *supra* note 103 at 6 where he states "It was the custom ... to spread the news about June 1 in each year that a hunt was about to be organized, and the method adopted to do this was to have certain men make the announcement when people came out from church services in the various parishes."

²¹¹ *Canadian Antiquarian and Numismatic Journal*, 3rd Series, 1909, Vol. VI, Nos. 1 and 2 as quoted in Stanley, *supra* note 21 at 73 where Riel states: "Si nous rebellons contre la Compagnie qui nous vend et veut nous livrer, et contre le Canada qui veut nous acheter,...nous ne nous rebellons pas contre la suprématie anglaise, qui n'a pas encore donnée son approbation pour le tranfert définitif de ce pays ... de plus nous sommes fidèles à notre patrie. ... Nous voulons que le peuple de la Rivière Rouge soit un peuple libre. Aidons-nous les uns les autres. Nous sommes tous frères et des parents, dit Monsieur Ross, et c'est vrai. Ne nous séparons pas. Voyez ce que Monsieur Mactavish dit. Il dit que de cette assemblée peut venir un bien incalculable. Unissons-nous, le mal qu'il a redouté n'aura pas lieu."

refused and insisted that “McDougall could only be brought in over their dead bodies.”²¹² At this early meeting there were clearly some divisions between the French and English delegations. But the fact that the meeting was being held in spite of HBC and Canadian objections helped illustrate the importance of Métis interests in the territory, as well as their control over governance.

When the French and English delegates met again, Riel attempted to convince them that the next step was to form a Provisional Government. He argued that the Council of Assiniboia “a vraiment montré une faiblesse extrême dans ces derniers jours ... Qu’en conséquence il est temps que les habitants de la colonie songent à la formation d’un gouvernement provisoire pour une protection et pour traiter avec le Canada et forcer celui-ci à nous donner un mode de gouvernement responsable.”²¹³ The English were concerned about an armed response from Canada and could not, therefore, agree with Riel’s proposal. Facing opposition from within his French Métis community Riel spent November 23 trying to convince the French Métis that a provisional government was necessary to advance their concerns. He carried his point and the next day a unanimous French delegation proposed the formation of a Provisional Government. The English, still wary of the consequences of such action, decided to consult their constituents before committing to such a plan. The convention of English and French delegates was adjourned for a week, placing the next meeting on December 1 which was the scheduled day the transfer to Canada was to be made official. It was then that the Métis drafted their first list of rights.

²¹² Stanley, *ibid.*

²¹³ *Canadian Antiquarian and Numismatic Journal*, in Stanley, *ibid.*

On the expected day of transfer, McDougal, sent his proclamation to Red River which was posted around the settlement.²¹⁴ This had little effect in dissuading the parish delegates to abandon their cause. Rather, it prompted them to focus and by the end of the day they had produced a draft of rights which had broad acceptance amongst the delegates.²¹⁵ On December 8 Riel seized his opportunity to declare his peoples' rights. He issued a "Declaration of the People of Rupert's Land and the North-West," in which he stated a similar impression of international law as Macdonald "that a people, when it has no Government, is free to adopt one form of Government, in preference of another, to give or to refuse allegiance to that which is proposed." Riel declared the new government to be "the only and lawful authority now in existence in Rupert's Land and the North-West, which claims the obedience and respect of the people".²¹⁶ Riel was providing a basis of justification for the actions that the French Métis had initiated. However, gaining the adherence of the English Métis would take a few months longer. Yet, the declaration extended a hand to the Canadians through a willingness to "enter into such negotiations with the Canadian Government as may be favourable for the good government and prosperity of this people."²¹⁷ This action was followed on December 10 by the raising of the Provisional Government's flag²¹⁸ and on December 27 Riel was elected as the new president of the Provisional Government.²¹⁹ And so it was that the Métis had given a recognizable political face to their cause. Canada could not ignore them. Stanley summarizes the Métis situation at the end of 1869 as follows:

Thus, by the close of the year 1869, Louis Riel and the métis were, without striking a blow or shedding one drop of blood, complete masters of the Red River Settlement. The Fort, with large supplies of ammunition, stores and money, was in their hands; the English half-breeds were

²¹⁴ Sprague, *supra* note 18 at 44.

²¹⁵ *Ibid.*

²¹⁶ Co. 42/678; C.S.P., 1870, Vol. V, No. 12 as cited in Stanley, *supra* note 21 at 84.

²¹⁷ *Ibid.*

²¹⁸ Stanley, *ibid.* at 85.

²¹⁹ See Stanley, *ibid.* at 86.

either indifferent or mildly sympathetic; the Canadian appeal to arms had failed; sixty-five political prisoners were in close confinement; the Provisional Government had been proclaimed; and the disappointed Lieutenant-Governor with his discomfited 'Conservator of the Peace' was returning over the snows to Canada.²²⁰

Still, at that moment in time, the Provisional Government was only a body reflected of the French Métis population. It was neither opposed nor sanctioned by the English Métis. And, the Provisional Government was not viewed favourably by Donald Smith, an officer with the Hudson's Bay Company, who was selected to represent Canada to the people of Red River.²²¹

Smith arrived in Red River on the 27 of December, 1869, the same day Riel became President. His early impressions of the conditions at Red River were not positive. He found that the "state of matters at this time, in and around Fort Garry, was most unsatisfactory, and truly humiliating."²²² Smith's unsatisfactory view of Red River also extended to the Provisional Government: "On the 6th January, I saw Mr. Riel, and soon came to the conclusion that no good could arise from entering into any negotiations with his 'Council,' even were we to admit their authority, which I was not prepared to do."²²³ Smith's subsequent actions provide further indication that he did not respect the authority of the Provisional Government. For example, when given the opportunity to speak to the Red River representatives Smith

requested the Chairman and those near him to begin by insisting that all arms should be laid down, and that the flag then flying (fleur de lis and shamrock) should be replaced by the British ensign; this, they thought, would come better at an after-stage; but the opportunity of doing so now lost, never recurred.²²⁴

²²⁰ *Ibid.*

²²¹ "Donald A. Smith's Report" in Morton, *supra* note 32 at 25. Morton's collection contains the entire published report as well as sections of the original report which were removed so as to not offend the government's French supporters.

²²² *Ibid.* at 27 where he writes: "Upwards of sixty British subjects were held in close confinement as 'political prisoners;' security for persons or property, there was none; the Fort, with its large supplies of ammunition, provisions, and stores of all kinds, was in possession of a few hundred French half-breeds, whose leaders had declared their determination to use every effort for the purpose of annexing the Territory to the United States; and the Governor and Council of Assiniboia were powerless to enforce the law."

²²³ *Ibid.* at 27.

²²⁴ *Ibid.* at 31.

While Smith was unwavering in his unwillingness to acknowledge the validity of the Provisional Government he also saw that there was reason for the Red River residents to be apprehensive about the arrival of Canadians.

Smith recognized that some of the Canadians were making off with vast, valuable pieces of land and that the Métis wanted their land secured.²²⁵ New Canadian arrivals were claiming land prior to the active Métis resistance of 1869-70. Friesen notes that despite years of drought and crop failures, and the failure of the hunt in 1868:

settlers were arriving from Ontario and staking out squatter's claims that challenged metis, Indian, and company assumptions. It appeared that a land rush was about to be unleashed in a territory where neither a government nor system of justice would ensure customary rights.²²⁶

The Provisional Government was formed primarily to secure the land, especially for those Métis who were most vulnerable: "the very survival of the French and *métis* community, unready as it was for a new order it would no longer dominate, depended upon security of land titles, or at least upon new grants ..."²²⁷

VI. Conclusion

It can be argued that the Provisional Government was not, strictly speaking, a "Métis" government. Indeed, for the first few months it did not have the adhesion of the English Métis. But this adhesion was gained on February 10, 1870 with Riel, again, becoming President. Further, in March a Legislative Assembly was formed.²²⁸ However, it could also be said that the

²²⁵ *Ibid.* at 43-44 where he writes: "It is also too true that in the unauthorized proceedings of some of the recent Canadian arrivals, some plausible ground had been given for the feeling of jealousy and alarm with which the contemplated change of Government was regarded by the native population. In various localities these adventurers had been industriously marking off for themselves considerable, and in some cases very extensive and exceptionally valuable tracts of land, thereby impressing the minds of the people with the belief that the time had come when, in their own country, they were to be entirely supplanted by the stranger...a belief, however, which I have no doubt, might have been completely precluded by the prevention of all such operations, until Canada had fully unfolded her policy and shown the groundlessness of these fears."

²²⁶ Friesen, *supra* note 57 at 116.

²²⁷ Morton, *supra* note 32 at xv as cited in Chartrand, *supra* note 1 at 86.

²²⁸ Giraud, *supra* note 20 at 370-71.

call for parish representatives did not specify that only “half-breed” or “Métis” were to be involved in the process. But it should be noted that the Métis made up over 80% of the population of the settlement.²²⁹ A large majority of which were deeply committed to the cause. Friesen points out that although the different factions at Red River carried varying allegiances, “[t]he heart of the resistance lay with the men mobilized by Riel – the cartmen and boatmen who wintered in the settlement were quite prepared to serve as an army in a good cause.”²³⁰ And it was with this base of support that the Métis led by Louis Riel established a Provisional Government in the Red River region. This government, and no other, exerted control during the resistance of 1869-70. The extent of their independence is captured by Mr. O'Donoghue, one of the Métis representatives, who proposed options other than entering confederation:

Might we not do at least as well as an independent Colony, or almost anything else? We are independent now. Why not continue so? We are all reputed rich? Why not continue so? Why not, as another alternative, alluded to by the Chairman – why not look forward to annexation? With annexation to the States we would not have to give up any of our Territory, rights or privileges.²³¹

With this background established we can turn to Chapter two where I will explore how one might apply the law of Aboriginal title to the circumstances of the Red River Métis.

²²⁹ Canada, H.C. *Sessional Papers* (1871), no. 20, despatch no. 63 as cited in Chartrand, *supra* note 1 at 3-4 (footnote 12) where it is written: “Canada’s census of 1870 listed a total population of 11,960 persons, 5,720 ‘French-Half-Breeds’ and 4,080 ‘English-Half-Breeds.’”

²³⁰ Friesen, *supra* note 57 at 119.

²³¹ “The Proceedings In The Convention, February 3 to February 5, 1870” in Morton, *supra* note 32 at 17-18.

CHAPTER TWO: THE RECOGNITION OF MÉTIS ABORIGINAL TITLE

I. Introduction

Having considered some of the context of Métis occupation at Red River in chapter one, this chapter will look at some of the issues pertaining to recognition of that title in Canadian common law. I will explore the jurisprudential guidance on the nature of Aboriginal title as well as some of the particular historical problems associated with Métis identity as mixed ancestry people. This chapter, critical of the common law tests, argues that Métis title is properly understood, in consideration of the history of the region, as a title stemming from their maternal ancestors but rooted in their unique cultural and political occupation of the land that predated effective Crown control. Effective Crown control would be defined as the moment that Canada gained a legitimate presence in the Métis territory. As such, it is contended that the Métis are not Aboriginal peoples in the sense of being here at the time European cultures contacted the peoples of North America. Rather, the Métis are an Aboriginal people of *Canada* and the Canadian nation (such as it was) gives the appropriate Crown framework for recognition of Métis title.

II. A General Background on Aboriginal Title

Canadian jurisprudence on Aboriginal title has pointed to 19th century decisions of Chief Justice Marshall of the Supreme Court of the United States. Marshall understood that Aboriginal claims to land originated in Aboriginal people's prior existence on the land. He explained:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.²³²

²³² *Worcester v. Georgia* (1832) 31 U.S. 515 at 542-543. Also see, *Johnson v. M'Intosh* (1823) 21 U.S. 543 at 574. While this chapter focuses heavily on the case law, critical assessments of such case law have been undertaken in

However, the “pre-existing rights” of the “ancient possessors” were not immediately recognized in Canadian colonial legal decisions. For example, in 1888 the Judicial Committee of the Privy Council (JCPC) found that the *Royal Proclamation of 1763* gave rise to Aboriginal land interests.²³³ In *St. Catherine’s Milling* Lord Watson explained that the *Royal Proclamation* showed that “the tenure of the Indians was a personal and usufructuary right, dependent on the good will of the Sovereign.”²³⁴ The “good will of the Sovereign” was displayed in the *Royal Proclamation* which Lord Watson understood in the following way:

The lands reserved are expressly stated to be ‘parts of Our dominions and territories;’ and it is declared to be the will and pleasure of the sovereign that, ‘for the present,’ they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion.²³⁵

So the Crown allowed for recognition of Aboriginal title and through the same authority claimed the ability to extinguish that title. That authority was based in the Crown’s “paramount estate”²³⁶ which gave the Crown the “absolute exclusive right to extinguish the Indian title either by conquest or by purchase”.²³⁷ But Canadian common law did not hang on to the notion that a royal decree gave birth to Aboriginal title.

In the *Calder* decision of 1973 six judges of the Supreme Court of Canada found that Aboriginal title did not have to be rooted in formal legal recognition from the Crown. Justice

the work of esteemed scholar Kent McNeil. Some of his more recent works on Aboriginal title include: “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 Sask. L. Rev. 281, “The Vulnerability of Indigenous Land Rights in Australia and Canada” (2004) 42 Osgoode Hall L. J. 271, “Self-Government and the Inalienability of Aboriginal Title” (2002) 47 McGill L. J. 473, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 Ottawa L. Rev. 301, “Aboriginal Title and Section 88 of the *Indian Act*” (2000) 34 U.B.C. L. Rev. 159, and “Aboriginal Title on the Ground: Establishing and Protecting Occupation”, in Bruce W. Hodgins, Ute Lischke, and David T. McNab, eds., *Blockades and Resistance: Studies in Actions of Peace and the Temagami Blockades of 1988-89* (Waterloo: Wilfrid Laurier University Press, 2003), 147.

²³³ *St. Catherine’s Milling and Lumber Company v. The Queen*, (1888), 14 A.C. 46 (P.C.) at 54 [*St. Catherine’s Milling*].

²³⁴ *Ibid.*

²³⁵ *Ibid.* at 54-55.

²³⁶ *Ibid.* at 55 where Lord Watson writes: “... there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever that title was surrendered or otherwise extinguished.”

²³⁷ *St. Catherine’s Milling and Lumber Co. v. Ontario (Attorney General)* (1887), 13 S.C.R. 577 (Q.L.) per Sir. W.J. Ritchie C.J.

Hall explained that “[p]ossession is of itself at common law proof of ownership”.²³⁸ Through this recognition Justice Hall and two others bypassed any need to use the Royal Proclamation, or any other legislative decree, as a legal basis for Aboriginal title. More specifically, Hall’s decision found that: “The aboriginal Indian title does not depend on treaty, executive order or legislative enactment.”²³⁹ Instead, Aboriginal title is displayed through prior occupation of the land by Aboriginal peoples and the claim remains in effect until it is extinguished by the Crown. Further, Hall’s judgment specified that Aboriginal title crystallized at the time of sovereignty.²⁴⁰ Although three other judges, led by Justice Judson, characterized Aboriginal title in more fragile terms, six of the seven judges found that Aboriginal title could exist without reliance upon Royal decree or legislative act.²⁴¹ Justice Hall’s reasoning was eventually adopted in later decisions.

Building on Justice Hall’s understanding, in 1980 the Federal Court in the *Baker Lake* decision looked to set out four features for proving Aboriginal title through possession:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time a sovereignty was asserted by England.²⁴²

²³⁸ *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313 (Q.L.) [*Calder*] per Hall J. Also see, *The Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 180 at para. 78 [*Baker Lake*].

²³⁹ *Calder, ibid.* (Q.L.)

²⁴⁰ *Ibid.* (Q.L.) where the Hall J. wrote: “The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty ... they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament in Ottawa.”

²⁴¹ This was later supported in *Baker Lake*, *supra* note 238 at para. 78 where the Court explains that the *Calder* decision supports “the general proposition that the law of Canada recognizes the existence of an aboriginal title independent of The Royal Proclamation or any other prerogative act or legislation. It arises at common law.” And, in *Paulette et al. and Registrar of Titles* (No. 2), (1973) 42 D.L.R. (3d) 8, (Q.L.) [*Paulette*] the Court states: “In the *Calder* case it would appear that both Mr. Justice Judson and Mr. Justice Hall in writing the two opposing judgments agree that even without the Royal Proclamation of 1763 there can be such a legal concept as Indian title or aboriginal rights in Canadian law.” And, *Guerin v. Canada*, [1984] 2 S.C.R. 335 [*Guerin*] (Q.L.) at para. 89: “Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it.”

²⁴² *Baker Lake, ibid.* at para. 80.

Each of these criteria are problematic and are illustrative of the formalistic barriers that the law can construct. *Baker Lake* was an expression of the common law of the time and it is worth exploring for several reasons. The criteria set out above have not changed a great deal in more recent years at the Supreme Court level. As such, it is worthwhile to examine these notions near their origins in order to see how, from the outset, Aboriginal title has been a problematic concept. Also, since *Baker Lake* discusses Aboriginal title in Rupert's Land, it is relevant for this present study because, as this thesis has already established, the Métis were residents of Rupert's Land. Therefore, I will explore the four features of Aboriginal title enumerated by the Federal Court.

First, the requirement of "organized society" is reflective of a time when Aboriginal people were thought of as "savages" and employs myths that somehow Aboriginal people were less than fully human.²⁴³ Indeed, this notion was adopted from the Privy Council's decision in *Re Southern Rhodesia* in 1919 where the JCPC refers to a scale of "social organization".²⁴⁴ To impart such criteria, even if acknowledging that Aboriginal people were "organized", is to make Aboriginal peoples prove that which is assumed elsewhere.

Second, the occupation requirement seems to operate in obvious contradiction to Crown occupation of vast Canadian wilderness. That is to say that Canada assumes no duty to actually occupy the land within its borders. Instead, according to the common law the declaration of sovereignty is enough to claim jurisdiction over that land. It also operates in contradiction of the treaty policy of the numbered treaties where the federal government did not seek proof of Aboriginal title and sought extinguishment of vast territories regardless of the level of

²⁴³ See generally, D'Arcy Vermette, *Colonial Oppression and the Law: Myth, Voice, Culture and Identity in Aboriginal Rights Discourse* (LL.M. Thesis, Queen's University Faculty of Law, 2004) [Unpublished] Chapter Two "Colonial Myths and Legal Fictions".

²⁴⁴ *Re Southern Rhodesia* [1919] A.C. 211 (P.C.) at 233-34.

occupation. That is, treaty negotiations proceeded as if all lands were held under Aboriginal title.²⁴⁵ As we will see later, the SCC has opted for a restrictive interpretation of Aboriginal title under section 35(1) Aboriginal rights.

Third, the requirement of exclusive occupation imparts a notion of property which was not necessarily shared by Aboriginal people. For example, in *Paulette et al. and Registrar of Titles (No. 2)* evidence was given which made Morrow J. conclude: “While each regional band feel [sic] free to enter into another’s region, and there did not appear to be any concept of trespass, such intrusions were always looked upon and treated as temporary.”²⁴⁶ This temporary sharing of land displayed the respect that was shared amongst the Aboriginal communities in that case.²⁴⁷ It should be noted that such customary land use can be used to reinforce exclusive occupation.²⁴⁸ But the ability to share the land cannot diminish from the importance of displaying exclusive occupation because “the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.”²⁴⁹ This, of course, is not a logical extension. Shared historical occupation merely indicates that use and occupation, under a modern Aboriginal title claim, would also be shared. Previously, the Court has recognized the need to be flexible in responding to the context at hand when deciding Aboriginal land issues.²⁵⁰

²⁴⁵ Chartrand, *supra* note 1 at 79. See footnote 305 where he writes: “When the Crown extinguished title in the treaty areas, it did not concern itself with legal proof of aboriginal title claims.”

²⁴⁶ *Paulette*, *supra* note 241.

²⁴⁷ *Ibid.* where the Court writes: “The chief of the Hay River Band, Chief Daniel Sonfrere, explained how in general the people of each band respected the areas of others.”

²⁴⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*] at para. 157 where the Court writes: “As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.”

²⁴⁹ *Ibid.* at para. 155.

²⁵⁰ See *R. v. Kruger*, [1978] 1 S.C.R. 104 (Q.L.) 1 where the court writes: “If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.”

This recognition should bring into question the need for defining a set of key features of Aboriginal title prior to hearing the claim and understanding the context at hand.

Fourth, and most immediate to the present study, using the time of sovereignty as a determinant of Aboriginal title is misplaced.²⁵¹ If the Supreme Court is serious about protecting Aboriginal people's unique cultures then Aboriginal title needs to be construed in a manner which respects the development of Aboriginal cultures post-assertion of Crown sovereignty. A claim of Crown sovereignty, on its own, does little to affect the lives and cultures of Aboriginal people. However, expressing sovereignty through corresponding action which affects Crown authority over the territory of Aboriginal people necessarily requires a reconciliation of claims. That is to say, the emergence of effective Crown governance, infringement of Aboriginal lifestyles, or direct negotiation between the Crown and Aboriginal peoples calls into question the content and meaning of Aboriginal rights including Aboriginal title. Indeed, as the Australian High Court in *Mabo* explains: "absolute and beneficial Crown ownership can be acquired, ... by an exercise of the appropriate sovereign power."²⁵² Simply asserting sovereignty is hardly an expression of appropriate power. In fact, it amounts to a very minimal expression of both power and intention.²⁵³

²⁵¹ This time period was unequivocally adopted by the Supreme Court of Canada in *Delgamuukw*, *supra* note 248 at para. 152. Also see, *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 [*Mitchell*] at para. 10.

²⁵² *Mabo and Others v. Queensland (No. 2)*, (1992) 175 CLR 1 [*Mabo*] at para. 56. Per Brennan J.

²⁵³ It might be noted here that international law requires more than the mere assertion of sovereignty to legitimate title. Indeed, the assertion of sovereignty, as *Mabo ibid.* explained, still needs to be accompanied by the appropriate exercise of that power. For more on *Mabo*, see Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" [1996] 1 *Aus. Indig. L. Reporter* 181-221 [Racial Discrimination]. For more on the development of the legal consequences of sovereignty see, Ken MacMillan, *Sovereignty and Possession in the English New World: Legal Foundations of Empire, 1576-1640* (Cambridge, U.K.: Cambridge University Press, 2006). Also see, Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester, U.K., Manchester University Press, 2002) at 61-84 where he explains that the denial of Aboriginal people's sovereignty has been used to inflate the imposition of European desires. Other rhetorical strategies have been used throughout history to undermine the legitimacy of Aboriginal interests in land. For example, the doctrine of discovery has been used to limit Aboriginal sovereign rights. This doctrine is laid out in *Johnson v. M'Intosh*, *supra* note 232. For an extensive background on that case, see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005). And Christianity, civilization and natural law have each

It can be argued that the problem with Métis Aboriginal title is, obviously, that it crystallized post-assertion of sovereignty. One might argue that English sovereignty in the Northwest appeared no later than May 2, 1670,²⁵⁴ as this was the date on which Rupert's Land was transferred to the "Hudson's Bay Company by Royal Charter of Charles II May 2, 1670."²⁵⁵ For this to be a functioning basis for measuring Aboriginal title, one would have to accept that the Royal Charter was a valid assertion of sovereignty *and* that sovereignty can be made valid by mere assertion *and* that the boundaries of Rupert's Land encompassed the territorial claims of the Métis. However, if the assertion of sovereignty is accepted as being equivalent to actual sovereignty, as it was in *Hamlet of Baker Lake*, then the Métis clearly did not have Aboriginal title to the land at the time of the declaration of sovereignty that could be recognized by the common law. With the issuance of the Royal Charter of 1670 the Crown exercised its authority over the territory by granting the Hudson's Bay Company exclusive authority to trade, and limited powers of government. Yet, this Charter also illustrates the ineffectiveness of a mere claim of sovereignty. The Royal Charter had little if any effect on Aboriginal populations. For example, the Royal Charter of 1670 did not extinguish Aboriginal title,²⁵⁶ and it was HBC and Canadian policy "to conclude agreements with the aborigines before dealing with the land in a

been used with rhetorical wizardry to justify wars against and dispossession of Aboriginal peoples. For example, see Anthony Pagden and Jeremy Lawrance eds. *Vitoria: Political Writings* (Cambridge, U.K., Cambridge University Press, 1991), and Herma Briffault, trans., Bartolomé de Las Casas, *The Devastation of the Indies: A Brief Account* (Baltimore, John Hopkins University Press, 1992), and Stafford Poole, C.M. trans., Bartolomé de Las Casas, *In Defense of the Indians* (Dekalb, Illinois, Northern Illinois University Press, 1992) where it is interesting to note that even in his defense of the Indians, Las Casas finds a way to justify war against them. For more on international legal history, politics and mechanism as they apply to Aboriginal peoples see, Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge, U.K., Cambridge University Press, 2003) and Robert A. Williams, Jr. *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

²⁵⁴ *Baker Lake*, *supra* note 238 at para. 2.

²⁵⁵ *Ibid.* at para. 27.

²⁵⁶ *Ibid.* at para. 5.

manner necessarily inconsistent with their aboriginal title.”²⁵⁷ That is to say that the Crown acknowledged that sovereignty was not necessarily inconsistent with Aboriginal title. It is, therefore, difficult to ascertain why an assertion of Crown sovereignty would, *on its own*, impair the further development of Aboriginal title.

Aboriginal lifestyles didn’t remain static through interaction with the HBC or the fur trade economy. But, changes in lifestyle cannot be equated with submission under the rule of another. Indeed, the HBC was a trading company that didn’t have any pretensions about settling or ruling over the territory until Lord Selkirk wished to set up the Red River colony. Even then the exercise of sovereign authority was limited to controlling Crown subjects.²⁵⁸ Until the sovereign authority was exercised in such a manner that it necessarily required a reconciliation of interests, Aboriginal people were free to develop their cultures as they required. Simply put, it is time to move beyond the notion that the mere casting of European eyes upon Aboriginal people’s lands crystallized Aboriginal people’s rights and those of the Crown. As with European discovery, a declaration of sovereignty would have had virtually no impact on Aboriginal people. It is only when this sovereignty comes into conflict with the existing authority of the Aboriginal population that rights need to be reconciled with assertions of authority. This view corresponds to the practicalities of the Canadian fur trade era:

It seems to me that the grant of title to the Company was intended solely to define its ownership of the land in relation to the Crown, not to extinguish the aboriginal title. That conclusion is consistent with what had already happened in other North American colonies where, unlike Rupert’s Land, settlement had made necessary the extinguishment of aboriginal title. It is consistent with the policy of the Company itself, expressed as early as 1683, with respect to lands required for trading posts. It is consistent with what the Company in fact did, through its surrogate

²⁵⁷ *Ibid.* at para. 75. This could also indicate that the Crown was merely inclined to dispense with some formalities despite the assumption of ownership which came along with the assertion of sovereignty. Here I would refer the reader to the definition of racism which I set out in the introduction.

²⁵⁸ *Ibid.* at para. 98 where the Federal Court writes of the Royal Charter of 1670: “The Company’s legislative authority in the colony was limited to the making of reasonable laws, not repugnant to the laws of England, with their application explicitly restricted to the Company itself, its officers and servants. The Company’s judicial jurisdiction was limited to the application of English civil and criminal law to persons ‘belonging to’ or ‘that shall live under’ the Company.”

Lord Selkirk, the only time it was required to make provision for a settlement. It is consistent with what the Canadian government has done since the admission of Rupert's Land to Canada.²⁵⁹

The Court in *The Hamlet of Baker Lake* goes on to describe the Hudson's Bay Company as being "very much in the position of the Crown" but that its "occupation of the territory in issue was, at most, notional."²⁶⁰ Indeed, the Royal Charter "did not purport to supercede with English law, the laws by which the aborigines governed themselves, nor did it authorize the Company to legislate in respect of aborigines nor to adjudicate in respect of them or their laws."²⁶¹ So, in such circumstances it is troubling to impose a strict timeframe of the declaration of sovereignty upon Aboriginal title.

However, the concern for the Métis of the Red River region could be moot if Crown sovereignty occurred at a later date. Can sovereignty be achieved by merely declaring it to be so? Brennan J., in *Mabo*, cites three ways of acquiring sovereignty: "International law recognized conquest, cession, and occupation of territory that was terra nullius as three of the effective ways of acquiring sovereignty."²⁶² Acquiring sovereignty merely by declaration would indicate the reliance upon myths that Aboriginal people were "without laws, without a sovereign and primitive in their social organization."²⁶³

The problem becomes more clearly displayed with further consideration of the word "sovereignty":

Sovereignty (sahv-[ə]-rin-tee). **1.** Supreme dominion, authority, or rule. **2.** The supreme political authority of an independent state. **3.** The state itself.

'It is well to [distinguish] the senses in which the word Sovereignty is used. In the ordinary popular sense it means Supremacy, the right to demand obedience. Although the idea of actual power is not absent, the prominent idea is that of some sort of title to exercise control. An ordinary layman would call that person (or body of persons) Sovereign in a State who is obeyed because he is acknowledged to stand at the top, whose will must be expected to prevail, who can get his own way, and make others go his, because such is the practice of the country.

²⁵⁹ *Ibid.* at para. 101.

²⁶⁰ *Ibid.* at para. 102.

²⁶¹ *Ibid.* at para. 99.

²⁶² *Mabo*, *supra* note 252 at para. 33. Per Brennan J.

²⁶³ *Ibid.* at para. 36.

Etymologically the word of course means merely superiority, and familiar usage applies it in monarchies to the monarch, because he stands first in the State, be his real power great or small.’ James Bryce, *Studies in History and Jurisprudence* 504-05 (1901).²⁶⁴

I would submit that rather than the date of sovereign *assertion* the Court should focus upon how the actual *exercise* of sovereign power conflicts with the lifestyles, rights or claims of Aboriginal people. A similar notion is adopted by the Supreme Court of Canada in *Powley* where it explains that Métis rights can best be accommodated by a test which focuses on the time period in which “Europeans *effectively established political and legal control in a particular area.*”²⁶⁵ As discussed previously, it is evident that the assertion of sovereignty in the Red River region resulted in ineffectual and minimal application of sovereign power.

The importance of sovereignty, and the underlying title gained from it, is that it is used to justify Crown action in acquiring absolute ownership of lands:²⁶⁶

Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown’s territory).²⁶⁷

Without the directed exercise of “sovereign power to grant an interest in land” or to “appropriate to itself ownership of parcels of land” there is no effect upon Aboriginal claims. The failure of the Crown to formally recognize or deal with Aboriginal claims did not extinguish Aboriginal claims or otherwise diminish the presence of such claims.²⁶⁸ The very absence of direct legislative measures can indicate the Crown’s toleration of both current and future Aboriginal claims.²⁶⁹ By imposing the date of the assertion of Crown sovereignty, the Court has not fully

²⁶⁴ “Sovereignty” *Black’s Law Dictionary*, *supra* note 142 at 1402.

²⁶⁵ *Powley*, *supra* note 2 at para. 37.

²⁶⁶ *Mabo*, *supra* note 252 at para. 55. Per Brennan J. and at para. 66 where Brennan J. writes: “Once traditional native title expires, the Crown’s radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.”

²⁶⁷ *Ibid.* at para. 52.

²⁶⁸ *R. v. Cote*, [1996] 3 S.C.R. 139 [*Cote*] at para. 44.

²⁶⁹ *Ibid.* at para. 52.

overcome its recognition that “...a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants”.²⁷⁰ Certainly then, the crystallization of Aboriginal title can only occur when exercise of sovereign power begins affecting Aboriginal claims to land. For example, the Crown exercised its authority in a way which was contrary to Aboriginal title by carrying out the treaty process.²⁷¹

III. The Supreme Court of Canada and the Nature of Aboriginal Title

With the Supreme Court of Canada’s decision in *Delgamuukw*, the Court was able to interpret the content of Aboriginal title. With the exception of the requirement that Aboriginal title “arises from possession before the assertion of British sovereignty”²⁷², here, as with *Baker Lake* the SCC still relies on a model of British dominance-by-stating-it-to-be-so rather than any change effectuated on the ground. Even so, Métis occupation of the Red River region seems consistent with the characteristics of Aboriginal title. The central characteristic of Aboriginal title is that it:

...arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law.²⁷³

The Métis were certainly in physical occupation of the Red River region prior to *Canada* gaining authority over the territory. I do not think it necessary to show that this title was “exclusive” or that it had completely displaced Indian title to the same territory. Indeed, there is nothing in the way in which the Métis viewed their title to indicate that it was meant to discount the prior and

²⁷⁰ *Guerin*, *supra* note 241.

²⁷¹ *Cote*, *supra* note 268 at para. 43 where the Court wrote: “Under the British law of discovery, the British Crown assumed ownership of newly discovered territories subject to an underlying interest of indigenous peoples in the occupation and use of such territories. Accordingly, the Crown was only able to acquire full ownership of the lands in the New World through the slow process of negotiations with aboriginal groups leading to purchase or surrender.”

²⁷² *Delgamuukw*, *supra* note 248 at para. 114.

²⁷³ *Ibid.* at para. 126. Also see para. 147 where the Court writes: “the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on the land; the latter includes, but is not limited to, their systems of law.” And at para. 114 where the Court identifies “a second source for aboriginal title – the relationship between common law and pre-existing systems of aboriginal law.”

possibly concurrent title of the First Nations people. In fact, the Métis position on the matter took the view that it was the fact of their descendency from the original residents which gave them a valid claim to the land.²⁷⁴

This occupation was also reflected in the laws which governed such activities as the Métis buffalo hunt, the customary practices the Métis enforced over the fur trade, as well as the customary practices of taking up river lots.²⁷⁵ Referencing Aboriginal law forms part of a broader investigation into the nature of Aboriginal occupancy on that land. This occupancy can be proved by referring to the “activities ... and the uses to which the land has been put by the particular group.”²⁷⁶ Along with Aboriginal people’s physical occupation, the political and cultural occupation, discussed earlier, also serves as evidence of occupation.²⁷⁷

Using Aboriginal laws and customs as proof of occupancy helps illustrate that Aboriginal title is a communal right. As a right held by the community, decisions with respect to that title are to be made by the community.²⁷⁸ The Aboriginal title will only be recognized if the

²⁷⁴ See, *Ens supra* note 136 at 115 where he writes: “Debate over who had title began in 1860 when Peguis, the Saulteaux Chief, challenged the HBC claim to land in the Red River Settlement with the simple argument that the Indians had never sold it to Lord Selkirk and the Hudson’s Bay Company. That prompted the Métis to hold a large meeting at the Royal Hotel near Fort Garry to discuss their position. The most eminent Métis traders and hunters – William Dease, Urbain Delorme, Pierre Falcon, William Hallet, George Flett, and William McGillis – all spoke, and all agreed that, the treaty being one of friendship, not sale, the HBC had not received title to the Red River Settlement by treaty with Peguis in 1817. Indeed, it was their view that the Métis had a legitimate claim to the land and, moreover, that their claim should have priority; they were descendents of the Cree, the first residents of the area, while the Saulteaux had arrived in the Red River region only shortly before 1817. Accordingly, the meeting concluded with an agreement by all present that since no proper arrangements had been made with the Native tribes of the region and since the Métis were now on the land and the immediate representatives of the first tribes in the region, the Métis should use every legitimate means to advance their claim for consideration in any arrangement which the Imperial Government might see fit to make.”

²⁷⁵ Here I am using “laws” in an informal sense to refer to those rules which are used to help regulate behaviour. However, it is clear that at least in relation to the buffalo hunts, those rules functioned very much in a formal legal sense. They were clearly articulated and carried known consequences for their breach. For example, see the firsthand account of Antoine Vermette, *supra* note 103.

²⁷⁶ *Delgamuukw, supra* note 248 at para. 128. Also see, *Marshall; Bernard, supra* note 13 at para. 56.

²⁷⁷ *Delgamuukw, ibid.* at para. 141 where the Court notes that Aboriginal people’s prior occupation had two aspects: “first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.”

²⁷⁸ *Ibid.* at para. 115 where the Court writes: “A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is

“...group can demonstrate ‘that their connection with the piece of land ... was of a central significance to their distinctive culture’.”²⁷⁹ The Supreme Court does not make this requirement overly burdensome. As long as the land was occupied pre-sovereignty and the Aboriginal group has “maintained a substantial connection” with it then the land will be of central significance to the Aboriginal culture.²⁸⁰ But this significance also acts as a restraint on the possible uses of that land by the Aboriginal title holders. That is to say, the uses of the land cannot be “irreconcilable with the nature of the group’s attachment to that land.”²⁸¹ Because the Métis demands and negotiation for Aboriginal title occurred at relatively the same moment in history, there was never a concern that they would use the land in a manner contrary to their title. Indeed, this restriction is a modern expression of the common law and it also seems to fly in the face of Aboriginal people’s reasons for seeking recognition of their title. Namely, the government of Canada is failing to acknowledge an Aboriginal claim or is infringing on their use of the land. Still, despite Aboriginal people seeking protection for their land, the Supreme Court chose to protect a myriad of government objectives which can justify an infringement of Aboriginal title.²⁸²

another feature of aboriginal title which is sui generis and distinguishes it from normal property interests.” Also see, *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1524 [*Campbell*] at para. 114 where the Court writes: “On the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal.”

²⁷⁹ *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*] at para. 26 as cited in *Delgamuukw*, *ibid.* at para. 150.

²⁸⁰ *Delgamuukw*, *ibid.* at para. 151. The issue of continuity was characterized in *Marshall; Bernard*, *supra* note 13 at para. 67 as follows: “The third sub-issue is continuity. The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group’s connection with the land must be shown to have been ‘of a central significance to their distinctive culture’: *Adams*, at para. 26. If the group has ‘maintained a substantial connection’ with the land since sovereignty, this establishes the required ‘central significance’: *Delgamuukw*, *per* Lamer C.J., at paras. 150-51.”

²⁸¹ *Delgamuukw*, *ibid.* at para. 117.

²⁸² *Ibid.* at para. 165 where the Court writes: “...the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or

The introduction of section 35(1) of the *Constitution Act, 1982* brought in protection preventing the extinguishment of Aboriginal title even if by “clear legislative act”.²⁸³ However, with this protection aside, the Supreme Court interpreted section 35(1) as merely enshrining common law doctrine.²⁸⁴ In this way, recognizing Aboriginal rights in the Constitution was a lateral move where the common law *became* constitutional law. As such, Aboriginal title is merely another Aboriginal right to be defined and applied by the Courts independent of other Aboriginal rights.²⁸⁵ If the common law rules for Aboriginal title are unable to be met by a claim, the Court is willing to find that other usufructuary rights might be present such as hunting or fishing rights.²⁸⁶

the task of the court is to sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land...²⁸⁷

What the Court makes clear by aiming to “assess the evidence and then find the equivalent modern common law right” is that “Aboriginal” title has little to do with Aboriginal people, laws, or customary practices. This is because those facets of Aboriginal occupation are used in

endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.”

²⁸³ *Marshall; Bernard*, *supra* note 13 at para. 39.

²⁸⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at para. 28 where the Court writes: “...s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law...At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights...it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law.”

²⁸⁵ *Marshall; Bernard*, *supra* note 13 at para. 53 where the majority writes: “Different aboriginal practices correspond to different modern rights. This Court has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow ... It is more accurate to speak of a variety of independent aboriginal rights.”

²⁸⁶ *Ibid.* at para. 54, 57, 58-59. Here the Court finds that seasonal activity falls “short of title” and, instead gives rise “to aboriginal hunting and fishing rights.”

²⁸⁷ *Ibid.* at para. 77.

an evidentiary capacity only. Even though the court will initially look towards Aboriginal practices or law for evidence, the content of the right is left in the hands of the common law.

One of these characteristics of the common law right which the Court heavily relies upon is “exclusive occupation”.²⁸⁸ Although this facet of Aboriginal title can be difficult to prove outright, the Métis have the luxury of the relatively recent historical record. Particular examples of exclusive occupation from the Red River Métis include the Métis armed interventions, Métis control through a representative Provisional Government and successful negotiations with Canada.²⁸⁹ The Court notes that exclusive occupation can, at the same time, be shared occupation.²⁹⁰ For this reason, such evidence of Métis exclusive occupation is not diminished by the presence of other Aboriginal groups in the Red River region.²⁹¹

While the majority decision in *Marshall; Bernard* provides a restrictive and backwards looking judgment which tends to focus on the common law rather than the communal and multi-faceted purposes to which Aboriginal lands might be put, the Métis of Red River do not have to face this test.²⁹² This is because the Métis of the Red River region have long ago negotiated for recognition and compensation of their Aboriginal title. As the past two chapters have shown there are ample ways that Métis title can be legitimately construed. Still, the matter of title being crystalized at the moment of the assertion of sovereignty remains a sticking point for the Métis.

²⁸⁸ *Ibid.* at para. 62, 64-65, 70.

²⁸⁹ Additionally, the interruption of Canadian surveyors and Métis refusal to allow Canadian representatives to enter the Red River region are unequivocal displays of their exclusive control of the territory they occupied. See, generally, Sprague, *supra* note 18, Chapter Three, “Asserting Canadian Authority over Assiniboia”, 33-54.

²⁹⁰ *Marshall; Bernard*, *supra* note 13 at para. 57 where the majority writes: “Exclusive occupation means ‘the intention and capacity to retain exclusive control’, and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent ... Shared exclusivity may result in joint title...”

²⁹¹ Indeed, it may be strengthened by their presence. For an indication of the relationship between Métis and First Nations, see Alexander Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories including The Negotiations on Which they were Based* (Calgary: Fifth House Pubs., 1991).

²⁹² See generally the strong dissenting opinion of LeBel J. in *Marshall; Bernard*, *supra* note 13 especially at para. 136 where LeBel argues for a greater role of the Aboriginal perspective: “Taking into account the aboriginal perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criterion. The group’s relationship with the land is paramount ... The mere fact that the group travelled within its territory and did not cultivate the land should not take away from its title claim.”

However, historical evidence does not support the application of this test to the Métis. As I will argue below, Métis title properly understood must recognize that the Métis are Aboriginal peoples as well as be linked to a time when Crown sovereignty was necessarily inconsistent with Métis title.

IV. A Métis Understanding of Title

As with all Aboriginal title, Métis title is characterized by the nature of their occupation of land. Thomas Flanagan has argued that a consequence of the Métis' European extraction is "[w]hen Manitoba entered Confederation, the Metis were British subjects with full civil and political rights, and all the attendant responsibilities."²⁹³ By the same logic, the Métis also inherited Aboriginal interests, rights and responsibilities from their maternal heritage.²⁹⁴ They were, after all, people born of the land. They had no other homeland from which to derive their rights. Sealey and Lussier make this point in the following words:

These Métis people are the true Natives of Canada. Indians and Europeans were immigrants – only the millennia separated their penetration into the New World. The meeting of the two races produced a mixture which was not from another land but whose sole roots were in the New World.²⁹⁵

While illogically asserting that Indians were immigrants, Sealey and Lussier's point that the Métis are Aboriginal people is indicated by their distinct cultural and political consciousness.²⁹⁶

²⁹³ Flanagan, *supra* note 7 at 232. Flanagan sees the extinguishment of the Métis "Indian title" as a way to "respect" the legal status that the Métis carried as British subjects. For Flanagan, it would seem, that there is nothing particularly Aboriginal about the nature of Métis Aboriginal title. This begs the question: Why did the Métis insist on a land grant based on their "Indian title"? Why not simply ask for additional lands as the first immigrants? Or a cash payment?

²⁹⁴ Sealey, *supra* note 73 at 3: "As descendants of Indian mothers, the Metis claimed, and had their claim accepted in custom and statute, as having an aboriginal claim to the land."

²⁹⁵ Sealey and Lussier, *supra* note 37 at 9.

²⁹⁶ It can hardly be said that Indians are immigrants. Various Aboriginal nations occupied this land as original settlers. This occupation, both physical, cultural, and political is the very basis for Aboriginal title as recognized in the legal systems of the political/legal systems of the immigrant populations. This is made clear in *Calder*, *supra* note 238 (Q.L.): "...aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion,..."

The conflict between Métis expression of Aboriginal title and the rights and privileges they assumed as British subjects is not a new phenomenon.²⁹⁷

The Métis tended to express their claim to title not merely in terms of their own rights, but also through a recognition of their ancestors.²⁹⁸ Indeed, on February 1, 1870 the delegates of the Métis government discussed the differences between the type of claims that they were pursuing for Indians, and those of more “civilized” people. A portion of that conversation is reproduced below:

Mr. Ross – As a Half-breed of this country, I am naturally very anxious to get all rights that properly belong to Half-breeds. I can easily understand that we can secure a certain kind of right by placing ourselves on the same footing as Indians. But in that case, we must decide on giving up our rights as civilized men. The fact is we must take one side or the other – we must either be Indians and claim the privileges of Indians – certain reserves of land and [illegible] compensation of blankets, powder and tobacco (laughter) or else, we must take the position of civilized men and claim rights accordingly. We cannot expect to enjoy the rights and privileges of both the Indian and the white man. Considering the progress we have made and the position we occupy, we must claim the rights and privileges which civilized men in other countries claim.

Mr. Thibert – The rights put forward by Half-breeds need not necessarily be mixed up with those of Indians. It is quite possible that the two classes of rights can be separate and concurrent. My own idea is that reserves of land should be given the Half-breeds for their rights.

Mr. Riel (French) – The Half-breeds have certain rights which they claim by conquest. They are not to be confounded with Indian rights. Great Britain herself holds most of her possessions by right of conquest. In conclusion he moved that the article pass with the addition of the words, “as soon as possible.”

Rev. H. Cochrane seconded the motion which carried.²⁹⁹

²⁹⁷ It might be useful to analogize how the courts have dealt with competing origins of laws in other contexts. For example, in *Connolly v. Woolrich and Johnson et al.* (1867), 17 R.J.R.Q. 75 [*Connolly*] a non-Aboriginal trader, married a Cree woman according to Cree custom. He later married a non-Aboriginal woman and, upon his death, he left his estate to his second wife. His will was challenged by his children from his first marriage. The Court found that *both* marriages created an equal interest in Connolly’s estate. This case illustrates that colonial law is capable of recognizing and empowering Aboriginal laws in particular circumstances.

²⁹⁸ Sprague, *supra* note 18 at 57 where he writes: “Ritchot’s reply was to resurrect the demand...that persons of part-Indian ancestry should claim a share of the compensation paid to Indians in recognition of their inherited part of the aboriginal title.”

²⁹⁹ *MMFI*, *supra* note 14 at para. 607. Also see Darren O’Toole, “Métis Claims to ‘Indian’ Title in Manitoba, 1860-1870” (2008) *The Can. J. of Nat. St.*; 28:2 241-271 at 255 explains that “[t]he only logical conclusion that explains why the Métis were so concerned about the extinction of Indian title is that they believed that they themselves held a co-existing radical or derivative Indian title, and in either case had a right to compensation for its extinction.” Also see, Ens, *supra* note 136 for an examination of the origins of Métis claims to title.

While it can be argued that the majority of voices noted the difference between the claims of Métis and Indians for the purposes of trying to protect Indian interests, it is not clear what strategy was ultimately employed to protect “half-breed” interests.³⁰⁰ Indeed, as Thibert pointed out, Métis can have reserves and still not be mixed up with the claims of Indians. Because they were discussing article 15 of their list of rights, this conversation is not illustrative of how the Métis ultimately viewed their own interests.³⁰¹ However, it does give some insight into the options available to them and the extent to which issues of Aboriginal title were still very much in their infancy during that time period. Based on this conversation one would get the impression that the Métis had not developed any common understanding of the roots of their own claim to title. This might be true. Considering that prior to 1869-70, it was only necessary for the Métis to advance their interests in land in limited and usually fleeting ways, there was never a need to develop a sense of how that title was to be construed. They merely understood themselves to be proper holders of such title. In the above conversation, Mr. Ross advances a position which seems quite consistent with the position of the federal government (discussed below). Mr. Riel offers a counter position that the Métis hold their title by conquest (it seems unlikely that Riel would be referring to the recent conquest over the HBC authority. It is more likely that he is referring to conquest over Indian interests). And, Mr. Thibert offers a moderate position which would account for the unique Métis identity but still recognize their Aboriginal title in a similar manner to how Indian title is recognized.

Despite this lack of coherency amongst the Métis delegates during the discussion on Indian claims, there was a long standing conception within the Métis leadership that their claims

³⁰⁰ *MMFI*, *ibid.* at para. 607-610 where the court simply uses this exchange to support the notion that the Métis were not considered to be “Indians”.

³⁰¹ Article 15 stated: “That treaties be concluded between the Dominion and the several Indian tribes of the country.” as cited in *MMFI*, *ibid.* para. 606.

to land were based on the fact that they were “descendants of the original lords of the soil.”³⁰² This declaration came as a result of an HBC attempt to enforce payment for land holdings within the settlement. Previous to this, an Imperial Parliament committee examining possible annexation of HBC territory (and title) to Canada found that Métis leadership were prepared to advance their claims to the land. The Nor’Wester reported that Pascal Breland, the chairman of one of these meetings, explained the claim of the Métis as follows:

I think there is a third party that can urge a claim – namely the Natives who are partly the descendants of the first owners of the soil ... I think it is not unlikely that the Half-Breeds of the country – representatives of the Cree and other tribes – might put in a good claim. They are Natives; they are present occupants; and they are representatives of the first owners of the soil with whom (as I have said) no satisfactory arrangement has been made.³⁰³

In addition to these examples, O’Toole notes the Métis involvement in the treaty process south of the border. Flanagan also makes use of the Métis experience in the United States. Flanagan provides a brief background to the American experience with “half-breed” or “mixed-blood” land grants and scrip issuance in the United States. Offering several examples which generally included restrictive measure on whom could apply for scrip or land combined with open-ended transferability of these grants, the Métis made out with no land base of their own. Flanagan summarizes: “Scrip and patents were issued, cancelled, and reissued in confusing succession. The history of the episode has never been written, so it is impossible to say who made what out of it.”³⁰⁴ Still, this lack of history doesn’t stop Flanagan from imparting lessons learned upon the Métis of Red River, who were closely related to the Métis to the south by shared ancestry and connected through trade. Flanagan’s assessment is as follows: “But whether or not the British Metis of Assiniboia actually received much in the way of American cash, scrip,

³⁰² Nor’Wester, 15 June 1861:2 as cited in O’Toole, *supra* note 299 at 249.

³⁰³ Nor’Wester, 14 March 1860 and 15 June 1861 as cited in *ibid.* at 248.

³⁰⁴ Flanagan, *supra* note 144 at 37.

and patents, there must have been a legacy for the 1870s.” Here Flanagan is correct but fails to grasp the fullness of what this legacy *may* have been. Flanagan continues:

The Métis saw that the extinguishment of Indian title was an opportunity for them to reap a windfall benefit, even though they were not considered Indians and had all the civil and political rights of British subjects. They saw that grants of land and scrip were something to be sold quickly, not to be held for the future. And as they watched speculators and American government officials skirt the law, they may have become cynical about the whole process and determined to get what they could for themselves.

It was also an education for speculators. They developed ways of using depositions, affidavits, assignments, and powers of attorney to circumvent well-intentioned restrictions on the transfer of scrip and land. So when the Canadian government made available a cornucopia of land and scrip in Manitoba in the 1870s, both sellers and buyers knew exactly what to do. With this headstart, the ingenuity of the market was always a step ahead of the efforts of the provincial and federal governments to control sales.³⁰⁵

Moving beyond the utility of such speculation, Flanagan’s assessment is incomplete; for it does not tell us what lessons the government of Canada could have learned from the experience south of the border. Further, considering that the Métis would have been cynical about the process employed south of the border you would think that they would have insisted on getting *land* and not scrip. Take for example, the assessment of Martha Foster:

Although superficially seeming to support a unified Métis identity, the 1854 and 1863 treaties’ mixed-blood provisions, rather than encompassing mixed-descent community, fragmented the Métis by forcing them to identify themselves in terms of their various Chippewa ancestries. Thus, government policy divided the U.S. Métis into small groups whose land rights and legal identity were dependent upon their relationship to specific Chippewa bands. The treaties recognized no separate, independent Métis Native rights. Such limited (and temporary) recognition served only to divide the Métis and to void their land in severalty, relinquishing any Native claims or hopes for a Métis land base. Despite the fact that even Ramsey [the U.S. treaty negotiator] understood that the Métis considered themselves to be ‘the real owners of the soil’ and sought to retain control of the region with their Chippewa relatives, the treaties had a far different effect. The allocation of small discrete parcels of land or scrip not only left the Métis prey to speculators, who descended immediately, but also scattered Métis holdings, effectively destroying their hopes for a homeland.³⁰⁶

Canada could have learned from this effective form of dispossession. Indeed, with these lessons in mind it is easy to see why Canada would be eager to randomly allot lands, and supply scrip. Both mechanisms are effective in dispersing a community interest. Still, none of this is explored

³⁰⁵ *Ibid.*

³⁰⁶ Martha Harroun Foster, *We Know Who We Are: Métis Identity in a Montana Community*, (Norman, Oklahoma: University of Oklahoma Press, 2006) at 47.

by Flanagan. Nor are the intentions of the Métis south of the border. Namely, that they too were pursuing a community interest and not merely a “windfall benefit”. If the Métis to the north were actively associated with the Métis to the south (as they were) it is perfectly feasible that they would have had aspirations for similar goals eg/ recognition of a community land base. But beyond that, perhaps the most obvious lesson that the Métis could have learned is that the validity of their claim to Indian title was reinforced through the issuing of *any* type of land grant. Flanagan doesn’t explore any of these alternative interpretations even though they are patently more responsive to all sides than his interpretation is. By ignoring this interpretation, Flanagan paints the picture that all is well with the government side and that the Métis don’t really mind so much. After all, according to Flanagan, the Métis were just looking for a “windfall benefit.” Indeed, while Flanagan does acknowledge that “the view that the Métis, as descendants of the Indians, had inherited a share of their aboriginal title that was not extinguished”³⁰⁷ was mentioned before in the colony, he fails to give it any weight opting instead to lay the foundation for such claims at the feet of Father Ritchot who brought up the matter during negotiations with the Canadian government (covered in chapter three).

Indeed, as O’Toole explains, the issue of Métis Indian title was actively debated during the period of resistance. For example, a public meeting on July 29, 1869 saw the courthouse overflowing with community members. One speaker explained that “it was necessary for the [Hudson’s Bay] Company, before selling their rights, to have the consent of the half-breeds, as they were Natives of the soil and were descended from the original possessors.”³⁰⁸ From the balance of evidence it is clear that Ritchot would have been well acquainted with Métis claims to land before he departed to Ottawa. Further, such claims have roots, at least as far back as the

³⁰⁷ Flanagan, *supra* note 144 at 33.

³⁰⁸ Begg, 1871: 87 as cited in O’Toole, *supra* note 299 at 252.

Battle of Seven Oaks in 1816. O'Toole shows that the Canadian government was well aware of Métis demands prior to the Métis delegates arriving in Ottawa to negotiate the terms of Red River's entrance into confederation.³⁰⁹ Still, the particulars of how that land claim was to be acknowledged and compensated needed to be worked out in negotiations.

IV.a. Incorporating Métis Understandings of Title into the Common Law

If Métis title were to be accepted in the courts today it would seem that the courts would have to either modify the character of the sovereignty test (so as to focus on effective Crown control) or interpret Métis title as being a derivative of Indian title (which would require no change in the sovereignty test but might disembowel the content of *Métis* title). Precedent tells us that it can be anticipated that the date of sovereignty would not be strictly applied to the Métis. In *Powley*, the SCC modified the pre-contact Aboriginal rights test “to reflect the distinctive history and post-contact ethnogenesis of the Métis...”³¹⁰ Therefore, the Court adopted a test which sought to

protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.³¹¹

A similar recognition could be expected for any Métis claims to Aboriginal title. The Court of Queen's Bench in Manitoba has recently found that such a modified Aboriginal title test would involve moving the date from the assertion of sovereignty to “the time of first imposition of British control over the land.”³¹² Here, the Court failed to clarify what is meant by “British control over the land”. This lack of specificity leaves the reader wondering if “British control over the land” is effectively any different than the previous assertion of sovereignty test. This

³⁰⁹ *Ibid.* at 257-61.

³¹⁰ *Powley*, *supra* note 2 at para. 14.

³¹¹ *Ibid.* at para. 18.

³¹² *MMF1*, *supra* note 14 at para. 577.

issue was not clarified at the Court of Appeal. However, the Court of Appeal seemed to take the 1670 Royal Charter as constituting a valid grant of *land* to the HBC, along with powers to grant that land.³¹³ The Court of Queen's Bench displays the overlap of these criteria when it assesses the beginnings of the Red River settlement:

Indeed, in 1811, when the Red River Settlement originated, it did so as the result of a large land grant from the HBC to Lord Selkirk which could not have been done had Britain not enjoyed sovereignty over the land and exercised control of it through the activities of the HBC.³¹⁴

The Court does not consider the other option here; that just as the HBC were granted jurisdiction over lands which the Crown did not own, so too did the HBC pass on illegitimate title to Lord Selkirk. That is, that the establishment of the colony was based upon the racist imaginations of colonial actors rather than upon any real title to those lands. Further, the Court does not draw upon Métis resistance to this settlement and the ultimate expulsion of the majority of the settlers. Neither does the Court draw upon the effectiveness or ineffectiveness of the HBC government. As shown previously, it was in many ways only as effective as the Métis allowed it to be. Regardless, it seems clear that when the Métis formed a Provisional Government and declared exclusive control of the territory, their assertion of title was *at the very least* equally as strong as any claim made by the Crown. Again, as stated above, this occupation could be shared with First Nations.

A test which would make more sense for Canadian jurisprudence would be based, not on perceived control over the land but upon the date in which that effective control is necessarily inconsistent with Aboriginal occupation and use of the land. That is at a time when the Crown's own occupation of land is conflicting with the occupation of the previous inhabitants.³¹⁵ This

³¹³ *MMF2*, *supra* note 14 at para. 19 and 20. Also see para. 21 where the Court takes the Lord Selkirk treaty of 1817 at face value.

³¹⁴ *MMF1*, *supra* note 14 at para. 581.

³¹⁵ A similar view is put forward by Kent McNeil, "A Question of Title: Has the Common Law been Misapplied to Dispossess the Aboriginals?" [1990] 1 *Monash Univ. L. Rev.* 16 at 91-110. And, McNeil, "Racial Discrimination"

would allow the court to be responsive to claims of Aboriginal title which emerged post-sovereign assertion but which also was not impacted by such assertions. In effect, it would allow the court to move beyond the magic imparted in Crown assertions and, once and for all, distance itself from the tenor of *St. Catherine's Milling*. The problem remains as to how such necessarily inconsistent action would be measured. And here the focus would be on physical actions. Legislation on its own will not impact upon a community, as it would have to have a tangible result that impairs the use, enjoyment or productivity of Aboriginal lands. Such a test would easily fit in with the modern duties of consultation since, along with the policy of the Royal Proclamation of 1763, the government would be under a duty to proactively attend to Aboriginal claims prior to infringing upon their interests. Applied to the Métis scenario we would be able to interpret the actions, and limited powers of the HBC, as not being inconsistent with Métis claims (if we accept the HBC as a valid expression of government action under such a test). Instead, the surveying of Métis lands would be the earliest moment which could trigger the solidification of Métis title.³¹⁶ That surveying was done by the Canadian government and, therefore, Métis claims would be articulated as against the Canadian Crown rather than the British.

The outcome of marrying the Aboriginal origins of Métis title with their unique cultural occupation can be seen in the Ojibwa response to the Métis. Karl S. Hele explains that “[f]or the Ojibwa, the Métis were not ‘Indian’ because they did not recognize or accept the authority of the

supra note 253 at 216 where McNeil explains: “...native title could not be extinguished by inconsistent grant. As the Crown could not give what it did not have, grants would be null and void to the extent that they were inconsistent with that title.” As such it was the responsibility of the Crown to legitimize its own occupation of Aboriginal lands. Also see, Larry Chartrand, “‘We Rise Again:’ Métis Traditional Governance and the Claim to Métis Self-Government” in Yale D. Belanger, ed. *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing Inc., 2008) 145-157 at 155 where he explains: “A qualifying time period may provide the level of assurance that the transition to Canadian government authority was truly effective and enforceable and not merely a temporary intrusion that did not possess the character of permanency to warrant being described as effective government control.” Chartrand proposes a period of ten to fifteen years as an adequate qualifying period.

³¹⁶ For an argument which would advocate for a later date based upon the emergence of a “truly effective and enforceable” alternate assertion of sovereignty see, L. Chartrand, *ibid.* at 154-55.

chief; yet they were acknowledged relatives.”³¹⁷ The Ojibwa took an active interest in obtaining land rights for the Métis. This effort was met with mixed success; the chiefs were unable to get recognition for Métis in the Robinson Treaties of 1850 but they were able to include the Métis in the bands.³¹⁸ The point is that despite the unique political and cultural characteristics of the Métis, which reinforced that they were a distinct community of Aboriginal people, both the Métis and their First Nations kin understood that the Métis had a share in the Aboriginal title to the land.

V. Conclusion

Since the Métis of the Red River region negotiated their “Indian” title and had it accepted by the Canadian Parliament, it is not necessary for a legal analysis to establish point for point whether or not the Métis met the modern common law standard of Aboriginal title.³¹⁹ This is because as far as recognition of Métis title is concerned “[t]he relevant issue, ... is not the legal basis for the assertion of an aboriginal title claim by the ‘Half-Breed’ population ... The issue is the intention of Parliament, which permits section 31 to be properly interpreted.”³²⁰ Still, this interpretation is not inclusive enough. If we are to understand Métis title, then we must not only rely upon official recognition by Parliament. Instead, attention must be paid to the ways in

³¹⁷ Hele, *supra* note 51 at 170.

³¹⁸ *Ibid.* at 178. For more on this point see, David McNab, *Circles of Time: Aboriginal Land Rights and Resistance in Ontario* (Waterloo, Ont.: Wilfrid Laurier University Press, 1999). In *Powley*, *supra* note 2, the Supreme Court concluded that that taking treaty would not necessarily extinguish the Métis rights of that person’s descendants. See para. 35: “We emphasize that the individual decision by a Métis person’s ancestors to take treaty benefits does not necessarily extinguish that person’s claim to Métis rights. It will depend, in part, on whether there was a collective adhesion by the Métis community to the treaty.”

³¹⁹ See, MMF Final Argument, *supra* note 136 at para. 201: “...Parliament made a statement in s. 31 that the land grant was made as a step towards the extinguishment of Indian Title. This settles the question whether the Métis had Aboriginal Title.” And, at para. 200 council for the MMF points to *Labrador Company v. The Queen*, [1893] A.C.104 at p. 123 where the Lord Hannen writes: “Even if it could be proved that the Legislature was deceived, it would not be competent for a court of law to disregard its enactments. If a mistake has been made, the Legislature alone can correct it ... The courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination.”

³²⁰ Chartrand, *supra* note 1 at 30.

which the Métis envisioned such title. Despite Parliament's intention to acknowledge the "Indian" title of the Métis, concern was expressed shortly after the negotiations that the Métis did not meet the test for Indian title:

Lieutenant-Governor Archibald elaborated the basis of Indian title as the actual use of particular lands by family groups, but he thought that many 'Half-Breed' families would not be entitled because they descended from 'Indian' ancestors from all over the continent.³²¹

Archibald was clearly concerned about the origins of the "Indian" ancestry of the Métis and not their current residency. The key question for the sake of Indian title as expressed in section 31 is: were the 'Half-Breed' people in question present and represented by the Métis negotiators at the time of negotiation? Indian title, when recognized either through the courts or through negotiation, exists against the sovereignty claims of the Canadian union. So, when Canada recognized the Indian title of the 'Half-Breed' people that was enough to validate their title as against the Canadian Crown. Indeed, it was precisely because they had this title, in a practical if not strictly legal sense, that Canada was forced to negotiate to extinguish it. One might argue that it was only the military and political reality of Métis strength that forced Canada's hand. However, such conditions were just a manifestation of the practical reality of Métis occupation of their homeland.

The difficulty with determining the legal status of Métis claims goes beyond evidentiary issues to the fact that the Métis have consistently been an afterthought in Crown legislation. For example, it is yet to be determined if the Métis are "Indians" under Federal power in s. 91(24). Only recently was it determined that the Métis were not "Indians" for the purpose of the Natural Resource Transfer Agreements.³²² It has been problematic to try to fit the Métis into either the constitutional structure or the common law. This is a result of their status as an "in-between"

³²¹ *Ibid.* at 29.

³²² See, *R. v. Blais*, 2003 SCC 44 [*Blais*]. Also see, *R. v. Grumbo* [1999] 1 W.W.R. 9 and *R. v. Laprise* [1977] 3 W.W.R. 379.

People: “The ‘Half-Breed’ population was indeed an ‘in-between’ population. Although distinct from the ‘white’ population, they were also distinguished from the Ojibway and Cree, who were known as ‘Indians.’”³²³ Despite being “in-between” people, there are two instances where the Métis were expressly recognized in the Canadian constitutional legislation. The first is the *Manitoba Act, 1870* which marks the emergence of Canadian authority in the Northwest. The second is section 35 of the *Constitution Act, 1982*, which represents the moment of Canada’s full official independence from British rule. These are key to understanding Métis Aboriginal title because, as explored above, as a post-contact people, the Métis cannot hold common law title in the same manner as First Nations.

However, one only needs to look to *Powley* to see that the Court is willing to moderately modify common law tests to accommodate the uniqueness of the Métis reality. In that decision, the Court had the following to say about accommodating the Métis within s. 35 Aboriginal rights:

As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada’s commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s. 35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.³²⁴

³²³ Chartrand, *supra* note 1 at 27. The term “Indian” was, at times, applied to the Métis as well.

³²⁴ *Powley*, *supra* note 2 at paras 17-18.

In theory, such an approach to modifying the current tests for Aboriginal title would open accommodation for the type of occupation that I have described earlier. However, the trial court in the *Manitoba Metis Federation* case failed to reason its way through the milieu.³²⁵ Indeed, in that case, the Court did modify the standard so that title would be identified “as at the time of first imposition of British control over the land.”³²⁶ This moderate adjustment would do little for the Métis if the Court adopted a standard interpretation of Royal decrees. Indeed, both the Royal Charter of 1670 and the Royal Proclamation of 1763 were used to establish that England exercised sovereign control over what was to become the Métis homeland.³²⁷ Yet, the court avoids the obvious problem of explaining how the Métis could have effective control during the resistance and yet, even if such is considered an illegal act (such as a rebellion) not usurping the Crown’s control and therefore, its title. If effective control is the test, can racism rather than principle help explain the inequality of its application?

The origins of Indian and Métis title are the same but the Métis at Red River are *Canadian* Aboriginal people. To modify the definition presented at the start of this thesis one could describe the Métis as being “indigenous, inhabiting the land from the earliest times, esp. before the arrival of Canadian authority.” It would be a major deficiency in the common law, if Courts were not able to recognize the tenure of Canada’s Métis populations. Can this in-between

³²⁵ *MMF1*, *supra* note 14. The Court of Appeal did not take the issue on. See, *MMF2 supra* note 14 at para. 474 where the Court writes: “Given my view that Aboriginal title is not a mandatory prerequisite to find a fiduciary obligation, and that any fiduciary obligation that may have existed was not breached in any case, I do not find it necessary to decide whether the Métis had Aboriginal title. Nor do I find it necessary to comment further on the manner in which the test for Métis Aboriginal title was formulated in the trial judgment.”

³²⁶ *MMF1*, *ibid.* at para. 577. And, at para. 594 the Court determined: “Applying the law to the historical facts, I conclude that the Métis of the Settlement, including their children to whom the section 31 grants were to be made, did not hold at July 15, 1870, or at anytime prior, aboriginal title to the lands which were to become Manitoba and serve as the source for the section 31 grants.”

³²⁷ *Ibid.* at para. 580: “In 1670, Britain made its extensive land grant to the HBC and from that date, in my view, Britain exercised control through the HBC in those areas where the grant pertained and beyond that after 1763. There was no argument before me as to the precise area covered by the 1670 grant. Thus, it is unclear to me the extent to which that grant covered the lands which in 1870 became Manitoba. However, after 1763, Britain gained sovereignty over all of Canada, which would have included the area not covered by the grant, if any, but which ultimately became Manitoba.”

People be considered Aboriginal,³²⁸ have recognizable Aboriginal hunting rights,³²⁹ and yet be without a title that is cognizable to the law?³³⁰ To say that the Métis people of Red River do not have, or never did have, Aboriginal title is to deny Métis Aboriginality, the will of Parliament and the validity of the *Manitoba Act*.³³¹ Such a conclusion would be repugnant to the law.³³²

³²⁸ As per *Constitution Act, 1982*, s. 35(2), *supra* note 35.

³²⁹ See *Powley*, *supra* note 2.

³³⁰ As per *MMFI*, *supra* note 14 at para. 594.

³³¹ Yet, this didn't stop the Court of Queen's Bench of Manitoba from finding that the Métis never did have title to their lands. At, *ibid.* para. 594 the Court wrote: "Applying the law to the historical facts, I conclude that the Métis of the Settlement, including their children to whom the section 31 grants were to be made, did not hold at July 15, 1870, or at anytime prior, aboriginal title to the lands which were to become Manitoba and serve as the source for the section 31 grants."

³³² This does not address the obvious evidentiary challenges which might arise in specific cases.

CHAPTER THREE: THE NEGOTIATIONS

This little community which has grown up in the very heart of the continent is unique. There is nothing like it in the world. Separated by boundless prairies from intercourse with the people of the South, barred out from Canada by 800 miles of swamp and wilderness, and mountain and lake, separated from the people on the Pacific shores by the almost impassible chain of the Rocky Mountains, they have yet little intercourse with the outer world. And yet they have among them men, who have had the advantages of the best education in which Europe can offer – men who in intellectual culture, in manners and in every social qualification are not surpassed in any country. And yet, these men are brought into immediate contact with the most primitive people in the world, with men in the primary stages of society, in the lowest and rudest conditions of civilization.

Is it any wonder that a community so secluded from all the rest of the world, uninformed of all that is transpiring around them, should be subject to great, to unreasonable alarms, when suddenly the barrier is burst, which separates them from the rest of the world, and they see their country about to be entered by strangers? Is it any wonder that their fears should be raised; should be traded upon by demagogues ambitious of power and place? I do not think it is....The circumstances in which these events place us impose a stern duty. We must re-establish law and order. We must vindicate the supremacy of the national flag. But the readiest mode of doing so is, at the same time, to show these people that their fears are unfounded, that their rights shall be guaranteed, their property held sacred, and that they shall be secured in all the privileges and advantages which belong to them, as Britons and as freemen.

This is why I rejoice that the Government have proposed a most liberal Bill, which gives the people every guarantee they have a right to ask. With this Bill in one hand, and the flag of our country in the other, we can enter, not as conquerors, but as pacificators, and we shall satisfy the people there that we have no selfish object of our own to accomplish, that we go there for their good as well as for our good.³³³

Hon. Mr. Archibald (M.P. from Nova Scotia), May 7, 1870.

I. Introduction

After much negotiation Canada and the HBC agreed upon terms for transfer of the HBC interest in Rupert's Land to Canada. Rupert's Land was, by Royal Charter, home to the HBC's exclusive trading license. As discussed in previous chapters it was a monopoly by words if not by action. Still, the exclusivity of those words gave the HBC a tradable interest in the territory. And the territory was vast; encompassing all of the waters draining into Hudson Bay. Or at least that is what the standard account of Rupert's land would tell us. However, Professor Kent McNeil has illustrated that Rupert's Land was more likely a grant to the HBC of the authority to

³³³ Hon. Mr. Archibald, May 7th, *Dominion Debates*, 1870, Vol. 1, 1424-1431 in Morton, *supra* note 32 at 220-221.

take possession of territory rather than an effective grant of land.³³⁴ As such, it is questionable if the HBC had title to any significant lands in the boundaries described in its Charter.³³⁵ The HBC could only lay a claim to such lands if it effectively occupied those lands to the exclusion of others with prior claims or if they successfully negotiated the surrender of the territory with the Aboriginal residents. It is my contention that the apparent partial extinguishment of land around the confluence of the Red and Assiniboine Rivers led to a chasm between the type of claims that Métis landholders were entitled to and the claim to which their children were entitled. This will be discussed below.

Regardless of the inadequacy of HBC title, when the HBC sold its interests to Canada, it would have traded away its rights, *realized or unrealized*, to the entirety of the territory within the grant. Canada and Britain acted as if there was a real interest to compensate and, at least to the extent that the HBC had a trading interest, this is grounded in fact. As such, for the sake of this chapter, it can be said that Rupert's Land was indeed the territory encompassing the waters which drained into Hudson Bay. This would include much of northern Ontario and Quebec, all of Manitoba, the majority of Saskatchewan, southern Alberta, Nunavut and parts of present day North Dakota and Minnesota. Stanley describes it as "an area as large as Europe, bounded on the north by the 'Barren Lands,' on the west by the snow-capped Rockies, and on the south by the arid plains".³³⁶ Canada made its final offer for this vast territory on March 9, 1869 and at the end of May, Parliament gave its approval. The substance of the agreement was as follows:

³³⁴ McNeil, *supra* note 180 explains at 4: "In English law, when the Crown attempts to grant more than it has, the courts do not necessarily invalidate the grant (though that *is* a possibility). Instead, they usually give it some effect if they can, by allowing it to convey whatever title the Crown has. While the Crown would not have had title to lands in Rupert's Land prior to acquiring sovereignty there, it could have authorized British subjects to settle there in its name and acquire lands for themselves." Without such permission from the Crown the subjects would merely be comporting themselves within the territory and underlying title of the Aboriginal peoples in whose territory they reside."

³³⁵ For more on the boundaries of Rupert's Land see generally McNeil, *ibid*.

³³⁶ Stanley, *supra* note 21 at 3.

the surrender by the Hudson's Bay Company of all its rights and privileges in Rupert's Land; the payment by Canada to the Company of £300,000; a land grant of one-twentieth of the land within the Fertile Belt, and certain blocks of land in the vicinity of the Company's trading posts totalling 50,000 acres; the right of the Company to continue its trade without hindrance or 'exceptional' taxation; and the purchase by Canada of the materials for the neglected telegraph.³³⁷

Canada ratified these terms and set a date of transfer of December 1, 1869.

The agreement between Canada and the HBC was essentially a commercial transaction. Canada was buying out the HBC interest to make way for a transfer of colonial title from Great Britain to Canada. However, the agreement was lacking any input from the people living in Rupert's Land. The largely Métis population at Red River had asserted their authority on several previous occasions and a formal agreement between the HBC and Canada was not going to stop them from asserting their rights on this occasion.³³⁸ Upon learning that his governor-designate had been barred from Canada's newest territory, Macdonald opted to open up communication rather than apply force. Father J.-B. Thibault and Colonel Charles de Salaberry were sent to Red River with the purpose of conferring with the French Half-breeds and "if possible, disabuse their minds of the erroneous impressions that have been made upon them."³³⁹ On January 6, near the end of their stay at Red River, Colonel Salaberry and Father Thibault met with Métis leadership. Riel was disappointed that the emissaries were not "given authority to treat with them".³⁴⁰ Lacking the influence to convince the Métis to abandon their cause, Salaberry and Thibault's mission was effectively over.³⁴¹ Thibault and Salaberry were sent as pacifiers not negotiators.

³³⁷ *Ibid.* at 41.

³³⁸ The "half-breed" population at Red River, both English speaking (4080) and French speaking (5720), was approximately 82% of the total population (11,960) according to the 1870 census. Letter, A. Archibald to Secretary of State for the Provinces, 9 Dec. 1870, NAC, RG 15, D-II-1, Vol. 228, File 1155 (1872), Reel T-12177. CAP-1196, MMF 006258 as cited in Catherine Macdonald, Research Report, Exhibit 16, March 17, 2004 in the case of *MMF1*, *supra* note 14 at 6.

³³⁹ Young to Granville, November 25th, 1869: P.P., 1870, L. (C. 207) as cited in Stanley, *supra* note 21 at 88.

³⁴⁰ Thibault's Report as cited in Stanley, *ibid.* at 90.

³⁴¹ The Metis had much distrust towards people coming from Canada and although, Father Thibault had worked in the North-west for over 30 years, Governor Mactavish doubted that Thibault would have much success influencing the Metis: "I believe Bishop Tache alone has influence sufficient to detach the men from their present leaders, and even he might fail." Mactavish to W.G. Smith, December 25th, 1869: London Inward Correspondence from Winnipeg, 1869; P.P., 1870, L. (C. 207) as cited in Stanley, *ibid.* at 90.

This limited mission is a reflection of Macdonald's lack of appreciation for the seriousness of the situation. Macdonald was not swayed by the new reality of Métis political organization. Rather than seeing validity in Métis political authority, Macdonald still viewed the HBC as the proper government in the territory. The official date of transfer from the HBC to Canada was set for December 1. And so, Macdonald cautioned Lt. Gov.-designate McDougall: "you are approaching a foreign country under the government of the Hudson's Bay Company ... You cannot force your way in..."³⁴² Although, this was never an option since McDougall had no force and no means of rapidly obtaining a force adequate for such an expression of strength. And, it should have been apparent that, even at this early stage, the HBC was not in power at Red River. The only route to a peaceful settlement was through negotiations.

II. The Negotiations at Red River

On December 10, 1869 at Macdonald's discretion, the Governor-General appointed Donald A. Smith, the top Canadian HBC officer in Canada, as a "Special Commissioner, to inquire into and report upon the causes and extent of the armed obstruction offered at the Red River...to the peaceful ingress of the Hon. Wm. McDougall," his instructions were to:

explain to the inhabitants the principles on which the Government of Canada intends to Govern the country and to remove any misapprehensions that may exist on the subject. And also to take such steps, in concert with Mr. McDougall and Governor Mactavish, as may seem most proper for effecting the peaceable transfer of the country and the Government, from the Hudson's Bay authorities to the Government of the Dominion.³⁴³

From Canada's viewpoint, the requisite negotiations to ensure transfer of the territory to Canada had already taken place. All that was left was ensuring that the people acquiesce to that agreement. Smith's role was to persuade the Métis to abandon their cause and place their faith in

³⁴² PAC, Macdonald Papers, Incoming Correspondence, p. 481, Macdonald to McDougall, 20 November 1869 as cited in Sprague, *supra* note 18 at 42.

³⁴³ Howe to Smith, December 10th, 1869: C.O. 42/678; C.S.P., 1870, Vol. V, No. 12 as cited in Stanley, *supra* note 21 at 89.

the benevolence of the Canadian Government. Smith did not have the power to negotiate with the Métis. In this regard, Smith's commission varied little from that of Colonel Salaberry and Father Thibault.

When Smith first arrived in Red River on December 27 it became clear that the Métis did not trust him. Smith had open doubts about the Métis authority. For example, after ascertaining why he was in Red River, the Council asked Smith to take an oath indicating that he would not try to undermine the "Government, legally established." Smith declined, but indicated that, unless otherwise stated, his intentions were not to disrupt the Government "legal or illegal as it might be".³⁴⁴ Some of the Métis interpreted Smith's meaning as a recognition of the legality of their Government. However, Smith tried to avoid any such implication.³⁴⁵ After another meeting with Riel on January 6, Smith "came to the conclusion that no good could arise from entering into any negotiation with his 'Council,' even were we to admit their authority, which I was not prepared to do."³⁴⁶ This conclusion may have helped Smith justify his secret agenda at Red River. Smith was to go to Red River under the guise of a commissioner whose public duties were to work with the HBC authorities in order to ensure a peaceful transfer of the territory. However, his subversive mission was "to make arrangements for the dispersion of the Insurgents, and the dissolution of their committee."³⁴⁷ No doubt, Smith could accomplish this subversive mission through explaining Canada's benevolent intentions toward the people of Red River. However, this goal, rather than promoting a peaceful transfer, seems directly antagonistic toward the people of Red River. After all, by the time Smith arrived at Red River, the Métis representative government had already taken effective control of the Red River settlement.

³⁴⁴ Smith to Howe, April 12th, 1870 C.S.P., 1870, Vol. V, No. 12 as cited in Stanley, *ibid.* at 91.

³⁴⁵ Smith to Macdonald, December 28th, 1869: Pope, *Memoirs of the Right Honourable Sir John Alexander Macdonald*, Vol. II, p. 114-115 as cited in Stanley, *ibid.*

³⁴⁶ Smith's Report as cited in Stanley, *ibid.*

³⁴⁷ PAC, Macdonald Papers, Letter Books, vol. 13, p. 648, Macdonald to Rose, 5 December 1869 in Sprague, *supra* note 18 at 46.

Smith had clearly tried to undermine the Métis leadership during his stay at Red River. This was confirmed during a meeting that Smith had with a HBC official, Sir Stafford Northcote on April 21, after returning from Red River. Northcote worked in Ottawa as Governor of the HBC until January 5, 1869 and was appointed by the HBC to defend the company's interests during the negotiations. His diary and his career both attest to the high-level contacts that he had while in Ottawa.³⁴⁸ Smith explained that he had “detached many of the leading men from Riel”.³⁴⁹ However, Smith's converts were not willing to speak against Riel. Similarly, Smith complained that the English were not strong enough, specifically mentioning Judge Black, who was to later serve as one of the Red River delegates in Ottawa:

Smith complained also of Mr. Black's weakness, and said that if he and the English party had acted firmly they could have commanded Frenchmen enough to insure a majority on every point, but Black said it would be necessary to give in to Riel on some points, and the result of his doing so was, to increase Riel's influence and to throw the French into his arms.³⁵⁰

While not entirely unexpected, such subversive acts are not befitting of an emissary sent to convey Canada's benevolent intentions.

Nonetheless, with the assistance of Colonel de Salaberry, Smith began working to convince the populace that the intentions of Canada were good for the people of Red River. De Salaberry was even reported to have attempted to bribe Riel, but the offer was “contemptuously refused.”³⁵¹ Smith's visit was to be debated publicly at a mass meeting of the whole settlement. This meeting took place on January 19 and 20, 1870. Smith assured the gathering, of around 1000 people, that he was in Red River to “contribute to bring about peaceably union and entire

³⁴⁸ For more on Northcote see Morton, *supra* note 32 at xxii.

³⁴⁹ “The Ottawa Diary of Sir Stafford Northcote” in Morton, *ibid.* at 76.

³⁵⁰ *Ibid.* at 77.

³⁵¹ Malmros to Davis, January 15th, 1870: MSS. Consular Despatches from Winnipeg, Vol. I, Department of State as cited in Stanley, *supra* note 21 at 92.

accord among all the classes of people of this land”.³⁵² While Smith had written earlier that no good could come from negotiating with the Council, the Métis seemed to be in much solidarity after the meeting, making negotiation inevitable. In the final speech of the second day, Louis Riel orated:

Before this Assembly breaks up, I cannot but express my feelings, however briefly. I came here with fear. We are not yet enemies (loud cheers) but we came very near being so. As soon as we understood each other, we joined in demanding what our English fellow subjects in common with us believe to be our just rights (renewed cheers). We claim no half rights, mind you, but all the rights we are entitled to. Those rights will be set forth by our representatives, and what is more, Gentlemen, we will get them (loud cheers).³⁵³

The meeting adjourned with a resolution that the English and French speaking parishes would each select 20 representatives to consider Smith’s commission and decide the next course of action.

This new group of representatives first met on January 25, 1870 and once again heard Smith who “gave assurances that on entering confederation, they would be secured in the possession of all rights, privileges, and immunities enjoyed by British subjects in other parts of the Dominion.”³⁵⁴ There was still the issue of the “Bill of Rights” which the Métis had drawn up in November. The representatives decided to nominate a committee to compose a new list of rights before presenting it to Commissioner Smith. On January 29, the new “List of Rights” was presented to the representatives who debated and amended it. During the deliberations, on February 4, Riel proposed that they should enter Confederation as a province rather than a territory. With immediate provincial status, the Métis could, hopefully, institute legislation which would protect them when the influx of settlers made them the minority. However, Riel

³⁵² *The New Nation*, January 21st, 1870 as cited in Stanley, *ibid.* at 93. This statement does not correspond well with Macdonald’s feeling on the subject the following month: “These impulsive half-breeds have got spoiled by this *émeute*, and must be kept down by a strong hand until they are swamped by the influx of settlers.” Macdonald to Rose, February 23rd, 1870: Pope, *Memoirs of the Right Honourable Sir John Alexander Macdonald*, Vol. II, p. 127-9 as cited in Stanley, *ibid.* at 95.

³⁵³ *The New Nation*, January 21st, 1870 as cited *ibid.* at 93.

³⁵⁴ Smith’s Report as cited *ibid.* at 94.

could not garner enough support for his proposal and his motion was defeated by a twenty-four to fifteen vote. Another of Riel's motions also suffered defeat when Riel proposed "that all bargains with the Hudson's Bay Company, for the transfer of this Territory, be considered null and void; and that any arrangements, with reference to the transfer of this country, shall be carried on only with the people of this country."³⁵⁵ It was somewhat odd to suggest that the Hudson's Bay Company was unable to divulge itself of its interest in Rupert's Land without the approval of the people of the territory. Even if the Métis felt that they were the rightful title holders, it cannot be denied that the HBC carried certain interests in the territory. These claims did not rest upon the authority of the Métis or First Nations of the territory. Instead, they were expressly granted to the Company and existed entirely within English law.

The Red River representatives met again on February 7. It was at this meeting that Smith, upon reviewing the new List of Rights, asserted that Parliament would have the final say and, in that regard, Smith invited the representatives to send "a delegation of the residents of Red River, to meet and confer with them at Ottawa ... to explain the wants and wishes of the Red River people, as well as to discuss and arrange for the representation of the country in Parliament."³⁵⁶ The invitation was promptly accepted by the representatives. Riel attempted to grasp upon the united front between French and English residents by proposing that the representatives formally adopt a united provisional government to aid negotiations with Canada. The English representatives were resistant, as they still regarded the HBC and the Council of Assiniboia as the legal authority in the territory. Riel and supporters argued that the current Provisional Government existed in fact and should be recognized by the representatives. When several of the representatives sought out Governor Mactavish for his opinion on the matter,

³⁵⁵ *The New Nation*, February 4th, 1870 as cited in *ibid.* at 95.

³⁵⁶ Smith's Report as cited in *ibid.* at 96.

Mactavish left no doubt about his views: "Form a Government for God's sake, and restore peace and order in the Settlement."³⁵⁷ Finally, on February 8, the representatives supported the Provisional Government with Riel as President without a single voice of opposition. The representatives closed this meeting by nominating the delegates who were to represent them in Canada: Judge Black was to represent the English concerns, A.H. Scott the American concerns, and Father Ritchot the French concerns.

Despite being the official representatives of the people of Red River, the delegates who went to Ottawa were not entirely welcomed. The perceptions which preceded their arrival were based upon the tumultuous events which had occurred at Red River prior to the Provisional Government uniting French and English speaking Métis. Although the events at Red River were not exactly calm prior to formal negotiations with Canada, the events were largely internal in nature. They involved attempted overthrows of the Provisional Government and the imprisonment of those involved. Ultimately though, Thomas Scott, a Canadian sympathizer and persistent thorn in the side of the Provisional Government, was executed. He had on several occasions attempted to mount armed resistance against the Government, threatened the lives of Riel and his supporters, and violently attacked the guards at Fort Garry. Scott was brought before a Council of War and charged with raising arms against the Provisional Government and attacking the guards. Scott was found guilty and sentenced to death. He was killed via firing squad on March 4. In the short-term, the execution of Scott served Riel's cause. After the execution, W. Garrioch, a representative from Portage la Prairie, who was supportive of a previous move against the Provisional Government stated to the Provisional Government: "Except in one instance, we have done our utmost to keep the peace. We feel that we are in duty bound to come under the Provisional Government, and are now on perfectly good terms with all

³⁵⁷ *Ibid.* at 98.

the people of Red River."³⁵⁸ While the execution managed to calm some of Riel's former opposition, Scott's execution by firing squad aroused deep feelings in Canada.

No doubt these feelings would have been even worse if Riel had carried out the execution of Major Boulton, a Canadian emissary. Boulton was in charge of a counter-insurrection force (a position which he apparently accepted reluctantly and at the suggestion of the counter-insurgents) which gathered in mid-February to move against Fort Garry. This force, which originally numbered about 60 and later swelled to over 200, disbanded when they discovered that most of the other political prisoners had been released and at the advice of the clergy who informed the group that they could not possibly succeed in taking the Fort. Still, Boulton and some followers attempted to return to their homes en masse past the Fort. Boulton's men were imprisoned in the Fort after being intercepted by the Métis.³⁵⁹

The building tensions at Red River prompted the Canadian Government to increase its influence at Red River by requesting the services of Bishop Taché, who had worked in the Northwest since 1845. Taché was in Rome when his services were requested, and he departed Rome on January 13, 1870, but Taché did not arrive at Red River until March 9, five days after Riel had executed Thomas Scott. After the shooting of Scott, the settlement mellowed somewhat and little tension was in the air when Taché arrived.³⁶⁰ Taché had written to Canada and asked that they "do justice" to the Métis demands.³⁶¹

The delegates who were selected by the Provisional Government were reluctant to carry out their assignment. Judge Black and Father Ritchot both had reservations about serving as delegates. Bishop Taché managed to convince them both, in private conversations, to carry out

³⁵⁸ *The New Nation*, March 11th, 1870 as cited in *ibid.* at 106.

³⁵⁹ For a much fuller account of this force and its circumstances, see *ibid.* at 100-103. And W.L. Morton, *Manitoba - A History*, 2nd ed. (Toronto: University of Toronto Press, 1967) at 135-37.

³⁶⁰ Stanley, *ibid.* at 109.

³⁶¹ Taché to Howe, confidential, March 11th, 1870 as cited *ibid.*

their assignment.³⁶² So, the delegates were furnished with a final draft of the “List of Rights” on March 22 and they departed for Ottawa.

II.a. The Lists of Rights and Métis Demands

The formal lists of Métis rights are only partially instructive of their wishes. If each item was granted as it is requested in the list, other actions could be triggered which would help to protect Métis interests. The list which could be seen as incorporating the most extensively developed demands of the Métis would be the List of Rights which travelled with the delegates to Ottawa. That list read as follows:

1. That the Territories, heretofore known as Rupert's Land and North-West, shall not enter into the Confederation of the Dominion of Canada, except as a Province, to be styled and known as the Province of Assiniboia, and with all the rights and privileges common to the different Provinces of the Dominion.
2. That we have two Representatives in the Senate, and four in the House of Commons of Canada, until such time as an increase of population entitle the Province to a greater representation.
3. That the Province of Assiniboia shall not be held liable, at any time, for any portion of the public debt of the Dominion contracted before the date the said Province shall have entered the Confederation, unless the said Province shall have first received from the Dominion the full amount for which the said Province is to be held liable.
4. That the sum of eighty thousand dollars (\$80,000) be paid annually by the Dominion Government to the Local Legislature of this Province.
5. That all properties, rights and privileges enjoyed by the people of this Province, up to the date of our entering into the Confederation, be respected, and that the arrangement and confirmation of all customs, usages, and privileges be left exclusively to the Local Legislature.
6. That during the term of five years, the Province of Assiniboia shall not be subjected to any direct taxation except such as may be imposed by the Local Legislature for municipal or local purposes.
7. That a sum of money equal to eighty cents per head of the population of this Province be paid annually by the Canadian Government to the Local Legislature of the said Province, until such time as the said population shall have increased to six hundred thousand (600,000).
8. That the Local Legislature shall have the right to determine the qualifications of members to represent this Province in the Parliament of Canada, and the Local Legislature.
9. That, in this Province, with the exception of uncivilized and unsettled Indians, every male native citizen who has attained the age of twenty-one years, and every foreigner, being a British subject, who has attained the same age, and has resided three years in the Province, and is a householder; and every foreigner other than a British subject who has resided here during the same period, being a householder, and having taken the oath of allegiance, shall be entitled to vote at the election of members for the Local Legislature and for the Canadian Parliament. It being understood that this Article be subject to amendment exclusively by the Local Legislature.
10. That the bargain of the Hudson's Bay Company with respect to the transfer of the Government of this country to the Dominion of Canada be annulled, so far as it interferes with

³⁶² Taché, *The Amnesty Again*, p. 11 as cited *ibid.* at 110.

the rights of the people of Assiniboia, and so far as it would affect our future relations with Canada.

11. That the Local Legislature of the Province of Assiniboia shall have full control over all the public lands of the Province, and the right to amend all acts or arrangements made or entered into with reference to the public lands of Rupert's Land and the North-West, now called the Province of Assiniboia.

12. That the Government of Canada appoint a Commission of Engineers to explore the various districts of the Province of Assiniboia, and to lay before the Local Legislature a report of the mineral wealth of the Province within five years from the date of our entering into Confederation.

13. That treaties be concluded between Canada and the different Indian tribes of the Province of Assiniboia, by and with the advice and co-operation of the Local Legislature of this Province.

14. That an uninterrupted steam communication from Lake Superior to Fort Garry be guaranteed to be completed within the space of five years.

15. That all public buildings, bridges, roads, and other public works be at the cost of the Dominion Treasury.

16. That the English and French languages be common in the Legislature and in the Courts and that all public documents, as well as Acts of the Legislature, be published in both languages.

17. That whereas the French and English-speaking people of Assiniboia are so equally divided as to number, yet so united in their interests and so connected by commerce, family connections, and other political and social relations, that it has happily been found impossible to bring them into hostile collision, although repeated attempts have been made by designing strangers, for reasons known to themselves, to bring about so ruinous and disastrous an event.

And whereas after all the troubles and apparent dissensions of the past, the result of misunderstanding among themselves, they have, as soon as the evil agencies referred to above were removed, become as united and friendly as ever.

Therefore as a means to strengthen this union and friendly feeling among all classes we deem it expedient and advisable

That the Lieutenant-Governor who may be appointed for the Province of Assiniboia should be familiar with both the French and English languages.

18. That the Judge of the Supreme Court speak the English and French languages.

19. That all debts contracted by the Provisional Government of the Territory of the North-West, now called Assiniboia, in consequence of the illegal and inconsiderate measures adopted by Canadian officials to bring about a civil war in our midst, be paid out of the Dominion Treasury; and that none of the members of the Provisional Government, or any of those acting under them, be in any way held liable or responsible with regard to the movement or any of the actions which led to the present negotiations.

20. That in view of the present exceptional position of Assiniboia, duties upon goods imported into the Province shall, except in the case of spiritous liquors, continue as at present for at least three years from the date of our entering the Confederation, and for such further time as may elapse until there be uninterrupted railroad communication between Winnipeg and St. Paul; and also steam communication between Winnipeg and Lake Superior.³⁶³

Stanley's basic assertion, that the Métis "rebellion" was fueled by the Métis desire to hang on to their primitive culture in the face of the impending influx of civilized men, seems to be unsupported by this List of Rights. Indeed, "Métis" specific demands seem to be virtually ignored in this List of Rights, which seems to be styled to find terms for provincial status upon entering confederation. Surely, the Métis were well aware that their population dominance in

³⁶³ C.O. 42/685; P.P. 1870, L. (C. 207) *ibid.* at 110-113. Also see, Sealey, *supra* note 73 at 55-59.

the territory would not last for very long. Some aspects of this list serve Métis ends as a diverse people but not necessarily as Aboriginal people. For example, the French and English languages are protected here, which is no doubt important for the Métis. Also, part 5 asks for the protection of the lands of current residents but this section is not aimed specifically at “Aboriginal title”. Part 9, in limiting voting rights to those who have lived in the province for a minimum of three years and are property holders (and excluding ‘uncivilized and unsettled Indians’) would help secure the Métis voting majority for the short-term. Perhaps the Métis hoped that this time would allow for the local legislature to protect the Métis interests during and after the disappearance of the Métis majority. This interpretation is supported by part 11 which insists upon local control over the public lands in the newly formed province. Also of interest is the contrast between the treatment of Indians in parts 9 and 13. In part 9, those “uncivilized and unsettled” Indians are not allowed to vote. This is interesting because it does not necessarily apply to all Indians. Rather than being exclusively about race, although it is definitely about that, voting rights are based on a lifestyle. Certainly there is nothing in this language which bars a settled and civilized Indian from voting. This section does much to dispel the notion that the Métis were seeking to protect their primitive lifestyle because they did not appear to view themselves in that manner. While the Métis at Red River recognized their Aboriginal ancestry they saw themselves as differing from Indians in lifestyle. In part 13, the demand for treaties with Indians is made. So, the List of Rights serves to underscore the importance of securing Indian rights and obligations via treaties while at the same time setting out that Indian lifestyle is not compatible with “civilized” people and institutions. Focusing on lifestyle reminds us of the enfranchisement mechanisms adopted later by Canada. Yet, voting in this context doesn’t seem to preclude an Indian from remaining an Indian while still being

able to vote if they meet the “civilized and settled” criteria. The obvious observation here is that the Métis most certainly saw themselves as civilized and settled. From this, it appears that the Métis were not “rebellious” in order to maintain their primitive culture but, rather, they were trying to assure that their property and language rights were protected, thus ensuring a smooth transfer into the Canadian Dominion. What is unclear is the extent to which the Aboriginal title argument may have been used to justify the preferences of the Métis. As we will see later Ritchot quickly moved to Aboriginal title when local control of lands seemed to be out of reach.

If the Métis were seeking to enter Canada on their own terms, it is also evident that they did not intend to rise against the Crown. During an interview with Bishop Taché on March 11, the leaders of the Provisional Government asserted that “they had never intended to rise against the Crown, that their sole intention was to come to an understanding with the Canadian authorities previous to joining Confederation.”³⁶⁴ Taché relayed Macdonald’s sentiments to the Métis that “in case a delegation is appointed to proceed to Ottawa, you can assure them that they will be kindly received, and their suggestions fully considered.”³⁶⁵ While Stanley erred in assessing the Métis motivation, he aptly captured Riel’s motives for resisting the initial transfer of the Northwest to Canada:

His aim was not to fight Canada, but, with the whole body of settlers, French and English, behind him, to force the Canadian Government to negotiate with the half-breeds the terms of their entry into Confederation. This was Riel’s constant objective from the beginning to the conclusion of the insurrection. Their own terms, embodied in a Canadian statute and confirmed by the Imperial Parliament, were regarded by the half-breed leaders as the only safeguard for the interests of a people soon to find themselves on the defensive.³⁶⁶

³⁶⁴ Taché, deposition as cited in Stanley, *ibid.* at 109-110.

³⁶⁵ Macdonald to Taché, private, February 16th, 1870 as cited in *ibid.* at 110.

³⁶⁶ *Ibid.* at 71.

However, the Métis resistance went beyond Riel. Stanley describes the feelings at Red River surrounding “nationality and livelihood”:

This feeling was naturally strongest among the French half-breeds. Their social and economic interests were more affected by Canadian expansion than those of their English-speaking kindred. Not only were the latter English speaking and Protestant, but they were, ... for the most part agriculturists, not hunters, and, therefore, less likely to suffer from the economic dislocation which was bound to follow any rapid influx of white settlers. Nevertheless, the Scotch and English half-breeds expressed anxiety regarding their rights, and Thomas Bunn, a prominent English half-breed member of the Council of Assiniboia, declared that, had the surveys taken place among the English half-breeds instead of among the French, they would have acted as the French had done.³⁶⁷

Although the French Métis were the first to rise against the transfer to Canada, the majority of the settlement was soon on board.

The various incarnations of the Metis List of Rights are relatively consistent in their language and goals. The listed rights seem designed to either ensure local governmental authority within the Dominion of Canada or to ensure that land and lifestyle are protected. The establishment of local authority takes its form in the demand for provincial status and voting rights. The latter category of rights is characterized by demands for protection of lands and language. With the inevitable threat of immigration looming, the demands for local government cannot be seen as a demand for Métis specific control of the territory. Remembering the context, the List of Rights was crafted at the behest of Donald Smith to facilitate negotiation with Canada. Entering Confederation as a province was the end goal. There was never a desire to retain a Métis specific government indefinitely over the Northwest. The *Manitoba Act* is crafted in much the same way as in that it contains culture and lifestyle specific provisions as well as provisions which are intended to complete the legal transfer of the Northwest. It is important to recognize that the Métis were trying to achieve fair

³⁶⁷ *Ibid.* at 62 (Stanley is referring to Bunn, deposition: Report of the Select Committee, 1874).

compensation for all the people in their territory. But this intention does not detract from their specific goals, or unique claims, as a people.

III. Negotiations in Canada

III.a. *A False Start*

The delegates from the Provisional Government arrived in Ottawa on April 11, 1870. The following day, Father Ritchot, who was taken to the Episcopal Palace where he was a guest of Rev. Father Administrator, received a warm welcome from Sir George Cartier, Minister of Militia. Ritchot was assured that the Canadian government was not swayed by the discontent in regards to the execution of Thomas Scott. Cartier gave Ritchot assurances that the Canadian government was ready to negotiate, to listen to the delegates, and to “do them justice in every particular”.³⁶⁸ Ritchot also met Hon. Joseph Howe, Secretary of State for the Provinces. Later that evening Ritchot heard that arrest warrants had been issued in Toronto for the Red River delegates. A.H. Scott was arrested that evening. Ritchot was served with an arrest warrant on April 13. His appearance in court was adjourned until the following day. Judge Black who travelled separately, was not arrested.

When Ritchot appeared in court on Thursday April 14, the judge declared that the Toronto magistrate who issued the warrant had no jurisdiction over the delegates. As a consequence, Ritchot and Scott were served with another warrant signed by an Ottawa magistrate and were immediately arrested again. The arrests of the Red River delegates were not received well in Britain. On April 18, Lord Granville sent a telegraph from Britain to get answers: “Did Canadian gov’t authorize arrests of delegates?” he asked, “Full information

³⁶⁸ “The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870” in Morton, *supra* note 32 at 133.

desired by telegraph”.³⁶⁹ Canada's response indicated that the arrests were not their doing: “Canadian gov’t did not authorize arrest of delegates. A brother of deceased Scott laid information on oath against two of the three as accessories before the fact.” Indeed, the arrest warrant was produced due to the efforts of Hugh Scott, the brother of Thomas Scott, who “swore out a warrant for the arrest of Ritchot and A.H. Scott on a charge of aiding and abetting the ‘murder’”.³⁷⁰ Great Britain was also informed that Macdonald was covering the legal costs of the delegates.³⁷¹

Ritchot's appearance in court on April 23 was less than dramatic. The prosecutor informed the Court that he wished to withdraw the charges due to lack of evidence and the judge accepted his request. Upon leaving the court Ritchot was met by a crowd of supporters (comprised of French-Canadians, Irishmen, and members of Parliament). Ritchot encouraged them not to demonstrate. After having been arrested, it was hard for Ritchot not to be aware of the tensions that surrounded the delegates. Protesters put pressure on the Canadian Government not to receive the delegates from Red River who were being stylized as “The Messengers of the Murderer...”³⁷² Demonstrations would only serve to fan the flames further.

III.b. *Competent Parties*

Stanley has argued that the Canadian government was reluctant to officially receive the delegates as representatives of the Provisional Government.³⁷³ Stanley explains that when Lord Dufferin was reflecting on the situation in 1875 he explained that the delegates “were

³⁶⁹ PAC, Records of the Governor General’s Office, Records of the Governor General, RG 7 G 13, Vol. 3, Granville telegram to Young, 18 April 1870 in Sprague, *supra* note 18 at 55.

³⁷⁰ Stanley, *supra* note 21 at 117.

³⁷¹ PAC, Records of the Governor General’s Office, Records of the Governor General, RG 7 G 13, Vol. 3, Young cypher telegram to Granville, 18 April 1870 in Sprague, *supra* note 18 at 56.

³⁷² *Telegraph*, as cited in Stanley, *supra* note 21 at 116.

³⁷³ *Ibid.* at 114-115 where he writes: “The Canadian Government took the stand that Ritchot, Black, and Scott, were the accredited delegates of the Convention rather than of the Provisional Government.”

selected, and the terms they were instructed to demand were settled, before the election of Riel to the so-called Presidency.”³⁷⁴ Official recognition of the delegates may have been viewed as giving some legitimacy to the Provisional Government. However, it is clear that the delegates were operating under the authority of the Government currently in place at Red River and not the Convention of delegates which preceded the Provisional government. Stanley explains:

the delegates had declined to accept their appointment from the Convention and were not persuaded to undertake the task of negotiation until after Tache's return. In view of the fact that the Provisional Government had been established by and with the approval of the majority of the different racial elements in the colony, it would appear that the delegates were justified in accepting their commission directly from the Secretary of that Government.³⁷⁵

Indeed, the delegates' official commission came from Thomas Bunn, the Secretary of State for the Provisional Government. That commission read as follows:

To Revd. N. J. Ritchot Ptre.

Sir – The President of the Provisional Government of Assiniboia in Council, by these presents grants authority and commission to you, the Reverend N. J. Ritchot, jointly with John Black, Esquire, and the Honourable A. Scott, to the end that you betake yourselves to Ottawa, in Canada; and that when there you should lay before the Canadian Parliament the list entrusted to your keeping with these presents, which list contains the conditions and propositions under which the people of Assiniboia would consent to enter into Confederation with the other Provinces of Canada.

Signed, this twenty-second day of March, in the year of Our Lord, one thousand eight hundred seventy.

By Order,
(Sgd.) THOMAS BUNN,
Secretary of State.

Seat of Government,
Winnipeg,
Assiniboia³⁷⁶

Although Macdonald and Cartier seemed reluctant to receive the delegates in any official manner, Ritchot had demanded official recognition. On Monday, April 25, the first day of substantive negotiation, Ritchot became displeased with the method of negotiations. While he noted in his journal that the Canadian representatives were courteous and friendly, he felt that he was still not received in an official capacity. Ritchot doubted whether negotiations could

³⁷⁴ Dufferin to Carnarvon, December 10th, 1875: C.O. 42/730; C.S.P., 1875, Vol. VII, No. II as cited *ibid.* at 114-15.

³⁷⁵ *Ibid.* at 115.

³⁷⁶ Bunn to Ritchot, March 22nd, 1870 as cited *ibid.*

proceed unless he was made aware of where the delegates officially stood. Cartier tried to reassure Ritchot that official recognition was given when he initially was introduced to Ritchot, that he met him as a representative of his Parliamentary colleagues, and that he and Macdonald were again meeting with Ritchot and Judge Black in an official capacity. Ritchot was further assured that Macdonald had recognized the delegates in Parliament and that official recognition would be given in writing.³⁷⁷ This recognition was given, by Hon. Joseph Howe, Secretary of State for the Provinces in the form of a letter dated April 26, 1870. That letter read:

Ottawa, April 26th, 1870.

Gentlemen – I have to acknowledge the receipt of your letter of the 22nd instant, stating that as delegates from the North-West to the Government of the Dominion of Canada, you are desirous of having an early audience with the Government, and am to inform you in reply that the Hon. Sir John A. Macdonald and Sir Geo. Et. Cartier have been authorized by the Government to confer with you on the subject of your mission and will be ready to receive you at eleven o'clock. I have the honour to be

Gentlemen,

Your most obdt. Servant,

(Signed) Joseph Howe.

To the Revd. N. J. Ritchot, Ptr.,

J. Black, Esq.,

Alfred Scott, Esq.³⁷⁸

Despite the wording of the letter, Morton's historical assessment provides a different interpretation of the delegate's authority:

The Convention elected by the people of Red River had elected delegates who might be sent as representatives of the people of Red River. The second Provisional Government was simply accepted without comment as a necessary stop gap; no officer or act of it was ever recognized and it was to vanish without a trace. But, in fact, the delegates, as representatives of the Convention of the people of Red River and not, as Riel claimed, of the Provisional Government, had to be received.³⁷⁹

Although the delegates were originally nominated by the Convention, the commission they carried, and presented to the Canadian authorities, was given by the Secretary of State for the Provisional Government. Even in its most mundane, the act of granting an official commission to the delegates refutes Morton's claim that no officer or act of the Provisional Government

³⁷⁷ "The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870" in Morton, *supra* note 32 at 138.

³⁷⁸ Howe to Ritchot, Black and Scott, April 26th, 1870 in Stanley, *supra* note 21 at 118.

³⁷⁹ Morton, *supra* note 32 at xix.

was recognized. The delegates were received under the authority they presented, and negotiations were carried out with full knowledge that the commission they carried was from the Provisional Government. This point is subtle but important because if the delegates did not come from the acting political authority in Red River *at the time of the negotiations* then they could hardly be accepted as proper representatives of the people. The federal government would have been negotiating with people who were not duly constituted to negotiate. The entirety of the discussions and the validity of the *Manitoba Act* itself would be under serious scrutiny. The very fact that the delegates carried a commission from the current acting government at Red River validated their mission and their authority to negotiate (and that was the Provisional Government).

It appears that the vague phrasing in the letter from Joseph Howe was intentionally used to accept the delegates without accepting them as representatives of the Provisional Government. A week before Joseph Howe wrote his letter, Macdonald defended the credentials of the Red River representatives in the House of Commons: "They could have the credentials of representatives from the meeting of the people...they had an election, and that certain bills of rights were agreed to, and certain delegates were appointed to lay them at the foot of the Throne..."³⁸⁰ Macdonald's statement shows that he understood the importance of the election in Red River and viewed it as a valid means to select representatives. J.W. Taylor, an American agent who was sent to Ottawa for the express purpose of reporting on the negotiations and who had high level contacts in Ottawa (including Joseph Howe, the Secretary of State for the Provinces) recognized that Canada could not avoid accepting the delegates while also legitimizing the Provisional Government, he wrote:

³⁸⁰ "Letters of J. W. Taylor From Ottawa, April 19 To May 5, 1870" in Morton, *ibid.* at 49. Morton notes that the original source of these quotations is the "reports of the question period in the House of Commons".

If the delegates are received, upon the appointment of the February Convention, it will be difficult to repudiate the government at Red River which was installed by the action of the same Convention. That Government has also a large degree of recognition from the Hudson Bay Company. Elsewhere than in an English colony, it would have long ago been recognized at Washington. I confess I do not see how the Canadian Government can reach the results they so ardently seek, through the intervention of the Red River delegates, without condoning the action of Riel's government – *even to the execution of Scott*. But, in the present excitement, this will be very hazardous.³⁸¹

There can be little serious doubt that Macdonald and Cartier were also competent parties to negotiate on behalf of the Dominion of Canada. Macdonald, the Prime Minister, and Cartier, the Minister of Militia and Defence, were Dominion representatives of the highest order. For the delegates from Red River, there was also no doubt that Macdonald and Cartier were properly positioned to negotiate a binding agreement.

III.c. *Negotiations Get Underway*

In reviewing the negotiations, it is helpful to compare the beginning and ending points. The negotiators began at very different positions. The Canadians wanted to gain control of a vast territory and Métis grievances were standing in their way. To a large extent Canada was in a reactive position. The Canadians had to respond to the Métis List of Rights which formed the basis of negotiation. The Métis bargaining power rested, for the most part, in the physical control they exerted over Red River. Therefore, it would follow, that the primary job of the Canadian negotiators was to offer enough enticement to convince the Métis to relinquish that control. The Métis were looking for assurances which would ensure that their prior occupation of the land was honoured through compensation while also providing for fair terms of union between the Dominion of Canada and the Northwest.

By looking at how the List of Rights and the *Manitoba Act* compare, we can identify the most likely areas of agreement and also locate potential areas which might require investigation

³⁸¹ *Ibid.* at 50.

beyond the terms of the *Manitoba Act*. As we will see, a great number of the demands in the List of Rights are reflected in some form in the *Manitoba Act*. But we must not put too much emphasis on the lists of rights, for as we will see below, they were but a starting point for negotiations.

The Métis demand for Provincial status was somewhat reluctantly acceded to although not as originally intended. The Métis envisioned that all of Rupert's land would join Union as a province called "Assiniboia". Instead, provincial status was granted under section 1 of the *Manitoba Act* over a much smaller parcel of land under the name of "Manitoba". Macdonald did not envision that the new territory was to immediately become a province, or that the territory would have representative government. So, Macdonald informed the delegates that he intended on making the territory a province at a future date. In the interim, officials would be appointed to run the territory. The delegates opposed this approach and Macdonald retreated. At first Macdonald offered a transition period of one year, which he then reduced to six months, and finally lessened the transition period to two months. Still, the delegates objected. Finally, Macdonald proposed a government akin to a colony which would consist of 26 representatives; 20 of these representatives would be elected and 6 would be appointed by the government of Canada. Judge Black wanted to accept these terms but Ritchot and Scott refused. Cartier and Macdonald were insistent upon this matter, but the delegates still refused to accept it. Macdonald had "no objection to *two-thirds* of the Council being selected from among the Residents," but anything resembling an elected responsible government had to wait until "the Territory is in a position to bear the burden and assume the responsibilities."³⁸² Finally, after further discussion Cartier and Macdonald acceded to responsible government. Although

³⁸² PAC Macdonald Papers, Letter Books, vol 13, p.848, Macdonald to Smith, 3 January 1870 in Sprague, *supra* note 18 at 49.

Macdonald initially resisted provincial status, his attitude changed after a few hours of negotiation, when “he finally conceded that provincial status might be granted at once, at least to the District of Assiniboia.”³⁸³ The insistence of the delegates is understandable. If the Métis were to ensure that their interests would be protected during the advance of settlement, it would be necessary to try and maintain local control while they had numbers on their side. Securing responsible government was an important first step. The Métis were already exercising self-government. It would be difficult to ask them to give it up, even if only temporarily. With the adoption of provincial status so too came the incorporation of sections 8 to 22 of the *Manitoba Act* which set out the rules governing the provincial legislature and provincial voting rights.

Many of the demands in the List of Rights are directly reflected in the *Manitoba Act*. The Métis demands for representation in the Senate and House of Commons are reflected in sections 3 and 4 of the *Manitoba Act* on the same basic terms set out in the List of Rights. Equal language rights for both French and English, which were put forth by the Métis in sections 16, 17, and 18, are laid out in section 23 of the *Manitoba Act*. These language rights were a key cog in the Métis strategy to protect their advantages as original settlers. It ensured that the expected influx of settlers from Ontario would not drown out the soon to be French speaking minority. The easy concession of equal English and French language rights reflected the same policy enacted in section 133 of the *BNA Act*.³⁸⁴

³⁸³ *Ibid.* at 57.

³⁸⁴ *British North America Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) (*Constitution Act, 1982*) s. 133 in *A Consolidation of The Constitution Acts 1867 to 1982* (Ottawa: Department of Justice Canada, 1999) which reads: “Either the English or the French Language may be used by any Person in the Debates of the House of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.”

The List of Rights addresses specific financial matters in sections 3, 4, 7, 15 and 20. Section 7 asked for the sum of eighty cents per Manitoba resident to be transferred from the Federal government to the Province. These exact amounts were adopted in the *Manitoba Act*. Similarly, section 20 dealing with duties is closely reflected in section 27 of the *Manitoba Act*. Although the specific terms of the other sections are absent from the *Manitoba Act*, similar issues are addressed in sections 24 through 29. These sections address the issue of funding the new province, services directly funded by the federal government, and the imposition and administration of customs duties. The lack of debate on these points as reflected in the journal of Father Ritchot gives some indication that agreement was reached on these points rather quickly.

Other sections of the List of Rights and the *Manitoba Act* reflect what appear to be fading concerns of the Métis or specific interests of Canada. For example, section 2 of the *Manitoba Act* expressly places Manitoba under the terms of the *BNA Act*. There is no comparable Métis interest reflected in the List of Rights. However, the act of negotiating membership in the union would make the inclusion of such a clause foreseeable. Similarly, the incorporation of the office and roles of the Lieutenant-Governor for the province were not mentioned in the Metis List of Rights. On the other hand, the Métis demands for mineral exploration reports, negotiation of Indian treaties, and steamship communication, reflected in sections 12 to 14 of the List of Rights, do not make an appearance in the *Manitoba Act*.

And still other Métis demands are clearly denied in the terms of the *Manitoba Act*. The Métis demand, in section 10, that the agreement between the HBC and Canada be annulled where it interferes with the new negotiation process was countered in the *Manitoba Act* with the reaffirmation of the HBC's negotiated agreement. Even in such an instance potential adverse effects are hard to see. If the Canadian government can execute its commitments to both parties

honourably then there is no reason to think that affirmation of the HBC agreement will impact upon negotiated Métis rights.

The Métis strategy for securing control of the new province and thereby ensuring that their land rights were protected was turned on its head when Canada insisted upon exerting control over the lands and resources as expressed in section 30 of the *Manitoba Act*. The List of Rights reveals that the Métis saw the key component in ensuring their rights would be honoured was to maintain control of provincial lands. This control coupled with their local voting majority would ensure that local politicians could protect Métis lands during the rapid changes which were to accompany the influx of settlers. By protecting Métis language rights, Métis leaders (through an amnesty reflected in section 19 of the List of Rights) and Métis lands (section 5 of the List of Rights), the Métis would give their community every opportunity to adjust to the new way of life which the settlers would bring. However, without control of the lands, the Métis would leave their rights hanging upon the goodwill of the Canadian government. And this is where the debate over some of the more contentious parts of the *Manitoba Act* is centered.

On April 23, after the dismissal of the charges brought against the delegates, Ritchot went to meet with Cartier and Sir John A. Macdonald at Cartier's house. Mr. Black was also in attendance. Ritchot's diary does not give any indication as to why Scott was not in attendance. Although his limited role in representing American interests could explain his apparent absence. According to Ritchot, the meeting was "pretty well confined to asking questions or requests for information on the respective positions of the two parties. Our instructions were not asked for."³⁸⁵ The Canadian representatives repeatedly assured the delegates that "they intended to accommodate all the delegates' suggestions."³⁸⁶

³⁸⁵ "The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870" in Morton, *supra* note 32 at 136.

³⁸⁶ Sprague, *supra* note 18 at 56.

The Red River and Canadian representatives met again on Monday April 25. This was the first substantive meeting between the delegates and representatives of Canada. Cartier and Macdonald had asked for an explanation of the List of Rights, afterwards they desired the delegates to compose a list which could be presented to them. Morton notes that this was an attempt by Cartier and Macdonald to shift the negotiations away from the List of Rights and the delegates and onto the people of Red River. Perhaps Cartier and Macdonald didn't fully appreciate that the people's representatives had already spoken and the answer was in the List of Rights. Or perhaps, they simply didn't like what they saw in the List of Rights and were hoping for a new list to be drafted. Judge Black was encouraged by the discussion but Ritchot "hadn't much taste" for it.³⁸⁷

III.d. *The Amnesty*

It was during the meeting of Monday, April 25 that Ritchot first brought up the demand for an amnesty. D.N. Sprague describes Ritchot's understanding:

Another facet of the demanded welcome was a general amnesty for all occurrences before the transfer. Ritchot stressed that such a pardon was the indispensable starting point, it was the '*sine qua non* of any settlement.' Subsequently, when Macdonald seemed only to resist the concession of provincial status, Ritchot thought that the Prime Minister was conceding the amnesty point and wished to move on.³⁸⁸

This was the first of several reassurances which Ritchot would receive concerning an amnesty. The desire for an amnesty is reflected in 19th clause of the Bill of Rights, which demands that "none of the members of the Provisional Government, or any of those acting under them, be in any way held liable or responsible with regard to the movement or any of the actions which led

³⁸⁷ "The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870" in Morton, *supra* note 32 at 137.

³⁸⁸ Sprague, *supra* note 18 at 56.

to the present negotiations.”³⁸⁹ And, it is from this basis that Ritchot pushed to protect the Métis leadership by securing a general amnesty.

When Ritchot brought the conversation toward the question of a general amnesty, he was informed that the Canadian representatives had no power in the matter. Ritchot understood the conversation as follows: “Sir John and Sir George told us that the affair was not within their competence, that they wish to treat only of affairs that concerned them, that that was a matter solely for the local government or for England.”³⁹⁰ Ritchot indicated that an amnesty was an essential step toward concluding an agreement. Macdonald and Cartier indicated that they would “undertake to get the matter settled and that it was easy – by such or such means that they indicated to us – provided that the matter is settled, it is all that matters to us.”³⁹¹ Indeed, Macdonald assured the delegates that he would ask the Governor General to “seek a guarantee of safety from prosecution from the Queen”³⁹² before transfer took place. At that point the issue of an amnesty seems to have been settled.³⁹³ Here the Canadian representatives were being less than helpful. Considering the arrests of the delegates in Ottawa, it should have occurred to them that an amnesty on the part of Canada would have had an impact, if merely symbolic. Indeed, there is evidence that Canada may have made overtures in that regard.

³⁸⁹ C.O. 42/685; P.P. 1870, L. (C. 207) in Stanley, *supra* note 21 at 110-113.

³⁹⁰ “The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870” in Morton, *supra* note 32 at 139.

³⁹¹ *Ibid.*

³⁹² Sprague, *supra* note 18 at 57.

³⁹³ Sir Stafford Northcote's diary confirms these points. On April 26th, Northcote spoke with Cartier and Macdonald who told him that “they had been discussing the difficult question of an amnesty and indemnity” with the delegates. The following day, Northcote again met with Cartier, who informed him “that the delegates were asking for an amnesty, but that the Govt. could only say that that was a question which must be left to H. M...” See, “The Ottawa Diary of Sir Stafford Northcote” in Morton, *supra* note 32 at 89.

Taylor's correspondence on May 2, 1870 addressed the importance of an amnesty on the same day that the Manitoba Bill was to be introduced to Parliament.³⁹⁴ However, as Taylor reported, Alfred Scott saw the issue as being settled:

Every one constantly recurs to the possibility of avoiding force. There is no confidence of success, if Riel is driven to forcible resistance. The expedition will consist of a thousand regulars (British troops) and 800 Canadian volunteers. In Quebec, the people will not volunteer, while in Eastern (Maritime) Provinces, there is no attempt to attain recruits. It seems difficult to increase the expedition – hence the necessity that it shall not be opposed. But it will be, unless Riel is protected by amnesty.

Mr. A. H. Scott, one of the Red River delegates, intimated during a private conversation which I held with him yesterday that the civil amnesty would be full and proceed from Canada: while the Imperial Government would assume the responsibility of a pardon for criminal offences – which seems not unlikely.³⁹⁵

Taylor's letter the following day reiterated his understanding that the amnesty had been assured:

...jurisdiction for crimes at Red River during the last six months (and of course previously) is not claimed for Canada, - indeed is expressly disclaimed by the Minister of Justice, Sir John Macdonald. This was elicited in response to an excited inquiry - 'what is to be done with the usurper Riel?' It was substantially admitted that the English Government would alone be responsible for criminal proceedings – and everything now confirms the opinion expressed in former communications, that long before the expedition reaches Red River, the Queen's proclamation of complete amnesty will be issued. On this point, I expect much frantic denunciation: but the conclusion is foregone.³⁹⁶

The Red River delegates were repeatedly given reassurances that an amnesty was agreed to. The day after the Manitoba Bill was initially presented to Parliament, Ritchot met with the Governor General and again the issue of an amnesty arose.

Father Ritchot met the Governor General on May 3. Ritchot's previous diligence left him during this meeting. Early in the negotiations with Cartier and Macdonald, Ritchot sought out official, written, recognition of his status and that of Cartier and Macdonald. However, in meeting with the Governor General, Ritchot was told that the Governor General had “promised in the name of Her Majesty that no one of those who had taken part in that unfortunate violation

³⁹⁴ Letters of J. W. Taylor From Ottawa, April 19 To May 5, 1870” in Morton, *supra* note 32 at 56.

³⁹⁵ *Ibid.* at 57.

³⁹⁶ *Ibid.* at 61.

of laws would be troubled, that in effect there would be a general proclamation of amnesty...”³⁹⁷

And it is on this point that Ritchot takes the Governor General, and Sir Clinton Murdoch,³⁹⁸ at their word. Ritchot did not insist upon written confirmation of the commitment for an amnesty.

Ritchot recounts the conversation in the following way:

Then Sir Clinton Murdoch told us that Her Majesty's government desired only one thing, which was to re-establish peace and to pass the sponge over all the facts and illegal acts which had taken place in the North West and its territories.

We remarked to him once more that we had nothing in writing on a subject so important and that it seemed necessary to have it. He replied to me that at a time when one dealt with men such as those before whom we were, it was not necessary to dot all the *i*'s, that they must have a certain latitude, that it would be more advantageous for us to have it so, etc.

I thought I should have to yield to these observations, but I observed the people would not be satisfied without having some assurances on this subject.

His Excellency told me that everything would go well, that the settlers of the North West could be reassured, that no one would be troubled.³⁹⁹

On May 17th, Judge Black departed for Montreal. Ritchot met with Judge Black prior to his departure. Black had kind words for Ritchot, Ritchot wrote:

He [Black] had no more business with the governments. He had all he needed and even more. The amnesty, the land question, were none of his business. The convention had charged him with the business of the English *métis* and me with the French Canadians. He was pleased with me. Without me, he said, we should not have had the half of what we had. The people of Red River, English and French, as also Canada owed me a great deal, etc.⁴⁰⁰

According to Ritchot's diary, he was the central figure in the negotiations in Ottawa. It was he who pushed the government on several key issues including the Métis land grants, and the amnesty. Indeed, as Ritchot indicated above, when Black departed the question of the amnesty was still not satisfactorily resolved, despite repeated assurances that an amnesty was coming.

³⁹⁷ “The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870” in *ibid.* at 146.

³⁹⁸ *Ibid.* Here Ritchot describes Sir Clinton Murdoch as a “special representative of Her Majesty” who was sent “to help settle the difficult question [of an amnesty], knew fully the intention of Her Majesty on that subject.”

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.* at 153. Black's sister also expressed kind words towards Ritchot: “Miss Black [Judge Black's sister] said the same thing; she thanked me a thousand times in the name of the settlers of Red River and wished me a thousand good wishes. She is very kind, and has always seen me with pleasure. She was pleased to make a comparison between our discussions that were so well bread with the debates of Parliament which were so controversial. She was happy to be able to say that she will long remember the generous effort that I have made for the people of Red River in general without distinction of origin or belief.”

On May 19, Ritchot and Cartier went to Rideau Hall to meet with the Governor General.

Ritchot discussed the issue of amnesty and received the following assurances:

His Excellency says that there is nothing to fear for the settlers of Manitoba who have taken part in the movement of last autumn and winter, that Canada has no jurisdiction at Red River, that he is not yet Governor of that part of the British possessions, that when he will be, he will only make peace prevail, that the English troops have nothing to do before the establishment of the new governor and government, that then the new government will be obliged to follow the orders of His Excellency which are very favourable to the settlers of Manitoba, that the Imperial Government has shown in the telegram of Lord Granville on which he based his proclamation in which he said that those who have taken part in the movement will not be molested so long as they are willing to recognize British authority.

I made the observation to His Excellency that, as I had already said to him, the Manitobans had never resisted England, but that proclamation was only for the past, and other events had happened since that time; that as for me I very much wanted to believe all that His Excellency told me, but something more was needed to make the people understand.

...

His Excellency told us that the Proclamation of December 8 is enough to assure us that a general amnesty is going to be proclaimed immediately, that it is not necessary to give another guarantee in writing. I remarked to him again that that proclamation was dated December 6, 1869, and it could happen that it would not be sufficient and not include events that had taken place since. His Excellency assured me that it would suffice, that, moreover, Her Majesty was going to proclaim a general amnesty immediately, that we could set out for Manitoba, that the amnesty would arrive before us.⁴⁰¹

Ritchot clearly had every reason to believe that an amnesty was secured. However, on May 24, the Governor General informed Ritchot, through Cartier, that the way to go about moving the amnesty forward was to draft a petition for the Queen and that the Governor General would back it. Ritchot was hesitant of this new hurdle:

I refused to do so at first and I ended by consenting because it is only a matter of form, I was told, that it was necessary to forward a document to Her Majesty and that the Governor was a little embarrassed at the thought of presenting it himself lest he should compromise himself.⁴⁰²

This petition was forwarded to the Governor on May 26. Ritchot left Ottawa under the distinct impression that the amnesty question had been secured and that official notice would be forthcoming.

⁴⁰¹ *Ibid.* at 154.

⁴⁰² *Ibid.* at 155-56.

III.e. *The Question of Metis Lands*

On April 27 the Red River delegates and Canadian representatives met once again. Macdonald and Cartier presented the delegates with a draft bill. The major stumbling block between the delegates and Canada was which level of government would have control over the resources. Ritchot held the view that the new province should be in charge of natural resources as the other provinces were. Macdonald and Cartier justified the federal government retaining the natural resources because of the expenses involved in the land transfer and in compensating Indians for the extinguishment of their title. This expense was real and fell solely upon the federal government via section 91(24) of the *BNA Act*. Ritchot was aware of this federal responsibility: “The matter of the Indian title being in the exclusive domain of the Confederation, the Province of Manitoba will not be called on to contribute ... to these grants.”⁴⁰³ Having not yet settled the issue of control over natural resources, Ritchot demanded that a compensation scheme should be directed to people of partial Indian ancestry “in recognition of their inherited part of the aboriginal title.”⁴⁰⁴ Ritchot used his displeasure with the allocation of natural resources to push his point on mixed blood Indian title. Ritchot stated that the dual land rights were necessary to get past the natural resources issue. Macdonald and Cartier gave way. The

⁴⁰³ *Ibid.* at 160. Also see, Canada, *The Report of the Royal Commission on Aboriginal Peoples. Report*. 5 vols. (Ottawa: Minister of Supply and Services Canada, 1996) (RCAP) at Vol. 2, Ch. 2, sub 6.1 has called for a Royal Proclamation to reaffirm the Crown’s relationship with Aboriginal Peoples. RCAP recommends that such a Proclamation would recognize, amongst other things, that “Métis people, as one of the Aboriginal peoples recognized in section 35 of the *Constitution Act, 1982*, are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*,” online at Indian and Northern Affairs Canada: <http://www.collectionscanada.gc.ca/webarchives/20071211054824/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh8_e.html#6.2%20Companion%20Legislation> (accessed on January 2nd, 2012). For the Commissions reasons supporting this opinion, Vol. 4, Ch. 5, sub. 1.5 online at: <http://www.collectionscanada.gc.ca/webarchives/20071211055837/http://www.ainc-inac.gc.ca/ch/rcap/sg/sj21_e.html#1.5%20Coverage%20under%20Section%2091%2824%29>. Note that while RCAP’s assessment is consistent with how Cartier had envisioned section 91(24) the matter has yet to be determined in the courts.

⁴⁰⁴ Sprague, *supra* note 18 at 57.

delegates were not united on this issue. Ritchot noted that he and Scott had a different opinion than Judge Black:

We maintain our rights in common with the other provinces. Mr. Black finds it just that the Dominion should have control of the lands, he finds extravagant the pretensions of the inhabitants of the North West to claim the lands as theirs. I reply and prove that not only is it not extravagant but just and reasonable. Sir George supports me, Sir John is of the same opinion, but they reply that to reach a settlement it is necessary to make some concessions.⁴⁰⁵

When the delegates were asked what should be done with the lands, Ritchot responded that control over lands was to rest with the local government. This according to the ministers was impossible so Ritchot explained that “[w]e could by no means let go control of the lands at least unless we had compensation or conditions which for the population actually there would be the equivalent of the control of the lands of their province.”⁴⁰⁶ The compensation that Ritchot was seeking was land for the extinguishment of Indian title and conditions which would ensure that those lands remained with Métis families for generations or perpetually.⁴⁰⁷ This didn’t sit well with Cartier and Macdonald: “The ministers make the observation that the settlers of the North West claiming and having obtained a form of government fitting for civilized men ought not to claim also the privileges granted to Indians.” Ritchot didn’t see the issue in the same light, as he responded: “They do not claim them, they wish to be treated like the settlers of other provinces, and it is reasonable.”⁴⁰⁸ Ritchot continued:

...because these settlers wish to be treated like other subjects of Her Majesty does it follow that those among them who have a right as descendants of Indians should be obliged to lose those rights. I don’t believe it; thus in asking control of the lands of their province, they have no intention of causing the loss of the rights that the *métis* of the North West have as descendants of Indians.⁴⁰⁹

⁴⁰⁵ “The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870” in Morton, *supra* note 32 at 140.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.* at 142. Ritchot argues for a “safeguarding law to keep the land in the family” and at 143 he explains that they had agreed upon the local legislature being in charge of distribution and that the local legislature “could pass laws to ensure the continuance of these lands in the *métis* families.”

⁴⁰⁸ *Ibid.* at 141.

⁴⁰⁹ *Ibid.*

Two things can be taken from this. First, the Métis residents were claiming settlers rights *and* rights due to Indian title. That is, these were distinct sources of entitlement. Second, the trade-off seemed clear, if Canada wanted to retain jurisdiction over the natural resources, then the Métis were to be compensated for their Indian title. If the federal government intended on using the wealth of the natural resources to defray the costs of extinguishing Indian title then Ritchot seemed justified in demanding that the Métis be compensated for their ancestral connection to the land.

On April 29, Ritchot displayed his vision and dedication as a representative of the people of Red River. When discussing the issue of how long children of the Métis would be entitled to land, Ritchot argued that a child's right to land should not end in less than 50 or 75 years. Again, Judge Black had a more conservative vision of the rights of the people of the Northwest, but Ritchot continued to push an optimistic agenda. When asked how many acres he had envisioned being set aside for the children, Ritchot offered 3 million acres as a starting point. Macdonald was not present at this meeting but it was clear from Cartier's response that such a number was too high. In order to move ahead with negotiations, the delegates and Cartier, decided to proceed with a number of 1.5 million acres. However, after long discussions involving the method and amount of land to be divided, Cartier “ventured to take it on himself to propose to his colleagues to grant 1,000,000 acres, but not more and it is a good deal.”⁴¹⁰ Further discussion was reserved for a later date.

Macdonald resumed the negotiations on Monday May 2. The issue of land arose quickly. Cartier and Macdonald offer 1.2 million acres while the delegates continue to claim 1.5 million. However, agreement was reached on the method of distribution, Ritchot writes:

⁴¹⁰ *Ibid.* at 143.

We continued to *claim* 1,500,000 acres and *we agreed on* the mode of distribution as follows, that is to say: The land will be chosen throughout the province by each lot and in several different lots [sic] and in various places, if it is judged to be proper by the local legislature which ought itself to distribute *these parcels of lands to heads of families in proportion to the number of children* existing at the time of the distribution; that these lands should then be distributed among the children by their parents or guardians, always under the supervision of the above mentioned local legislature which could pass laws to ensure the continuance of these lands in the *métis* families.⁴¹¹

Ritchot's intent was obviously to ensure the current Métis occupants continued to reside in their homeland by guaranteeing that their children would be given land. Macdonald's own account confirms the commitment to protect Métis lands:

That in order to compensate the claims of the half breed population as partly inheriting the Indian rights, there shall be placed at the disposal of the local legislature one million and a half acres of land to be selected anywhere in the territory of the Province of Manitoba, by the said legislature, in separate or joint lots, having regard to the usages and customs of the country, out of all the lands not now possessed, to be distributed as soon as practicable amongst the different heads of half breed families according to the number of children of both sexes then existing in each family under *such legislative enactments which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families* – To extinguish Indian claims.⁴¹²

There is some contention about the context of Macdonald's account. Specifically, the Court in *MMF1* viewed this piece of evidence as merely being Macdonald's take on what *Ritchot* was demanding rather than being reflective of any agreement reached.⁴¹³ I reject that interpretation since Métis action illustrates that they were under the impression that the agreement outlined in these accounts had been achieved. It is likely, therefore, that such an impression would have been induced by Macdonald and Cartier. Even if Macdonald's account is only reflective of his recording of Ritchot's demands, the fact that the Métis understood these terms to have been met

⁴¹¹ *Ibid.* at 143.

⁴¹² PAC, Macdonald Papers, Incoming Correspondence, pp. 40641-40642 as cited in Sprague, *supra* note 18 at 58.

⁴¹³ See *MMF1*, *supra* note 14 at para. 501-02 which read as follows: "I conclude as well that Macdonald's handwritten note of May 2, 1870 (para. 114) was simply his recording of that which Ritchot told Macdonald and Cartier. It was not evidence of an agreement reached between the Red River delegates on the one hand and Macdonald and Cartier on the other.

To interpret it otherwise, as asserted by the plaintiffs, would, I reiterate, require one to conclude that after making this agreement, Macdonald and Cartier proceeded almost directly to Parliament, where each made speeches as to the land grant which was substantially different in material respects to that which, if you accept the plaintiffs' position, they had only earlier that day agreed."

(at least in a general sense) illustrates that Macdonald most likely indicated his acceptance of these terms during the negotiations.

Ritchot had consistently argued for compensation for the Métis Indian title. Métis land protection seems to have arisen as a counter to the federal insistence that the Canadian government control the resources of the Northwest. Considering that Ritchot's vision was to ensure the children of the Métis had land rights extending for the next 50 to 75 years, it is apparent that keeping the land in the hands of the Métis was his main objective. Although the amount of land didn't seem to be decided upon in Ritchot's account, Macdonald's account appears more certain that the amount agreed upon was 1.5 million acres. Both accounts agree that the method of distribution was to be vested in the local legislature which would, as Macdonald stated above, "secure the transmission and holding of the said lands amongst the half breed families". It is in this agreement that we can begin to understand the context of the "benefit of families" clause eventually found in the *Manitoba Act*.

At this point, one can hypothesize how these lands would possibly remain in Métis hands if they were not to be granted in collective blocks. The only reasonable conclusion is that, at a minimum, lands were to be selected and granted to families. There was never any discussion that these lands were to be given to individuals. This might seem impractical but for a community which is desirous of protecting itself from the influx of settlers, community selection seems to be the only logical method of selecting lands. If for example, the number of children in the settlement was 10,000 and the total number of acres to be granted had remained at 1.5 million it would be possible to estimate that each child is worth 150 acres. But it does not follow, from the evidence gathered so far, that each child would be given a grant of 150 acres. Instead, if the Delorme family had 5 children that family would be entitled to a block of land

equivalent to 750 acres. The children are used to quantify the family grant, they are not the direct recipients of the grant. The fact that both Macdonald and Ritchot confirmed that these grants were to be kept “in the *métis* families” or “secured...amongst the half breed families” tells us that these were to be held as a collective holding. The language in both accounts is illustrative of the fact that the land was to be kept in the families and not within a specific family. Using the example above, the Delorme family would not gain the right to withdraw 750 acres from the collective grant. Instead, they would be given access to that much land based on the size of their family. However, this is only one possible interpretation. The land could also encompass large areas of common usage similar to the hay commons just outside the river lots. In that case, the children would not be used to calculate the exhaustion of the entirety of the grant, but would merely be used to calculate the portion which was being set aside for family settlement. These are possibilities but what seems clear is that the grant was collective in nature, individual grants in fee simple were not contemplated, and protections were to be issued to ensure communities maintained control over the land. It should be noted that this is perfectly consistent with modern legal interpretations of Aboriginal title.⁴¹⁴

On May 2, Northcote met with Cartier to learn if he would be able to view the proposed Act before it was submitted to Parliament in order to ascertain if any of the provisions were going to affect the Hudson's Bay Company's arrangement with Canada. Although not a first hand account, Cartier's summary confirms the amount and type of allotment for the Métis land grant. Northcote wrote:

⁴¹⁴ *Delgamuukw*, *supra* note 248 at para. 113 where the Court writes: “Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties.” The consequences of individuals attempting to acquire land from Indians are spelled out by C.J. Marshall in *Johnson v. M'Intosh*, *supra* note 232 at 593 as follows: “The person who purchases the lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”

I walked up to Sir G. Cartier's house, and sent in my card. He came to speak to me, leaving the delegates with Sir J. A. M.[acdonald] in the next room. I said, 'I have not liked to intrude upon you while the negotiations have been going on, but as I understand they are now nearly concluded I venture to ask whether you will allow me to see the measure before it is introduced, in order that I may see whether it in any way affects the interests of the Company.' He said, 'We propose to form a small province and to give it a constitution which will be fit for it, but we do not mean to give the local legislature power over the lands, because we have to provide for the extinction of the Indian title, for our engagements to the H.B. Co., and for the construction of the Railway. We therefore mean to keep the power of dealing with the lands in our own hands, making a larger contribution to the provincial expenses than we usually do in consideration of our doing so. But we propose to allot 1,500,000 acres, or thereabouts, to the half-breed population, who seem to have a kind of Indian claim to some land.' I asked, 'How are these 1,500,000 acres to be given? Will a block of land be set apart, and will not this affect the Company's claim?' He said, 'It cannot affect the Company's claim. The Company's bargain with Canada takes precedence of any other, and if we break it you will have a claim for indemnity from Canada, which I suppose you won't object to.' I understood him to say further that there would not be a block set apart for the half-breeds, but that each person whose claim to land was recognised would receive an order entitling him to claim his allotment at any time. I said I supposed, then, they would be much in the same position with the Company and that both they and we would come and claim our allotments as the blocks were set out. He appeared to agree that this would be so, but again added 'If you find you are injured you must come to Canada for an indemnity in some shape or other;' and then, as I was going out, he added, laughing, 'Mind, I don't say this officially.'⁴¹⁵

However, when Macdonald introduced the provision to Parliament later that evening, the amount of land had been reduced to 1.2 million acres:

There are also provisions to satisfy the mixed population of the country inserted in the Bill for the same reason, although it will be quite in the power of the local Legislature to deal with them. They provide that either the French or English language may be used in the proceedings of the Legislature, and that both of them shall be used in records and journals of both Chambers.... With respect to the lands that are included in the Province, the next clause provides that such of them as do not now belong to individuals, shall belong to the Dominion of Canada, the same being within boundaries already described. There shall, however, out of the lands there, be a reservation for the purpose of extinguishing the Indian title, of 1,200,000 acres. That land is to be appropriated as a reservation for the purpose of settlement by half breeds and their children of whatever origin on very much the same principle as lands were appropriated to U.E. Loyalists for purposes of settlement by their children. This reservation, as I have said, is for the purpose of extinguishing the Indian title and all claims upon the lands within the limits of the Province.⁴¹⁶

This reference to Loyalist land grants inspired the government to commission a study by Stephen Patterson on the history of Loyalist land grants. In that report Patterson describes how the grants were issued:

⁴¹⁵ "The Ottawa Diary of Sir Stafford Northcote" in Morton, *supra* note 32 at 96-97.

⁴¹⁶ Sir John A. Macdonald, May 2nd, *Dominion Debates*, 1870, Vol. 1, 1287-1320 in Morton, *ibid.* at 168-169. This reference to Loyalist land grants inspired the government to commission a study by Patterson on the nature of Loyalist land grants. See Stephen E. Patterson, "Land Grants for Loyalists: A Report Prepared for the Department of Justice Canada" Winnipeg, Manitoba, October 31, 2005 in the case of *MMFI*, *supra* note 14.

...an individual settler could apply for 100 acres and an additional 50 acres for each member of his family... For all grantees, the purchase price set in 1774 was waived, but as before, the grantee was obliged to settle, clear, plant, and raise livestock. And, again as before, he was required to pay a quit rent, although the first payment was deferred for ten years... Failure to take up the land and to meet the obligations could trigger the escheat process. The document that conveyed a grant of land consisted of a printed form in which all of the obligations of the grantee were spelled out, the failure to comply with which would cause the land to revert to the Crown.⁴¹⁷

When considering this along with the understanding of Ritchot and Macdonald, we do not see any immediate contradiction. While Macdonald told the house that the grants were to be made on “very much the same principle” it can be assumed that an exact match was not possible because of the peculiarities of Aboriginal title. Modification to the Loyalist scheme could be as simple as ensuring that any lands which did not comply with the settlement obligations, were held by the Crown for redistribution to Métis families or to be held in common for the benefit of the families were successfully settling the land. It could mean that the Métis land grant was to be apportioned in the same manner with heads of families getting a base grant and being awarded secondary grants based on the number of their children. Comparing the Métis grant to the loyalist grants does not necessarily mean that they are to be distributed exactly the same. The broader context to understanding that statement rests in the agreement reached between the delegates.

Not all members of Parliament were thrilled with the idea of setting aside 1.2 million acres for the children of the half-breeds. Indeed, Canada's future Prime Minister, Alexander Mackenzie could not understand why special provision was being made to extinguish the Indian title of a people who did not consider themselves to be Indians:

A certain portion to be set aside to settle Indian claims and another portion to settle Indian claims that the half-breeds have. But these half-breeds were either Indians or not, (hear). They were not looked upon as Indians, some had been to Ottawa, and given evidence, and did not consider themselves Indians. They were regularly settled upon farms, and what the object could be in

⁴¹⁷ See Patterson, *ibid.* at 14.

making some special provision for them that was not made for other inhabitants was more than he could understand.⁴¹⁸

Cartier told the House that these lands were not to be considered Indian reserves and it was important to settle the claims of the “first settlers” who “made the territory.”⁴¹⁹ Macdonald took a different tact. After making it clear that the land grant was not to be used to extinguish the title of “full blooded Indians”, he insisted that as representatives of the “original tribes” the half-breeds deserved “grants of land for them and their children.”⁴²⁰

On May 4, Northcote had a departing interview with Macdonald where he asked about the lands which were to be set aside for the HBC. Northcote remained concerned that the Métis land grant might interfere with the agreement between the HBC and Canada. It was evident even at this early date that Macdonald did not intend to go out of his way to keep the Métis community intact:

I afterwards saw Sir John Macdonald, who showed me the clauses of the bill which affect the Company's claims. They seem satisfactory. I asked him how the allotments to the half-breeds were to be made, and he said that when blocks were set out the Government would make provision for giving lots to such of the half-breeds as were claimants, taking care not to put them all together. Our twentieths would of course be reserved to us whether the rest of the block were sold or given away.⁴²¹

⁴¹⁸ Alexander Mackenzie (who would become Prime Minister of Canada from 1873-78), May 2nd, *Dominion Debates*, 1870, Vol. 1, 1287-1320 in Morton, *supra* note 32 at 172.

⁴¹⁹ Sir George E. Cartier, May 2nd, *Dominion Debates*, 1870, Vol. 1, 1287-1320 in Morton, *ibid.* at 176 where Cartier states: “The land, except 1,200,000 acres, was under the control of the Government, and these were held for the purpose of extinguishing the claims of the half-breeds, which it was desirous not to leave unsettled, as they had been the first settlers, and made the Territory. These lands were not to be dealt with as the Indian reserves, but were to be given to the heads of families to settle their children. The policy, *after settling these claims*, was to give away the land so as to fill up the country.” Emphasis added.

⁴²⁰ See the exchange of Hon. Mr. Wood and Sir John A. Macdonald, May 2nd, *Dominion Debates*, 1870, Vol. 1, 1287-1320 in Morton, *ibid.* at 198-199 where Macdonald states: “Hon. Sir JOHN A. MACDONALD said the reservation of 1,200,000 acres which it was proposed to place under the control of the Province, was not for the purpose of buying out the full blooded Indians and extinguishing their titles. There were very few such Indians remaining in the Province, but such as there were they would be distinctly under the guardianship of the Dominion Government. The main representatives of the original tribes were their descendants, the half-breeds, and the best way of dealing with them was the same as the United Empire loyalists had been dealt with, namely, giving small grants of land for them and their children.”

⁴²¹ “The Ottawa Diary of Sir Stafford Northcote” in Morton, *ibid.* at 103. Dispersing the Metis community would help ensure smooth emigration to the new province. See, Sir John A. Macdonald, May 2nd, *Dominion Debates*, 1870, Vol. 1, 1287-1320 in *ibid.* at 196-97 where Macdonald said: “With regard to the question of boundary and the size of the new Province, the Government would fully consider it, but he considered it would be injudicious to have a large province which would have control over lands, and might interfere with the general policy of the Government in opening up communication to the Pacific, besides, the land legislation of the Province might be

Macdonald's reassurance seems to be hinting at something other than what appeared to be agreed upon. After all, the nature of the agreement seemed to lead to the conclusion that land would not be for sale. Sale would act directly against the maintenance of the lands within Métis families. During the first night of Parliamentary debate on the proposed Bill, Macdonald was asked if the Bill was open to amendment and Sir John A. replied: "the Bill, of course, was open to amendment."⁴²² In the context of the Parliamentary process it is understandable that a bill would be open to amendment. Compromise just makes it easier to gain support for a bill. However, compromising on the terms of such an agreement could endanger the very nature of that agreement. That is to say that only Macdonald and Cartier had sufficient firsthand knowledge of the negotiations to ensure that the agreement was honoured in the form of a bill. Leaving the bill open to Parliament diminished the hard work of the Canadian and Red River representatives and put the conditions of agreement at risk.

Also on May 4, Sir John A. Macdonald informed the House that the boundaries of the Province had been modified to include Portage la Prairie at the urging of several members. As a result, "they had added 1,000 to the number of inhabitants of the proposed Province, a proportion of whom were half-breeds, they proposed to add 200,000 acres more, increasing the area from 1,200,000 acres to 1,400,000 to provide for the families of half-breeds living in the country."⁴²³ This expansion of the provincial boundaries was not discussed with the delegates. A more substantial change became apparent when Macdonald discussed how the half-breed lands were to be divided:

obstructive to emigration. All that vast Territory should be for purposes of settlement under one control, and that the Dominion Legislature. Another consideration was that by obtaining control of these lands they would be able to obtain means by which they would be in a position to obtain repayment of the disbursement of the £300,000 for the purchase and of the expenditure which they might be hereafter put to."

⁴²² Sir John A. Macdonald, May 2nd, *Dominion Debates*, 1870, Vol. 1, 1287-1320 in Morton, *ibid.* at 190.

⁴²³ *Ibid.* at 202.

Those clauses referred to the land for the half-breeds, and go toward extinguishing the Indian title. If those half-breeds were not pure-blooded Indians, they were their descendants. There were very few full-blooded Indians now remaining, and there would not be any pecuniary difficulty in meeting their claims. Those half-breeds had a strong claim to the lands, in consequence of their extraction, as well as from being settlers. The Government therefore proposed for the purpose of settling those claims, this reserve of 1,400,000 acres. The clause provided that the lands should be regulated under orders in Council by the Governor General, acting by the Lieut.-Governor, who should select such lots or tracts in such parts of the Province as he might deem expedient to the extent aforesaid, and divide the same among the children of half-breeds – heads of families. No land would be reserved for the benefit of white speculators, the land being only given for the actual purpose of settlement. The conditions had to be made in that Parliament who would show that care and anxiety for the interest of those tribes which would prevent that liberal and just appropriation from being abused.⁴²⁴

Where the delegates were discussing local legislative control over the half-breed land grant, Macdonald indicated in this address that the Lieutenant Governor would “select such lots or tracts ... as he might deem expedient”. No doubt, such a change would not endear itself to the Red River delegates. Further, here again Macdonald indicates that the land is to be distributed to the heads of families and not directly to the children for the purpose of settlement.

On May 5, the Red River delegates received a copy of the Bill which was introduced in the House. Ritchot was displeased with the modifications which had taken place since he last viewed it. The delegates complained to Cartier and Macdonald, Ritchot recalls their response as follows:

They declared that in practice it amounted to the same thing. For us they promised that they would give us by order in council, before our departure, assurance of the carrying out of our verbal understandings; but that for the present it would be impossible to get the Bill passed if one changed its form, that they would have a bad enough time to get it passed just as it was, that in any case we had nothing to fear, our verbal agreements were known and approved by the ministry who had promised to give us the order in council for the execution of our understandings.

The two ministers seeing that we were strongly opposed promised us, among other things, to authorize by order in council the persons we would choose to name ourselves as soon as might be after the Bill should be passed – to form a committee charged with choosing and dividing, as may seem good to them, the 1,400,000 acres of land promised. I promised for my part to take the matter into consideration and to yield to their desire, if I could convince myself that I could to it. I saw several friends afterwards who assured me that that would not only be well, but even better. Concerning a great number of comments on my part they said that in all events the Bill as edited was advantageous for us, that it was necessary to strive to get it passed.⁴²⁵

⁴²⁴ *Ibid.* at 204.

⁴²⁵ “The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870” in *ibid.* at 147.

This is a telling passage. Ritchot's concern was justified by his knowledge of the Canadian process. Namely, he wanted the legislation to accurately reflect the responsibilities undertaken in their negotiations. Without accurate legislation, there was little binding the government to honour their commitments. Still, Ritchot was getting caught in both houses. It was not his responsibility to ensure the method with which the government of Canada was to honour the negotiated agreement. He had received assurances that the responsibilities Canada undertook in the negotiations would be honoured. It was also not his responsibility to craft, edit, or ensure passage of a parliamentary Bill.

The following day, the delegates were again reassured that the Bill, in order to get passed Parliament, must be in a form not wholly reflective of their agreement. The delegates were told that guarantees, which reflect their agreement, will be made prior to their departure.

On May 9, Ritchot and Scott asked Cartier about

certain words of the Bill, among others of these words, clause 27, residents with domicile – *tenant feu et lieu*. He told us that included all the *métis* who were winterers or tripmen who had not left the country to establish themselves in another; but who passing a great part of their lives on trips or in wintering, regarded the Red River Settlement as their home. The government knew that part of the *métis* are nomads, and it considers them to be settlers of the province of Manitoba.⁴²⁶

This understanding formed part of the “liberal” land policy adopted for the Métis. Speaking to Parliament, Sir George E. Cartier laid out this liberal policy:

The Government intended to be liberal, and the claims of the half-breeds would be seen by those interested, to have been considered. The Government agreed that the lots should be 200 acres. He might say that the intention of the Government was to pursue a land policy which would not be surpassed in liberality by any Province in the Dominion, or any State in the neighbouring Union, or by the Federal Government itself, (hear, hear). If the children of the half-breeds should fail to avail themselves of the liberal offers made them to settle on the reserves, the land would be forfeited to the Crown.⁴²⁷

Cartier did not explain the reasoning behind why the land is forfeited to the Crown. However, referring back to both Macdonald and Ritchot's account, this makes sense, since the Crown

⁴²⁶ *Ibid.* at 149.

⁴²⁷ Hon. Sir George E. Cartier, May 9th, *Dominion Debates*, 1870, Vol. 1, 1499-1504 in Morton, *ibid.* at 223-224.

either in the form of the local legislature or Parliament would still be required to pass legislation designed to maintain that land in the Métis families. This could be done by simply reissuing the land to other children who have come of age. Cartier's vision of the outcome of unclaimed Métis land did not involve an alternative form of compensation. The land would simply be returned to the Crown. No timelines were provided as to when Métis claims would expire or how claims were to be made. Taken on its own, Cartier's solution to stagnant Métis claims is consistent with the Canadian position that the federal government was to keep control of the resources in order to cover the costs associated with expanding. Returning the land to the Crown would offer the government an alternative means of profiting from it. But as discussed earlier it is more likely that by having the land return to the Crown, this would enable the Crown to uphold its commitment to Métis families.

On May 19 the Governor General assured Ritchot that Cartier's promises concerning the land would be honoured:

We discussed the land question, explaining to His Excellency our understanding on the subject. His Excellency put some questions to me and assured me on what Sir George had said, that the settlers would have their choice of land and that they would have it *gratis*.....⁴²⁸

This passage points out that the Métis land grant was to be made according to what the Métis wanted. Rather than a random allotment of land, the Métis were to "have their choice of land".

On May 27, Ritchot had his final meeting with Cartier:

He gave me the letter which he [had] promised me and which he had made out in the name of his colleagues and of the Governor General.
...I hand it back to him to get him to add some guarantees on the subject of the 31st clause of the Act regarding the choice and division of lands that were to be distributed to the children. He promised me to see to it.⁴²⁹

⁴²⁸ "The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870" in *ibid.* at 154.

⁴²⁹ *Ibid.* at 156.

After negotiations with the Red River delegates were concluded, Canada made the final payments to the HBC.⁴³⁰ With this step completed, the Imperial Government passed an Order in Council on June 23, 1870 stating that:

from and after the fifteenth day of July, 18th, the...North-Western Territory shall be admitted into and become part of the Dominion of Canada...and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory.⁴³¹

Ritchot returned to Red River in June and, although the Canadian Government did not require that the Provisional Government ratify the agreement, the Provisional Government proceeded to do just that. After Ritchot made his report to the Legislative Assembly, Louis Schmidt and Pierre Poitras forwarded the motion "that the Legislative Assembly of the country do now, in the name of the people, accept the Manitoba Act."⁴³² Canada was informed of the ratification in the following letter from Thomas Bunn to Joseph Howe:

I have the honour to inform you that one of our delegates to your Government has returned and has reported on the result of his mission.

In considering that report, the first point which presented itself, was the insulting and undignified reception which our invited delegates met with on their arrival in Canada, a circumstance which, I need hardly say, is very much to be deplored.

In view, however, of the liberal policy adopted in the interest of the people of the North-West by the Canadian Ministry, and recommended by the Imperial Government, a policy necessarily based on the principles for which they have fought, the Provisional Government and the Legislative Assembly, in the name of the people of the North-West, do accept the 'Manitoba Act,' and consent to enter into Confederation on the terms entered into with our delegates.

I have further the honour to inform you that the Provisional Government and the Legislative Assembly have consented to enter into Confederation in the belief, and on the understanding, that in the above-mentioned terms a general amnesty is contemplated to all the parties who had to meet the difficulties with which the Provisional Government had to deal, without which amnesty the people of the North-West could not consider themselves treated as a peaceable and a loyal people ought to be, but would feel themselves unjustly forced into Confederation.

I have, etc.,

"(Sgd.) THOMAS BUNN.

After much consideration, Macdonald appointed Hon. A. G. Archibald as the Lieutenant-Governor for the new province. Ritchot informed Riel that Cartier sought the continuance of

⁴³⁰ Rose to Granville, May 4th, 1870: P.P. 1870, L. (C.207) as cited in Stanley, *supra* note 21 at 121.

⁴³¹ Printed in *Charters, Statutes, Orders in Council Relating to the Hudson's Bay Company*, pp. 171-200; as cited *ibid.*

⁴³² Bunn to Howe, June 24th, 1870: C.O. 42/687 as cited *ibid.* at 124.

the Provisional Government until the Lieutenant-Governor arrived. Riel, therefore, stayed on until August 24.

IV. Conclusion: The Negotiated Agreement with the Métis People

The delegates appointed to negotiate on behalf of the people of Red River carried with them the express authority of the duly elected Provisional Government to carry out such negotiations. As was illustrated in chapter one, the Métis had a valid title in the lands surrounding the Red River. It is also evident that as the elected representatives of the people of the region, the Provisional Government was morally obligated to champion the interests of all their residents. This responsibility was discharged in regards to both future and historic interests. The future interests included seeking out the most favourable terms for union with Canada. The people of the region would be going through a volatile transition and the terms of union could help give them the opportunity they needed to succeed as members of the Dominion of Canada. Looking after future interests also involved honouring the past. To this end, the delegates sought to protect the culture, land, and customary rights which had grown up in the Red River region.

The Red River area was a predominantly Métis community. By honouring the Métis history in that region the delegates were attempting to ensure the people's future, not only as Canadians, but as Métis. Through the process of negotiation, the delegates sought four key concessions that would specifically impact upon the Métis residents. *One*, the delegates obtained a generous recognition of the rights of current settlers. Although, not specified for this reason, such recognition would obviously ensure that those in possession of land would not be pushed off their land by incoming settlers. It should be stressed that these grants, even if they were for Métis land holders appeared to have nothing to do with Aboriginal title. On the one hand, this doesn't make sense since if Ritchot's grand design was to help secure a Métis enclave, he should

have ensured that by virtue of their Indian title the Métis land holders, were entitled to those lands. On the other hand, it is clear that Ritchot was pushing two agendas. The settlers agenda was to have title to the land they resided upon. If Ritchot could secure that for all land holders and, at the same time, secure a land base for the Métis by virtue of their Indian title, he was that much further ahead. This distinction would cause confusion later as some Métis parishes thought that they were entitled to select river lots as part of the children's land grant. There is one other reason why it is more than likely that these two types of land holdings were conceived of as entirely distinct grants; the Selkirk Treaty. Even though questionable in its legitimacy, the Selkirk Treaty purported to extinguish Indian title to the area in which most of the current land holdings were to be found. As such, it would be awkward for the Canadian government to again recognize Indian title within that zone and purport to extinguish it through reservations. Because the Selkirk Treaty was limited to several miles on either side of the river, the broader territorial claims of the Métis would still bear Aboriginal title and require extinguishing. While this doesn't comport with the effective Métis control and occupation of the Red River region, it does comport with a perception that the HBC had the primary claim to those lands. It is likely therefore, that in order to push the HBC governance and title (and to legitimize the transaction for the larger territory) that Cartier and Macdonald would have easily accepted settlers' rights to these lands. Indeed, as Ritchot's journal reflected, the Canadian representatives quickly offered recognition of all titles recognized by the HBC.

Two, equal protection of the French and English languages was sought which reflected the reality in Red River at the time. This protection was readily offered and helped ensure that all residents could contribute to the future of the new province. This was especially important to the French Métis as it was immigration from Ontario which they feared. They recognized that

they were likely to become a minority in their own land. Along with this recognition religious denominational schools would help protect the French Métis Catholic faith.

Three, the delegates sought to protect the Métis leadership from Canadian retribution. Ritchot undertook this task and returned to Red River under the impression that an amnesty had been assured. Based on available source material, it is reasonable to conclude that the amnesty formed part of the verbal agreement. The *Manitoba Act*, was ratified by the Métis based on the understanding that it included an amnesty.

Four, in order to secure greatest benefit for the people of Red River, the delegates argued for provincial control of provincial land and resources. When the federal negotiators refused, the delegates obtained compensation for the Indian title of the Métis in the form of land grants. It is safe to say that this Indian title was, at the creation of the *Manitoba Act*, one of the most controversial aspects of the *Act*. History has assured that it remains the most controversial agreement the negotiators reached. But what was agreed upon?

Just prior to the initial introduction of the *Manitoba Act* bill, Ritchot, Cartier, and Macdonald all independently confirmed that the amount of land which was to be set aside for the Métis was 1,500,000 acres to be selected from within the boundaries of the new province. This was the last confirmed agreement prior to changes being made within the Canadian legislative process. Any evidence regarding agreement after the acreage was reduced is cloudy at best. It is difficult to see Ritchot's acquiescence to the amended bill as a wholesale endorsement of its terms. Without taking into account Cartier and Macdonald's assurances that the verbal terms would be honoured through Orders in Council, the whole picture is not being considered. Indeed, even Thomas Flanagan, who was commissioned by the Federal Department of Justice to research the *Manitoba Act* land grants on the government's behalf wrote: "In Ritchot's mind, the

bargain would consist not only of the written text of the Manitoba Act but also of the verbal promises”.⁴³³ But was the acreage part of the verbal promises? I think it is unlikely that Macdonald or Cartier would have assured Ritchot that they would add 300,000 acres through Orders-in-Council. Albeit reluctantly, it appears that Ritchot was encouraged to accept the acreage as it appeared in the Bill.

Distribution of these lands was supposed to be handled and distributed by the local legislature with, as Macdonald stated, the intent of securing “the transmission and holding of the said lands amongst the half breed families”.⁴³⁴ Despite the divergent language in the *Act*, Ritchot obtained assurances that the verbal understandings would be upheld. Macdonald and Cartier told Ritchot that “in practice it amounted to the same thing” and promised “to authorize by order in council the persons we would name ourselves as soon as might be after the Bill should be passed – to form a committee charged with choosing and dividing, as may seem good to them, the 1,400,000 acres of land promised.”⁴³⁵ For Ritchot, the verbal agreement remained firmly intact despite the changes that were necessary to get the Bill passed through Parliament.

⁴³³ Flanagan, *supra* note 7 at 41.

⁴³⁴ PAC, Macdonald Papers, Incoming Correspondence, pp. 40641-40642 as cited in Sprague, *supra* note 18 at 58.

⁴³⁵ “The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870” May 5, in Morton, *supra* note 32 at 147.

CHAPTER FOUR: A MÉTIS TREATY

I. Introduction

Understanding what was negotiated in Ottawa is only part of the problem. The other part of the problem, certainly from the perspective of legal analysis, is properly characterizing that agreement. The most obvious way to characterize it is by simply looking at the method in which the agreement was officially recorded. In that sense, the entirety of the agreement is found in a piece of legislation, sanctioned by Parliament, and carried out under the authority of Canadian and British law. Under this conception one can acknowledge that the *Manitoba Act* of 1870 did not necessarily carry the details or nuance (or competing understandings) that may have existed between the parties that negotiated its terms. However, this is not a stumbling block for all researchers because since the intention of Parliament was recorded in the agreement, and the *Act* is the only *legal* instrument coming out of the negotiations, it is only that intention which matters in interpreting the *Act*. This approach has been adopted by Thomas Flanagan who acknowledges that Father Ritchot would have had a different understanding of the agreement than Canada did, but nonetheless proceeds with a literalist interpretation of the *Manitoba Act*. Effectively, his approach decontextualizes the *Act* from both parties to its creation.⁴³⁶ While there is leeway for historical arguments into the interpretation of legislation,⁴³⁷ Flanagan doesn't explore these nor does he explore any other arguments for including the verbal understanding in his historical-legal assessments. If, on the other hand, a person wishes to find a vehicle in which the negotiated terms can be honoured (which would also provide a fuller legal understanding) we can look

⁴³⁶ Flanagan, *supra* note 7 at 29 writes: "In a legal sense, the Manitoba Act was an ordinary statute of Parliament, later given constitutional status by the Constitution Act (British North America Act), 1871, and the Constitution Act, 1982. But in a political sense, the Manitoba Act arose out of negotiations between the delegates of the provisional government of Assiniboia ... and the representatives of the Canadian cabinet"

⁴³⁷ For an example, see R. Bobbit, "Methods of Constitutional Argument" (1989), 23 U.B.C. Law Rev. 449 in Macklem et al. eds. *Canadian Constitutional Law*, 2nd Ed. (Toronto: Emond Montgomery Pub. Ltd., 1997) at 14-15 where the author discusses historical and textual arguments.

further afield to the area of common law which has come to define and interpret treaties. This chapter is going to test that area of law for a fit with the circumstances surrounding the creation of the *Manitoba Act* in order to identify if a treaty was negotiated at Ottawa in 1870. This chapter argues that the law of treaties fits the facts and that one of the consequences of there being a treaty negotiated in Ottawa is that the Métis perspective has to be taken into account if we are to understand the meaning of that treaty. Further, it is argued, the fact that the treaty was enshrined (for the most part) in a legislative Act, does nothing to discount the nature of the treaty or the requirement that the Métis understanding is necessary to properly interpret that *Act*. In getting to this conclusion, this chapter will look at some of the key aspects of treaty making and treaty law and apply the lessons learned from previous chapters to that legal framework. It should be stated here that arguing that a treaty was indeed created in Ottawa in 1870, does not bar an inclusive look at the *Manitoba Act* as a piece of legislation. Inclusive features of treaty law are well-established whereas statutory interpretation requires a broad approach to contextual analysis. I choose to examine treaty law here because it is the best fit for understanding the Métis agreement. I will begin with some general points.

II. Treaties: General Principles

In broad terms, the purpose of a treaty is to unite two (or more) distinct political/legal entities through binding agreement.⁴³⁸ The binding agreement is the unifying factor rather than the nature of the agreement itself. It is perfectly feasible that you could have a treaty that is intended to create a permanent disconnect between two or more entities and yet these entities are united in such agreement. That is to say that a treaty does not need to imply the melding or

⁴³⁸ *Black's Law Dictionary*, *supra* note 142 s.v. "Treaty": "A formally signed and ratified agreement between two nations or sovereigns; an international agreement concluded between two or more states in written form and governed by international law. A treaty is not only the law in each state but also a contract between the signatories."

coming together of these entities in some physical or political sense beyond the terms of the treaty. It is more important that they have reached agreement. The Treaty of Utrecht (1713) in which, among other things, France affirmed Great Britain's title to Hudson's Bay and transferred control of Newfoundland and Nova Scotia from France to Great Britain is one example of such a treaty.⁴³⁹ Another example, would be the Treaty of Versailles (1919) which laid out the terms of peace between the Allied and Axis nations ending World War I.⁴⁴⁰

The basic requirements to participate in such a process are, first and foremost, political autonomy that clearly distinguishes two signatories. That is to say, sovereign nations would obviously be qualified but, in the case of the Treaty of Versailles, Dominions of Great Britain (including Canada, Australia and New Zealand) appeared as separate signatories. This reflected the emerging reality of Canadian independence in foreign relations even if such independence was not yet made formal through targeted legislation. The second requirement is sufficient control over the land, or other obligations to be transferred/exchanged. This principle is fairly straightforward; a country cannot sign over something that does not belong to them or isn't within their control. As we will see below, Canadian courts have identified similar basic requirements when assessing the validity of treaties between Aboriginal peoples and the Crown.⁴⁴¹

Because colonial law sees Aboriginal-Crown treaties as differing from international treaties, these treaties are now interpreted within a branch of Canadian common law enshrined in

⁴³⁹ For more information on the Treaty of Utrecht, see, online: <http://www.heritage.nf.ca/exploration/utrecht.html>.

⁴⁴⁰ For more information on the Treaty of Versailles, see, online: <http://www.foundingdocs.gov.au/item.asp?dID=23>.

⁴⁴¹ See, Brian Slaterry, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L. J. 101 (Q.L.) at para. 28 where he writes: "early treaties concluded between Aboriginal nations and European powers were often international in nature, in the sense that they were concluded between independent, self-governing political entities, each with their own territories."

the *Constitution Act, 1982*.⁴⁴² When disputes arise between the holder of a treaty right and the Canadian government the case often appears before a Canadian court. Aboriginal peoples were considered to have a level of autonomy requisite to complete a treaty for a large part of Canadian history; however, currently, they are seen as falling under Canadian authority. Catherine Bell describes this relationship as follows:

Key words in the description of Aboriginal autonomy are 'inherent' and 'internal.' Operating on the premise that Britain, and subsequently Canada, asserted sovereignty over Aboriginal peoples and keeping the analysis within the confines of British policy and Canadian law, the report envisages Aboriginal autonomy as a sphere of political autonomy within a confederation of distinct national groups ... This body of law recognizes the inherent nature of Aboriginal government and at the same time places limits on Aboriginal autonomy within Canada.⁴⁴³

While there is still debate and opposition towards treaty disputes being decided wholly within the Canadian legal tradition, the present examination is concerned with how Canadian law responds to treaty issues.⁴⁴⁴ Further, because this work considers the possible treaty status of the agreement reached between Canada and the Métis in 1870, and that agreement was designed to bring the Métis people and lands within the Canadian dominion, it is not unreasonable to expect that Canadian law should have some avenue to examine related disputes.⁴⁴⁵ For that reason, my analysis will focus upon the interpretative principles found within Canadian law.

⁴⁴² See generally, Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Canadian Bar Review 196. And *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 52-66 where the Court incorporates the "principles relating to aboriginal rights" (para. 55) while importing a justificatory framework for legislation which infringes Aboriginal rights.

⁴⁴³ Catherine Bell discussing the findings of the Report of the Royal Commission on Aboriginal Peoples in Catherine Bell, "Comment on Partners in Confederation, A Report on Self-Government by the Royal Commission on Aboriginal Peoples" (1993) 27 U.B.C. L. Rev. 361-375 (Q.L.) at para. 8.

⁴⁴⁴ See for example, Slattery *supra* note 442 at 204 where the author notes: "It seems doubtful whether aboriginal peoples initially understood or accepted the principle that their basic rights could be unilaterally altered by statute, and Crown agents were often less than candid on this point when they negotiated treaties with Indian nations." Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed. *Indigenous Legal Traditions* (Vancouver, UBC Press: 2007) at 79 quite rightly points out that "Determining the rights of Indigenous people according to Canadian or European-derived law is not the equivalent of establishing respectful relations with Indigenous people."

⁴⁴⁵ This might be true for enforcement of treaty promises but raises concerns if the very nature of an agreement is being questioned.

In *St. Catherine's Milling*, the Privy Council did not have the benefit of hearing from the Ojibway signatories to the treaty in question. Still, the Court forged ahead with identifying "the legal consequences of the treaty of 1873."⁴⁴⁶ The provincial and federal branches of the Crown disagreed and the federal government argued "that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty."⁴⁴⁷ It could be argued that this illustrates that one of the functions of treaties was to transfer legal rights from Aboriginal people to the Crown. This transfer typically involved some form of consideration, such as guaranteed hunting and fishing rights. However, because the Privy Council located the origin of Aboriginal interests in the largesse of the Crown, it found that no such transfer of legal interests in land took place as the result of the treaty.⁴⁴⁸

The SCC in *Sioui* notes how Great Britain and France adopted policies toward Aboriginal peoples which would "maintain relations with them very close to those maintained between sovereign nations."⁴⁴⁹ As a result, the common law doctrine of Aboriginal rights found room to accommodate the existence of Aboriginal interests even in the advancement of European settlement:

European settlement did not terminate the interest of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as

⁴⁴⁶ *St. Catherine's Milling*, *supra* note 233 at 53.

⁴⁴⁷ *Ibid.* at 52.

⁴⁴⁸ See, *ibid.* where it is written: "Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario v. Mercer* might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has had all along a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to 'an interest other than that of the Province in the same,' within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed."

⁴⁴⁹ *R. v. Sioui* [1990] 1 S.C.R. 1025 at para. 68.

rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them...⁴⁵⁰

Although Aboriginal interests continued despite European settlement, the Crown's settlement goals and Aboriginal peoples welfare were best dealt with by reaching common understanding through a treaty process. However, not all treaties involved land distribution:

Treaties served a broad range of purposes. In early years, they were often used to establish or confirm peace and friendship between the parties, to regulate matters of trade, to cement military and political alliances against other nations, or to resolve particular disputes or grievances. On other occasions, they were used to cede aboriginal lands to the Crown in return for stated benefits, to draw boundaries between aboriginal territories and areas open to settlement, or to describe in detail the limits of lands reserved for indigenous peoples within larger tracts ceded to the Crown.⁴⁵¹

Despite these broad purposes, treaties are "governed by a uniform body of law, which determines their existence, legal character, interpretation and effects."⁴⁵²

Using treaties to transfer land rights was a continuation of the policy formalized by King George III in the *Royal Proclamation of 1763*.⁴⁵³ These principles were first formally articulated in an effort to regulate the purchase and settlement of Indian lands, the *Royal Proclamation* restricted governors from issuing patents or surveying "any Lands whatever, which, not having

⁴⁵⁰ *Mitchell*, *supra* note 251 at para. 10. Also see *Thomas v. Norris* [1992] 2 C.N.L.R. 139 (B.C.S.C.) where Justice Hood stated: "Assuming that spirit dancing was an aboriginal right, and that it existed and was practised prior to the assertion of British sovereignty over Vancouver Island, and the imposition of English law, in my opinion those aspects of it which were contrary to English common law, such as the use of force, assault, battery and wrongful imprisonment, did not survive the coming into force of that law, which occurred on Vancouver Island in 1846 or, at the latest, in 1866, when the two colonies of Vancouver Island and British Columbia were merged."

⁴⁵¹ *Slattery*, *supra* note 442 at 208.

⁴⁵² *Ibid.* at 207.

⁴⁵³ *Paulette*, *supra* note 241 where Justice Morrow writes: "This policy as far back as 1763 was not one to deny Indians title but rather recognized its existence and laid down the procedures for extinguishment which appear to have been adopted and followed down through the years by the Canadian Government at least up to the signing of Treaties 8 and 11." If the Royal Proclamation is viewed as being reflective of Imperial Policy, which is now enshrined in S.35 of the *Constitution Act, 1982*, then the debate over its application to Northern and Western portions of Canada is less important. However, the Supreme Court has already spoken on the territorial scope of the Royal Proclamation in *R. v. Signeareak* E1-53, [1966] S.C.R. 645 (Q.L.) where the Court writes: "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 Hudson's Bay Company. Accordingly the Proclamation does not and never did apply in the region in question [NWT] and the judgment to the contrary are not good law." So, while the Royal Proclamation did not extend to the NWT territorially, the *policy* did apply to the NWT.

been ceded to or purchased by Us, as aforesaid, are reserved to the said Indians”.⁴⁵⁴ As such, Aboriginal interests were to first be exchanged or surrendered through agreements with the Crown. The *Royal Proclamation* reflected the emerging practice of the day to establish treaties for such purposes. In recent years, Canada’s Supreme Court has characterized the purpose of treaties as reconciling “pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.”⁴⁵⁵ Whether the Crown sought extinguishment or reconciliation, treaties help to provide certainty to both parties by setting out how future relations will be governed.

III. What is a “Treaty” in Canadian Law?

III.a. *A Treaty is ...*

Most of the case law concerning the definition of and interpretation of treaties revolves around s. 88 of the *Indian Act* which reads:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.⁴⁵⁶

As will be detailed further below, while interpreting that section, the courts have adopted a broad understanding of the term “Treaty”. And, the courts have incorporated this analysis in contemplation of s. 35(1) treaty rights. One basic quality of a treaty is that it is an agreement

⁴⁵⁴ *Royal Proclamation*, *supra* note 85.

⁴⁵⁵ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 20.

⁴⁵⁶ *Indian Act* R.S., 1985, c. I-5, s. 88; Retrieved online at: <<http://laws.justice.gc.ca/eng/acts/I-5/index.html>> (accessed on June 16, 2011). This identical section was formerly section 87. The version cited here was the one used in Canadian Courts to establish the case law in this chapter. However, a new version of this section was introduced in 2005 which reads as follows: “**88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.”

made between Aboriginal peoples and the Crown. It must be remembered that surrenders are made to the Crown, not to a particular level of government.⁴⁵⁷

Although the various levels of government have disputed the legal effects of historic treaties, such disputes remain internal to the Crown. Dickson C.J. has pointed out that “[d]ivisibility of the Crown recognizes the fact of a division of legislative power and a parallel division of executive power.”⁴⁵⁸ However, this division does not create a multiplicity of “Crowns”. Treaty rights are not affected by this division of powers.⁴⁵⁹

This most basic rule has also been interpreted flexibly by the Courts to include the “word of the white man”.⁴⁶⁰ Although “the word of the white man” is a central interpretive principle, that word must be given in consideration of commitments on behalf of the Aboriginal signatory. That is to say that there should be an exchange of commitments. The Supreme Court in *Simon* found that the central document in that case was a treaty because it represented “an exchange of solemn promises ... entered into to achieve and guarantee peace.” As a result, the Court found that the treaty was “an enforceable obligation between Indians and the white man”.⁴⁶¹

While land transfer is found in many treaties, this is not a defining feature for all treaties. The defining characteristics of treaties remain the same “whether land was ceded or not”.⁴⁶²

⁴⁵⁷ *St. Catherine's Milling*, *supra* note 233 at 60 where the Court writes: “By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, ... ‘to the Government of the Dominion of Canada,’ for the Queen and Her successors for ever. It was argued that a cession in these terms was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown. That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown.”

⁴⁵⁸ *Mitchell v. Peguis Indian Band* [1990] 2 S.C.R. 85 [*Peguis*] at para. 23.

⁴⁵⁹ *Campbell*, *supra* note 278 at para. 82 where the Court explains: “The fact that the federal government assumed this responsibility [for Indians and Lands Reserved for Indians] under s. 91, rather than the provinces under s. 92, did not affect aboriginal rights because ... it was a division ‘internal’ to the Crown.” For more on the Nisga’a Agreement see, Sara Baade, “Aboriginal Self-Government in British Columbia: The Nisga’a Agreement-in-Principle” (1997) 3 Appeal 42 (Q.L.).

⁴⁶⁰ *R. v. White and Bob*, (1964) 50 D.L.R. (2d) 613 [*White and Bob*] (Q.L.).

⁴⁶¹ *R. v. Simon* [1985] 2 S.C.R. 387 (Q.L.) [*Simon*] at para. 51.

⁴⁶² *Ibid.* at para. 50 where the Court writes: “None of the Maritime treaties of the eighteenth century cedes land. To find that s. 88 applies only to land cession treaties would be to limit severely its scope and run contrary to the

Indeed, there is no need for a territorial claim to be involved in the creation of a treaty. Treaties of peace and friendship fall within the definition of “treaty” as do agreements dealing with political or social rights.⁴⁶³ Regardless of the issues in agreement, the Supreme Court has found three general characteristics of a treaty: “...what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”⁴⁶⁴ The presence of a treaty, clearly, is not determined based on whether or not the formal term “treaty” was applied to the document.

As was noted earlier, Canadian courts do not consider Aboriginal/Crown treaties to be international agreements. However, while “analogous”, they are also not considered according to the rules established for domestic contracts:

Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.⁴⁶⁵

This “solemn” and “public nature” has encouraged the courts to develop rules of interpretation that move treaties, which are analogous to contracts, outside of the rules of contract law. So, for example, when the Court refers to using the “wording” of treaties to determine its scope, the oral undertakings must also be incorporated into that understanding. Slattery explains that normally treaty agreements

were oral rather than written agreements. An Indian treaty typically took the form of a spoken exchange of proposals and responses, often marked by special rituals, and usually taking place in

principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.”

⁴⁶³ See *Sioui*, *supra* note 449 at para. 40 where it is stated: “There is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty ... There is also no basis for excluding agreements in which the Crown may have chosen to create, for the benefit of a tribe, rights over territory other than its traditional territory.”

⁴⁶⁴ *Ibid.* at para. 43. Also see para. 12 where the court determined that the document was a treaty. The key factor was the presence of promises made to the Hurons protecting “free exercise of religion, customs and liberty of trading with the English”

⁴⁶⁵ *R. v. Badger* [1996] 1 S.C.R. 771 [*Badger*] at para. 76. Also see *R. v. Sundown*, [1999] 1 S.C.R. 393 [*Sundown*] at para. 24.

several sessions extending over a number of days, leading to a firm understanding between the parties on certain matters.⁴⁶⁶

Since both oral and written terms can exist simultaneously, understanding the content of treaty agreements is usually a difficult process of historical inquiry. It is for this reason, that the courts have developed unique rules for interpreting the content of treaties. With the focus on “firm understandings” the Court is placing emphasis on substance rather than form.

In the present study, the solemnity of the Negotiated Agreement was clearly displayed upon Ritchot’s return to Red River when he presented the agreement to the Provisional Government. That government subsequently ratified the agreement as represented in the *Manitoba Act*. The potential applicability of this understanding to the Negotiated Agreement in 1870 should be obvious. The consequence of such an inclusive interpretation would be the difference between a literalist interpretation such as Flanagan has offered, and a more inclusive understanding of the agreement available from the broad historical record. One of these latter interpretations, although not the one adopted here, can be found in Paul Chartrand’s book.⁴⁶⁷

III.b. *Who are the Parties to a Treaty?*

As was mentioned previously, treaties are exchanges of solemn promises between the Crown and Aboriginal peoples, but what gives each of these parties the capacity to enter into a treaty? This is a central question, because “[i]f any one of these parties was without such capacity, the document at issue could not be a valid treaty...”⁴⁶⁸

⁴⁶⁶ Slattery, *supra* note 442 at 208. A firm understanding of the terms was not always reached. Indeed, considering the cultural barriers, and the different purposes with which each party was entering negotiations, a firm understanding was more likely to be an anomaly rather than the norm. For example, see *Paulette*, *supra* note 241.

⁴⁶⁷ *Supra* note 1.

⁴⁶⁸ *Sioui*, *supra* note 449 at para. 21.

In the *Simon* decision, the Supreme Court had to ask the most basic question of the treaty: “Was the Treaty of 1752 Validly Created by Competent Parties?”⁴⁶⁹ To examine this question the Court chose to adopt a “liberal and generous” approach.⁴⁷⁰ This principle was applied in the following way:

The Treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. *In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected...* The Micmac Chief and the three other Micmac signatories, as delegates of the Micmac people, would have possessed full capacity to enter into a binding treaty on behalf of the Micmac. Governor Hopson was the delegate and legal representative of His Majesty the King. *It is fair to assume that the Micmac would have believed that Governor Hopson, acting on behalf of His Majesty The King, had the necessary authority to enter into a valid treaty with them.* I would hold that the Treaty of 1752 was validly created by competent parties.⁴⁷¹

In the above, the Court has identified that the parties to the Treaty carried the proper intention, the proper delegated political authority, the proper understanding of each other’s position. Since “Governor Hopson was the delegate and legal representative of His Majesty the King”, the Court had little trouble in finding him competent to enter into a treaty, in part, because the Micmac would have believed that he was competent. This principle was flushed out further in *Sioui*.

In *Sioui* the Supreme Court of Canada adopted the position that the question of capacity is considered from the Aboriginal point of view: “the Court must ask whether it was reasonable for them to have assumed that the other party they were dealing with had the authority to enter into a valid treaty with them.”⁴⁷² This approach is applicable when considering the capacity of the Crown as well as when considering the capacity of the individual representing the Crown.⁴⁷³ From the Aboriginal point of view, was the individual they were dealing with one who “could

⁴⁶⁹ *Simon*, *supra* note 461 at para 18.

⁴⁷⁰ *Sioui*, *supra* note 449 at para. 18 where the Court wrote: “In my opinion, this liberal and generous attitude, heedful of historical fact, should also guide us in examining the preliminary question of the capacity to sign a treaty, as illustrated by Simon and White and Bob.”

⁴⁷¹ *Simon*, *supra* note 461 at para. 24 [emphasis added].

⁴⁷² *Sioui*, *supra* note 449 at para. 28.

⁴⁷³ *Ibid.* at para. 32.

reasonably have been assumed to be capable of giving the word of the white man”?⁴⁷⁴ There can be no reasonable doubt that the Red River delegates would have had the distinct impression that Prime Minister Macdonald and Minister Cartier were fully capable of entering negotiations with them. On the other side, official recognition was given of the Red River delegates from Canada. But more to the point, negotiations were entered into. Such action should be enough to illustrate that both parties felt the other was competent to carry out such negotiations.

As political communities, Aboriginal peoples carried another necessary criteria for entering into a treaty agreement: possession of negotiable rights. This is reflected in the following passage from *Campbell*:

... the fact that the Crown in right of Canada and the Crown in right of British Columbia have entered into these negotiations, and concluded an Agreement, illustrates that the Crown accepts the Nisga’a Nation has the authority to bargain with the State and possesses rights which are negotiable.⁴⁷⁵

The courts have displayed that as political communities Aboriginal nations possessed negotiable rights which could be exchanged in solemn agreements reached with Crown officials. Thus the very existence of a treaty is determined according to broad principles which are designed to give Aboriginal people’s understanding of the agreement a privileged position in relation to the Crown. After confirming the existence of a treaty, the courts are then faced with the task of identifying the content of the treaty. Here too, the courts have established interpretative principles. Thus far, there seems to be no barriers to prevent a court from accepting the Negotiated Agreement as a treaty between the Crown and the Métis people of Red River.

⁴⁷⁴ *Ibid.* at para. 36. Also see the similar notion of “ostensible authority” or “apparent authority” in *Black’s Law Dictionary*, *supra* note 142 at 128 where it is explained that such authority arises where “a legal power is vested in the agent in the absence of any intention by the principal that it should exist, or even in spite of his intention that it should *not* exist. The operative facts causing this power to exist are acts of the principal which, considered along with surrounding facts, induce the third person with whom the agent deals to believe reasonably that the principal intended the power to exist.”

⁴⁷⁵ *Campbell*, *supra* note 278 at para. 33.

Acceptance of this interpretation would open the door to a more nuanced interpretation of the agreement.

IV. Identifying the Existence of a Treaty

The courts are often arbiters of history. When trying to decide if a document falls within the definition of a treaty the courts need to look at the context surrounding the negotiation and creation of the document. The existence of a treaty is a matter of law based on the guidelines laid out previously. However, the courts must look to history to determine if the document and the negotiators meet those tests. To enable this inquiry, the courts have clearly asserted the ability to conduct its own research and take notice of historical facts: “The Court is entitled ‘to take judicial notice of the facts of history whether past or contemporaneous’...and it is entitled to rely on its own historical researches...”⁴⁷⁶ One such example comes from Acting Co.Ct.J. Patterson, in *Syliboy*, who took notice of the actions of the Crown to determine if a treaty existed. Acting Judge Patterson was suspicious of explicit statutory protection of Indian hunting rights. Patterson looked at legislation protecting Aboriginal hunting rights as evidence to support the non-existence of the Treaty of 1752:

In 1794 the first of our many Game Acts was passed, 1794 (N.S.), c. 4. It provided that no person within a certain period each year should kill partridge or black duck but Indians and poor settlers. It might be argued that the exception goes to show that the Indians had a special right by treaty, but if they had such a right why mention it in the statute? It would seem to me that the proper interpretation would be that they having no such right by treaty were given it by statute.⁴⁷⁷

Although his interpretive eye is unfavourable to the Aboriginal claims, Judge Patterson’s technique shows willingness of courts to look at the circumstances surrounding the document in order to determine its nature. Despite the use of external historical information, Patterson’s

⁴⁷⁶ *White and Bob*, *supra* note 460. Approved in *Sioui*, *supra* note 449 at para. 60.

⁴⁷⁷ *Rex v. Syliboy* [1929] 1 D.L.R. 307 (Q.L.) [*Syliboy*].

analysis was almost entirely void of Aboriginal agency. His views of Aboriginal people were later dismissed by the Supreme Court of Canada.⁴⁷⁸

Moving past *Syliboy*, Canadian courts have attempted to resolve this lack of Aboriginal agency by incorporating historical interpretation which applies the standards of the past to current interpretation. The British Columbia Court of Appeal's decision in *White and Bob* is illustrative of this technique:

The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded ... The unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances on Vancouver Island in 1854 does not detract from it as being a 'Treaty'.⁴⁷⁹

The "nature of the transaction" would no doubt include, where evidence exists, the actual negotiations. Any evidence of the negotiations could be helpful in illustrating the understandings of the parties even if the historical record lacks the precision to clearly establish specific verbal

⁴⁷⁸ See, *ibid.* where Justice Patterson writes: "Two considerations are involved. First, did the Indians of Nova Scotia have status to enter into a treaty? And second, did Governor Hopson have authority to enter into one with them? Both questions must I think be answered in the negative.

(1) 'Treaties are unconstrained Acts of independent powers.' But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

....

(2) Did Governor Hopson have authority to make a treaty? I think not. 'Treaties can be made only by the constituted authorities of nations or by persons specially deputed by them for that purpose.' Clearly our treaty was not made with the constituted authorities of Great Britain."

Patterson's use of rules for interpreting international treaties is not consistent with the definition of "treaty" set out in the previous section. Patterson's analysis has not been followed in other courts but it serves to illustrate some of the barriers which Aboriginal people face when an inflexible approach to the law is applied to treaty interpretation. For an analysis of the theory underlying this type of reasoning see, Slatery, *supra* note 442 at paras. 6 – 18. The Supreme Court of Canada stated the following, in *Simon* *supra* note 461 at para. 21, regarding Patterson's analysis: "It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing."

⁴⁷⁹ *White and Bob*, *supra* note 460. Also see, *Sioui*, *supra* note 449 at para. 45 where the Court emphasized the "importance of the historical context, including the interpersonal relations of those involved at the time, in trying to determine whether a document falls into the category of a treaty under s. 88 of the Indian Act....formalities are of secondary importance in deciding on the nature of a document containing an agreement with the Indians."

terms. The approach set out in *White and Bob* was later endorsed by the Supreme Court in the following way:

courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.⁴⁸⁰

By opening the analysis to the “unusual” standards of draftsmanship of the past and the “perception each party might have” the courts have allowed a more generous interpretation of the historical context than was applied in *Syliboy*. The Supreme Court went further by providing a governing interpretive principle. When considering these contextual factors, the courts “should adopt a broad and generous interpretation of what constitutes a treaty.”⁴⁸¹ On this point it can be said the Courts in the MMF case have done the exact opposite. For example, the trial judge argued that because Ritchot was aware of the Parliamentary process, that he was not under any pretensions that he was concluding a treaty.⁴⁸² However, from the evidence available, it is quite clear that Ritchot did not see the events in Parliament as capturing the entirety of the agreement. Why would a person who was well-aware of the parliamentary process, negotiate for terms outside of that process unless he was under the impression that an extra-parliamentary process could achieve material results? Ritchot appeared to be much more concerned with obtaining results rather than details of government process. Indeed, the amnesty was never written in the *Manitoba Act*, yet Ritchot had conveyed to the Provisional government that this was part of the agreement reached in Ottawa. And, he had obtained assurances after Parliament got its hands on the Bill. Are these assurances worthless? No, they are essential aspects of the agreement that was reached.

⁴⁸⁰ *Sioui*, *ibid.* at para. 16.

⁴⁸¹ *Ibid.* at para. 17.

⁴⁸² *MMF1*, *supra* note 14 at para. 468-73.

The Court noted that it is important to examine the “circumstances existing when the document was prepared” in order to ascertain its status as a treaty.⁴⁸³ Further, the formal signing of a document is not necessary to conclude a treaty. Instead, “...extrinsic proof of solemnities could help to show that the parties intended to enter into a formal agreement and that they manifested this intent in one way or another.”⁴⁸⁴ In *Sioui* the Court looked at the presence of guarantees of freedom of religion, customs and trade to illustrate its treaty status. Rather than viewing the document as a short-term guarantee of safe passage, these guarantees “would definitely have been more natural in a treaty where ‘the word of the white man’ is given.”⁴⁸⁵

The courts can also look to the subsequent conduct of the parties in an effort to see if their post-negotiation actions are illustrative of behaviour recognizing a treaty. However, lack of evidence in this area is not necessarily detrimental to a treaty claim. Lack of evidence concerning subsequent conduct might indicate “observance of the rights contained in the document or mere oversight. Moreover, the subsequent conduct which is most indicative of the parties intent is undoubtedly that which most closely followed the conclusion of the document.”⁴⁸⁶ Because the relevance of subsequent conduct is related to its proximity to the negotiation of the treaty, the courts are not moved by concessions of the existence of a treaty. Here it is important to note that the ratification by the Provisional Government ratified the *Manitoba Act*, following Ritchot’s return to Red River. One must ask, why would the Provisional Government ratify the *Act* if it did not contain a treaty agreement?

Conducting an historical analysis is important for the court even when the existence of a treaty is in dispute. In *R. v. Sappier*; *R. v. Gray* the Supreme Court noted:

⁴⁸³ *Sioui*, *supra* note 449 at para. 58.

⁴⁸⁴ *Ibid.* at para. 55.

⁴⁸⁵ *Ibid.* at para. 56.

⁴⁸⁶ *Ibid.* at para. 88.

As part of the agreed statement of facts put before the Court ... the Crown admitted that the Treaty of 1725 and the ratification thereof in 1726 are valid Treaties and that the defendants are beneficiaries of those Treaties. The Crown's concession about the validity of the Treaty is one of law. This Court has recognized that it is not bound by concessions of law ... Nonetheless, the fact that this concession occurred in the context of a criminal prosecution raises fundamental fairness concerns.⁴⁸⁷

Certainly a Crown statement as overt as the concession of a treaty should be evidence of subsequent conduct illustrative of the existence of a treaty. However, the Crown was not unanimous in this assertion. The same Treaty was considered by a lower court and "the trial judge concluded that the 1725-1726 Treaties have no legal force insofar as they were terminated by subsequent hostilities between the Mi'kmaq and the British."⁴⁸⁸ Although the existence of a treaty turns on both general and specific evidence, it remains a matter of law. The evidentiary issues can be agreed upon but as a matter of law, the courts remain the arbiter.

V. How Are Treaties Interpreted?

After determining that a treaty was created by competent parties, the courts need to look at the content of the treaty. This task is typically done in order to determine if a treaty protects an Aboriginal accused of violating hunting or fishing regulations. In this section we will look at how the courts attempt to access the content of the treaty. In response to the historical context of treaties, the often unequal bargaining power, and the fact that the written documents were prepared by the Crown, the courts have adopted rules of interpretation which go beyond the written text of treaties.⁴⁸⁹ There are three broad principles that govern the interpretation of treaties: The courts must be cognizant of the honour of the Crown, the courts must apply a liberal

⁴⁸⁷ *R. v. Sappier; R. v. Gray* [2006] S.C.J. No. 54 at para. 62 [*Sappier; Gray*].

⁴⁸⁸ *Ibid.* at para. 64, referring to *Newfoundland v. Drew* (2003), 228 Nfld. & P.E.I.R. 1, 2003 NLSCTD 105.

⁴⁸⁹ *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*] at para. 4 where Binnie J. writes: "...I recognize that if the present dispute had arisen out of a modern commercial transaction between two parties of relatively equal bargaining power, or if, as held by the courts below, the short document prepared at Halifax under the direction of Governor Charles Lawrence on March 10, 1760 was to be taken as being the 'entire agreement' between the parties, it would have to be concluded that the Mi'kmaq had inadequately protected their interests. However, the courts have not applied strict rules of interpretation to treaty relationships."

and generous interpretation and, as when determining the existence of a treaty, the courts must be aware of the context in which the treaties were negotiated. Still, a common understanding that there was a solemn agreement at the time of negotiation would stand as evidence for the existence of a treaty. Even if only one side is under the impression that there was an agreement that would be strong evidence as well.

V.a. Honour of the Crown

The concept of the honour of the Crown has undergone some revision through its long history. David Arnot, the then Treaty Commissioner of Saskatchewan, described the beginnings of this concept as follows:

This is a very ancient convention with roots in Pre-Norman England ... Anyone who was charged with speaking or acting on behalf of the King bore an absolute personal responsibility to lend credit to his master's good name. Should he fail in this responsibility or cause embarrassment, he was required to answer personally to the King with his life and fortune. The Crown was not an abstract or imaginary essence in those days but a real person whose power and prestige was directly dependent on the conduct of his advisers, captains, and messengers.⁴⁹⁰

The honour of the Crown was a duty and responsibility to act justly. In so doing, the honour of the Crown was upheld. This form of the honour of the Crown is evident in Justice Cartwright's analysis in *George*, where he writes:

In *St. Saviour's Southwark (Churchwardens)* [(1613), 10 Co. Rep. 366 at 66b and 67b, 77 E.R. 1025 at 1027.] case, Lord Coke said:

If two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged bad; then for the King's honour, and for the benefit of the subject, such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant, and therewith agrees Sir J. Moleyn's case in the sixth part of my reports.

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.⁴⁹¹

⁴⁹⁰ David M. Arnot, "The Honour of the Crown" (1996), 60 Sask. L. Rev. 339 (Q.L.).

⁴⁹¹ *R. v. George* [1966] S.C.R. 267. Also see, *Regina v. Taylor and Williams*, (1982), 34 O.R. (2d) 360 (ON.C.A.) [*Taylor and Williams*] at para. 19.

However, the honour of the Crown was not always so justly interpreted. Again, David Arnot explains:

But the rise of the global British empire in the 19th Century led British jurists to turn the concept of “Crown honour” on its head. A strange fiction arose, associated with the “act of state” doctrine, to the effect that what the ministers of the Crown do must be honourable, simply because they are the Crown’s ministers. Thus, an ancient notion that there is an unwritten but fundamental Bill-of-Rights embedded in the symbol and dignity of the Crown, was converted into a pretence for justifying every administrative action taken in the Crown’s name. The shield was neatly converted into a sword.⁴⁹²

As such there might be a tendency to view the *Manitoba Act* as either a treaty *or* a legislative Act but few would consider examining it as being both. If you justify the administrative action by interpreting the *Manitoba Act* first as a legislative Act, then there might be a corresponding tendency to treat the treaty argument with disdain. For, if the Crown had intended to enter a treaty then they would have formally said so. However, if you look first to treaty law and recognize that an agreement was reached, it is much easier to recognize that treaty and to see the legitimacy of the *Manitoba Act* as being the Crown’s attempt to honour that agreement. This latter approach, I would contend, is more in keeping with the historical record. Further, it is in keeping with the contemporary practice of negotiating treaties and then passing them through the Parliamentary process.⁴⁹³

⁴⁹² Arnot, *supra* note 490.

⁴⁹³ For one example, see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon*] (canlii) online: <<http://www.canlii.org/en/ca/scc/doc/2010/2010scc53/2010scc53.html>> and *Little Salmon/Carmacks First Nation Final Agreement*, July 1, 1997 (online: <http://www.eco.gov.yk.ca/pdf/little_salmon_carmacks_fa.pdf>). The key features of this process were identified in *Campbell supra* note 278. In that decision Justice Williamson explains at para. 8 that “The Nisga’a Final Agreement is the document concluded by those negotiating on behalf of Canada, the province, and the Nisga’a. The Agreement, pursuant to the terms of the document itself, became a “treaty” once it had been ratified by the Nisga’a people, and once settlement legislation passed by Parliament and the legislative assembly had been proclaimed. The effective date was May 11, 2000.” And, at para. 28 Williamson notes that the legislative process is implicated in section 35(3): “In 1983, s.35 subsection (3) was added ensuring that treaty rights included not only those in existence, but those that might be acquired after that date by way of land claims agreements.” Part of passing the legislation through Parliament or a provincial legislature is a way for the government to validate the agreement and the parties to that agreement, at para. 33: “the fact that the Crown in right of Canada and the Crown in right of British Columbia have entered into these negotiations, and concluded an Agreement, illustrates that the Crown accepts the Nisga’a Nation has the authority to bargain with the State and possesses rights which are negotiable.” Finally, the legislative process serves to formalize the development of Constitutional jurisdiction which Williamson explains as follows, at para. 180: “I have also concluded that the Constitution Act, 1867 did not

In the more recent past the Canadian Courts have established that the principle of the honour of the Crown embodies principles of justice.⁴⁹⁴ This is reflected in the following, oft cited, passage from *Badger*:

...the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' will be sanctioned.⁴⁹⁵

As with the history laid out above by Arnot, the Supreme Court has recently recognized that the honour of the Crown is a “core precept”⁴⁹⁶ which, in the context of treaty interpretation, extends from the assertion of Crown sovereignty.⁴⁹⁷ As a framework for treaty interpretation the honour of the Crown places a duty on courts to interpret Crown action in an honourable way, rather than adopting a construction which would cause the Crown to be in breach of treaty rights. For example, Hall J. in *Daniels v. White* adopted a construction of Parliamentary intent which upheld the “solemnity with which the Indian treaties had been negotiated” and rejected the notion that

distribute all legislative power to the Parliament and the legislatures. Those bodies have exclusive powers in the areas listed in Sections 91 and 92 (subject until 1931 to the Imperial Parliament). But the Constitution Act, 1867, did not purport to, and does not end, what remains of the royal prerogative or Aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982.”

⁴⁹⁴ Slattery, *supra* note 442 at 207 where it is written: “As with other facets of the doctrine [of Aboriginal rights], this body of treaty law was generated by long-standing customary relations between aboriginal peoples and the Crown and is informed by basic principles of justice which engage the Crown’s honour.”

⁴⁹⁵ *Badger*, *supra* note 465 at para. 41 as cited in *Sundown*, *supra* note 465 at para. 24 and *Marshall*, *supra* note 489 at para. 49. Also see, *Taylor and Williams*, *supra* note 491 at para. 19 where it is written: “In approaching the terms of a treaty...the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.”

⁴⁹⁶ *Haida Nation*, *supra* note 455 at para. 16: “The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples ... It is not a mere incantation, but rather a core precept that finds its application in concrete practices.”

⁴⁹⁷ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 [*Taku River*] at para. 24 where the Court writes: “The duty of honour derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation ... In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.” Also see, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [*Mikisew*] at para. 51 where the Court writes: “The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court as a *treaty obligation* as far back as 1895, four years before Treaty 8 was concluded”.

the federal government “had the slightest intention of breaching those treaties.”⁴⁹⁸ As a broad governing principle the honour of the Crown gives rise to interpretive techniques which seek a just approach to treaty rights disputes. Part of that just approach involves being attentive to the intentions of the parties. Ritchot made it clear that he was seeking maintenance of the community and, to this end; both he and Macdonald acknowledged that the land was to be kept within Métis families. Upholding Crown honour would mean interpreting the *Manitoba Act* in a way which was responsive to that reality. That is, honour would be upheld to the extent that the courts were willing to uphold the *agreement* and not merely the literal terms of the *Act*.

V.b. Context

It remains common sense and common practice that “[t]he starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms.”⁴⁹⁹ However, courts have recognized that the written terms are often not entirely reflective of the terms of agreement. Any court which wishes to discover the terms of a treaty must learn about the historical context in which that treaty was created. Whether this context is referred to as the “proper setting”⁵⁰⁰ or the “surrounding circumstances,”⁵⁰¹ establishing the historical context involves similar tasks, such as consulting the text of the Treaty, oral evidence and, where available, written reports of the Treaty Commissioner.⁵⁰² The

⁴⁹⁸ *Daniels v. White*, [1968] S.C.R. 517 (Q.L.). The honour of the Crown does not exist solely as an interpretive tool for the courts. It also gives rise to the modern duty of consultation. This duty arises in advance of a breach of treaty rights, whereas the honour of the Crown is usually applied by the courts in contemplation of a possible breach of treaty rights. See, *Mikisew*, *ibid.* at para. 4 where the Court writes: “The duty of consultation ... flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*)...”

⁴⁹⁹ *Marshall*, *supra* note 489 at para. 5.

⁵⁰⁰ *Rex v. Wesley*, [1932] 4 D.L.R. 774 at 789 where the Court writes: “It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.”

⁵⁰¹ *Taylor and Williams*, *supra* note 491 at para. 8.

⁵⁰² *Paulette*, *supra* note 241.

context can only be established through a commitment by the courts to look beyond the written terms of the treaty. For example, in *Taylor and Williams*, MacKinnon, A.C.J.O determined that not all of the terms of the Treaty of 1818 were expressed in the written portion. With the assistance of both parties, the Court referred to historical documentation which contained the minutes of the treaty negotiations: “the minutes of this council meeting recorded the oral portion of the 1818 treaty and are as much a part of that treaty as the written articles of the Provisional Agreement.”⁵⁰³ MacKinnon expressed the importance of incorporating the oral terms into the treaty:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty’s effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.⁵⁰⁴

The oral terms, whether obtained through oral testimony or through the notes or minutes of the negotiations, are utilized by the courts to determine a fuller effect of the treaty. It is for that reason that MacKinnon proceeded to expressly incorporate the oral terms of the treaty negotiations into the meaning of the treaty.⁵⁰⁵ Examining the context also helped MacKinnon determine the motivations underlying treaty rights: “If the Indians were to remain in the area one wonders how they were to survive if their ancient right to hunt and fish for food was not continued.”⁵⁰⁶ By combining the motivations of the parties with the intention expressed in extrinsic evidence, courts are able to craft a more complete picture of the terms of the treaty agreement.⁵⁰⁷

⁵⁰³ *Taylor and Williams*, *supra* note 491 at para. 7.

⁵⁰⁴ *Ibid.* at para. 8.

⁵⁰⁵ *Ibid.* at para. 22.

⁵⁰⁶ *Ibid.* at para. 18.

⁵⁰⁷ See James [Sakej] Youngblood Henderson, “Interpreting Sui Generis Treaties” (1997) 36 Alta. L. Rev. (No. 1) 46 (Q.L.) at note 158 where he writes: “In many cases the dividing line between contextual and intentional analysis

Due to the benefit gleaned from crafting the treaty documents, the Crown's intention is usually evident in the document itself. Still, it is important to understand what both sides intended when they entered into the agreement.⁵⁰⁸ Extrinsic evidence carries its value in its ability to bring Aboriginal understanding of treaties closer to the forefront of the court's analysis. However, the incorporation of extrinsic evidence remained in doubt after Justice Estey, writing for the Court, expressed concern about the use of similar material:

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view, the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.⁵⁰⁹

Despite these concerns, Estey J. proceeded to consider evidence of the treaty negotiations. And, in *Horseman*, the decision of the Supreme Court affirmed the court's willingness to adopt extrinsic evidence. In *Horseman*, Cory J.'s decision turned to extrinsic evidence to determine the intention of the parties and the promises exchanged.⁵¹⁰ Wilson J. justified the incorporation of extrinsic evidence as being a necessary step in overcoming language and cultural barriers which prevented the written document from incorporating all the terms agreed upon.⁵¹¹ Indeed, Wilson expressly rejected the application of the rules of contract interpretation to treaty interpretation. As Wilson explained in her dissenting judgment:

is unclear. Contextual analysis appears to be about discovering events and legal regimes, whereas intentional analysis is concerned with cognitive attributes and the intelligibility of human conduct."

⁵⁰⁸ *R. v. Horse* (1988) 47 D.L.R. (4th) 526 (Q.L.) where the Court wrote: "The ultimate objective of this treaty was for the government to obtain ownership of the lands it covered and to open the surrendered lands to settlement. The preamble of the treaty clearly illustrates this point ... In exchange for the surrendered lands the government promised to assist the Indians in acquiring skills necessary for agriculture."

⁵⁰⁹ *Ibid.*

⁵¹⁰ *R. v. Horseman*, [1990] 1 S.C.R. 901 [*Horseman*] at para 47: "These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time."

⁵¹¹ *Ibid.* at para. 5.

Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day's formal requirements. Nor should they be undermined by the application of the interpretive rules we apply to-day to contracts entered into by parties of equal bargaining power.⁵¹²

The rule which concerned Wilson was that “extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity”.⁵¹³ The use of extrinsic evidence would be severely curtailed if ambiguity is a necessary trigger to its use. The need for ambiguity seems especially restrictive in a situation of expediency and/or severe cultural disconnect between the negotiators. In the present context, the most obvious location of ambiguity is found in the “for the benefit of families clause” in Section 31 of the *Manitoba Act*.⁵¹⁴ Still, this can be explained by reference to the historical materials which set out the Métis expectations.

Justice Binnie, writing in *Marshall*, rejected this approach for three reasons. *First*, he noted that “even in a modern commercial context extrinsic evidence is available to show that a written document does not include all of the terms of an agreement.”⁵¹⁵ Due to historical inequalities, it makes sense that treaty interpretation should not be treated more strictly than interpretation of modern contracts. Binnie's *second* reason for allowing extrinsic evidence was that the Supreme Court had “made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty.”⁵¹⁶ The purpose of such an approach is to help give meaning to the terms of a treaty.⁵¹⁷ *Third*, and perhaps most importantly, Binnie cited the power and language barriers as reason for including extrinsic evidence: “...where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral

⁵¹² *Ibid.* at para. 6.

⁵¹³ *R. v. Marshall*, [1997] N.S.J. No. 131 para. 21 as cited in *Marshall*, *supra* note 482 at para. 9.

⁵¹⁴ *Supra* note 29.

⁵¹⁵ *Marshall*, *supra* note 489 at para. 10.

⁵¹⁶ *Ibid.* at para. 11. Also see, *Sundown*, *supra* note 465 at para. 25.

⁵¹⁷ *Ibid.* at para. 11 where the Binnie J. refers to *Taylor and Williams*, *supra* note 491 at 236: “...if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.”

terms while relying on the written terms”.⁵¹⁸ Even though the negotiations in Ottawa were carried out in a short time frame, there is no reason why this same rule could not apply to the context of the Manitoba Métis. Including the use of extrinsic evidence in determining the terms of a treaty also coincides with rules of interpretation in regards to the meaning of those terms.

Binnie refers to Justice Cory's words in *Badger*:

....when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement ... As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction.⁵¹⁹

Again, there is no reason why this rule wouldn't be applicable to the negotiations in Ottawa. Therefore, it is important to examine the Negotiated Agreement and not merely the *Act* which was meant to bring that agreement into force.

When interpreting this historical context the courts have mentioned the importance of the actions of the parties. Specifically, the courts are concerned with “how, historically, the parties acted under the treaty after its execution.” This action provides “evidence by conduct ... as to how the parties understood the terms of the treaty”.⁵²⁰ Evidence of prolonged and uninterrupted execution of an understanding of treaty rights serves to illustrate what exactly the parties to the treaty believed were the terms: “The accepted evidence was that this understanding of the treaty has been accepted and acted on for some 160 years without interruption. In my view, it is too late now to deprive these Indians of their historic aboriginal rights...”⁵²¹ Post-negotiation action can take the form of declarations or written letters by government officials or as acts which carry

⁵¹⁸ *Ibid.* at para. 12.

⁵¹⁹ Cory J in *Badger*, *supra* note 465 at para 52 as cited in *Marshall*, *ibid.* at para. 14. Also see, *Sappier*; *Gray*, *supra* note 487 at para. 71 where the Court states that when incorporating extrinsic evidence, parties should be given notice of extrinsic evidence relied on by the court. However, failure to gain notice is not fatal if documents are well-known and in the public record.

⁵²⁰ *Taylor and Williams*, *supra* note 491 at para. 21.

⁵²¹ *Ibid.* at para. 25.

out the understood treaty right.⁵²² Generally speaking, the “subsequent conduct of the parties” will help determine if the parties intended to enter a treaty.⁵²³ This analysis can incorporate “all available sources of information, including any written memorials or accounts, oral tradition, the broader social and political objectives of the parties, and the history of their relationship.”⁵²⁴ This evidence is another way in which the courts can gain insight into Aboriginal understandings while attempting to overcome difficulties inherent in the historical record.⁵²⁵

V.c. Liberal and Generous Interpretation

Justice Dickson, in *Nowegijick*, asserts this basic rule of interpretation as follows: “It seems to me ... that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”⁵²⁶ Dickson applied this rule as follows: “If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.”⁵²⁷ Dickson was presented with two options and, applying a liberal construction in favour of the Indians, chose the construction which was of benefit to them. Although Dickson was interpreting a statute, the rule is equally applicable to treaties.⁵²⁸

⁵²² *R. v. Morris* [2006] S.C.J. No. 59 at para. 24 where the Court assesses letters written by Governor Douglas in relation to the North Saanich Treaty of 1852: “These external acknowledgements by Douglas are significant where, as here, the treaty was concluded orally and subsequently reduced to writing. The oral promises made when the treaty was agreed to are as much a part of the treaty as the written words...”

⁵²³ *Sioui*, *supra* note 449 at para. 59.

⁵²⁴ Slattery, *supra* note 442 at 208.

⁵²⁵ Catherine Bell and Karin Buss, “The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises” (2000), 63 Sask. L. Rev. 667 (Q.L.) at para. 9.

⁵²⁶ *R. v. Nowegijick* [1983] 1 S.C.R. 29 (Q.L.) in section IV.

⁵²⁷ *Ibid.* and in the concluding paragraphs Dickson summarizes his approach to interpreting the *Indian Act*: “We must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section.”

⁵²⁸ *Sioui*, *supra* note 449 at para. 18 and 19 where the Court writes: “Finally, once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction.” Also, for an example of a more restrictive interpretation see, *R. v. Francis* (1969) 10 D.L.R. (3d) 189 (Q.L.) immediately following the citation of the Treaty of 1779.

The liberal and generous interpretation has real power to read treaty rights in a manner which contemplates Aboriginal participation in the treaty process, rather than in a Eurocentric literalist interpretation. For example, the Court in *Simon* found that incidental acts are included in the treaty right: “the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds.”⁵²⁹ However, Dickson’s conception of the rule would later clash with that of LaForest J. In *Mitchell v. Peguis Indian Band* Dickson expanded his reasoning in *Nowegijick*:

The *Nowegijick* principles must be understood in the context of this Court’s sensitivity to the historical and continuing status of aboriginal peoples in Canadian society ... It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to *any statute relating to Indians*, even if the relationship thereby affected is a private one. Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.⁵³⁰

Indeed, Dickson saw a wide scope for the application of the liberal and generous approach: “The only limitation to the principle articulated in *Nowegijick* was that the treaties or statutes must ‘relat[e] to Indians’ for the liberal interpretive principle to apply.”⁵³¹ However, as alluded to above, LaForest J., with the support of a majority of the Court, rejected such a wide scope for this interpretive technique regarding statutes:

Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of *any statutory enactment dealing with Indians*, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed *at maintaining Indian rights*, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation

⁵²⁹ *Simon*, *supra* note 461 at para. 31. Also see, *Marshall*, *supra* note 489 at para. 44.

⁵³⁰ *Peguis*, *supra* note 458 at para. 15. [emphasis added]

⁵³¹ *Ibid.* at para. 16.

bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown...⁵³²

LaForest saw statutes as being fundamentally different from treaties. While interpretation of statutes should reflect the will of Parliament, statutes relating to treaty rights will still receive an interpretation, where possible, which corresponds to the honour of the Crown. By straining to interpret statutes relating to treaties in a manner which prevents the negation of Crown commitments, the courts are upholding the honour of the Crown.⁵³³ Despite these reservations concerning statutes LaForest found that the liberal and generous approach applied directly to treaties.⁵³⁴ Although being applied in different ways, the liberal and generous rule applies to both statutes and treaties. In light of the extinguishment of “Indian” title, it is a rule of

⁵³² *Ibid.* at para. 119. [emphasis added] LaForest felt it necessary to qualify the liberal and generous approach as it applied to statutes relating to Indians, at para. 120, he wrote: “At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.”

⁵³³ *Marshall, supra* note 489 at para. 43 where Binnie J. upholds the honour of the Crown: “If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.”

⁵³⁴ *Peguis, supra* note 458 at para. 118 where LaForest writes: “I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents, therefore, it is only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.” The liberal and generous approach has allowed for treaty rights to be interpreted in a flexible manner to ensure that they are not “frozen in time”. See for example, Binnie J. quoting *Sundown, supra* note 465 at para. 32 as cited in *Marshall, ibid.* at para. 53: “...treaty provisions should be interpreted 'in a flexible way that is sensitive to the evolution of changes in normal' practice ...” Also see, *Marshall; Bernard, supra* note 13 at para. 25 “Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology. But the activity must be essentially the same.” This allows the modern practice of ancient rights to use modern means to carry out the right. The liberal and generous approach does have its limits. For example, the liberal and generous approach does not extend the application of treaty rights to Aboriginal persons whose ancestors were not direct parties to the treaty. This is true even where a treaty rights holder grants permission to a non-holder to practice the right. *R. v. Shipman* [2004] 2 C.N.L.R. 288 at para 64 tells us that this is the case because treaty “[r]ights are derived from the Treaty itself and members of a Treaty cannot bestow their rights on others ... Permission on its own, does not give the third party a right in law.” And, even where the Treaty in question expressly passes on “the full and free privilege to hunt over the territory now ceded by them, ... as they have heretofore been in the habit of doing”, and evidence at trial showed that it was customary to give permission to hunt within the territory, the Court still held that the right to invite others to hunt within their treaty territory did not necessarily confer a legal right to non-treaty members to hunt within that territory. This is because “the right stems from the Treaty itself.”

interpretation which would apply to the Manitoba Métis regardless of how the *Manitoba Act* is viewed. Applying this rule to the *Manitoba Act* would allow for an interpretation which is more consistent with the Negotiated Agreement. It would reject a simple interpretation of the wording of the *Act* which is a method that effectively cuts the Métis out of the process.

V.d. Ambiguities

One aspect of a liberal and generous interpretation is the rule resolving ambiguities.⁵³⁵ In *Daniels v. White*, Hall J. (dissenting) expressed an early incarnation of a similar rule:

The lamentable history o[f] Canada's dealings with Indians in disregard of treaties made with them ... ought in justice to allow the Indians to get the benefit of an unambiguous law which for once appears to give them what the treaties and the Commissioners who were sent to negotiate those treaties promised.⁵³⁶

Hall's expression was concerning unambiguous laws; however he was clearly concerned with upholding treaty rights where the interpretation permitted. This appears to be a precursor to the "ambiguities in favour of Indians" rule which was later laid out in a decision of the Ontario Court of Appeal and the Supreme Court of Canada, which can be simply stated as follows: "any ambiguities in the wording of the Treaty or document must be resolved in favour of the Native people."⁵³⁷ Despite the simple nature of this rule the Supreme Court has adopted an interpretive principle which can have the effect of overriding the ambiguities rule.

In *Sioui* the Court tried to adopt a position of reconciliation of interests:

Even a generous interpretation of the document, ... must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible

⁵³⁵ The ambiguities rule was clearly placed within the liberal interpretation model when in *Peguis*, *supra* note 458 at para. 13 Dickson C.J. identified "[t]wo elements of liberal interpretation" as follows: "(1) ambiguities in the interpretation of treaties and statutes relating to Indians are to be resolved in favour of the Indians, and (2) aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. In some cases, the two elements are indistinguishable, but in other cases the interpreter will only be able to perceive that there is ambiguity by first invoking the second element."

⁵³⁶ *Daniels v. White*, *supra* note 498 (Q.L.).

⁵³⁷ *Horseman*, *supra* note 510 at para 50. Also see, *Taylor and Williams*, *supra* note 491 at para. 20 where the Court wrote: "if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible..."

interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.⁵³⁸

By focusing on a reconciliation of interests, the Court seems to pay little regard for the reasons behind the liberal and generous interpretation. Namely, language differences, Crown drafting of documents, and cultural differences (including different legal cultures) impacted upon achieving a common understanding.⁵³⁹ Indeed, such differences placed the Aboriginal negotiators in a position of deficient power. By interpreting ambiguities in favour of Aboriginal signatories, the Courts can attempt to overcome some of the barriers which Aboriginal people face in having their treaty rights recognized.

Rather than being a complete repudiation of the ambiguities rule, the concept that the courts must attempt to find common intention, in theory, could merely serve as a reminder that courts must not go too far in accommodating Aboriginal understandings. That is to say that incorporating Aboriginal understandings must not lead the courts to neglect the Crown's understanding at the time of the treaty. Such an interpretation of the rule is suspect because it would indicate that the Court has lost sight of the fact that the history of negotiation and drafting treaties has typically served Crown intentions quite well. Interpretive rules are applied to balance out this history with Aboriginal understandings. The ambiguities rule has been clearly stated:

⁵³⁸ *Sioui*, *supra* note 449 at para. 114.

⁵³⁹ While these might have been barriers to particular treaty processes. Relationships which were developed over a longer period allowed for the development of normative practices which defined the space of common understanding. However, even then the historical record reveals only part of the story. For example, see Janna Promislow, “‘*Thou Wilt Not Die of Hunger ... for I Bring Thee Merchandise*’: Consent, Intersocietal Normativity, and the Exchange of Food at York Factory, 1682-1763” in Webber J. and Macleod C.M. eds. *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) at 103 where she writes: “...the HBC records, allow us to glimpse the normative practices that shaped relations between Europeans and the lowland Cree on the shores of Hudson Bay. It is not possible, at this remove, to delineate these relationships exactly or to describe the norms of the intersocietal space with absolute precision. Instead, ambiguity is the defining characteristic of the latter - if only because the investigation has been conducted through one-sided accounts of events written several centuries ago.”

...if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible.⁵⁴⁰

Also:

any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed....⁵⁴¹

In light of these clear statements, it is somewhat surprising that the courts have more recently placed an emphasis on common intention.⁵⁴² This is because in the search for common intention ambiguities can merely be seen as the likely ground in which the common intention lies rather than as a trigger for the “doubtful expressions resolved in favour of the Indians” rule of interpretation. For example, in *Morris* in order to reach conclusions on the content of the treaty, the Court looked to “the common intentions of the parties to the Treaty, as distilled from the context in which the Treaty was entered into.”⁵⁴³ No doubt, the common intention is an ideal to strive for, however, if courts are going to rely upon the historical context then they must be careful not to simply import the bias found in the historical record. Further, the moral authority of the courts to unilaterally interpret treaties seems to be on shaky ground. As negotiators to the treaties, Aboriginal people and their systems of law must be full participants in any process of reconciliation.

It should be noted that the ambiguities rule has been rejected as an interpretive technique in relation to modern treaties. The courts have asserted that courts should be hesitant to apply

⁵⁴⁰ *Taylor and Williams*, *supra* note 491 at 235-36 as cited in *Marshall*, *supra* note 482 at para. 51.

⁵⁴¹ *Badger*, *supra* note 465 at para. 41 as cited in *Sundown*, *supra* note 465 at para. 24.

⁵⁴² See, Bell and Buss, *supra* note 525 at para. 8 where the authors note: “as members of the judiciary become more aware of the oral culture of Aboriginal peoples and the fiduciary obligations of the Crown, the desire to ascertain the understanding of the First Nation signatories at the date of treaty has gained greater priority over the need to find ambiguity.”

⁵⁴³ *Morris*, *supra* note 522 at para. 33. Also see, *Sioui*, *supra* note 449 at 1069 as cited in *Marshall*, *supra* note 489 at para. 14 where Lamer noted that the purpose of these flexible rules is to fulfil the responsibility of the Court to “choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles” the Aboriginal interests with Crown interests. Emphasis in original.

the liberal and generous rules of interpretation where vulnerabilities such as those found in historic treaties do not exist.⁵⁴⁴ However, in the case of the Red River delegates, the lead negotiator was Father Ritchot. He was neither trained in law nor did he (or any of the other delegates) have a direct hand in drafting the *Manitoba Act*. So while this rule might not be used in its full force, there is still enough of a vulnerability to justify paying particular attention to the Métis perspective when interpreting the agreement. In this case, however, there is a common (or corresponding) intention which suits both parties interests. Specifically, Canada's intention was to acquire the territory and open it up to settlers. This was part of the grand design of a nation extending from coast to coast. The Métis desired a community land base which would be protected from the expected influx of settlers. There is no conflict here. Rather, the acceptance of the Métis understanding justifies their ratification of the agreement and the Provisional Government's effective granting of access to Canada and its immigrants. Without the guarantee of reservations the Métis would not have given such permission.

VI. The Negotiated Agreement and the Manitoba Métis Treaty

There might be some immediate resistance to the idea that there was a treaty negotiated in Ottawa between the Red River delegates and Canada. This resistance would come on the level of either form; that the negotiations were never called a treaty and were carried on outside of normal Indian treaty processes, or there could be resistance to the very idea that the Métis are

⁵⁴⁴ *Eastmain Band v. Canada (Federal Administrator)* (C.A.) [1993] 1 F.C. 501 at para. 29 where Federal Court of Appeal writes: "Thus while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all parties who signed it and take into account the historical and legal context out of which it developed. To seek ambiguities at all costs – and there will always be room for this in documents of such magnitude – and to interpret any ambiguity systematically in favour of the Aboriginal parties, would be to invite those parties to use the vaguest possible terms in the hope that they might then apply to the courts and the certainty that, by so doing, they would gain more than the actual fruit of the negotiations. This sort of approach would distort the entire process of negotiating treaties..." Also see, *R. v. Howard* [1994] 2 S.C.R. 299 at para. 9, And, para. 5 for a summary of the competencies of the Haiwatha representatives.

a treaty people; policy, the argument might go, dictated clearly that only Indians were to be dealt with through treaties. Additionally, there could be some skepticism from legal thinkers who can't wrap their minds around an agreement being protected by the concurrent coexistence of a treaty *and* legislation. This section will deal with the problems mentioned above as well as outline what I believe should be the proper legal characterization of the negotiations in Ottawa.

VI.a. Are the Métis a Treaty People?

The Métis are recognized as go-betweens in the treaty process but they are often not associated with being directly involved as parties to a treaty.⁵⁴⁵ This is due to some overriding perception that there was a consistent government policy which did not include Métis as parties to treaties. That perception is flawed but the implication which stems from it; that the law will not see the Métis as treaty people because it was never the government's intention to enter treaties with them, is even more flawed. Contrary to that perception of government policy, there are several ways in which the Métis participated in treaties in the past. The most obvious would be the instances where they were given the chance, as individuals, to enter treaty with their Indian relatives. Such a choice was based on perceived lifestyle. Take for example, the following exchange during the negotiations of the North-West Angle Treaty in October of 1873:

CHIEF – I should not feel happy if I was not to mess with some of my children that are around me – those children that we call the Half-breed – those that have been born of our women of Indian blood. We wish that they should be counted with us, and have their share of what you have promised. We wish you to accept our demands. It is the Half-breeds that are actually living amongst us – those that are married to our women.

GOVERNOR – I am sent here to treat with the Indians. In Red River, where I came from, and where there is a great body of Half-breeds, they must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land. All I can do is to refer the matter to the Government at Ottawa, and to recommend what you wish to be granted.⁵⁴⁶

⁵⁴⁵ See *Morris*, *supra* note 291 at 293-295.

⁵⁴⁶ *Ibid.* at 69. Yet, this should not give rise to the notion that there was a hard policy in this regard. Afterall, the Métis did adhere to treaty three.

The Indian perspective here would indicate that the Métis were part of their community and should be treated as such. The government perspective was only partly based on that factor, but was also based on notions of race. The half-breed, as a people in-between, were to be designated as either Indian or white. Morris' distinction based on money and land is not fully accurate for the Indians were granted land as well. However, it was to be set out in reserves for the benefit of the entire community rather than through a process of individual allotments or titles such as settlers might get. What this shows is that the "policy" towards half-breeds was not one of flexible accommodation so much as a collection of policies where circumstance and exigency would determine which policy would be put into effect.

This piecemeal approach is reflected in Lt.-Gov. Morris' characterization of the various classes of half-breeds:

The Half-breeds in the territories are of three classes – 1st, those who ...have their farms and homes; 2nd, those who are entirely identified with the Indians, living with them and speaking their language; 3rd, those who do not farm, but live after the habits of the Indians, by the pursuit of the buffalo and the chase.

As to the first class, the question is an easy one. They will, of course, be recognized as possessors of the soil, and confirmed by the Government in their holdings, and will continue to make their living by farming and trading.

The second class have been recognized as Indians, and have passed into the bands among whom they reside.

The position of the third class is more difficult. The loss of the means of livelihood by the destruction of the buffalo, presses upon them, as upon our Indian tribes; and with regard to them I reported in 1876 and I have seen no reason to change my view, as follows:

'There is another class of the population in the North-West whose position I desire to bring under the notice of the Privy Council. I refer to the wandering Half-breeds of the plains, who are chiefly of French descent and live the life of the Indians. There are a few who are identified with the Indians, but there is a large class of Metis who live by the hunt of the buffalo, and have no settled homes. I think that a census of the numbers of these should be procured, and while I would not be disposed to recommend their being brought under the treaties, I would suggest that land should be assigned to them, and that on their settling down, if after an examination into their circumstances, it should be found necessary and expedient, some assistance should be given them to enable them to enter upon agricultural operations.'⁵⁴⁷

The desire to see a coherent policy on the part of the government has clouded the interpretation of its flexible and often inconsistent approach to what appears to be the same class of people.

⁵⁴⁷ *Ibid.* at 294-95.

Take for instance the policy to grant scrip to the Métis rather than to enter treaties with them. One author has asserted that the *Manitoba Act* “pointed the way to the procedure to be adopted for extinguishment of Metis title.” He explains as follows:

Metis claims rest upon the same general foundation as those of persons recognized by the Government of Canada as having Indian status. They rest upon governmental recognition of an aboriginal interest in the soil, a usufructuary rights constituting a burden on the Crown’s title. The Manitoba Act (section 31) recognized aboriginal title in the soil insofar as Manitoba Metis were concerned. It sought to extinguish that title by a land grant through an issue of scrip. This pattern was later extended to the Metis of the North-West Territories and then to those living in territory surrendered by Treaties Eight and Ten.

The procedure adopted for dealing with the Metis was unilateral. It proceeded by legislation and order-in-council. It did not even have the appearance of a negotiated settlement which the treaties had. Metis commissions did not negotiate terms, but simply examined the status of claimants to determine their eligibility to participate in the compensation offered. Indian title was extinguished, in theory at least, from the bottom upwards, while Metis title was extinguished from the top down.⁵⁴⁸

Here the author is confusing government action for policy and is substituting that policy over the history. In a “Chronology and Summary” background provided at the end of the article, Taylor does note that the delegates of the provisional government “went to Ottawa and the Manitoba Act was drawn up.”⁵⁴⁹ Well, this looks like a bottom up approach. But that doesn’t mesh with the author’s vision of a coherent policy. Instead of a coherent policy which includes the *Manitoba Act*, the author should have paid attention to his own research. For example the author notes that “[n]othing better illustrates the ad hoc fashion in which Metis claims were dealt with than the continual widening of the classes of claimants and other changes that were made throughout the whole period.”⁵⁵⁰ What is revealed through his research is not a coherent policy so much as a policy of expediency. As such it is necessary to look at each instance on its own. For example, the half-breed adhesion to Treaty Three⁵⁵¹ cannot represent a continuation of this

⁵⁴⁸ John Leonard Taylor, “An Historical Introduction to Metis Claims in Canada” *The Can. J. of Nat. St.* III, 1(1983): 151-181 at 166-67.

⁵⁴⁹ *Ibid.* at 171.

⁵⁵⁰ *Ibid.* at 165.

⁵⁵¹ For more on this adhesion, see Wayne E. Daugherty, “Treaty Research Report: Treaty Three (1873)” (Ottawa: Indian and Northern Affairs Canada, 1986) 54-57 and Wendy Moss, “Métis Adhesion to Treaty No. 3.” (Ottawa: Native Council of Canada, 1979).

scrip policy which was supposedly developed in the *Manitoba Act*. Fundamentally, the recognition of an identifiable half-breed community in a formal treaty flies in the face of this policy. Indeed, it would fit more with the less frequent policy of recognizing half-breeds as Indians (as was done in the *Manitoba Act*). The author takes the presumption of a coherent policy and uses that to interpret the history. This is not surprising, since, it is standard fare (and this paper has also argued) that there was a coherent policy extending back to the Royal Proclamation of 1763 which dealt with Indians. Yet, even that policy was only rudimentarily carved out. One need only look at the wide variety of treaties from coast to coast to see that the extinguishment of title was not always front and centre in British policy.⁵⁵² Although, here again, the presumption that the treaties were land surrenders has formed the standard account of legal interpretation.⁵⁵³ The reality of government policy towards the Métis was that it was dependent upon the situation. At times they were to be incorporated into bands, at other times they negotiated a community interest, and at other times they were dealt with unilaterally, as individuals, through grants of scrip.⁵⁵⁴ What can we take from this? Well, if we look back at

⁵⁵² Nor was the understanding that the Crown would extinguish all title in advance of settlement. Hon. David Laird, Ex-Governor of the Northwest Territories, *The Historical and Scientific Society of Man.*, Transaction No. 66, Feb. 23, 1905 (Winnipeg: The Manitoba Free Press Company, 1905) at 4 explains: "In upper Canada, except in the case of the Robinson and McDougall Treaties, the surrender had been taken for certain lands to which the Indians laid a special claim; but in the later Treaties and in those of the North-West, the Indian title was extinguished over the whole area of country to be utilized by incoming settlers, out of which, of course, the Indians were allowed extensive reserves at places generally selected by themselves."

⁵⁵³ For an alternative conception see Gordon Christie, "Justifying Principles", *supra* note 16.

⁵⁵⁴ Scrip is often seen as stemming directly from the *Manitoba Act* rather than from government policy. For example, Daugherty, *supra* note 551 writes at 54: "Section 31 of the [Manitoba] Act reserved 1,400,000 acres (567,000 hectares) to be granted to the children of Métis heads of families through the redemption of scrip (that is, land certificates)." Since there is no mention of scrip in section 31 or in the negotiations, one can assume that Daugherty is using the same process as Taylor in misattributing government practice as legal principle. Although, used in a different manner, a similar association can be found in *Blais*, *supra* note 322 at para 34 which reads as follows: "This perceived difference between the Crown's obligations to Indians and its relationship with the Métis was reflected in separate arrangements for the distribution of land. Different legal and political regimes governed the conclusion of Indian treaties and the allocation of Métis scrip. Indian treaties were concluded on a collective basis and entailed collective rights, whereas scrip entitled recipients to individual grants of land. While the history of scrip speculation and devaluation is a sorry chapter in our nation's history, this does not change the fact that scrip was based on fundamentally different assumptions about the nature and origins of the government's relationship with scrip recipients than the assumptions underlying treaties with Indians."

Taylor's description of the policy and ask an open-ended question: Where does section 31 of the *Manitoba Act* fit into this policy? We can see quite clearly that it is a bottom up style of negotiation which is consistent with Indian policy rather than perceived Métis policy. The story here is government inconsistency in dealing with the Métis rather than any broad consistent policy which characterized its interaction with them. If the government chose, unilaterally, to violate the treaty it negotiated with the Métis, this only establishes the true inconsistency of the policy rather than provide a path to interpreting the *Act* ex post facto. The same point could be made in relation to Indian treaties which were unilaterally violated by the Crown.

In addition to specific instances where Métis collectives or individuals were admitted into treaty, the general policy objectives reached through collective negotiations fall in line with those of other treaties. The half-breed adhesion to Treaty Three and the Negotiated Agreement discussed above are similar in that they both treat with the Métis as groups rather than individuals. These dealings with Métis collectives fell within the accepted Crown policy of extinguishing Aboriginal title to promote settlement. For example, the Crown dealt directly with the Métis as treaty partners in the adhesion to Treaty Three. This adhesion has been described as an anomaly: "The Indian policy of the Dominion in the North-West was only being developed during the 1870's. The Government still knew little about the area and its people. Under such circumstances, anomalies such as this example can be expected."⁵⁵⁵ Still, it was an anomalous decision that was made in full knowledge of the half-breed status of the signatories and even admitted them as "half-breeds" into the treaty. Can it be that our bias towards uniformity might cause us to interpret these agreements as something other than they are? Even if these are the most absurd exceptions to the rule, they are nonetheless, of a different character than the policy of granting scrip to individuals.

⁵⁵⁵ Taylor, *supra* note 548 at 161.

Paul Chartrand notes the similar policy objectives found in Indian treaties and the *Manitoba Act*: “In the 1870’s, Indian policy in the west manifested itself through the medium of the treaties. The same objects are apparent in section 31. The Canadian ministers admitted its purpose to settle any claims of Indian title, in order to clear the Crown title for settlement purposes.”⁵⁵⁶ This admission is found in the wording of Section 31 which states in part: “And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province...”⁵⁵⁷ The adoption of such language and policy becomes more critical when we consider that the *Manitoba Act* was drafted within days of the negotiations which created it. So, when John A. Macdonald stated, some 15 years later that “[t]hat phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians”⁵⁵⁸ we can see a reflection of the final policy adopted in the Northwest more broadly, rather than the specific circumstances of the *Manitoba Act*. As explored previously, it is clear from the negotiations and the history prior to the negotiations that, while the Métis did not consider themselves to be Indians, they did consider themselves to have Indian title. This title was expressly recognized, and the Métis of Red River were dealt with as a group in a manner reflective of the general Indian policy. By looking at the circumstances of the negotiations, the general policy of the Crown, and the final agreement it is more than reasonable to conclude that the land agreement reached in the Negotiated Agreement and reflected, in part, in the *Manitoba Act*, is a treaty.

The evidence for the Canadian government’s intentions to form a treaty can be found in several places. The most obvious source is the negotiations discussed above. There is every indication in those negotiations that the Crown intended to enter faithful and binding

⁵⁵⁶ Chartrand, *supra* note 1 at 134. Chartrand also notes at 5: “It has always been British colonial policy to clear the Crown’s title to the public lands required for settlement by purchasing the Indian title to the lands.”

⁵⁵⁷ *Supra* note 29.

⁵⁵⁸ *House of Commons Debates*, July 6, 1885, at p. 3113, cited in T.E. Flanagan, “The History of Metis Aboriginal Rights: Politics, Principle and Policy” (1990), 5 *C.J.L.S.* 71 at 74 as cited in *Blais*, *supra* note 322 at para. 22.

negotiations. More direct evidence that these negotiations were of the same quality as treaty negotiations can be found in government practice in regards to other treaty agreements. When the policy was later crystallized, it became apparent that half-breeds were to be dealt with as individuals who were often given the choice of entering treaty or taking scrip.⁵⁵⁹ But as illustrated above, even that choice was clouded in particular circumstance. Rather than applying a false conception of uniformity to the Métis experience with Canada we must look at each instance individually and determine how it fits either with law or with policy. The best evidence of government intention is the sincere way in which they appeared to carry out negotiations with the delegates from Red River and the speed with which they brought about a legal instrument to maintain that agreement. Whether this worked or not, it does not negate the sincerity of the action.

VI.b. What Parts of the Negotiated Agreement Deal with Métis as Métis?

The most obvious term which was designed to secure the future land base of the Manitoba Métis is the children's land grant. Indeed, it is my assertion that section 32 is not part of a treaty agreement with the Métis. But these terms need to be interpreted carefully in order to see this separation. O'Toole explains that "[t]he Métis did not view individual and collective rights as being mutually exclusive, but as being, not unlike the fee simple and Crown title,

⁵⁵⁹ See. Jill St. Germain, *Indian Treaty-Making Policy in the United States and Canada, 1867-1877* (Toronto: University of Toronto Press, 2001) at 92 where she writes: "Canada treated with various peoples...but reserves were assigned on the basis of bands within each nation. Instructions as to specific location did not come from the highest authority, as was the case in the United States. Instead, treaties included either terms specifying the regions wherein the Indians concerned expressed a desire to settle or provisions promising the selection of reserves at a later date 'in consultation' with the people concerned. In theory this left the Indians with considerable latitude as to where they wished to live, a more relaxed arrangement than that accorded the American Plains Indians. It also implied that Indian consent was important. In practice, however, it was not always honored, particularly over time as the Dominion government began to see the disadvantages of permitting the Indians to make these selections...In Manitoba, the ongoing dispute over Outside Promises delayed reserve surveys in some cases more than five years, and when the Indians finally came to settle on the lands they had chosen, they discovered in at least one instance that they had already been surveyed for Hudson's Bay Company and homestead purposes." Treating with the Métis as individuals was argued by Alexander Morris during the treaty negotiations *supra* note 546.

complementary and congruent.”⁵⁶⁰ While this would help provide a probable explanation for what Ritchot’s perceptions may have been with regards to the distribution of the children’s allotment, it is not a plausible line of reasoning to justify the inclusion of section 31 and 32 grants within the same style of grant. Indeed, it seems clear from the negotiations that section 32 was easily secured for the benefit of *all settlers*. There is nothing responding to Métis claims within section 32 or in the negotiations leading up to it. It is only after the substance of section 32 is carved out that Ritchot turns the negotiations to the issue of Métis lands. Section 31 however, was negotiated clearly for the *exclusive benefit of the Métis*. This duality is not a surprise if we look at how the delegates were selected to represent different interests within the settlement. Ritchot was there to represent the French Métis and in so doing he effectively secured a land grant for all Métis. While the English and French may have differed on their interpretation of how that grant may be carried out, it is the French interpretation which would give us insight into what Ritchot was trying to achieve and which should help interpret his journal and Macdonald’s corroborating communications. Ritchot received correspondence from Riel on April 19, 1870 which told him to argue “that the country be continued to be divided in two, in order that the two populations living apart may be kept as a safeguard of our most endangered rights”.⁵⁶¹ The French desire for a separate and enclaved land base seem to have been well-understood in the settlement. Anglican Bishop, Machray, was also of the understanding that the French Métis “wish for a Section of the country to be restricted to the French population.”⁵⁶² This supports an interpretation of the Negotiated Agreement as responding to the Métis as a community. The context also helps to provide insight into what

⁵⁶⁰ O’Toole, *supra* note 299 at 261.

⁵⁶¹ Morton, *supra* note 32 at 137 as cited in O’Toole, *ibid.* at 261.

⁵⁶² Morton, *supra* note 32 at 506 as cited in O’Toole, *ibid.* at 260.

other features of the Negotiated Agreement would have been of central concern to the Métis as Métis. These other terms are as follows:

1. The protection of French and English languages. This is protected in section 23 of the *Manitoba Act* which reads as follows:

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.⁵⁶³

Ritchot's journal doesn't reflect any difficulties in obtaining this promise.

2. The establishment of denominational schools. As with the language question it might be assumed that this benefit was granted rather easily since there is no reference to negotiations on this point in Ritchot's journal. Denominational schools are protected in section 22 of the *Manitoba Act* which reads, in part, as follows:

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions: --

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union: --

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education: --⁵⁶⁴

3. The amnesty to protect the Métis leadership. This amnesty was not formally given prior to Ritchot's departure from Ottawa. However, as shown above, it did form part of the verbal understanding of the agreement.

⁵⁶³ *Manitoba Act*, s. 23, *supra* note 29.

⁵⁶⁴ *Manitoba Act*, s.22, *ibid.*

While the proper administration of the land question is, no doubt, the most pressing of these four matters, each of these would allow the Métis to protect their communities in the transition to their new land bases. The underlying assumption which accompanies virtually all treaties is that the Crown was attempting “to facilitate the expansion of settlement on Aboriginal lands.”⁵⁶⁵ This assumption has been used to effectively read in settlement aspirations where the treaty is silent on the matter.⁵⁶⁶ However, in this case, the aspirations were made explicit and the Métis land grant was to be an exception to that broader settlement scheme. The trick for the judiciary is in avoiding the tendency to infuse all aspects of the treaty (both Aboriginal and non-Aboriginal interests) with the intentions of the Crown. Indeed, the only way to understand the government’s settlement aspirations in this case, is to see the Métis land base as an exception to that settlement.⁵⁶⁷ That is, if we are going to acknowledge that the government had intentions for the territory then it is also necessary to look at the Métis interests from the Métis perspective. As I have shown in this chapter and previously, the Métis intention was to secure a land base for

⁵⁶⁵ Christie, “Justifying Principles”, *supra* note 16 at para. 29.

⁵⁶⁶ *Ibid.* where he writes of the Maritime treaties: “When the Court spoke of peace and order, it clearly had in mind the peaceful and orderly expansion of the British presence in the Maritimes. Rather than see a conflict between this sort of peace and order and the simultaneous recognition and confirmation of Mi’kmaq hunting and fishing rights, the Court aimed at what it later termed a conciliation. This conciliation, however, was fundamentally biased in favour of the Crown, for it began with the premise that expansion of settlement must be permitted, and so tried to imagine how Aboriginal interests could be accommodated within this expansion. The only possible rationale for this premise lies in a view of treaties as surrenders, such that Aboriginal parties have no absolute powers after the treaties are signed. The result is treaty interpretation which is flawed from the outset, for it consistently fails to pay heed to the fundamental intentions of the Aboriginal parties. The Court assumes that Crown sovereignty is paramount, and that Aboriginal sovereignty (if the Court should feel there ever was such a thing) is subservient to this higher power.”

⁵⁶⁷ This was supported in the Parliamentary debates where the notion of granting 1.4 million acres was characterized as a “reserve” and “appropriation” by Hon. Sir John A. Macdonald, on May 4th, 1870 as cited in Morton, *supra* note 32 at 204 where it is written: “Those half-breeds has a strong claim to the lands, in consequence of their extraction, as well as from being settlers. The Government therefore proposed for the purpose of settling those claims, this *reserve of 1,400,000 acres*. The clause provided that the lands should be regulated under orders in Council by the Governor General, acting by the Lieut.-Governor, who should select such lots or tracts in such parts of the Province as he might deem expedient to the extent aforesaid, and *divide the same among the children of half-breeds – heads of families*. *No land would be reserved for the benefit of white speculators, the land being only given for the purpose of settlement*. The conditions had to be made in that Parliament who would show that care and anxiety for the interest of those tribes which would prevent that liberal and just *appropriation* from being abused.” [emphasis added]

their people. The meeting of the minds of Ritchot and Macdonald in regards to keeping these lands within Métis families is illustrative of the Métis intention and is also supported by the broader context of Métis desires. There is a tendency of the Courts to interpret treaties in such a way that the Crown intention can overpower the objectives of the Aboriginal party. Gordon Christie offers an alternative vision which would require consideration of both parties' objectives:

The fundamental bias found in Simon clearly animates the Court's reasoning in Sioui. The accommodation sought between the two sets of objectives is one-sided, for the Huron's modern appeal to the treaty must be made in the face of an unyielding acceptance of the Crown's mission. By the 20th century, British expansion had completely overrun the traditional territory of the Huron, and yet still the exercise of Huron treaty rights must be tested against whether or not they might interfere with the operation of the invading park. The only way to make sense of this result is by conceiving of the treaty as a surrender to the British Crown. Imagining that it was part of a negotiated agreement, meant to bind the two nations in a structure which would facilitate their sharing of the land, would never lead to this sort of judicial outcome.⁵⁶⁸

As I stated previously, in regards to the Métis the settlement intentions of the government were made clear. Christie's comments are more apt for the objectives of First Nations. However, his observation of the bias of the time provides insight into how the agreement reached with the Métis may have become contorted and carried out in a manner which was not reflective of the understanding, he writes:

While many, if not most, of the Aboriginal parties expressed the deepest desire to be able to continue living as their peoples had for countless generations, the mind-set of many Crown negotiators in the period beginning roughly with the Robinson-Huron Treaty of 1850 often seemed to parallel that of the general population – that Aboriginal peoples were best off either integrating into the Western world or dying out completely.⁵⁶⁹

This is pertinent to the Métis. Certainly there were concerns about the incoming settlers and the agricultural norm which they would establish. However, as is evidenced in the Métis desires as well as the terms of the Negotiated Agreement, the Métis were by and large more concerned with protecting their communities and culture than they were at protecting the particular lifestyle of

⁵⁶⁸ Christie, "Justifying Principles", *supra* note 16 at para. 43. In contrast, St. Germain, *supra* note 559 at 41 explains that the consistent aspect of Canadian treaty policy from 1870-77 was the "importance of land and the extinguishment of Indian title as the chief goal sought by Canadian authorities..."

⁵⁶⁹ Christie, *ibid.* at para. 89.

the hunt. The Métis did not expressly or impliedly extinguish these rights in consideration of agricultural implements as some other treaty agreements indicate. Instead, the Métis limited their transaction to their title, in exchange for the security of a land base. Again, Christie's comments seem appropriate: "What is fair in this context is quite clear: Aboriginal peoples are due what they negotiated for, as they extended a hand of sharing to newcomers."⁵⁷⁰

The most obvious similarity between the Negotiated Agreement and a treaty is its nature as a land transfer/reservation agreement. This is consistent with the general policy of the Crown in regards to obtaining title over Aboriginal lands. However, the transfer of land does not in itself create a treaty. For example, Brian Slattery points out that treaties can be crafted "to draw boundaries between aboriginal territories and areas open to settlement, or to describe in detail the limits of lands reserved for indigenous peoples within larger tracts ceded to the Crown."⁵⁷¹ These terms can very much be used to describe the reservation of Métis land in the Negotiated Agreement. Other treaties might protect cultural practices such as fishing or hunting rights. Similar to those agreements, the Métis at Red River sought recognition for their dual language rights and customary land use rights. However, language rights and land rights are also found within the *B.N.A. Act, 1867*. While the *B.N.A. Act* and the Negotiated Agreement might superficially be similar, they are in fact quite different. The most important difference being that the Métis' Provisional Government did not gain its legitimacy under the authority of the Crown. That is to say that the *B.N.A. Act* represents the union of the Crown's jurisdiction through a central federal authority, whereas the Negotiated Agreement exists between the Crown and the Métis of Red River. The Negotiated Agreement brought together two distinct political

⁵⁷⁰ *Ibid.* at para. 156.

⁵⁷¹ Slattery, *supra* note 442 at 208.

communities through concession of cultural, political and land rights. It represented a treaty at its most fundamental level.

VI.c. *An Act AND a Treaty*

At its most fundamental level the Negotiated Agreement is best characterized as a treaty. However, that treaty was enshrined in legislation which would later become a constitutional document. This is not the same process outlined in the *N.R.T.A.* cases where it was said that the Crown intended to breach the treaty by restricting commercial hunting and providing, in its place, an expanded hunting territory to its treaty partners.⁵⁷² That legislative amendment was made three decades after the treaty was negotiated for the purposes of broad jurisdictional adjustments in the Canadian confederation. The Negotiated Agreement and the *Manitoba Act* were crafted at virtually the same time. The delegates were actively engaged in the development of its terms (although they may have been in a different form to get through Parliament) and they were reassured that the verbal understandings would be carried out as the Bill was passing through the House of Commons. As a result of this peculiar situation, in the next chapter I will examine the corresponding duties from the perspective of both treaty and constitutional law.

From the perspective of the Canadian government there should be no barrier to recognizing that a given context can give rise to a treaty *and* legislation.⁵⁷³ Since there was no contradiction between treaties and legislation, the method carried out in Ottawa would be a natural fit for a situation in which treaties were merely a means to an end and Aboriginal peoples

⁵⁷² See, *Badger*, *supra* note 465 at para.83 where Cory J. writes for the majority: “It will be remembered that the NRTA modified the Treaty right to hunt. It did so by eliminating the right to hunt commercially but enlarged the geographical areas in which the Indian people might hunt in all seasons.” Treaty 8 was concluded in 1899 and the N.R.T.A.’s were created in 1930.

⁵⁷³ St. Germain, *supra* note 559 at 153 describes a certain level of ambivalence on the part of the Canadian government towards treaties. She writes: “The fact that the British government, and subsequently the colonial and Canadian legislatures, saw no contradiction between making treaties and legislating for the Indians illustrates this ambivalence.”

were seen to be cultural throwbacks that, over time, would come around to the influence of civilization.

VII. Conclusion

The rules of treaty interpretation do not solve all the problems of colonialism. Since the introduction of Section 35(1) of the *Constitution Act, 1982*⁵⁷⁴ the courts have been more willing to restrict governmental actions that might infringe a treaty or Aboriginal right. Indeed, as Henderson points out, the Supreme Court stated that prior to 1982 “it was not in a position to question an unambiguous decision on the part of the federal government to modify its treaty obligations.”⁵⁷⁵ With the introduction of the contextual approach to treaty interpretation the courts were more willing to turn attention to Aboriginal intentions and understandings. However, the courts were not prepared, and remain largely unprepared, to investigate context in a manner which is truly open to the Aboriginal worldview, beliefs, languages and so forth. Henderson finds the assumption that “an Aboriginal context can be adequately explained in a Eurocentric context is the essence of cognitive imperialism and of the academic process that underlies colonization.”⁵⁷⁶ The unique problems faced by the courts have resulted in the need to develop unique rules of interpretation. However, in order for the rules to have effect, they must be applied consistently.

Being neither international agreements nor contractual agreements, Aboriginal treaties are viewed by Canadian law as being *sui generis*. The unique nature of Aboriginal and treaty rights has allowed the courts to establish rules of interpretation which are not wholly consistent with any other particular area of the common law. Rules of interpretation, such as a liberal and

⁵⁷⁴ *Constitution Act, 1982*, *supra* note 35.

⁵⁷⁵ Henderson, *supra* note 507 at note 70.

⁵⁷⁶ *Ibid.* at note 75.

generous approach, and flexible requirements for recognition of treaties based on historical norms have the potential to help release the common law from “colonialism’s hostile and confining thicket.”⁵⁷⁷ Success in this area depends on the common law’s “ability to accept and receive Aboriginal principles and perspectives.”⁵⁷⁸

However, there is much doubt about the court’s ability, or willingness, to accomplish such goals. For example, in *Marshall; Bernard* Chief Justice McLachlin describes a process of “translation” which seems contrary to the acceptance of Aboriginal “principles and perspectives”. The process, which is also applicable to treaties, involves examining “the pre-sovereignty aboriginal practice” and translating “that practice, as faithfully and objectively as it can, in to a modern legal right.”⁵⁷⁹ In essence, Aboriginal practices are translated into common law rights. The court’s focus on Aboriginal practices necessarily excludes Aboriginal systems of law, regulation, and worldview from the legal analysis. As such the full Aboriginal perspective on the right cannot be obtained. McLachlin emphasized the “*perspective* of the aboriginal people” is considered when assessing the “pre-sovereignty *practice*”. When the translation to a common law right occurs, it is the “European perspective” which is considered. In *Marshall; Bernard* the result of the application of such an approach was a denial of Aboriginal title because the Mi’kmaq occupation did not correspond to the common law right to title. McLachlin insisted that “[t]he common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant.”⁵⁸⁰ Justice LeBel was of the opinion that this approach “is too narrowly focused on common law concepts”⁵⁸¹ and goes on to champion the use of Aboriginal “conceptions of territoriality, land-use and property ... to modify and adapt the

⁵⁷⁷ John Borrows and Leonard I. Rotman, “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 Alta. L. Rev. (No. 1) 9 at note 107.

⁵⁷⁸ *Ibid.* at note 187.

⁵⁷⁹ *Marshall; Bernard*, *supra* note 13 at para. 48.

⁵⁸⁰ *Ibid.* at para. 77.

⁵⁸¹ *Ibid.* at para. 110.

traditional concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches.”⁵⁸² As the criticism in the dissenting opinion illustrates, the potential for sui generis principles of interpretation to combat colonialism are significantly diminished if the courts are unwilling to adopt these principles when considering the actual legal right.

If this limited approach to Aboriginal rights interpretation is applied directly to treaty rights, courts could undertake a liberal and generous examination as it pertains to Aboriginal understandings of the practice. However, once the court turns to the “European perspective” to craft legal protection, Aboriginal rights which may not have been expressly negotiated in the treaty could be infringed. As Henderson notes: “the treaties are not comprehensive documents or codes of Indian rights. They are partial agreements that reflect only what the treaty parties could agree upon. Those powers not expressly delegated to the Crown are reserved to the Aboriginal order.”⁵⁸³ This means that limiting Aboriginal perspectives when crafting the legal right could result in an imposition of Crown law where an “Aboriginal order or government” was not placed “under the authority of any British government or institution.”⁵⁸⁴ As discussed throughout this chapter, the rules of interpretation serve to counter Crown advantage in recorded history. It must be remembered that the vast majority of this recorded history was created by non-Aboriginal people and without direct Aboriginal input. It is a history filled with bias based on the “disciplines, theories, and paradigms” of Eurocentric thought.⁵⁸⁵ It is important to interpret

⁵⁸² *Ibid.* at para. 127. And, at para. 130: “The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title.”

⁵⁸³ Henderson, *supra* note 507 at note 173. Similarly, on the reserved rights doctrine, see *United States v. Winans*, 198 U.S. 371, 381 (1905).

⁵⁸⁴ *Ibid.* at note 177.

⁵⁸⁵ *Ibid.* at note 146. Also see, note 149 where Henderson writes: “The colonial legacy makes contextual analysis an arduous task. An interpreting justice has to reconcile concepts of truth and relativity from Eurocentric thought with Aboriginal concepts of space, time, and process.”

treaties in a liberal and generous manner cognizant of the biases of history,⁵⁸⁶ however, the courts must ensure that they do not counter this bias on the front end of interpretation only to reaffirm colonial bias when defining the legal right. Any theory or practice of interpretation which diminishes Aboriginal participation in treaty interpretation while promoting insular application of the common law, at any stage, is not befitting of section 35(1) guiding principles.⁵⁸⁷

So, even while this chapter has argued that the common law provides adequate space to recognize the existence of a Manitoba Métis Treaty (MMT), I do not necessarily feel that the courts are open to providing meaningful interpretive weight to the Negotiated Agreement as set out in the previous chapter. Nonetheless, the specific reaction of the courts to particular legal challenges is not the focus of this thesis. Instead, now that I have shown that the existence of the MMT is a reasonable legal reality, I will forge ahead and, in the next chapter, will examine a constitutional and common law response to simultaneous existence of the *Manitoba Act* and the MMT. In that chapter I will set out certain legal duties which were incumbent on the Crown as a result of the MMT.

⁵⁸⁶ For a review of some of the problems associated with researching the Métis see, Gwen Reimer and Jean-Philippe Chartrand, "Documenting Historic Métis in Ontario" *Ethnohistory*, Vol. 51, No. 3, Summer 2004, 567-607.

⁵⁸⁷ Bell, *supra* note 443 draws a similar comparison between treaties and legislative power at para. 26 where she writes: "theories that trivialize treaties and emphasize the legislative power of the federal and provincial governments are rooted in antiquated principles of law that presume the superiority of European nations and their institutions. The continued use of principles founded on inequality should be challenged."

CHAPTER FIVE: TREATY RESPONSIBILITIES AND THE CONSTITUTIONAL ORDER

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.⁵⁸⁸

I. Introduction

Treaty agreements have grown to carry certain legal attributes in Canadian law. In a previous chapter, I explained how these attributes are reflected in the way the courts interpret and define treaties. Once the existence of a treaty is confirmed the courts have also provided guidance on understanding the legal effect of such agreements. Having concluded previously that there was a treaty between the Métis and Canada, I now turn to the law which provides for the enforcement of such agreements. In the case of the Manitoba Métis Treaty of 1870 [MMT], there are treaty principles which must be taken into account as well as constitutional interpretative principles. I will first cover the treaty principles which are to be given effect by the Manitoba Treaty. It can be argued that as a treaty, the MMT is more weakly protected by treaty principles than by constitutional principles. While this might be the case, the MMT of 1870 is first and foremost a treaty. However, it is not exclusively a treaty. The government chose to embody the MMT in the terms of union for Manitoba. The *Manitoba Act, 1870* is a constitutional document with the corresponding burdens that the government carries in performing the duties found in constitutional documents. At the same time, to simply interpret the *Manitoba Act* as constitutional legislation and, therefore, deny its existence as a treaty agreement is to purport that no solemn exchange of promises occurred between the delegates of Red River and the Canadian representatives. As asserted earlier, I believe that there is little

⁵⁸⁸ *Mikisew Cree*, *supra* note 497 at para. 1.

doubt that such an exchange occurred. This chapter will review the powers and duties associated with treaties and constitutional legislation in order to find a fair interpretive prism with which we can view the MMT that was enshrined in the *Manitoba Act*.

While most of the case law dealing with treaties is set out in treaties conducted between the Crown and First Nations, the principles established in that case law can be analogized to the MMT. When the Manitoba Métis Federation [MMF] brought the *Manitoba Act* before the courts they asserted that “the fact that the Métis are Aboriginal people is the key to this case: it is the means of unlocking the legal principles that apply here.”⁵⁸⁹ This fact is key for determining a starting point for legal argument but it is not wholly determinative of how legal principles are applied. Even the most generous legal principles have limitations or exceptions which can present a significant barrier for Aboriginal peoples who are not entirely unfamiliar with Euro-Canadian legal norms and political process. I begin the process of discovering which legal rules were to govern the MMT by examining Crown authority.

II. Crown Superiority

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, 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...⁵⁹⁰

The administration of Aboriginal affairs falls under s. 91(24) of the *B.N.A. Act*. This was done to ensure “uniformity of administration” over Indian affairs and Indian lands.⁵⁹¹ The issue of whether the Métis fall under section 91(24) has not been settled judicially. While it is not entirely unreasonable to see the Métis as falling within s.91(24) jurisdiction, the issue is not

⁵⁸⁹ MMF Final argument, *supra* note 136 at para. 126.

⁵⁹⁰ *Sparrow*, *supra* note 442 at para. 49.

⁵⁹¹ *St. Catherine's Milling*, *supra* note 233 at 59 where Lord Watson interpreted s.91(24) as follows: “It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.” It should be noted that Lord Watson made this comment without the benefit of hearing full argument on the scope, and purpose, of s.91(24).

pertinent to the outcome of this present study because federal jurisdiction is implicated in the MMT. Federal jurisdiction over the Métis of Red River seems even more substantiated, in part, because the MMT was negotiated solely with the federal government and involved compensation for “Indian title” which would fall nicely under the area of “Lands reserved for the Indians”, as federal domain in s. 91(24). Indeed, this was the vision of Cartier at the time of the negotiations.⁵⁹² However, while lesser evidence has been used to interpret constitutional documents,⁵⁹³ Cartier’s opinion was focused on justifying the financing of the land reserved for the Métis and should not necessarily be seen as an authoritative legal interpretation of s.91(24). Regardless, attaching federal responsibility to the administration of the treaty entitlements of the Red River Métis does not necessarily implicate s. 91(24). Federal administration of the land grant was expressly set out within section 31 where it stated that the grant was to be administered “under regulations to be from time to time made by the Governor General in Council” and that the division of those lands would be subject to “such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.”⁵⁹⁴ Even more so, it is the preceeding section which solidifies federal jurisdiction. Section 30 of the *Manitoba Act* clearly states that “[a]ll 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”.⁵⁹⁵ It is from “such ungranted lands”⁵⁹⁶ that the Métis land grant is to

⁵⁹² “The Journal of Rev. N.-J. Ritchot March 24 to May 28, 1870” in Morton, *supra* note 32 at 160.

⁵⁹³ See *Blais*, *supra* note 322 where a statement made by Macdonald 15 years after the passing of the *Manitoba Act* was used to interpret the meaning of “Indian title” within that Act.

⁵⁹⁴ *Supra* note 29. A similar conclusion was reached by the Attorney General of Canada, *Factum of the Respondent*, *MMF v. Canada and Manitoba*, Supreme Court of Canada (2011) at para. 139 where Canada writes: “It is entirely unnecessary in this case to consider whether the Métis or their lands fall under ss. 91(1A) or 91(24) of the *Constitution Act, 1867* because neither provision is the source of legislative authority for section 31 of the *Manitoba Act*.”

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Ibid.* s.31.

be appropriated. As such, when interpreting the treaty responsibilities of the MMT, it is imperative that focus be on the federal Crown.

In the colonial context, it is not surprising that early jurisprudence found that treaties were subordinate to federal statutes.⁵⁹⁷ This subordination ensured that treaties could be breached or infringed by the mere presence of contradictory legislation. The MMT is unique in this regard as it is protected constitutionally, thus confining federal action to the purposes of that agreement. Nonetheless, the paramountcy of federal statutes in relation to treaty agreements was an important facet of colonial machinery. It illustrated the lack of respect and commitment that the Crown held toward Aboriginal people. For example, in *R. v. Sikyea* the Court found that the “promise and agreement” in treaty 11 could “be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the B.N.A. Act, from doing so.”⁵⁹⁸

The lack of obligations flowing directly from treaties was made clear in *Pawis v. The Queen* where the Federal Court was unable to recognize claims which the plaintiffs, Ojibway Indians of the Lake Huron Treaty of 1850, brought against Canada. The plaintiffs sued Canada for breach of contractual obligations and breach of trust for “enacting the Ontario Fishery Regulations under the Fisheries Act without exempting the Ojibway Indians from their application”.⁵⁹⁹ In that case the legislation, as an instrument of the Crown, was held to be superior to treaty agreements. Even though treaties also reflect the will of the Crown, laws stemming from regular legislative process are held to be superior to treaties. Catherine Bell

⁵⁹⁷ *Syliboy*, *supra* note 477: “Where a statute and treaty conflict a British Court must follow the statute...”

⁵⁹⁸ *R. v. Sikyea*, 43 D.L.R. (2d) 150 [1964] (Q.L.) at 628. The judgement of Johnson, J.A. was affirmed in *R. v. Sikyea*, [1964] S.C.R. 642. For another example of the federal Crown acting with impunity in relation to Indians see *Logan v. Styres* [1959] O.J. No. 329 at para. 18 where the Court found: “While it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve land, as has been done herein...”

⁵⁹⁹ *Pawis v. The Queen*, (1979) 102 D.L.R. (3d) 602.

notes that such a principle “does not correspond to Aboriginal understanding of the treaties or the promises of Crown negotiators, it does correspond with British constitutional tradition and is a rule that has consistently been upheld by Canadian courts.”⁶⁰⁰ Canadian courts have readily upheld the superiority of the Crown because they too are part of the British constitutional tradition.

Even on occasions where it appears that the Supreme Court is struggling with the application of the rule, the paramountcy of legislation remains fully intact. In *Daniels v. White*,⁶⁰¹ which was another case dealing with the *Migratory Birds Convention Act*, the majority of the Court followed the simple rule that Crown legislation trumps treaty rights. And while the dissenting opinions of Cartwright C.J. and Ritchie J. would have upheld the treaty right, their reasons did not undermine the superiority of the Crown. For Cartwright and Ritchie, the issue boiled down to the words in Manitoba’s *NRTA* which, in their minds, distinguished *Daniels v. White* from *Sikyea*:

The situation in the case at bar is different. The right of hunting, trapping and fishing given to the Indians by the words of section 13 ... has been, since 1930, enshrined in an amendment to our Constitution and given:

... 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.

I find it impossible to uphold the conviction of the appellant unless we are able to say that, by the application of some rule of construction, there should be inserted in s.1 of the British North America Act, 1930, immediately after the words ‘Parliament of Canada’ the words ‘except the Migratory Birds Convention Act’. I know of no rule which permits us to take such a course.⁶⁰²

So the issue wasn’t about upholding the treaty right. As Judson explained, the majority held that because the *Migratory Birds Convention Act* was in place prior to the 1930 *NRTA*, the *NRTA* could “not repeal by implication a statute of Canada giving effect to an international

⁶⁰⁰ Bell, *supra* note 443 at para. 10. Also see, *Francis*, *supra* note 528.

⁶⁰¹ *Daniels v. White*, *supra* note 498.

⁶⁰² *Ibid.* per Cartwright C.J.

convention.”⁶⁰³ Therefore, the central issue was about which piece of legislation took precedence over the treaty.

Rights discourse, including Aboriginal and treaty rights, maintains the Crown’s power to balance the competing interests between rights bearing groups.⁶⁰⁴ Similarly, the federal Crown’s assumption of jurisdiction for “Indians, and Lands reserved for the Indians” does not rule out a sphere for Aboriginal governance, nor does it implicitly extinguish Aboriginal rights, claims or jurisdiction.⁶⁰⁵ So, while the Crown maintained superiority over Aboriginal people it still needed to direct that power with “plainly expressed...intention”⁶⁰⁶ if it intended to have a lasting impact on treaty rights. With no easy way of reconciling the assumption of Crown superiority with the nation-to-nation arrangement of treaty negotiation, it is not surprising that “[i]n Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements.”⁶⁰⁷ Although promises and agreements might have protection under the law of contracts, they had little legal protection in the form of treaties prior to the 1982 Constitutional amendments. The exception, discussed further below, would be the protection that section 88 of the *Indian Act* provided against provincial laws of general application post-1951 amendments.

An examination of Crown superiority directs our inquiry towards legal rulings which determine that a treaty right (or otherwise defined land entitlement stemming from the *Manitoba*

⁶⁰³ *Ibid.* at . Also see, note 4. Where Judson explains that the 1930 agreement imposed no burden upon the federal government to honour the same treaties which the province was committed to. Judson noted that “the whole tenor” of the Natural Resource Transfer Agreement 1930 “is that of a conveyance of land imposing specified obligations and restrictions on the transferee, not on the transferor. This applies, in particular, to paragraph 13, which makes provincial game laws applicable to Indians in the province subject to the proviso contained therein. That only provincial game laws were in the contemplation of the parties, and not federal enactments, is underscored by the words ‘which the Province hereby assures to them’ in para. 13.”

⁶⁰⁴ *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 92 where it is written: “The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a Charter or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended.”

⁶⁰⁵ *Campbell*, *supra* note 278 at para. 82 where the Court writes: “The fact that the federal government assumed this responsibility under s. 91, rather than the provinces under s. 92, did not affect aboriginal rights because, to use the word of the Supreme Court of Canada in *Mitchell*, it was a division ‘internal’ to the Crown.”

⁶⁰⁶ *Ibid.* at para. 179.

⁶⁰⁷ *Wesley*, *supra* note 500 at 788.

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Act) has been infringed, altered or extinguished by contradictory legislation. Additionally, federal legislation, which expressly or unambiguously infringes or clearly and plainly extinguishes the treaty rights of the Manitoba Métis, will also be an expression of Crown superiority. While general in nature, this principle emphasizes the vulnerability of treaty rights prior to 1982. The MMT would be assessed according to this principle. However, before blindly embarking on that search, it is important to keep in mind that the constitutional context of the MMT tempers this principle. Through the enshrinement of the skeleton of agreement within the MMT in the *Manitoba Act*, the superiority of the Crown took action which raised the treaty to the highest legal status in the land. The constitutional recognition changed the rules and tempered the impact of simple Crown superiority. As with the *NRTA* in 1930, which constitutionalized the treaty rights of the prairie Indians, the *Manitoba Act* also offered greater protection to Métis rights.⁶⁰⁸

II.a. Provincial Laws of General Application

Under the Crown's superiority there is no doubt that the Crown is entitled to restrict or compartmentalize its powers. This was done through section 88 of the *Indian Act* which brought into legislation a common law rule which was already being carved out in case law.⁶⁰⁹ Still, the Crown reinforced its jurisdiction over treaties when it legislated that "[u]nder s. 88 of the Indian Act, when the terms of a treaty come into conflict with federal legislation, the latter

⁶⁰⁸ The *NRTA* and the *Manitoba Act* differ significantly in purpose. The *NRTA*'s were intended to modify treaty rights already long in existence whereas the *Manitoba Act* was intended to honour treaty rights being negotiated concurrently.

⁶⁰⁹ These cases are set out in *Rex v. Shade*, [1952] A.J. No. 39 at para 15 where Feir D.C.J. explains that: "Section 87 is a new section, not appearing in any of the prior legislation affecting Indians. It seems to be a clarification and restatement of previous case law which, in so far as offences against provincial statutes are concerned, is found mainly in these cases: *Rex v. Hill* (1907), 15 O.L.R. 406, 22 Can. Abr. 484; *Rex v. Beboning* (1908), 17 O.L.R. 23, 13 C.C.C. 405, 22 Can. Abr. 483; *Rex v. Martin* (1917), 41 O.L.R. 79, 29 C.C.C. 189, 39 D.L.R. 635, 22 Can. Abr. 485; *Rex v. Rodgers*, [1923] 2 W.W.R. 353, 33 Man. R. 139, 40 C.C.C. 51, [1923] 3 D.L.R. 414, 11 Can. Abr. 64; *Rex v. Cooper*, [1925] 2 W.W.R. 778, 35 B.C.R. 457, 44 C.C.C. 314, 22 Can. Abr. 499; *Rex v. GrosLouis*, [1944] R.L. 12, 81 C.C.C. 167, Abr. Con. 3533."

prevails...”⁶¹⁰ Simply, federal legislation trumps treaties while treaty rights are protected from contradictory provincial laws *directed at Indians*. This rule is set out more fully below.

Crown paramountcy extends to provincial legislation, despite the presence of s. 91(24) of the *B.N.A. Act*. As is illustrated in *R. v. George*, section 87 of the *Indian Act* (now section 88) made provincial laws of general application applicable to Indians subject to the terms of the treaties.⁶¹¹ As such, Martland J., writing for the majority, made clear that:

This section was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation.⁶¹²

While treaty rights were protected, Crown superiority ensured that the balance of terms which were not determined in treaty negotiations, clearly rested with the Crown. It is with this backdrop that *R. v. Kruger* can be fully appreciated. In *Kruger* the Supreme Court noted that section 88 of the *Indian Act* provides that “[t]he terms of the treaty are paramount; in the absence of a treaty provincial laws of general application apply.”⁶¹³ That is to say that treaties are paramount vis-à-vis provincial legislation because federal legislation makes it so. Treaties do not in themselves hold anything above, or put any burden on Crown legislative powers. The Supreme Court explains section 88 through constitutional division of powers.⁶¹⁴ Because Indians fall under federal jurisdiction and the Courts have been consistently focused on Aboriginal culture, section 88 can be reduced to an understanding that “provincial laws of general application are precluded from impairing ‘Indianness’.”⁶¹⁵ However, if Indians are

⁶¹⁰ *Simon*, *supra* note 461 at para. 54.

⁶¹¹ *Indian Act*, s88, *supra* note 456.

⁶¹² *George*, *supra* note 491.

⁶¹³ *Kruger*, *supra* note 250.

⁶¹⁴ *Cote*, *supra* note 268 at para. 86 where the Court writes: “S. 88 accords a special statutory protection to aboriginal treaty rights from contrary provincial law through the operation of the doctrine of federal paramountcy.”

⁶¹⁵ *Morris*, *supra* note 522 at para. 42

affected “only incidentally”⁶¹⁶ then the provincial legislation is valid. Protecting “Indianness” from provincial legislation is rooted in section 91(24) and the federal Crown’s jurisdiction over “Indians”. It could be argued that such protection would incorporate all lands held for those purposes and, as such, would provide another “in” for the Métis and their “Indian title” lands. Indeed, in line with this thinking is the recognition that section 88 does not allow provinces to legislate on Indian reserves as federal legislation is exclusive in regards to reserve lands.

This is not a steadfast rule as the Supreme Court has pointed out that treaty rights can be “insignificantly” interfered with by provincial laws: “...a *prima facie* infringement requires a ‘meaningful diminution’ of a treaty right... If provincial laws or regulations interfere insignificantly with the exercise of treaty rights, they will not be found to infringe them.”⁶¹⁷ A ‘meaningful diminution’ of the treaty right will trigger s. 88 protection and the provincial legislation will not be able to be incorporated under s.88. Since section 88 has common law origins, the fact that the *Indian Act* does not apply to the Métis is not relevant. It is the common law rule which has its origins in federal paramountcy which is important.

When assessing provincial laws of general application it is important to identify any provincial legislation which interferes with the core of the MMT. Such legislation would be found to infringe upon federal jurisdiction set out in the *Manitoba Act*. However, provincial legislation which only affects the Métis incidentally would be valid provided that it doesn’t impact upon “lands reserved for” the Métis as Indians.

II.b. *Extinguishment and Constitutional Protection*

Prior to the entrenchment of Aboriginal and treaty rights in the *Constitution Act, 1982*, the tradition of Crown superiority included the ability of the federal or Imperial Crown to

⁶¹⁶ *Ibid.* at para. 41.

⁶¹⁷ *Ibid.* at para. 53.

extinguish treaty rights. This left treaty rights with little practical protection.⁶¹⁸ Extinguishment is merely another, albeit extreme, method of derogating Aboriginal and treaty rights; a power which has always been assumed to be exclusive to the federal Crown.⁶¹⁹ In order to extinguish Aboriginal and treaty rights, “strict proof” is needed that the Crown intended to extinguish such rights.⁶²⁰

Treaty rights received constitutional protection under section 35(1) of the *Constitution Act, 1982*. This protection was extended to all treaty rights which were not extinguished prior to 1982.⁶²¹ Section 35(1) has not been interpreted in a way which would revive previously extinguished rights. Nor has it been interpreted as creating new rights or a new legal rights regime. Rather, section 35(1) has been interpreted in a way which merely constitutionalized the former common law doctrine on Aboriginal and treaty rights.⁶²²

The conflict between the reality that treaties are sacred agreements binding both the Crown and Aboriginal people, and the principle of Crown superiority, was settled in favour of Crown superiority. This conflict was evident when the Supreme Court noted that the solemn

⁶¹⁸ *R. v. Agawa*, (1988) 53 D.L.R. (4th) 101 where the Court states: “In practical terms, however, the only effective protection of Indian treaty rights until 1982 was provided by the Indian Act, R.S.C. 1970, c. I-6, enacted by the Parliament of Canada pursuant to its power under s. 91(24) of the Constitution Act, 1867 to make laws in relation to ‘Indians, and lands reserved for Indians’.”

⁶¹⁹ *Simon*, *supra* note 461 at para. 54 where it is written: “It has been held to be within the exclusive power of Parliament under s. 91(24) of the Constitution Act, 1867, to derogate from rights recognized in a treaty agreement made with the Indians.” Also see *Horseman*, *supra* note 510 at para 62 where Cory J. states, in reference to the N.R.T.A.’s effect on Aboriginal treaty rights: “... although it might well be politically and morally unacceptable in today’s climate to take such a step as that set out in the 1930 Agreement without consultation with a concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.”

⁶²⁰ *Simon*, *ibid.* at para. 38.

⁶²¹ *Agawa*, *supra* note 618 where the Court writes: “The effect of s. 35(1) has been carefully examined by scholars concerned with the rights of aboriginal peoples in Canada. They are almost unanimous in their view that a treaty right, which has not been extinguished but merely limited or restricted by federal legislation, is an existing treaty right within the meaning of s. 35(1). Only a treaty right which has been extinguished is incapable of revival.” This protection also includes treaty rights which protect rights which all citizens enjoy. Binnie J. in *Marshall*, *supra* note 489 at para. 48 explains: “The fact the *content* of Mi’kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher *protection* they presently offer to the Mi’kmaq people.”

⁶²² *Mitchell*, *supra* note 251 at para. 11.

nature of treaties made “it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned.”⁶²³ In the same decision the Court also found that due to the “far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises.”⁶²⁴ It is for this reason that the Supreme Court in *Sparrow* rejected the notion that statutes which were merely inconsistent with the exercise of a treaty right were capable of also extinguishing such rights. Instead, the Court adopted the following test: “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.”⁶²⁵ When examining the issue of extinguishment it is important to look for federal legislation which extinguished Métis treaty rights with a clear and plain intention prior to 1982. This intention has to come from the federal government because any provincial legislation which purports to extinguish or alter such rights is invalid. Not only must the intention be clear and plain but the onus of proving that a treaty right has been extinguished rests upon the Crown.⁶²⁶ However, it is not enough to prove intention, the Crown must also provide “strict proof of the fact of extinguishment”.⁶²⁷ This requirement ensures that the Crown exercise its assumed superiority in a manner consistent with the rule of law and that its actions were actually sufficient to carry out extinguishment. It also gives insight into the status that was imparted to treaties in Canadian law.

⁶²³ *Sioui*, *supra* note 449 at para. 96. Also see *Slattery*, *supra* note 442 at 210: “In equity, the Crown cannot be permitted to impugn the binding force of statements that have induced another party to surrender certain rights or otherwise alter its position to its detriment, as by accepting the suzerainty of the Crown or ceding tracts of aboriginal lands.”

⁶²⁴ *Simon*, *supra* note 461 at 405-406 as cited in *Sioui*, *ibid.* at para. 91.

⁶²⁵ *Sparrow*, *supra* note 442 at para. 37.

⁶²⁶ *Badger*, *supra* note 465 at para. 41. Also see, *Sappier*; *Gray*, *supra* note 487 at para. 63. And, *Horseman*, *supra* note 510 at para 50. Also see Wilson J.’s dissenting opinion at para 21.

⁶²⁷ *Badger*, *ibid.* as cited in *Sundown*, *supra* note 465 at para. 24.

II.c. *Justification of Crown Infringement*

The Crown's freedom to legislate in contravention of Aboriginal and treaty rights became restricted with the introduction of section 35(1). While much of the basis for section 35(1) analysis came from previous treatment found in the common law, the introduction of constitutional status allowed the Supreme Court to create a new test to demand that the Crown justify any infringement of Aboriginal and treaty rights. The Court uses the principle of fiduciary duty and the principle of the honour of the Crown to impose a justification test on Aboriginal rights infringement:

[W]e find that the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power ... federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.⁶²⁸

After initially conjuring up the justification test in *Sparrow*, which was the Court's seminal decision on Aboriginal rights, the Supreme Court extended the justification test to treaty rights. In the Court's mind, Crown sovereignty still trumped the solemnity of negotiated treaties: "Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged...It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified."⁶²⁹

This justification means that when considering legislative infringements of Aboriginal or treaty rights, the Crown must "demonstrate that the legislation in question advances important general public objectives in such a manner that it ought to prevail."⁶³⁰ As such, Crown legislation can still infringe treaty rights protected under section 35(1) despite the fact that "[t]he rights granted to Indians by treaties usually form an integral part of the consideration for the

⁶²⁸ *Sparrow*, *supra* note 442 at para. 62.

⁶²⁹ *Badger*, *supra* note 465 at para. 77

⁶³⁰ *Ibid.* at para. 80.

surrender of their lands” and that such rights were of “paramount concern to the Indians” and formed “an essential element of this solemn agreement.”⁶³¹ In this way, even with constitutional protection of Aboriginal and treaty rights, the principle of the superiority of the Crown is maintained.⁶³²

When examining the MMT it should be remembered that the justificatory test only emerged as a result of the enshrinement of Aboriginal rights in the constitution of 1982. So, only treaty rights which have survived to 1982 will gain benefit of that section. Still, the MMT gained legislative protection with the passing of the *Manitoba Act* in 1870 and constitutional protection a year later. The impact of this enshrinement will be discussed below.

III. Treaties and Crown Responsibilities

III.a. *Honour of the Crown*

While Crown superiority over Aboriginal treaties was, and remains, unquestioned in Canadian law, principles have been applied which governed the actions of the Crown in carrying out treaty promises. Upholding treaty promises was a way to ensure that the “honour and good conscience”⁶³³ of the Crown were maintained. For example, in *Rex v. Wesley* the Court had the following to say while upholding the hunting rights of the appellant:

It is satisfactory to be able to come to this conclusion and not to have to decide that ‘the Queen’s promises’ have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be ‘convinced of our justice and determined resolution to remove all reasonable cause of discontent.’⁶³⁴

⁶³¹ *Ibid.* at para. 82.

⁶³² As *Marshall*, *supra* note 489 at para. 61 makes clear, this superiority also extends to regulating protected treaty rights. The Court points out that treaty rights can be regulated provided that such regulations can be “enforced without violating the treaty right....Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard.” However, regulation which cannot be enforced in a way which honours the treaty right, would be vulnerable to the justification standard laid out in *Badger*.

⁶³³ *Wesley*, *supra* note 500 at 788.

⁶³⁴ *Ibid.* at 790.

When the Court in *Wesley* found satisfaction in avoiding a determination “that ‘the Queen’s promises’ have not been fulfilled”, it was upholding the honour of the Crown. However, the Northwest Territories Court of Appeal, in *Sikyea*, was not able to find honour in the Crown’s actions. As a result, when the *Migratory Birds Convention Act* contradicted the hunting rights protections in Treaty 11, the Court seemed quite dissatisfied that it was forced to find that Indian hunting rights had been taken away:

It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada.⁶³⁵

In contrast to *Wesley*, the disappointment expressed above in *Sikyea* was a reflection of the Court’s inability to uphold the honour of the Crown. Instead, *Sikyea* fell back on the Crown’s superiority. What is displayed in contrasting these two cases is that the honour of the Crown operates as an interpretative principle, rather than an enforceable duty. As discussed below, the honour of the Crown may more recently be viewed as being tied to fiduciary duties, as a method of interpretation, the honour of the Crown has boundaries. One of these boundaries is Crown superiority. The struggle between the honour of the Crown and Crown superiority over treaty rights is revealed in Wilson J.’s dissenting opinion in *Horseman*: “to the extent that it is possible, one should view para. 12 of the Transfer Agreement as an attempt to respect the solemn engagement embodied in Treaty No. 8, not as an attempt to abrogate or derogate from that treaty...”⁶³⁶ In this way, the honour of the Crown acts as an interpretive principle. By engaging

⁶³⁵ *Sikyea*, *supra* note 598 at 636. This approach was affirmed in *Sikyea* (SCC), *supra* note 598, *George*, *supra* note 491 and *Daniels v. White*, *supra* note 498.

⁶³⁶ *Supra* note 510 at para 21 where Wilson J. continues “In so saying, I am fully aware that this Court has stated on previous occasions that it is not in a position to question an unambiguous decision on the part of the federal government to modify its treaty obligations ... We must, however, be satisfied that the federal government did make an ‘unambiguous decision’ to renege on its Treaty 8 obligations when it signed the 1930 Transfer Agreement.”.

the honour of the Crown, which both Aboriginal and treaty rights do,⁶³⁷ Crown action and intents are assumed to be consistent with promises made to Aboriginal people. As a result, if Parliament chooses to exercise its legal superiority to contravene promises made “courts should hold legislatures to a high standard of clarity in this area.”⁶³⁸ This is especially true when courts are asked to determine if the Crown has extinguished an Aboriginal or treaty right and forsaken its honour. Used as an interpretive principle, the honour of the Crown is complementary to the requirement that extinguishment be “clear and plain” because it would help the Crown avoid the appearance of “sharp dealing”.

The honour of the Crown is invoked in treaty interpretation to ensure that the intention of the parties, although unexpressed, is maintained in the agreement. In *Marshall*, that meant that the promise to provide truckhouses also included the Mi’kmaq right to hunt and fish so that they would have something to trade at the truckhouse.⁶³⁹ Here the Court wrote:

If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.⁶⁴⁰

The Court in *Marshall* required the substance of treaties to be expressed with more content than one might find in an “empty shell”.⁶⁴¹

More recently, *Haida Nation* provided the Supreme Court with the opportunity to spell out the principle of the honour of the Crown. Despite having decades to ponder the issue, the

⁶³⁷ *Badger*, *supra* note 465 at para. 78.

⁶³⁸ *Slaterry*, *supra* note 442 at 210.

⁶³⁹ *Marshall*, *supra* note 489 at para. 43.

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid.* at para. 52 where Justice Binnie writes: “I do not think an interpretation of events that turns a positive Mi’kmaq trade demand into a negative Mi’kmaq covenant is consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Lieutenant Governor, seeking in good faith to address the trade demands of the Mi’kmaq, accepted the Mi’kmaq suggestion of a trading facility while denying any treaty protection to Mi’kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. This was not a commercial contract. The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. In my view, with respect, the interpretation adopted by the courts below left the Mi’kmaq with an empty shell of a treaty promise.”

words and phrases employed by the Court reveal a vague and ill-defined concept. What *Haida Nation* does tell us is that the honour of the Crown is the foundation for other more specific duties. The duty to consult and accommodate, and specific fiduciary duties are rooted in the honour of the Crown.⁶⁴² Because the honour of the Crown gives rise to specific duties, the Court has refuted the notion that the honour of the Crown is “a mere incantation” arguing instead that it is “a core precept that finds its application in concrete practices.”⁶⁴³ However, just because “[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples”⁶⁴⁴, specific duties are not necessarily called into play. At its core, the principle of the honour of the Crown simply calls upon the Crown to act honourably. Due to the “historical roots” the principle “must be understood generously in order to reflect the underlying realities from which it stems.”⁶⁴⁵ This foundation means that the Crown must act in a way which avoids “even the appearance of ‘sharp dealing’.”⁶⁴⁶ An interpretation of a treaty can be based in the knowledge that such an interpretation is required in order to uphold the honour and integrity of the Crown. This applies to both treaty making and treaty fulfillment.⁶⁴⁷

Where the honour of the Crown gives rise to a duty to consult, this duty can be applied to both pre-treaty/settlement actions and to post-treaty making actions. While the Court refers only to “intrusions on settled claims”⁶⁴⁸ it is clear that such intrusions are only identified as being intrusions through consultation (in which case the Crown should avoid such intrusions to the extent possible). If the intrusion is blatant, and consultation is not carried out, the honour of the Crown has been neglected at the expense of the Aboriginal treaty partner whose consideration

⁶⁴² *Haida*, *supra* note 455 at para. 16.

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.* at para. 17.

⁶⁴⁶ *Ibid.* at para. 19 (note omitted).

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.* at para. 24 where, in reference to the consultation discussion in *Delgamuukw*, the Court writes: “These words apply as much to unresolved claims as to intrusions on settled claims.”

has been disregarded. In such a situation the absence of a clear and plain intention to extinguish the right or interest at issue, would result in an enforceable breach based on the honour of the Crown. That is, the interpretive principle of the honour of the Crown, would engage duties which would require enforcement of treaty obligations. Treaty obligations cannot simply be ignored.

The importance of the honour of the Crown is summed up by the Supreme Court. Although the following paragraph discusses the honour of the Crown in the context of section 35 rights, the historic origins of the principle⁶⁴⁹ ensure its viability for claims that precede the introduction of section 35:

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.⁶⁵⁰

The cases involving consultation and accommodation employ the principle of the honour of the Crown but often refer to section 35. While the duty to consult and accommodate might be directly linked to section 35 Aboriginal rights, the honour of the Crown predates section 35. The distinction to be drawn is between legal duties attached to section 35 rights, and the principles which preserve Aboriginal interests for section 35 challenge. The honour of the Crown is one such principle. Consider what Chief Justice McLachlin wrote in *Taku River*:

As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions ... The obligation to consult does not arise only upon proof of an Aboriginal claim, in

⁶⁴⁹ See Arnot, *supra* note 490. Also see, *Haida*, *ibid.* at para. 32 where the Court writes: “This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, ‘[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation’ (emphasis added).”

⁶⁵⁰ *Haida*, *ibid.* at para. 25.

order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.⁶⁵¹

While it may be possible that no *enforceable* duties existed prior to the emergence of section 35 Aboriginal and treaty rights, the honour of the Crown ensured that treaty agreements would not go unrecognized. Failure of the Crown to respond in a manner consistent with the honour of the Crown would ensure that the claim or dispute remained a live issue, even in the face of what might seem to be actions by the government that were contrary to the Aboriginal claim. Justice Binnie of the Supreme Court of Canada explains in *Mikisew Cree*:

The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court as a treaty obligation as far back as 1895, four years before Treaty 8 was concluded ... the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the Royal Proclamation of 1763...⁶⁵²

This is because the honour of the Crown is the watchful eye that has been around since the first contact of Aboriginal and European peoples.

The Supreme Court also established a connection between treaty negotiation and the duty to consult. Here the Supreme Court wrote that the duty to consult was not completely discharged at the time Treaty 8 was negotiated. Essentially, it was the Crown's submission in *Mikisew* that any duty to consult was exhausted when the treaty was negotiated. Under this view the entirety of the Indian interest is expressed in the treaty and the Crown can undertake whatever development it sees fit so long as it leaves intact the Aboriginal interest which, in this case, the Crown defined as "the essential ability of the Indians to continue to hunt, fish and trap."⁶⁵³ In

⁶⁵¹ *Taku River*, *supra* note 497 at para. 25.

⁶⁵² *Mikisew Cree*, *supra* note 497 at para. 51.

⁶⁵³ *Ibid.* at para. 53. Of the Crown's submission Binnie J. wrote, at para. 54: "This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not

rejecting the Crown's argument, Binnie J. noted that when the Crown chooses to exercise its treaty right (taking up lands) it is under a duty to inform the Mikisew of the impact upon Mikisew treaty rights (hunting, trapping and fishing). This duty reflects the principles of the honour of the Crown; "to deal with the Mikisew 'in good faith, and with the intention of substantially addressing' Mikisew concerns."⁶⁵⁴ The duty to consult operates on a scale of potential impacts. That is to say that the duty may differ depending upon the impact that Crown actions will have upon an Aboriginal community. Even though the duty to consult is "triggered at a low threshold", "adverse impact is a matter of degree"⁶⁵⁵ and therefore, the particular requirements of the duty to consult and accommodate must fit the circumstances. The honour of the Crown operates in much the same way and it is the logical starting point for the duties to consult and accommodate. This is because "the honour of the Crown infuses every treaty and the performance of every treaty obligation."⁶⁵⁶ The historical roots of the honour of the Crown shows that duties, unlike rights, are not creations of section 35. This interpretation is supported by the wording of section 35 which does not mention duties. Indeed, although duties have been expressed in cases litigated under the umbrella of section 35 Aboriginal and treaty rights, there is nothing in section 35 that protects duties. To a certain extent duties are the formalization of a reciprocal action necessary to honour the rights that are recognized in section 35. Still, the principle of the honour of the Crown, rather than section 35, is the basis for the duties that have

simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it."

⁶⁵⁴ *Ibid.* citing *Delgamuukw*, *supra* note 248 at para. 68.

⁶⁵⁵ *Mikisew Cree*, *ibid.* at para. 55.

⁶⁵⁶ *Ibid.* at para. 57. Binnie continues: "Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in [page418] violation of its procedural obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's substantive treaty obligations as well."

been expressed recently in Canadian jurisprudence. Because of the recent articulation of these duties, there might be some debate about the appropriateness of applying them to actions of the distant past. However, the honour of the Crown has infused treaty agreements throughout history. We can, therefore, plough ahead with considering the honour of the Crown in relation to the Métis of Red River. While the particular attributes of the duty to consult and accommodate will serve as guide posts, these particular duties are ultimately not necessary to identifying obligations owed to the Métis. The honour of the Crown and the Crown's fiduciary duties will be much more applicable.

III.b. Honour of the Crown applied to the Métis

The honour of the Crown was put before the Court in Manitoba by the Manitoba Métis Federation. In that case the MMF did not forcefully argue that there was a treaty agreement. Instead, the MMF argued that the honour of the Crown is at stake no matter how the negotiations between the Métis and Canada are characterized.⁶⁵⁷ The duty to consult and accommodate Aboriginal peoples is an expression of the honour of the Crown. These duties are merely aspects of the “independent obligation” that is sourced in the honour of the Crown. The dealings between the Métis and Canada established particular commitments. The Métis had secured the region to the exclusion of Canada and its authorities after which, the Provisional Government relinquished control over the territory in exchange for recognition of land, cultural, and regional rights. Within that agreement was a treaty securing compensation for the birthright of the next generation of Métis. On the obligations arising out of the honour of the Crown, the MMF quite rightly states: “they were not merely obligations to 7000 children as individuals, but obligations

⁶⁵⁷ MMF Final Argument, *supra* note 136 at para. 788 where the MMF writes: “The honour of the Crown must be observed in all the Crown's dealings with the Aboriginal peoples.”

to the Métis as a people.”⁶⁵⁸ These obligations have to be considered in unison. They are independent obligations, however, the ability of the Crown to honour its obligations to the Métis children was dependent upon also honouring its commitments to the community as a whole.

The MMF seemed to struggle at times with characterizing the *Manitoba Act* and the oral agreement that accompanied it. The MMF argued that the honour of the Crown was “a source of independent obligation”.⁶⁵⁹ But it was also argued that the honour of the Crown did not necessarily extend to all the promises granted in the *Manitoba Act* negotiations. The MMF writes:

We know the List of Rights referred to establishing a Province, a bicameral legislature, two official languages.
As to these items, it may be that the honour of the Crown did not apply in any legal or constitutional sense. But as regards the provisions of s.31, the Crown was dealing solely with an Aboriginal people, and with a group of 7000 children, and the standard of honour had to be observed.⁶⁶⁰

The *Manitoba Act*, and the Negotiated Agreement which preceded it, are unique in Canadian history. It is the first time that Aboriginal rights were secured in a constitutional document by way of negotiation. It is akin to having a peace and friendship treaty, and land cession treaty, and to a certain extent a modern self-government structure all negotiated and enshrined in the constitution. In that sense, the *Manitoba Act* was far ahead of its time. The uneasiness with which scholars and litigators attempt to identify the agreement is not surprising. Having said that, the MMF’s postulation that the honour of the Crown may not have applied to the items which do not deal directly with Aboriginal peoples is completely wrong. Such an interpretation is not in keeping with the foundation of Crown honour. As illustrated in chapter four, the roots of the honour of the Crown predate all of Canada’s treaties with Aboriginal peoples. In the early

⁶⁵⁸ *Ibid.* at para. 803.

⁶⁵⁹ *Ibid.* at para. 806.

⁶⁶⁰ *Ibid.* at para. 814-815.

1600's courts were upholding the king's honour.⁶⁶¹ As such, the honour of the Crown is a principle which ensures that the Crown, and its agents, act honourably toward *all* subjects. That Crown obligation extends to all the facets of the *Manitoba Act*. While I have previously argued that only certain aspects of the *Manitoba Act* make up the Manitoba Métis Treaty, the honour of the Crown is unquestionably applicable to the entire agreement.

The MMF has noted that the Métis are different from Indians. Citing the SCC in *R. v. Blais*, the MMF explains that the context of the Manitoba Métis Treaty ensured that “[t]he Crown viewed its obligations to Indians, whom it considered its wards, as different from its obligations to the Métis, who were its negotiating partners in the entry of Manitoba into Confederation.”⁶⁶² This statement should not be construed as meaning that Treaty principles don't apply. Or, more specifically, it should not be understood as arguing for the abandonment of the principle of the Honour of the Crown. As negotiating partners, both Canada and the Métis exchanged commitments. By exchanging these commitments Canada put itself under an obligation to honour them. The intentions of Canada are expressed in the negotiations with the Métis representatives, the debates in Parliament, and the enshrinement of negotiated principles in the *Manitoba Act*. The fact that the Métis were not considered to be “wards” of the State only serves to refine what commitments were owed. It does not absolve Canada of its obligations to honour the commitments it made to the Métis. Indeed, unlike fiduciary duty, the applicability of which can be defined in a more specific way, the very act of undertaking negotiations with the Métis and exchanging commitments invoked the Honour of the Crown.

In relation to the Métis, the Honour of the Crown means that the children's land grant has to be given the content that it was understood to have at the time. The granting of actual land is

⁶⁶¹ *Supra* note 490.

⁶⁶² *Blais*, *supra* note 322 per Binnie at para. 33. Also see MMF Final Argument, *supra* note 136 at para. 802.

only one step in securing this treaty promise. The content of that promise is to be found in the reference “for the benefit of families” contained in the *Manitoba Act*, as well as in the intention of the Métis to keep their communities together. It is readily apparent that this was the overriding motivation behind all the demands for land that the Métis made. A simple, random allotment of land to children would fail to benefit the families. Random allotment to the children without consideration of the families would give no meaning to the benefit of the families clause resulting in an “empty shell of a treaty promise”. In failing to distribute land in a way which would benefit the families, the federal government would not be acting honourably. This is one standard by which federal conduct must be judged.

IV. Fiduciary Duty

It is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary) to the exclusion of the interest of any other person or the separate interest of the beneficiary.⁶⁶³

IV.a. *What are Fiduciary Duties?*

Aboriginal/Crown relations are not the only place to turn if one desires to understand fiduciary duties. Indeed, the Aboriginal/Crown fiduciary context is, in comparison to other areas of the law, in its infancy. Therefore, reviewing how fiduciary duties take shape outside of the Aboriginal/Crown context can help to understand the concept. Additionally, by understanding the general nature of fiduciary duties, we can determine how the Aboriginal context may differ. While not exactly comparable, the broker/client scenario is one which easily analogizes to the

⁶⁶³ *Wik Peoples v State of Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 95 per Brennan CJ. (citations omitted).

sphere of Crown/Aboriginal relationships. In that context, the Supreme Court has identified some policy considerations for upholding fiduciary relationships:

These are occupations where advisors to whom a person gives trust has power over a vast sum of money, yet the nature of their position is such that specific regulation might frustrate the very function they have to perform. By enforcing a duty of honesty and good faith, the courts are able to regulate an activity that is of great value to commerce and society generally.⁶⁶⁴

The key features here are that one party (the advisor) is given trust and power over an interest of the person (in this case that interest is money). The nature of the power is not confined to particular legislative regulations but, rather, is characterized by discretion. To ensure that such discretion is utilized in the best interests of the vulnerable person, the Court is prepared to enforce “a duty of honesty and good faith” on the advisor.⁶⁶⁵

Beyond this basic policy framework, the Court more clearly establishes that several factors can be used to help distinguish a fiduciary relationship. One distinguishing factor is “the presence of loyalty, trust and confidence”.⁶⁶⁶ Another distinguishing factor is the corresponding “duty of skill and competence”.⁶⁶⁷ Honesty, good faith, skill and competence are necessary features which a fiduciary must uphold because anything less takes advantage of the discretionary power that the fiduciary holds to the potential detriment of the vulnerable person.⁶⁶⁸

The pertinent question regarding vulnerability is not what the relationship was prior to

⁶⁶⁴ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [*Hodgkinson*] at para. 45 per LaForest J.

⁶⁶⁵ Also see *ibid.* at para. 117 per Sopinka J. and McLachlin JJ (as she then was) where “trust and loyalty” are identified as the key components of the fiduciary relationship: “At the heart of the fiduciary relationship lie the dual concepts of trust and loyalty... And while the fiduciary relationship is no longer confined to the classic trustee-beneficiary relationship, the underlying requirements of complete trust and utmost loyalty have never varied.”

⁶⁶⁶ *Ibid.* at para 26 per LaForest J.

⁶⁶⁷ *Ibid.* LaForest continued: “Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in fiduciary relationship gives rise to a corresponding duty of loyalty.”

⁶⁶⁸ Leonard I. Rotman, “Aboriginal Rights: Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years After *Guerin*” (2003) 22 Windsor Y.B. Access Just. 363 (Q.L.) at note 125.

agreement, although this might also be influential, but what is the result after the agreement.⁶⁶⁹ In this context, it is the agreement which establishes fiduciary responsibilities.

The duty itself alters the frame of reference for expectations. While a person in one instance might act in their own interests as fiduciary they are obligated to act in the interests of the vulnerable party. In contractual situations, as Professor Finn notes, the pertinent point is to examine whether there is an expectation that one party will act in the interests of the other party.⁶⁷⁰ This expectation carries with it a certain amount of vulnerability and the additional expectation that one's own interests won't be pursued while acting in the interest of another. This point was endorsed by Justice LaForest who saw the relevant question being whether: "one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue."⁶⁷¹ It is clear that the decision to undertake the responsibility for another person's interest cannot be made lightly, and the administration of that interest cannot be carried out haphazardly.

In order to help identify the existence of a fiduciary relationship, LaForest J. sets out the following criteria which are characterized as "indicia that help recognize a fiduciary relationship rather than ingredients that define it."⁶⁷²

- 1) scope for the exercise of some discretion or power;
- 2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and,
- 3) a peculiar vulnerability to the exercise of that discretionary power.⁶⁷³

⁶⁶⁹ Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1 at 6 as cited in *Hodgkinson*, *supra* note 664 at para 27 where Weinrib writes: "It cannot be the sine qua non of a fiduciary obligation that the parties have disparate bargaining strength. ... In contrast to notion of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement."

⁶⁷⁰ P.D. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76 at 88 in *ibid.* at para 28.

⁶⁷¹ *Hodgkinson*, *supra* note 664 at para. 32.

⁶⁷² *Ibid.* at para 30.

While the application of these considerations to the Manitoba Métis Treaty might seem obvious, it is worth outlining some of the key points. Specific regulations for the distribution of land may have very well frustrated the process. Instead, the Crown committed to make appropriate regulations from time to time as was necessary to honour its commitments. The Crown assumed jurisdiction over vast “sums” of land and the Métis imparted their trust to the Crown to facilitate the transfer of the land. The trust imparted by the Métis is an expression of their vulnerability and while “vulnerability is not the hallmark of fiduciary relationship ... it is an important indicium of its existence.”⁶⁷⁴ So while these indicia do correspond to the Crown/Métis situation in 1870, it should be remembered that we are not yet discussing fiduciary duties as they arise in the Aboriginal context.

Citing Professor Finn, LaForest J. notes that one of the roles of the enforcement of fiduciary duties is maintaining the credibility of public institutions.⁶⁷⁵ The government of Canada can certainly be seen as representing one of these institutions. Maintaining credibility can only be accomplished by legal institutions if there is both an identifiable duty and sanction for failing to uphold or honour that duty. Justice Laforest explains the relationship between social institutions with fiduciary function and the courts role in holding these institutions in check:

The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the

⁶⁷³ *Ibid.* at para 30. This vulnerability has been more clearly explained, outside of the Aboriginal context, in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 27-36. Also see, *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247 at para. 68 where the Court explains: “The first is that fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship.” [Emphasis in original].

⁶⁷⁴ *Hodgkinson, ibid.* at para 25 per LaForest J. LaForest J. continued: “Vulnerability is common to many relationships in which the law will intervene to protect one of the parties.”

⁶⁷⁵ P.D. Finn, “Conflicts of Interest and Professionals”, In Legal Research Foundation Inc. Seminar, Professional Responsibility. Paper presented at Professional Responsibility Seminar, University of Auckland, May 29, 1987. Auckland: Legal Research Foundation Inc., 1987 at 15 as cited in *ibid.* at para. 46.

rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.⁶⁷⁶

This description of the underlying justification for the fiduciary principle is especially relevant to Canada's western expansion post-1870. Canada had many interests to juggle in the development and settlement of the west, not the least of which were the Aboriginal interests. Flexibility was necessary to allow the government to juggle these responsibilities effectively. It is only by circumstance that the Supreme Court, in this unrelated decision, alludes to one of the major criticisms of how the Métis children received their land grant when it writes: "the marketplace cannot always set the rules".⁶⁷⁷ Such circumstance should not be mistaken for mere coincidence. Rather, by touching on the divergent points in the MMT context, the Court illuminates the obvious applicability of the fiduciary principle to the circumstances surrounding the MMT.

IV.b. Aboriginal Peoples and Fiduciary Duties: The Beginnings

The concept of fiduciary duties has been applied to Aboriginal peoples in vastly different ways. The beginnings of fiduciary duties associated with Aboriginal rights or claims, were very much in keeping with fiduciary duties used elsewhere in the law. For example, the Supreme Court in *Guerin* asserted that Aboriginal title, combined with the requirement that the Aboriginal interest is only alienable to the Crown, imposed a fiduciary duty upon the Crown which is owed to Aboriginal people.⁶⁷⁸ This source of fiduciary duty is a distinct source but not necessarily the only source.⁶⁷⁹ This duty, which is "an equitable obligation, enforceable by the courts", requires

⁶⁷⁶ *Ibid.* at para. 48 per LaForest J.

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Guerin*, *supra* note 241 at para. 84: "The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown."

⁶⁷⁹ *Ibid.* at para. 85: "The surrender requirement and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians."

the Crown to deal with the land for “the benefit of the Indians” and if “the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.”⁶⁸⁰ Here the Court relies on established legal concepts in an attempt to impose obligations upon Aboriginal/Crown relationships. The Supreme Court provides a clear articulation of the context in which a fiduciary duty can arise:

...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act of the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary’s strict standard of conduct.⁶⁸¹

This description is very much in keeping with that provided earlier in the broker/client context.

One instance where the emergence of fiduciary duties are clearly established is the surrender of land.⁶⁸² The surrender of land puts the Aboriginal community in a vulnerable position because the federal government is given, or has assumed, the responsibility to deal with the land: “[t]he purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.”⁶⁸³ Even though this quotation refers to *Indian Act* regulations, it has long been the policy of the Crown that Aboriginal title can only be surrendered to the Crown. In reference to the historical role of Crown as intermediary, Chief Justice Dickson referred to the Royal Proclamation of 1763, which sought to protect Indians from abuses and frauds.⁶⁸⁴ The historic relationship to which Dickson refers is only part of the understanding of fiduciary. The

⁶⁸⁰ *Ibid.* at para. 83.

⁶⁸¹ *Ibid.* at para. 102.

⁶⁸² *Ibid.* at para. 105: “When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians’ behalf.”

⁶⁸³ *Ibid.* at para. 100.

⁶⁸⁴ *Ibid.* where Chief Justice Dickson wrote: “Through the confirmation in the Indian Act of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians’ best interests really lie. This is the effect of s. 18(1) of the Act.”

responsibilities of a fiduciary can crystallize after transfer or expropriation.⁶⁸⁵ More specifically, the fiduciary duty arises when these duties are undertaken, even in the absence of transfer or expropriation. It can also be said that a similar responsibility, as that described by Chief Justice Dickson, can be found in section 31 of the *Manitoba Act* which confers discretion upon the Crown to decide for the half-breeds where their best interests really lie. It is important to note that the basis for the protective function of the fiduciary duty, that being the protection from abuses and frauds, is what lies at the core of the complaints against the administration of section 31 lands under the *Manitoba Act*. While discretion is a hallmark of the fiduciary relationship, that discretion can be limited by specific conditions. In such a case “[a] failure to adhere to the imposed conditions will simply itself be a prima facie breach of the obligation.”⁶⁸⁶ The impact of the conditions set forth in the *Manitoba Act* will be considered below.

IV.c. Aboriginal Peoples and Fiduciary Duties: A General Rule for Aboriginal Law

The Supreme Court was not always consistent with its treatment of the fiduciary principle. Under section 35(1) Aboriginal and treaty rights, the Supreme Court initially saw an expanded understanding of the fiduciary principle. This expanded view of fiduciary duties began with the assertion of Crown sovereignty. At that moment an obligation emerged to “treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty

⁶⁸⁵ Rotman, *supra* note 668 at note 52 where Rotman explains that in *Osoyoos Indian Band v. Oliver (Town of)* 2001 3 S.C.R.746: “the Supreme Court’s majority judgment held that the Crown’s fiduciary duty to Aboriginal peoples was not restricted to acts of surrender, but applied equally to expropriations. Iacobucci J. outlined a two-step process that characterized the Crown’s duty. The first step was for the Crown to determine whether an expropriation involving Indian lands was required to fulfill a public purpose. Once the decision to expropriate was made, the Crown was then found to have a duty to preserve the Indian interest in the land to the greatest extent practicable.”

⁶⁸⁶ *Guerin*, *supra* note 241 at para. 109: “The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown’s discretion vis-à-vis the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. ... A fiduciary obligation will not of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary’s discretion.”

characterized as ‘fiduciary’ ...”⁶⁸⁷ This statement by the Supreme Court of Canada in the *Sparrow* decision seems to impart the notion of fiduciary to a broader set of responsibilities than outlined above in *Guerin*. By connecting fiduciary duty to the assertion of sovereignty, the Court sees fiduciary duties arising from the superiority of the Crown. It is the superiority of the Crown which brings the capacity to extinguish Aboriginal claims and also the responsibility to treat Aboriginal peoples “fairly and honourably”. The Court also refers to protecting Aboriginal peoples from exploitation. Since exploitation is mentioned in connection with the requirement of treating Aboriginal peoples honourably, the fiduciary duty outlined in *Sparrow* takes on the shape of a general duty to be applied broadly in a similar manner as the honour of the Crown. This understanding is reinforced by the Court’s broad statement that the fiduciary duty remains a guiding principle in the recognition and affirmation of section 35 Aboriginal and treaty rights.⁶⁸⁸

Leonard Rotman characterizes the importance of this general duty as setting “guidelines for understanding the legal nature of modern Crown-Native interaction.”⁶⁸⁹ Seen in this light, a move away from this guiding principle of Crown-Native relations is a move toward a more combative relationship; a relationship which embodies colonial dominance in legal reasoning.⁶⁹⁰

A general fiduciary duty, as set out in *Sparrow*, has certain attributes:

1. it acts as an important check on governmental legislative power (as seen in *Sparrow*, this applies to both federal and provincial power);
2. it is the primary manifestation of the notion of the ‘honour of the Crown’;
3. it is the primary link between historic and modern Crown-Native relations, and;
4. it animates the rights contained in section 35(1) of the Constitution Act, 1982.⁶⁹¹

While these might also apply to a more restrictive interpretation of fiduciary obligations, the way in which such attributes take shape could vary significantly.

⁶⁸⁷ *Mitchell*, *supra* note 251 at para. 9.

⁶⁸⁸ *Sparrow*, *supra* note 442 at para. 59.

⁶⁸⁹ Rotman, *supra* note 668 at note 107.

⁶⁹⁰ See Christie, “Colonial Reading” *supra* note 16.

⁶⁹¹ Rotman, *supra* note 668 at note 107.

It could be said that the Court in *Sparrow* was distinctly referring to honour *and* duties. Despite honour and fiduciary duty being mentioned in the same sentence, the use of “and” might suggest that protecting Aboriginal peoples from exploitation was a related but distinct duty. In this way, the duty might arise in different contexts than the honour of the Crown which the Court links directly to the assertion of Crown sovereignty. As with many aspects of the *Sparrow* decision, the fiduciary context remained unclear. Still, *Sparrow* establishes that “a general guiding principle for s. 35(1)” is that:

the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.⁶⁹²

It is with words such as these that the Supreme Court carves out a more comprehensive conception of fiduciary duties; a conception which applies broadly to the relationship between Aboriginal peoples and the Crown, rather than to context specific duties. Indeed, the fiduciary principle was used as justification for the Court’s introduction of the test for justifying infringement of Aboriginal rights.⁶⁹³ In that sense, the fiduciary principle underpins *all* relations between Aboriginal peoples and the Crown.

The words in *Sparrow* might leave the reader wondering if honour of the Crown and fiduciary duty are not merely two sides of the same coin. The link between honour of the Crown and fiduciary duties is explained by Rotman as an “an inherently logical step.” Still, Rotman points out that there is a disconnect in Canadian Aboriginal and treaty rights jurisprudence vis-à-vis the linkage between the Crown’s fiduciary obligations to the Aboriginal peoples and the

⁶⁹² *Sparrow*, *supra* note 442 at para. 59. Also see *Taylor and Williams*, *supra* note 491.

⁶⁹³ *Sparrow* *ibid.* at para. 62 where the Court writes: “There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words ‘recognition and affirmation’ incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. ... Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.”

notion of the honour of the Crown.⁶⁹⁴ One possible explanation for this disconnect, is that the honour of the Crown and fiduciary duty are similar concepts for different contexts. In the context of a treaty dispute all that needs to be emphasized is that the Crown honours its commitments.⁶⁹⁵ That requirement would ensure that Aboriginal people see the benefits they agreed to. However, in non-treaty contexts it might be more appropriate to focus on the specific relationship which emerged from the negotiated surrender, or expropriation. In this way, the Court can remind the Crown that it has a fiduciary duty towards Aboriginal peoples, a duty which prevents haphazard treatment of the negotiated Aboriginal interest.

IV.d. Aboriginal Peoples and Fiduciary Duties: Back to the Beginnings

In contrast to the general fiduciary duties set out in *Sparrow*, the Supreme Court has, more recently, diverted fiduciary duties back towards specific relationships as outlined earlier in the broker/client example. The Court's push away from a general application of the fiduciary principle is not surprising. A general principle would require a reinvention of the fiduciary concept because in the traditional fiduciary context one party is vulnerable to the discretion of the other. This implies that there has always been a consistent power imbalance in the relationship between Aboriginal peoples and the Crown. As a result, it has been argued that the fiduciary principle as set out in *Sparrow* is best applied bilaterally. In recognizing that Aboriginal peoples might be owed fiduciary duties, the Court has failed to recognize that in some circumstances, and at certain moments in time, Aboriginal peoples might have owed fiduciary

⁶⁹⁴ Rotman, *supra* note 668 at note 125. Here Rotman is referencing the work of Alan Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?", (1992) 2 N.J.C.L. 163 at 187.

⁶⁹⁵ See *ibid.* at note 126 where Rotman notes "notions of the 'honour of the Crown' are most often seen in treaty cases."

duties to the Crown.⁶⁹⁶ However, the general application of fiduciary duties is no longer on the radar of the Supreme Court of Canada. Instead, the fiduciary relationship is premised upon specific duties determined by reciprocal actions. While some instances might best be characterized by Aboriginal peoples having greater power than the Crown, it is the exchange of trust which is central to the fiduciary principle. The relevant power transformation is not a historical transformation in *bargaining* power.⁶⁹⁷ Instead, the power transfer which is most relevant is that which leads to the fiduciary relationship in the first place. That power can be directly transferred from one party to the other for particular purposes or with identifiable expectations, or it can be the result of the unilateral assertion of power by the Crown.⁶⁹⁸ Still, the general recognition of a broad fiduciary duty applicable to all Aboriginal peoples would coincide nicely with the unilateral assertions of Crown power through claims to sovereignty. This thesis, therefore, takes the position that such a broad duty crystalizes at the moment of Crown assertion of sovereignty. Even a broad duty would find correspondingly broad measures of enforceability on matters such as policy, protection, and the attendant outcomes thereof. The general fiduciary relationship must not be completely abandoned when articulating a particular relationship that may have been initiated through a negotiated agreement.

⁶⁹⁶ Bryce Edwards, "Toward a Bilateral Fiduciary Relationship: Recognizing Mutual Vulnerability in *R. v. Marshall*" (2001) 59 U.T. Fac. L. Rev. 107-116 (Q.L.) at para. 8 citing *Guerin*, *supra* note 241 at 418 where he writes: "Guerin marked the Court's initial invocation of the principle of fiduciary duty in the Crown-First Nations context...Dickson C.J.C. held that the Crown intervention in land alienation was 'to prevent the Indians from being exploited.'...There was little recognition in *Guerin*, therefore, of any power held by the First Nations. Measured by the *Guerin* standard, the First Nations were merely wards of the Crown."

⁶⁹⁷ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 40. McLachlin J. (as she then was) for the minority did not find a fiduciary duty present prior to surrender.

⁶⁹⁸ *Guerin*, *supra* note 241 at para. 102 where Chief Justice Dickson wrote for the majority: "I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."

An example of the Court's more recent treatment of fiduciary duties owed toward Aboriginal peoples can be found in *Wewaykum Indian Band v. Canada*.⁶⁹⁹ That case tested the limits of the fiduciary principle and, rather than interpreting fiduciary duties in a flexible manner reflective of a new relationship found in section 35(1), the Supreme Court opted for a strict and limited interpretation of fiduciary duties. This was partly due to the dispute residing outside of the section 35 Aboriginal rights context. In the absence of Aboriginal rights, the legal dispute can rely wholly upon legislated responsibilities. In a seemingly bizarre case, the circumstances in *Wewaykum* involved two Indian bands claiming each other's reserve lands. The claims were not based on Aboriginal title or treaty rights. Instead, each band based its claims on government documentation which was inconsistent in its assignment of reserve lands and a corresponding argument that such allocations had an accompanying fiduciary duty.

The Supreme Court asserted that a fiduciary duty exists "to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples".⁷⁰⁰ This is supported by a misguided conception of the origins of fiduciary duties as residing in "the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help."⁷⁰¹ There are several problems with this idea. The first is that the concept of "rights" is not evident in the vast majority of Aboriginal perspectives on treaty negotiations. Certainly, the Court can't assume that Aboriginal peoples were "persuaded" without the presence of a treaty. The second problem with this rosy conception of fiduciary origins is the fallacy of Crown honour. The Crown was interested in doing through law what they were not prepared to do through military means: exterminate Aboriginal peoples. Gaining legal control (even if this

⁶⁹⁹ *Wewaykum Indian Band v. Canada*, 2002 SCC 79.

⁷⁰⁰ *Ibid.* at para. 79.

⁷⁰¹ B. Slaterry, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 753 as cited *ibid.* at para. 79.

control was achieved through colonial myths⁷⁰²) was only the first step in this extermination. The fiduciary duty is a means of controlling with colonial legal mechanisms a relationship which, in an equitable setting, would exist outside that legal framework. The Court has called this relationship “sui generis” but has, at the same time, applied legal notions which are firmly planted in the Canadian and/or colonial legal setting. Fiduciary duty is one such legal concept.⁷⁰³ Although the Supreme Court notes that Aboriginal people, who had their interests held under government control, were vulnerable to government “ineptitude,”⁷⁰⁴ the Court fails to maintain an understanding of fiduciary duties which would apply the principle in a general manner to all Aboriginal/Crown relations. As such the fiduciary principle as applied to Aboriginal contexts post-*Sparrow* has become very much reflective of its common law origins despite its presence in a “sui generis” relationship.

In keeping with its common law origins, the Court expressly stated that “[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests”.⁷⁰⁵ Although the court implies that the general duty is located in section 35 Aboriginal rights, it does not make clear how that general principle relates to the narrower and enforceable duties laid out in *Wewaykum*. Indeed, the case reads more like an acknowledgment, and then an abandonment, of the general fiduciary duty set out in *Sparrow*. In setting the parameters of the fiduciary principle, and why it is not a successful avenue of argument for the Bands in *Wewaykum*, the Supreme Court identified five characteristics. While some of these criteria are specific to the case at hand, others can be generalized for the benefit of discussing fiduciary principles more broadly. I will discuss two of those principles below.

⁷⁰² See Vermette, *supra* note 243 at chapter 2. More recently, see Vermette, *supra* note 9.

⁷⁰³ *Wewaykum*, *supra* note 699 at para. 80.

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.* at para. 81.

First, reiterating that the fiduciary duty is a specific duty, the Supreme Court pointed out that such duties vary “with the nature and importance of the interest sought to be protected”.⁷⁰⁶ In the *Wewaykum* case the Court determined that the starting point for analysis was found in the Crown assuming the role of intermediary between the Indian bands and the Province. The duty was owed as part of the creation of reserves and in relation to the specific lands designated in such a process.⁷⁰⁷ This starting point is relevant because in *Wewaykum* Aboriginal title was not central to the emergence of fiduciary duties. Because the First Nations in *Wewaykum* had migrated to the lands in question, their rights (or interests) were to be considered along with other subjects of the Crown. The Crown had to balance interests rather than simply ensuring that they act in the best interests of those to whom they held fiduciary obligations.⁷⁰⁸ Identifying this point is important by way of contrast. The Court contrasted the *Wewaykum* case with that of *Guerin* on the basis that in *Wewaykum* the Crown was not “interposing itself between an Indian band and non-Indians with respect to an existing Indian interest in lands.”⁷⁰⁹ Similarly, on this key issue, *Wewaykum* differs from the situation of the Manitoba Métis because in the situation of the MMT the treaty did rely upon Aboriginal title. It can be said that the Crown clearly and unambiguously interposed itself between the existing Métis land interests and those interests of incoming settlers. This role of intermediary clearly puts the Crown in a position to exercise its discretion in a way which makes the Métis vulnerable to such exercise. Despite the presence of

⁷⁰⁶ *Ibid.* at para. 87.

⁷⁰⁷ *Ibid.* at para. 93.

⁷⁰⁸ *Ibid.* at para. 96 where the Court writes: “[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting.” The Court continued: “In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were “vulnerable” to the adverse exercise of the government’s discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians.”

⁷⁰⁹ *Ibid.* at para. 91.

the *Manitoba Act*, the situation with the MMT cannot be likened to reserves created under the *Indian Act* regime where no such Aboriginal title was at play. Although the government was obliged to uphold the constitutional terms in the *Manitoba Act*, it was left with a great deal of discretion in executing those terms. This was intentional on the part of the government and the corresponding duties associated with that discretion were clearly undertaken by government speakers in Parliament.⁷¹⁰

The second principle from *Wewaykum* which is material to the study of the MMT is the outlining of duties that arise prior to reserve creation. Here the court outlines the application of the fiduciary duty to a situation where the Indians were granted a reserve in the absence of an Aboriginal or treaty right to lands in that area. The Métis situation is quite different. The Métis had Aboriginal, treaty and constitutional rights to the land in question. In *Wewaykum*, the Court determined that at the stage of reserve creation, whether a fiduciary duty has arisen or not, the Crown had obligations defined in the *Indian Act*. Métis Aboriginal title has been denied by Canada's courts despite it being recognized within the *Manitoba Act*.⁷¹¹ *Wewaykum* shows that even in the absence of Aboriginal title, Crown undertakings can give rise to fiduciary obligations. While the obligations to the Métis cannot similarly be found in the *Indian Act*, obligations can be found in the *Manitoba Act*. The consequences of this, and the constitutional issues will be dealt with below. In *Wewaykum*, the Court determined that the presence of a fiduciary duty can lead to quite specific responsibilities. While some of these can be related to specific actions such as full disclosure and “acting in the best interests of the beneficiary”,⁷¹² others are more general such as loyalty and good faith. With words like loyalty and good faith it

⁷¹⁰ Sir John A. Macdonald, “Debates on the Manitoba Bill”, May 2nd, 1870 in Morton, *supra* note 32 at 204.

⁷¹¹ *MMFI*, *supra* note 14 at para. 562-94.

⁷¹² *Wewaykum*, *supra* note 699 at para. 94.

is clear why Justice Binnie saw a connection between honour of the Crown and fiduciary duties.⁷¹³

Noting that the Crown intervention was positive, and designed to protect the bands in question,⁷¹⁴ Binnie J. still found that the Crown had fiduciary obligations owed to the Indians. In doing so, Binnie reminds the reader that context is key. Regard must be paid to the “context of the times” in order to assess the discharge of fiduciary obligations.⁷¹⁵ This context can include other competing claims and Binnie noted that the Crown is not an ordinary fiduciary. The Crown must serve all of the obligations it owes to its subjects.⁷¹⁶ Applied broadly, this conception would reduce the fiduciary duty to a mere shadow of its potential. However, context is key to understanding Binnie’s decision and the lack of an Aboriginal or treaty right upon which to base the fiduciary obligations is central to understanding why the obligations owed to the bands in question could be equated with obligations owed to other Crown subjects. If Binnie’s understanding of fiduciary duties was to be applied to other contexts it would perpetuate the colonization of Aboriginal peoples. In the case of the Métis of Manitoba, or any other Aboriginal community which negotiated an agreement with the Crown, fiduciary obligations cannot be owed equally to other subjects. The reason for this is simple. Any rights, especially to land, which other subjects of the Crown might have are constrained by, *and only arise because of*, the negotiation of agreements with Aboriginal peoples. Métis land rights are recognized in

⁷¹³ *Ibid.* at para. 80 where Binnie J. writes: “Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the “honour of the Crown”

⁷¹⁴ *Ibid.* at para. 95 where Binnie writes: “In this case the intervention of the Crown was positive, in that the federal government sought to create reserves for the appellant bands out of provincial Crown lands to which these particular bands had no aboriginal or treaty right. As explained, the people of the Laich-kwil-tach First Nation arrived in the Campbell River area at about the same time as the early Europeans (1840-1853). Government intervention from 1871 onwards was designed to protect members of the appellant bands from displacement by the other newcomers.”

⁷¹⁵ *Ibid.* at para. 97.

⁷¹⁶ *Ibid.* where Binnie writes: “As the dispute evolved into conflicting demands between the appellant bands themselves, the Crown continued to exercise public law duties in its attempt to ascertain “the places they wish to have” (as stated at para. 24), and, as a fiduciary, it was the Crown’s duty to be even-handed towards and among the various beneficiaries.”

the *Manitoba Act*. Clearly, a failure of the Crown to manage or constrain the advance of settlement which might infringe upon its ability to honour Métis land rights is a failing in the Crown's duty as fiduciary. Also, title in fee simple originates from the Crown itself so it is always subject to the Crown's radical title, whereas Aboriginal ownership of land preexisted Crown title. As such, when the Crown brings its subjects on to newly acquired Aboriginal lands, it has a responsibility which preexisted the arrival of those subjects.

The context of the times further illustrates that the granting of land was only part of the fiduciary obligations owed to the Métis. In *Wewaykum*, the Court noted that the Crown's fiduciary obligation expands *after* the creation of a reserve. When the reserve is created it is the Crown's duty to protect and preserve that Band's "quasi-proprietary" interest.⁷¹⁷ This is true even in relation to reserves "created on non-s. 35(1) lands."⁷¹⁸ The purpose of this fiduciary duty is to protect the Band from exploitative bargains.⁷¹⁹ In carrying out these responsibilities, the Crown is held to the standard of "a man of ordinary prudence in managing his own affairs".⁷²⁰ On the nature of the duty owed, the Supreme Court found that the Crown had to go beyond the role of "honest referee". As a fiduciary, the Crown owed care and protection to the Band in such a manner that "[t]he Crown was obliged to preserve and protect each band's legal interest in the reserve".⁷²¹ It is not surprising that the Court would require this level of care. If we recall, the

⁷¹⁷ *Ibid.* at paras 98 – 104.

⁷¹⁸ *Ibid.* at para 98.

⁷¹⁹ *Ibid.* at para 100 where the Court writes: "It is in the sense of "exploitative bargain", I think, that the approach of Wilson J. in *Guerin* should be understood. ... Wilson J. stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction". The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). ... Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself. (Of course, there will also be cases dealing with the ordinary accountability by the Crown, as fiduciary, for its administrative control over the reserve and band assets.)

⁷²⁰ *Ibid.* at para. 94 citing *Blueberry River*, *supra* note 697 per McLachlin J. at para. 104

⁷²¹ *Ibid.* at para 104.

specific nature of the relationship is not what gives rise to the fiduciary duty. That is, fiduciary duties are not limited to a lease agreement, or a broker/client scenario, or a treaty relationship which promises a land grant. Instead,

The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position...It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.⁷²²

The Supreme Court of Canada has found that fiduciary duty can be met by consulting Aboriginal people when decisions need to be made concerning their land.⁷²³ This duty of consultation flows from Aboriginal title, because Aboriginal “title encompasses within it a right to choose to what ends a piece of land can be put”.⁷²⁴ But the fiduciary duty is not limited to Aboriginal title, as it also extends to treaty rights. In carrying out the fiduciary duty, there is a responsibility to legislate in a manner which provides “representatives of the Crown with sufficient directives to fulfil their fiduciary duties”.⁷²⁵ Without such guidance an “unstructured discretionary administrative regime” would risk infringing treaty rights.⁷²⁶

⁷²² *Hospital Products v USSC* [1984] HCA 64; (1984) 156 CLR 41 at 96-97, per Mason J. Also see *Mabo*, *supra* note 252 at 200 per Toohey J: “Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position.” Also see *Haida*, *supra* note 448 at para. 18: “[T]he duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake.”

⁷²³ *Delgamuukw*, *supra* note 248 at para. 168.

⁷²⁴ *Ibid.* at para. 168.

⁷²⁵ *R. v. Adams*, [1999] 3 S.C.R. 101, at para. 54 as cited in *R. v. Marshall*, [1999] 3 S.C.R. 533 (Marshall 2) at para. 33.

⁷²⁶ *Ibid.* Although *Adams* was dealing with Aboriginal rights, the Court in *Marshall* adopted this interpretation for treaty rights.

IV.e. Aboriginal Peoples and Fiduciary Duties: The Bounds of Métis Considerations

By way of summary, and with respect to the Manitoba Métis situation, we can make a note of the responsibilities that arise prior to reserve creation, such as “loyalty”, “good faith”, “full disclosure” and acting in the best interests of the beneficiary. Acting with respect to the interests of Aboriginal peoples goes hand-in-hand with being able to “reasonably” understand what might be the best interest of the beneficiaries. It means being able to listen, to be attentive, and to respond to the needs of the beneficiaries. But the fiduciary obligations do not end at the creation of reserves.⁷²⁷ It is the exploitative bargains which remain the central concern of scholarly investigation of the distribution of lands under the Manitoba Métis Treaty. This leads to Binnie J.’s comment in *Wewaykum* that “the role of honest referee does not exhaust the Crown’s fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty.”⁷²⁸ Despite the fact that in the 1870’s the Crown had to deal with administering the lands in a new province, a responsibility which extended to the competing claims of old settlers, new settlers, and the Métis land grant, the mere presence of such competing claims is not enough to justify the abandonment of the Crown’s fiduciary duty.

The way to look beyond these competing claims and see the fiduciary responsibility in its own light is to appreciate the land surrender characteristic of the MMT. The Supreme Court in *Guerin* was dealing with the Crown’s failure to negotiate the terms of a lease of Indian lands in the best interests of the Indian Band. While a lease agreement is, in general, different from the MMT, both *Guerin* and the Manitoba Métis context involve the surrender of land in exchange for promises from the Crown which induced the application of Crown discretion. Even though

⁷²⁷ Rotman, *supra* note 668 at note 101. “Following the creation of reserves and the resultant expansion of the Crown’s fiduciary duties, the Crown had a duty to ensure that its Aboriginal beneficiaries were not made subject to exploitative bargains.”

⁷²⁸ *Ibid.* citing *Wewaykum*, *supra* note 699 at para 104.

specific fiduciary obligations may differ, the obligations undertaken by the Crown in both cases gives rise to fiduciary obligations.

While much focus is on the children's land grant, the surrender in the MMT can be seen in three ways. First, the Métis surrendered their independent political autonomy in exchange for an integrated political authority as outlined in the treaty and subsequent *Manitoba Act, 1870*. This surrender doesn't mean that the Métis divulged all rights to self-govern but rather that they set out the structure within which future Métis political authority would exist, namely a constitutional structure with local responsible government. Second, the Métis surrendered their title to land. It has been argued that according to Canadian law the Métis had no such title to surrender. However, Métis title was clearly the centrepiece of the land grant issue. This title was described as "Indian title" in the *Manitoba Act* and it was effectively exercised during the resistance of 1869-70 where the Métis exercised control over the territory Canada coveted. The third surrender was that of administration. It could be argued that administration is merely a function of the political control which the Métis exercised prior to the MMT. That might be so, in which case I am splitting hairs. However, it is also clear that even if the Métis had opted for an integrated political existence and surrendered their title for land, they could have (if negotiations were favourable) reserved the right to administer their own land grant. This was partly done as the Métis felt that they were going to be able to choose their allotments. However, the bulk of the administrative function was assumed by Canada. This administrative function, and the corresponding surrenders by the Métis, put the Métis in a vulnerable position vis-à-vis the Canadian government. As history has shown, Métis vulnerability was also evident in relation to the incoming settlers. The surrenders, and subsequent vulnerability to Canadian discretion imparted a responsibility upon Canada to attend to the commitments made to the Métis in a way

that insured that the best interests of the Métis were foremost. While the requirements for a fiduciary relationship, according to the *Guerin* criteria, are apparent in the MMT context, the specifics of those duties require a more detailed analysis. These specific duties will be articulated in the next section.

The fiduciary duty, it might be argued, is not applicable to the Métis. The federal government, at times, viewed the Métis as not needing the same kind of Crown protection that was directed towards First Nations peoples. In hindsight the federal government's view is highly debatable. One thing is for certain, the fiduciary cannot decide how vulnerable the beneficiary is in fact. Moving past the specifics of Métis vulnerability, Rotman suggests that as a consequence of *Sparrow*, the Crown's fiduciary duty "ought to be applicable to all of the Aboriginal peoples contemplated by section 35(2)"⁷²⁹ As stated above, the implications of *Sparrow* are not clear. Rotman seems to be relying on the broad interpretation of the *Sparrow* fiduciary doctrine. Still, Rotman notes that questions about the applicability of the fiduciary duty to Métis people exist in part because *Powley* did not "clearly articulate" "the basis of the fiduciary discussion in relation to Métis peoples".⁷³⁰ While a clear articulation of the fiduciary basis might not have been made in relation to the Métis, the Supreme Court's more recent forays into fiduciary law indicate that such duties are owed where a specific situation exists and not owed generally to all Aboriginal peoples. In regards to the Métis of Manitoba, the existence of the undertakings of the Crown and the vulnerability of the Métis are hallmarks of such a relationship. Rotman cites the Royal Commission on Aboriginal Peoples (RCAP), which is more assured in its view that fiduciary obligations exist in regards to the Métis.⁷³¹ Again, here is an articulation of duties owed to a

⁷²⁹ *Ibid.* at note 111.

⁷³⁰ *Ibid.* at note 123.

⁷³¹ *Ibid.* citing RCAP, *supra* note 403, Vol. IV, Perspective and Realities, at 224 where it is written: "The government of Canada owed a fiduciary duty to the members of the Métis Nation, as to all Aboriginal people. The

specific Métis population in a specific circumstance. While the Royal Commission does mention that duties are owed to all Aboriginal peoples, their report was written just 6 years after the *Sparrow* decision, which seems to have been more of a blip than a precedent for the fiduciary doctrine. The reference to the *Manitoba Act* makes clear that the Commission was targeting a specific Métis community with its discussion of fiduciary duties. This is consistent with the more recent case law.

Is there a problem with the enforceability of the fiduciary principle when we are discussing Aboriginal/Crown issues predating 1982? Here again I turn to Rotman who points out that “treaty promises were regarded by the courts as moral obligations that were not legally enforceable until the entrenchment of treaty rights in section 35(1).”⁷³² One answer to the preceding question is that we are now in the era of section 35(1) Aboriginal and treaty rights and, therefore, the fiduciary duties (and treaty rights) have teeth. However, for the Manitoba Métis, this is not the complete answer. Where Rotman points out that treaty obligations were seen in moral terms rather than as legally enforceable obligations, he is using the foundation of court decisions which subsume treaty rights under other legislation. Specifically, if we look to the principle from *Daniels v. White* discussed earlier we see that the Court was concerned with which piece of legislation trumped the other. It was not a matter of simply regarding treaties as moral obligations. Rather, it was the presence of a superior legal authority (legislation). In that case, an international treaty which intended to protect migratory birds, seemed in direct contrast to the protection of hunting and fishing found in the Indian treaty. The Court recognized the validity of the international obligations over those of the treaty. A similar situation arises in

government was legally responsible to act in the best interests of Métis people and not to place its own interests, or those of non-Aboriginal persons, ahead of Métis interests. Its tolerance or reckless ignorance of, and occasional complicity in, the schemes by which many Métis people were effectively stripped of their Manitoba Act benefits is difficult to reconcile with that fiduciary responsibility.”

⁷³² *Ibid.* at note 36.

regards to the *Natural Resource Transfer Agreements (NRTAs)*. When the Court was faced with recognizing a treaty right or the rights set forth in the *NRTA*, the Court opted for the *NRTA*. As a constitutional document the *NRTAs* set out how provinces and the federal government will relate to each other in regards to natural resources. The *NRTA* is, therefore, a document which sets forth basic principles and, as such, deserves protection. While the same can be argued for treaties, the colonial legal structure has had a hard time imbuing treaties with the same esteem. All of this discussion serves to introduce the difference found in the Manitoba Métis situation. If it was explicitly recognized as such at the time, the MMT might have received a similar status in Canadian courts. However, since the MMT was enshrined in a constitutional document, the Métis of Manitoba were the first Aboriginal peoples to have explicitly constitutionally protected rights.⁷³³

Similar to treaty rights, the fiduciary principle that was “owed by the Crown was not necessarily regarded as enforceable in the courts.”⁷³⁴ More recent indication from the Supreme Court suggest otherwise. For starters, the SCC has stated that the duty to consult “is not a mere incantation, but rather a core precept that finds its application in concrete practices.”⁷³⁵ As such, duties became the standards by which Canadian courts judge the past actions of the Crown and they can give rise to enforceable standards. In this regard, the Court has undertaken to assess fiduciary duties in B.C. in the early 1900’s, well before the advent of section 35(1), which tells us that despite the historical reluctance of courts to enforce duties, the duties were present and the Crown had to respond. At the very least, it can be said that those duties that were present in the past are enforceable in today’s courts.

⁷³³ This interpretation would exclude any similar interpretation imparted on the *Royal Proclamation of 1763*. The constitutional status of the *Manitoba Act* was affirmed in 1871, *supra* note 33. One approach which argues that Aboriginal rights have long been (even prior to 1982) part of the unwritten rules of the Constitution, can be found in *Campbell supra* note 278 at para. 67-70.

⁷³⁴ Rotman, *supra* note 668 at note 38.

⁷³⁵ *Haida, supra* note 455 at para. 16.

While the honour of the Crown and fiduciary duty are closely related concepts,⁷³⁶ the content of a fiduciary obligation relates to specific duties while the honour of the Crown is an underlying principle guiding Crown action in relation to the commitments made by the Crown.⁷³⁷ The attachment of fiduciary obligations to specific duties might explain why case law does not apply this principle to historic treaties. The general nature of the language, and problems with interpreting such treaties, might dissuade the courts from identifying specific duties owed.⁷³⁸ Still, as Rotman notes, the linking of fiduciary duties with the honour of the Crown seems to be a logical step considering that fiduciary duty and the honour of the Crown both share similar roots.⁷³⁹ This connection is obvious because “the ethical standards of a fiduciary in the context of Crown-Native relations most certainly require, at a minimum, the upholding of the Crown’s honour.”⁷⁴⁰ Can it then mean that honour of the Crown is simply the more general sibling of a fiduciary relationship? In a context where the Court might not be in a position to identify specific legal duties is it enough to say “keep your word” and “act honourably”? Very often a fiduciary duty might lead to a specific action being required of the Crown. If a court is looking at fishing rights from a treaty that was negotiated over 200 years ago, then it is very much not in a position to say “the First Nation is entitled to X amount of the catch each year in this region,

⁷³⁶ Rotman, *supra* note 668 at note 73 where he writes: “The raising of the Crown’s fiduciary duty in Ross River indicates the Supreme Court’s recognition that Crown legislation and procedure that affect the interests of a First Nation must be closely scrutinized in order to uphold the duty and honour of the Crown.”

⁷³⁷ *Ibid.* at note 93 where Rotman cites *Wewaykum*, *supra* note 699 at paras. 83 and 85 “to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.”

⁷³⁸ Rotman, *ibid.* at note 137 where he writes: “as a result of the judicial compartmentalization of issues, treaty cases generally do not refer to cases decided on the basis of fiduciary obligations and vice versa. The curious result of this practice is that the notion of the ‘honour of the Crown’ highlighted in treaty jurisprudence is generally not considered within fiduciary jurisprudence and understandings of the nature of the Crown’s duties to Aboriginal peoples in fiduciary cases is not referred to in treaty case law. However, as indicated above, the honour of the Crown in the context of its treaty obligations [and] duties shares a common foundation with the Crown’s fiduciary duty; both are rooted in the historical interaction between the Crown and Aboriginals.”

⁷³⁹ *Ibid.* at note 138 where Rotman writes: “The historic nature of the Crown’s fiduciary duty to Aboriginal peoples is inextricably linked with its treaty obligations; as a result, it is rather difficult to sever fiduciary duties from treaty obligations.”

⁷⁴⁰ *Ibid.* at note 148.

and the Department of Fisheries must ensure that Y amount of fishing licenses are set aside for this purpose” or the like. Instead, a court determines that there is a treaty right to fish and puts the onus back on Canada and the First Nation to negotiate the difference. A more recent treaty, or one with more specific terms, will spell a different solution. For example, if interest is owed or if payments are short, then these things can be specifically accounted and ruled upon in a judgment because it reflects the identifiable damages resulting from a failure to live up to the obligations present in the treaty or agreement.⁷⁴¹

Fiduciary duties arise in specific situations, however, they can also remain generally defined. That is, they do not have to prescribe specific solutions. So when the Supreme Court in *Ross River* found that the Governor in Council’s decision to create a reserve remained “subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations, which arise under s. 35 of the Constitution Act, 1982”⁷⁴² the details of the fiduciary obligations were not spelled out. It is possible in certain instances to deduce a fiduciary obligation without clearly identifying the precise nature of those obligations.⁷⁴³ To understand the Crown’s fiduciary duty as simply extending a requirement that it acts only in accordance with what it feels are the best interests of Aboriginal peoples is inadequate. The fiduciary relationship imparts a level of competence upon the fiduciary. It is not enough to assert “I assumed that this was in the

⁷⁴¹ *Ibid.* at note 146 where he writes: “In spite of what was said in *Van der Peet*, the judiciary has not yet ruled specifically on the fiduciary character of treaties. There have been definite hints, though, such as in the Supreme Court of Canada’s judgment in *Bear Island*, where the Court implied that the Crown’s fulfilment of treaty promises is an application of fiduciary obligation. However, in recent treaty cases where there is discussion of ‘the honour of the Crown’ no mention of the Crown’s fiduciary obligations is made. Perhaps the most prominent of these is *Marshall No. 1*, where both the majority and dissenting judgments made important references to the notion of the ‘honour of the Crown,’ but nowhere was the word ‘fiduciary’ found when discussing the nature of the Crown’s relationship to the Mi’kmaq or the obligations created by the treaties in issue in that case.”

⁷⁴² *Ibid.* at note 68 where Rotman cites *Ross River Dene Council Band v. Canada*, 2002 SCC 54 at para. 62.

⁷⁴³ *Ibid.* at note 73 where Rotman points out: “the fiduciary nature of the parties’ interaction creates the need for a court to consider the representations made by the Crown and what a Band would have understood or acknowledged from them.” Here Rotman is applying a principle similar to the principle found in the interpretation of treaties. The treaty interpretation principle here is that treaties must be interpreted in a way which corresponds to how Aboriginal peoples would have naturally understood them.

best interest of my client”. Instead, the fiduciary must determine what those best interests are and provide justification for actions which override the stated interests of the client. The fiduciary must take account of the interests of their “client” because it is the only way of determining what the entire landscape of interests looks like. The children of the Métis at Red River were in a similarly vulnerable position. Their interest in the land was secured for them by the action and the stated intentions of their parents. The children’s interest in the land was tied to those intentions by way of ensuring that the distribution of lands was for the benefit of families. It is clear therefore, that if the government failed to distribute lands according to the wishes of the families it was likely in a breach of the fiduciary duty owed to the children of the Métis. A duty which the Government had willingly and expressly undertaken.

One area in which the Crown might argue that fiduciary duty was not owed to the children of the Métis is that, as individuals, the children cannot be expected to benefit from such a duty. However, the case of the Manitoba Métis is little different from the example of Indian Bands.⁷⁴⁴ The Métis did have a collective interest in the land and, while the children were to receive some form of individual allotment, it was for the purpose of preserving the collective interests of the community. This is reflected in the “benefit of families” clause as well as the Métis understanding that they were to be able to select their lands. While the selection of lands was to be undertaken by the Métis in consultation with the Crown, the Crown was solely responsible for the protection of the land interests of the Métis children. It can be said that the entire community was vulnerable to Crown discretion and as such, a fiduciary duty was owed to that Métis community as a whole.

⁷⁴⁴ Rotman, *supra* note 668 at note 108 where Rotman explains that “[t]echnically, the Crown’s fiduciary duties are not owed to individual Indians, but to bands.” Rotman continues: “While bands are the *de jure* beneficiaries of the Crown’s fiduciary-obligations, the individual members of the bands are the persons who, collectively, share in the benefits flowing from the Crown’s duty.”

For that reason I have taken the liberty of rephrasing a key passage from *Guerin* in terms of the half-breed land grant contained in the MMT:

[T]he Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Métis understood would be embodied in the surrender. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Métis to surrender their land on the understanding that the land reserve would be granted on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. If the promised grant proved impossible to obtain, the Crown, instead of proceeding to grant the land on different, unfavourable terms, should have returned to the Métis to explain what had occurred and seek the Métis' counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.

While the existence of the fiduciary obligation which the Crown owes to the Métis is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is both more general and more exacting than the terms on any particular surrender. In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppels. The Crown cannot promise the Métis that it will grant land on certain stated terms, thereby inducing the Métis to alter its legal position by surrendering the land, and then simply ignore that promise to the Métis detriment...

In obtaining without consultation a much less valuable land grant than that promised, the Crown breached the fiduciary obligation it owed the Métis. It must make good the loss suffered in consequence.⁷⁴⁵

The applicability of that passage might, initially, seem clear. However, there remains one overriding question in regards to the Métis land grant. This question revolves around the enshrinement of the grant in the *Manitoba Act*. Specifically, if the argument put forth in this

⁷⁴⁵ *Guerin*, *supra* note 241 at paras. 111-13 where the actual passage reads: "Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.

While the existence of the fiduciary obligation which the Crown owes to the Indians is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is both more general and more exacting than the terms on any particular surrender. In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppels. The Crown cannot promise the Band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the Band to alter its legal position by surrendering the land, and then simply ignore that promise to the Bands detriment...

In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the Band. It must make good the loss suffered in consequence."

thesis is that the Métis negotiated a treaty agreement with the Crown, what difference does it make if the same or similar commitments were enshrined in the *Manitoba Act, 1870*?

V. The *Manitoba Act*, and Constitutional Constraints

A full and fair consideration of the *Manitoba Act* makes certain contemporary legal debates much more clear. These debates are, of course, focused on historical interpretation and would include the question of whether the Métis are “Indians” for the purpose of section 91(24).⁷⁴⁶ Additionally, there are issues generally of Aboriginal title pertaining to the Métis and how that test might be adopted to fit the Métis experience. Both of these issues are given more insight when the *Manitoba Act* is considered in historical context.⁷⁴⁷ For the present purposes the *Manitoba Act* is the primary source for consideration of constitutional responsibilities toward the Métis and division of powers in Manitoba pertaining to Métis lands.⁷⁴⁸ There are two main issues to consider when examining the *Manitoba Act* and its impact on the commitments made to the Métis. The first is the legal effect that constitutionalizing the Métis land grant had on Crown responsibilities and duties toward the Métis. To examine this issue we will look at what meaning is embodied in the *Manitoba Act* through both historical and textual interpretations. The second

⁷⁴⁶ See *Reference As to Whether “Indians” in S. 91(24) of the British North America Act Includes Eskimo Inhabitants of the Province of Quebec*, [1939] S.C.R. 104 [*Re Eskimo*]. For more literature on this point see: Paul L.A.H. Chartrand, ed. *Who are Canada’s Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publishing Ltd., 2002), Mark Stevenson, “Section 91(24) and Canada’s Legislative Jurisdiction with Respect to the Métis” (2002) 1 Indigenous L.J. 237, Don McMahon and Fred Martin, “The Métis and s. 91(24): Is Inclusion the Issue?” Canada, Royal Commission on Aboriginal Peoples, Research Reports, Project Area 5: Aboriginal and Treaty Rights of Métis and Inuit. In *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* [CD-ROM]. (Ottawa: Libraxus, 1997). Bradford Morse and John Giokas, “Do the Métis Fall Within Section 91(24) of the *Constitution Act, 1867*?” Canada, Royal Commission on Aboriginal Peoples, Research Reports, Project Area 5: Aboriginal and Treaty Rights of Métis and Inuit. In *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* [CD-ROM]. (Ottawa: Libraxus, 1997), Clem Chartier, “‘Indian’: An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867” (1978-79) 43 Sask. L. Rev. 37 and Brian Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986).

⁷⁴⁷ The Supreme Court of Canada used contextual analysis completely inappropriately in *Blais*, *supra* note 322. For more see Vermette, *supra* note 8.

⁷⁴⁸ MMF Final Argument, *supra* note 136 at para. 140 where they explain: “In *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575, Martland J. referred to: ‘The right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is a legal question.’”

issue is the question of federal versus provincial jurisdiction over the Métis land grant. This issue is of importance because both federal and provincial governments were legislating in relation to that grant.

V.a. *Constitutionalizing the Manitoba Métis Treaty: A Historical and Contextual Interpretation*

The basic principles of constitutional interpretation begin with a determination of the meaning of the legislation. This process was undertaken in an earlier chapter when the historical context of the *Manitoba Act* was examined. This context revealed that the Parliament of Canada intended to implement the agreement negotiated with the Métis. Just as with Confederation in 1867, the entrance of Manitoba expressed the will of the people and this expression is what a constitution is intended to portray.⁷⁴⁹ Potential Canadian confederation in the mid-1860's saw delegates come together to discuss the terms of union. Similarly, the Métis sent delegates to Canada to discuss the same issues. The major difference between the two processes was the time. Where Canadian confederation initially took several years of negotiation, the entrance of Manitoba into confederation took far less time. Both negotiations were marked by small groups of representative delegates who returned to their representative assemblies for ratifying votes. The federal structure was an attempt to "reconcile diversity with unity".⁷⁵⁰ The federal/provincial structure has been described as "a political and legal response to underlying social and political

⁷⁴⁹ *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.), at 745 as cited in Rotman et al., eds. *Constitutional Law: Cases, Commentary and Principles* (Toronto: Thomson Canada Ltd., 2008) at 2 where the Court writes: "The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature of the government."

⁷⁵⁰ *Reference Re Secession of Quebec* [1998] 2 S.C.R. 373 [*Quebec Reference*] at para. 43.

realities.”⁷⁵¹ This is an obvious statement. The distribution of powers is intended to give governments the roles that they are most suited for.⁷⁵²

The individual provincial structures allowed local majorities, who were minorities federally, to protect their autonomy and cultures.⁷⁵³ This principle is equally applicable to Manitoba. The intent of the delegates was that by ensuring a local representative government, they would be able to protect their interests. However, it must also be recognized that specific measures were taken to protect the Métis minority from both federal and provincial powers. The recognition of the Métis land rights was one such measure. The intention in both the wording and negotiation of that section is, in a general sense, quite obvious. Namely, by ensuring the Métis land base, Métis communities and culture would also be able to survive. Similar measures can also be seen elsewhere in the Constitution in the context of language and educational rights for religious minorities. Without such provisions, these minorities were destined to be “submerged and assimilated” into the culture of the majority.⁷⁵⁴ Finally, the Supreme Court has noted the importance of democracy in the constitutional process:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the ‘sovereign will’ is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution...The system must be capable of reflecting the aspirations of the people...Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the ‘sovereign will’ or majority rule alone, to the exclusion of other constitutional values.⁷⁵⁵

⁷⁵¹ *Ibid.* at para. 57.

⁷⁵² *Ibid.* at para. 58.

⁷⁵³ *Ibid.* at para. 59.

⁷⁵⁴ *Ibid.* at para. 79. One broad approach to such protection can be found in *Nunavut Land Claims Agreement Act* (S.C. 1993, c. 29) online at Department of Justice Canada < <http://laws-lois.justice.gc.ca/eng/acts/N-28.7/page-1.html> > (accessed on January 3, 2012).

⁷⁵⁵ *Ibid.* at para. 67.

Much can be made about the intention of Parliament and the literal wording of the *Manitoba Act*. It can be argued that when the wording of the *Manitoba Act* is examined, there is little in the way of responsibilities owed toward the Métis. While the land grant to the children of the Métis is obviously clear, it is less clear from the text of the *Manitoba Act*, that the Crown was intending to undertake distribution of those lands in any specific process. It can be said that the discretion which resided in the Governor General in Council to make regulations “from time to time” was an expression of an ill-defined agreement or even less. Such general regulation could signify that the Crown never made an agreement with the Métis but saw the land grant as a means to help facilitate the Métis transition to more sedentary ways of life. The land grant was, therefore, kept open to respond to the needs of this population in transition. While this might be one way to read the *Manitoba Act*, it is not the proper way to read the *Act*. The circumstances of the legislation are key to understanding its content. Indeed, looking at the circumstances is *necessary* when considering statutes that relate to Aboriginal peoples.

The vulnerability of the Métis in 1869-70 in relation to the Crown was obvious. This is a key aspect in informing fiduciary duties. It is also important when interpreting the *Manitoba Act* itself. As was argued previously, the negotiations between Prime Minister Macdonald and Cartier, and the representatives from Red River, resulted in a general if not specific understanding of terms. The Métis were vulnerable to the written interpretations that would follow and how those interpretations would be interpreted and applied in law. These circumstances give rise to the same concerns which encouraged the Court to originally adopt the rule of interpretation that treaties and statutes relating to Indians should be given a liberal and generous interpretation in favour of the Indians. This rule isn’t intended to blindly resolve expressions in favour of the Indians, rather it is intended to ensure that a full and fair accounting

of the Aboriginal perspective is applied to the statute or agreement. A proper interpretation of the historical context which takes into account the vulnerability of the Aboriginal party is key.

V.b. Constitutionalizing the Manitoba Métis Treaty: A Legislative Interpretation

To begin, the *Manitoba Act* sets out the limits of what was known as the “postage stamp” province. In its original form, Manitoba was a tiny province which encompassed the majority of occupied lands associated with the discontented Métis residents at and near the junction of the Red and Assiniboine rivers. Section 2 of the *Manitoba Act*, 1870 states that the *British North America Act*, 1867 will apply to Manitoba. This included federal jurisdiction over “Indians, and Lands reserved for the Indians”. I set out the argument at the outset of this chapter that it is not necessary to rely upon section 91(24) to assert that the distribution of the Métis land grant was an exclusive federal responsibility. The distribution of the Métis land grant was expressly reserved to the Governor General in Council which would direct, through Orders in Council, the Lieutenant-Governor of the Province of Manitoba. Because these lands are ungranted, they do not exist within provincial domain. Normally, lands would remain outside of provincial domain until such time as they were granted. This is made clear in section 30 of the *Manitoba Act* that ensured that all ungranted lands remained under the jurisdiction of the Government of Canada subject to the agreement for surrender of Rupert’s Land by the Hudson’s Bay Company. However, because the Métis grant carried continuing obligations which would require federal oversight, these “granted” lands would remain outside of provincial jurisdiction. Finally, although technically speaking, the *Manitoba Act* of 1870 was a federal statute,⁷⁵⁶ its confirmation

⁷⁵⁶ *A.G. Manitoba v. Forest*, at 1039 where the Supreme Court states: “If ... the *Manitoba Act* is taken by itself it must be observed that this is a federal statute which means that, unless otherwise provided, it is subject to amendment by the Parliament that enacted it and no other. It is, however, otherwise provided in s.6 of the *British North America Act*, 1871. This section denies any amending power to the federal Parliament and the amending power it allows to the Legislature of Manitoba is ‘to alter from time to time the provisions of any law respecting the

through Imperial legislation in the *Constitution Act, 1871* ensured that it could not be amended by regular legislative action.⁷⁵⁷ It was for practical purposes a constitutional document from its inception, the implementation of which was a responsibility exclusive to the federal government.

V.c. The Manitoba Act and Métis Lands: Federal or Provincial Jurisdiction?

The issue of federal or provincial jurisdiction is not one which needs to delve deeply into that historical context in order to discover which level of government was responsible for the Métis land grant. There are several sections of the *British North America Act, 1867* and the *Manitoba Act, 1870* which help to delineate federal and provincial responsibilities in relation to the Métis land grant. It was under the authority of section 146 of the *British North America Act, 1867* that the Dominion of Canada expanded its territories.⁷⁵⁸ This was a federal and imperial responsibility. No provincial powers are established or effected by this section. An argument can be made that the Parliament of Canada did not by itself have authority under section 146 to establish new provinces. However, the *Manitoba Act*, was later sanctioned by the British

qualification of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province.” as cited in MMF Final Argument, *supra* note 136 at para. 134.

⁷⁵⁷ See section 6 of the *Constitution Act, 1871*, *supra* note 33 which states: “6. Except as provided for 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 said Province.” On the scope of this section see Chartrand, *supra* note 1 at 116 where he writes: “Section 6 also prohibits alteration of the provisions of any other Act establishing new provinces, and thereby confirms its intention to permit only once and for all federal enactment in respect of provincial constitutions. To read the qualification ‘in so far as it relates to the province of Manitoba’ as permitting federal legislative interference with the Constitution of Manitoba is to propose that it was intended to provide less protection for Manitobans than for residents of future provinces carved from the territories.”

⁷⁵⁸ Section 1 of the *Manitoba Act, 1870*, *supra* note 29. Also see section 146 of the *B.N.A Act, 1867*, *supra* note 384 which reads: “146. It shall be lawful for the Queen, by and with the Advice of Her Majesty’s Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert’s Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.” For an account of the fraud perpetuated by the Government of Canada during this expansion of territory through the treaty process see Paulette *supra* note 241.

government and the Queen. In the interim, without judicial challenge the legislation was assumed to be valid.⁷⁵⁹ Because the *B.N.A Act* was in effect, even after lands had been granted the distribution of federal and provincial powers remained a limitation on the powers of both governments. The question is why would the surrender of a Métis “Indian title” be dealt with by a different legislative justification than that which was used for First Nations communities? And, can the province of Manitoba ever claim jurisdiction over Métis lands, either before or after they were granted? These questions, while disputable, are not irresolvable.

I would contend that the federal government cannot extinguish “Indian title” where it does not exist. The acknowledgement of such title by the government is, for legal purposes, a way of legitimizing the title. An example of this is the numbered treaties.⁷⁶⁰ In the numbered treaties vast territories were (purportedly) ceded in exchange for rights to continue their ways of life (access to hunting and fishing) and social welfare (health care and education).⁷⁶¹ The ceding of these territories did not require proof of occupation consistent with what the Supreme Court might require today. Further, the Courts today will not think of challenging the basic foundation of those treaties, namely, that the Aboriginal title to land was ceded by those Aboriginal peoples. It was the purpose of the Crown to gain access to land. The Court pursued this motive with such tenacity that the Crown’s desire to obtain land appears in court decisions which clearly did not involve land cession.⁷⁶² In situations where land is ceded, if the Aboriginal peoples were not the valid title holders, a solemn *exchange* of promises could not have been achieved in those treaties. By recognizing that title, the Crown validated it for purposes of law. This is equally true for the

⁷⁵⁹ Rotman, *supra* note 749 at 155-56. Also see section 5 of the *Constitution Act, 1871*, *supra* note 33 which found that the *Manitoba Act* “shall be and be deemed to have been valid and effectual for all purposes whatsoever”. As cited in MMF Final Argument, *supra* note 136 at para. 132.

⁷⁶⁰ This argument was mistakenly dismissed by the judge in the MMF1, *supra* note 14. While we have moved away from notions of rights only extending from Royal decree (as seen in *St. Catherine’s Milling* and the *Royal Proclamation*) the impact of Crown acknowledgement of rights cannot be rendered nugatory.

⁷⁶¹ See generally Morris, *supra* note 291.

⁷⁶² See, *Marshall; Bernard*, *supra* note 13.

Métis of Manitoba. While Macdonald later explained that “Indian title” was not the correct term because Métis people did not consider themselves Indian, he did not discount the validity of their land claim. The distinction Macdonald was drawing was a racial or cultural one. Using today’s nomenclature Macdonald may have felt more comfortable applying the term *Aboriginal* title for it is certain that that is exactly the concept which the *Manitoba Act* was aimed at compensating. In so legislating, the Crown recognized a valid claim to land. Without validity in that claim, they had no grounds to be distributing scrip to the Métis of the Northwest Territories with the purpose of extinguishing Aboriginal title.

If the federal government carried responsibility over the Métis land grant regardless of whether that jurisdiction was obtained via the *Manitoba Act* alone or in conjunction with the *B.N.A. Act*, questions about the extent of provincial jurisdiction remain. In the presence of section 91(24) jurisdiction, it is clear that, in certain exceptional circumstances, provincial laws can apply to both the “Indians” and the “Lands” under section 91(24). Professor Hogg points out that this general rule has five exceptions:

- 1) If the provincial laws target Indians in a way which singles them out then those laws can be determined to be directed at “Indians, and Lands reserved for the Indians” rather than incidentally affecting them.⁷⁶³
- 2) Provincial laws which are otherwise valid, but which affect aspects of “Indianness” such as Aboriginal or treaty rights, are invalid. This is because such actions would make too much headway into federal jurisdictional authority.⁷⁶⁴

⁷⁶³ Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 594.

⁷⁶⁴ *Ibid.* at 594-96.

- 3) In situations where a provincial law might affect the section 91(24) sphere of jurisdiction in a manner that comes into conflict with a contrary federal law, the federal law will take precedence, to the extent of the conflict, because of the principle of federal paramountcy.⁷⁶⁵
- 4) The fourth exception refers to the Natural Resource Transfer Agreements.⁷⁶⁶ These agreements were not in effect in 1870. It has been determined that the Métis are not “Indians” for the purposes of that section.⁷⁶⁷
- 5) The fifth exception is section 35 Aboriginal rights protection.⁷⁶⁸ Here again, the time period covered in this thesis ensures that section 35 would only apply in the context of modern litigation.

Section 88 of the *Indian Act* was not in effect at the time that the *Manitoba Act* became law. The basic rules established in section 88 are applicable because they speak to division of powers. Indeed, these basic rules are similar to the exceptions listed above: Provincial laws of general application apply to Indians, unless a federal Act is contrary to the provincial legislation, and unless the provincial laws conflict with a treaty right.⁷⁶⁹ Laws of general application are the only laws that a province could have applied in regards to Métis lands. The validity of provincial legislation is one of the grounds upon which the MMF challenged the actions relating to the distribution of Métis lands.⁷⁷⁰ It could be argued that because exclusive federal jurisdiction is undoubtedly linked to the *Manitoba Act*, that the continuing fulfillment of its duties would ensure that provincial legislation could have virtually no say over the conditions of land use, occupation, sale etc. Here the first three exceptions listed by Professor Hogg would apply but

⁷⁶⁵ *Ibid.* at 596.

⁷⁶⁶ *Ibid.* at 596-97.

⁷⁶⁷ *Blais, supra* note 322.

⁷⁶⁸ Hogg, *supra* note 763 at 597.

⁷⁶⁹ *Ibid.* at 597-600.

⁷⁷⁰ See MMF Final Argument, *supra* note 136 at para. 136.

rather than referencing “Indians, and Lands reserved for the Indians” it would reference the Métis land grant.

VI. The Constitution, Duties and Powers: What was owed to the Métis?

As discussed previously, it is clear that the federal government was responsible for distributing and legislating in regards to Métis lands. But what were these responsibilities? Several associated duties can be identified. The most obvious is that the Métis land grant cannot be extinguished by regular legislative measures. As a constitutional right to *land*, the promise must be fulfilled. Because the *Manitoba Act* was intended to honour an agreement, it must be fulfilled in both the terms and the spirit of the *Act*. The wording of the *Act* gives rise to discretion in both the Governor in Council and the Lieutenant Governor of Manitoba to carry out land grant obligations. This agreement can be said to embody the fiduciary principles discussed earlier. Rather than merely being able to employ notions of Crown superiority and extinguish the Métis land rights at will, the Crown was forced, through its own legislation, to uphold those rights. The key aspect to honouring these rights was, as both Macdonald and Ritchot noted, to keep the land within Métis families. Such a responsibility would require ongoing federal government oversight and would keep the Métis land grant out of the reach of provincial measures.

Constitutional supremacy tells us that: “an act of the legislature, repugnant to the constitution, is void.”⁷⁷¹ This is a fundamental rule and even though the text of a constitution can be interpreted in a flexible manner, a given interpretation “cannot alter the thrust of its

⁷⁷¹ *Marbury v. Madison*, 5 U.S. 137 (U.S. Dist. Col. 1803) at 177 as cited in Rotman, *supra* note 749 at 23. In Canada this principle is found in section 52(1) of the Constitution which states: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect.”

explicit text.”⁷⁷² The explicit text also helps to determine what a majority in the province can and cannot do. The provincial and federal governments could not, even with a majority vote or the sanction of their constituents, override the constitution. As the Supreme Court has previously noted, such a majority vote might seem in keeping with the democratic principles which gave root to the constitution.⁷⁷³ However, simple majority rule without the guidance of both constitutionalism and the rule of law can lead to mob rule. As the Supreme Court has characterized it, constitutionalism makes a democratic system possible by “creating an orderly framework within which people may make political decisions.”⁷⁷⁴ We must, therefore, understand duties and responsibilities as expressed in both treaty principles *and* constitutional principles.

Paul L.A.H Chartrand’s work, along with the arguments of the Manitoba Métis Federation, form the nucleus of expressed legal obligations owed to the Métis. I add my voice to that collection below where I consider the arguments of the Manitoba Métis Federation; however, I am more concerned with and will directly assess the duties and obligations identified by Chartrand. Chartrand’s work, unlike that of the Manitoba Métis Federation, is not concerned with producing a particular litigated outcome. The advantage of academic inquiry is that the discourse does not have to be limited by the constraints of litigation strategy. This ensures that the issues can be covered in more breadth and more fairly. This is evident in Paul Chartrand’s pioneering and thorough analysis of the *Manitoba Act* and its consequences. The general critique that I would have of Paul Chartrand’s conclusions is that they are too specific to be directly comparable to duties owed. I cast the duties more broadly. Perhaps this is a consequence of our approach to the material. But it is more likely that this is a result of his work

⁷⁷² *Re Eurig Estate*, [1998] 2 S.C.R. 565 (S.C.C.) at para. 66 as cited in Rotman, *ibid.*

⁷⁷³ *Quebec Reference*, *supra* note 750 at para. 75.

⁷⁷⁴ *Ibid.* at para. 78.

being written two decades previous to my work. I therefore, have much more legal precedent to reflect upon in regards to duties owed to Aboriginal peoples. After a thorough review of the settlement scheme which was adopted and carried out at Red River, Chartrand provides 14 ways in which the government ultimately breached its obligations to the Métis.⁷⁷⁵ This characterization of the specific breaches does not necessarily coincide with duties owed. Indeed, a duty can be breached in several ways. In my opinion, in order to properly and effectively judge government behavior it is necessary, and it is the approach of this thesis, to characterize the duties which are owed *prior* to assessing the settlement scheme which was actually carried out at Red River. Below I set out those duties in only as much detail and precision as is necessary to define them based on what we know from the Negotiated Agreement and the legal framework established above. To do more is to leave no room for government discretion. To do less is to impart no constraint on that discretion.

VI.a. Honour of the Crown: Promises to be Kept

Treaty law, at its very core, invokes the Honour of the Crown. Treaties are exchanges of solemn promises and the Crown is supposed to keep its promises.⁷⁷⁶ At its most restrictive interpretation, the whole of the 1.4 million acres had to be given to the children of the half-breeds. No children could be left out and land distribution totaling less than 1.4 million acres would be considered non-fulfillment. Three of the breaches of obligations identified by Paul Chartrand fall within this category. The first is that the Crown failed “to provide lands by giving scrip as a substitute”.⁷⁷⁷ Here Chartrand is referring to situations where people were given a piece of paper which entitled them to cash or a randomly selected piece of land. It

⁷⁷⁵ Chartrand, *supra* note 1 at 138-149.

⁷⁷⁶ *Ibid.* at 61 [footnotes omitted].

⁷⁷⁷ *Ibid.* at 140 where he writes: “Once the government thought it had granted away the whole of the 1.4 million acres but found that some entitled persons had not received lands, it issued scrip to them instead of lands.”

should be remembered that the land was to be allotted in such a way as to benefit the families. It is questionable how a random allotment could accomplish such a goal. It certainly wouldn't do any favours to the Métis desire to keep their communities intact. One might argue that "benefit of families" means nothing more than that each member of those families received an individual entitlement. However, the same result could be achieved without that language being inserted into the *Act*. Such an interpretation, therefore, denies any meaning to those words (or to the context in which those words found a way into the language of section 31).

Chartrand's second argument in relation to the proper distribution of land is that "the government failed to give lands to all the children of heads of families."⁷⁷⁸ This breach, as Chartrand identifies it, was that the government instituted a restriction on when children were born. This meant that children who were born after July 15, 1870 were not entitled to land under section 31. However, this is not so clear. We know that Ritchot had initially proposed land settlement obligations that would extend over several decades and cover all the Métis children born during that time. This was intended to ensure that the Métis communities would remain intact for future generations. However, the settling of 1.4 million acres indicates that the Métis community as a whole was only to receive a set amount of land. This knowledge does not square well with the perpetual settlement of children of the heads of families. If the children were to be settled as *individuals* for the benefit of families then the government would have every interest and the necessity of dividing the land grant amongst the individuals who were already present. It simply would not be feasible to speculate on how many children were yet to be born to heads of families. The obvious problem with this interpretation is that it is not clear that individual allotment was intended. The *Manitoba Act* stated that the land was to be divided

⁷⁷⁸ *Ibid.* at 142.

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 or otherwise, as the Governor General in Council may from time to time determine.⁷⁷⁹

Is it the children residing in the province at the time of transfer? Or is it the heads of families residing in the province at the time of transfer? Either interpretation could be taken from the wording of the *Act*. The context is key to finding the proper interpretation. The context of the Negotiated Agreement tells us that the Métis intended to protect the land base of their community. It was this central feature of the negotiations and the driving force of the Métis resistance as a whole which must be given weight in interpreting the meaning of the *Act*. Therefore, as part of the distribution of lands “for the benefit of the families” it was imperative that the Crown ensure a land grant for all children of heads of families. After all, other than by technicality of language, how could the government argue that a central feature of protecting the Métis land base was to arbitrarily cut off children born after the time of transfer? A young family might have had 5 children, but with 4 being born after the date of transfer only one of their children would be entitled to land.

The third point made by Chartrand in reference to the land grant was that it was to be granted “for the purposes of settlement only”.⁷⁸⁰ This is obvious from the wording of the *Act* itself which states that the land was to be granted “on such conditions as to settlement or otherwise, as the Governor General in Council may from time to time determine.”⁷⁸¹ The fact that “settlement” is expressly drawn out in the *Act* is significant. While “otherwise” seems open-ended, a proper interpretation of the *Act* reveals that “otherwise” could not have altered the meaning and intention of the *Act*. Indeed, when interpreting statutes it is essential that those

⁷⁷⁹ *Manitoba Act*, s31, *supra* note 29.

⁷⁸⁰ Chartrand, *supra* note 1 at 143 where he writes: “Section 31 intended to provide lands to settle the families of the beneficiaries. It did not intend to provide lands that could be traded in the public market.”

⁷⁸¹ *Manitoba Act*, s31, *supra* note 29.

items which are clearly delineated, such as “settlement”, are clearly similar to those items which are used to expand the section, such as “otherwise”.⁷⁸² In this way, “settlement” as both a term and the intention behind the *Act*, confined the term “otherwise” to those things which are similar to settlement and which advance settlement purposes.

VI.b. *Fiduciary Duties: To Act in a Timely Manner*

Of all the identifiable fiduciary duties the most obvious and most central is the duty to act towards fulfilling the Métis land grant in a timely manner. The reasons for this are twofold. First, with the opening up of the Northwest Territories, Métis lands would need to be secured in order to protect those lands from occupation by incoming settlers. Considering the predictable influx of settlers and speculators, the only way to do this was to effect designation of lands in a timely manner and bring in protective regulations which would ensure all lands had been distributed prior to allowing sales. Second, the land needed to be distributed in order to secure a land base for those children who were already of, or near, the age of entitlement for lands. Without timely granting of such lands, the families and communities would begin to fracture and Métis participation in the economic and political future of the Province would be stifled.

Chartrand’s first cited breached obligation is “delay”. Chartrand argues that “[t]he delay made it virtually impossible to comply with the true object of settling the beneficiaries in communities at their usual places of residence. The community was broken up, dispossessed, and displaced.”⁷⁸³ This related directly to another one of the breaches which Chartrand identifies: “failure to select the lands ahead of incoming settlement.”⁷⁸⁴ In order to select the

⁷⁸² See, Ruth Sullivan, *Statutory Interpretation* 2nd ed. (Toronto: Irwin Law, 2007) at 70.

⁷⁸³ Chartrand, *supra* note 1 at 138.

⁷⁸⁴ Chartrand, *supra* note 1 at 140 where Chartrand writes: “The requirement to distribute lands to be taken from the public lands required that this selection was to take place as an exception, in favour of the beneficiaries, to the general administrative policies respecting the public lands. In other words, section 31 intended to fetter the administration of policy authorized by section 30.”

lands before incoming settlement, the Crown was under a duty to act in a timely manner. Less obvious is Chartrand's related assertion that the Crown breached its obligations by "setting a time limit for Section 31 claims".⁷⁸⁵ Here I think that Chartrand is being too specific. The discretion that is held by a fiduciary does not limit the fiduciary to a particular strategy of implementation, provided that the strategy actually accomplishes its goals and that such a strategy is in the best interests of the beneficiary. If the government was to actually carry out its obligations and set a time limit to facilitate this process then there is nothing wrong with that. However, if the time limit caused the government to fail to reach its goals then it is a method for breaching other duties.

The duty to act in a timely manner reflects the underlying purpose behind the modern duty to consult and accommodate Aboriginal claims. As expressed by the Supreme Court: "To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of that resource. That is not honourable."⁷⁸⁶ In the Métis context, maintenance of honour required that the Crown act in a timely manner so as to not detrimentally impact the Aboriginal claim.

VI.c. Fiduciary Duties: Best Interests of the Children of the Half-breeds

As a fiduciary, the Crown was under an obligation to act in the best interests of the half-breed community. Because the children's land reserve was intended to protect the community, this requirement also involved listening to the desires of the community in determining what the best selection of lands were. It should be remembered that these were lands granted for the purpose of extinguishing "Indian title" and as a result the sui generis nature of the land

⁷⁸⁵ Chartrand, *supra* note 1 at 143.

⁷⁸⁶ *Haida*, *supra* note 455 at para. 27.

surrendered should have played a role in guiding the Crown toward the proper distribution of such lands. In more recent times, Aboriginal title (as it is now called) “has been described as *sui generis* in order to distinguish it from ‘normal’ proprietary interests, such as fee simple...As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.”⁷⁸⁷ Just as the Aboriginal perspective is important in understanding their attachment to their lands for the purposes of proving title, it is equally as important when considering grants which are intended to compensate for the extinguishment of such title. To understand what the Métis sought in exchange for Aboriginal title, it is necessary to look at the Métis perspective. This process of listening informs Crown discretion. Where discretion exists, the Crown is “required to exercise this discretion in the Band’s best interests.”⁷⁸⁸ Canada held a similar discretion in regards to Manitoba Métis lands. This discretion, however, was confined by the terms of the *Act* and the negotiated agreement.

This duty also required that the distribution of the land grant be given priority. It was a grant which was negotiated prior to the incoming rush of settlement and it was, therefore, a grant which should have been distributed prior to the needs of incoming settlers. The point here is reflected by the MMF who explain: “[t]he Crown was bound to serve the interests of the children and not allow those interests to be trumped by the new majority.”⁷⁸⁹ Fiduciary duties cannot be changed at the whim of the changing majority. In this case, it was precisely the fact that a new majority would be coming to the territory which required the protection of the Métis land base.

⁷⁸⁷ *Delgamuukw*, *supra* note 248 at para. 112.

⁷⁸⁸ *Blueberry*, *supra* note 697 at para. 17 per Gonthier J. for the majority.

⁷⁸⁹ MMF Final Argument, *supra* note 136 at para. 714.

In other contexts which invoke fiduciary duties, the Crown was required “to put the Band’s interests first.”⁷⁹⁰ There can be no issues of competing interests in such a situation.

VI.d. Fiduciary Duties: To Distribute Lands for the Benefit of Families

As part of the requirement to act in the best interests of the Métis community, and in upholding the honour of the Crown by implementing the Negotiated Agreement, the Crown was under a duty to distribute lands in a way which benefitted the families. One way to accomplish this goal, which Chartrand identifies, is that the Crown could have considered the choice of beneficiaries in respect of land selection. Indeed, Chartrand saw this as one of the ultimate failures of the Crown’s settlement scheme:

Section 31 gave the lieutenant-governor the exclusive authority to make the selections. The discretion was his to exercise. The background of section 31 shows that the Crown’s ministers promised the delegates of Red River that the choices of the beneficiaries would be respected in order to induce them to accept the Manitoba Bill, and provide a benefit to Canada. This collateral warranty, or common understanding of the parties, is a part of the agreement that must be used to interpret the content of section 31. Thus the lieutenant-governor was required to consider the choices of the beneficiaries in exercising his discretion.⁷⁹¹

Another way in which the distribution of land could benefit the families is by selecting lands which were suitable for settlement purposes. Distributing lands with little value or, more specifically, with little chance of successful settlement, would be a violation of the Crown’s fiduciary duties. However, the dual purposes of section 31 must be kept in mind. Lands were meant for settlement purposes but the location of those lands was to be determined in a manner which would be most likely to preserve the Métis community. This meant giving lands that were

⁷⁹⁰ *Blueberry*, *supra* note 697 at para. 14 per Gonthier J. for the majority. In the context of the duty to consult, this priority can be expressed as a duty to listen and respond to Aboriginal concerns, as it was expressed in *Taku River*, *supra* note 497 at para. 25: “The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them.”

⁷⁹¹ Chartrand, *supra* note 1 at 140.

“close to their existing homes.”⁷⁹² Distributing lands according to their intended benefit was essential to properly disposing of the lands as Aboriginal title lands.⁷⁹³

One area in which Chartrand may go too far in characterizing the nature of the benefit intended by section 31 is in his claim that section 31 was intended to provide a benefit to heads of families. While a “family scheme” was intended, I find that it is not *necessarily* a clear assumption that heads of families were intended to benefit by directly receiving section 31 lands. On the one hand, the heads of families were compensated via claims as existing settlers under the provisions of section 32. It was around these settlements that section 31 lands were intended to be distributed so that the heads would benefit by having their community sustained. While I agree with Chartrand that “Section 31 expressly declared its intention to benefit the families”; and that “[n]o family members were to be excluded from participation”,⁷⁹⁴ I do not agree that this necessarily meant that the heads of families were supposed to receive a portion of section 31 lands as a grant. Families can benefit by having communities preserved through appropriate assignment of the children’s land grant in proximity of their own holdings. On the other hand, the wording of the *Act* can be interpreted in a manner which focuses the granting of land through the heads of families which were present in Manitoba at the time of transfer. How can land be granted through the heads without having those heads participate in the grant itself? Indeed, if we take anything from the reference to the Loyalist grants which was made in Parliament we can

⁷⁹² *Ibid.* at 141 where Chartrand notes that “The Crown gave, to children only, lands randomly selected that were not related to the needs of the beneficiaries to secure land close to their existing homes.”

⁷⁹³ *Delgamuukw*, *supra* note 248 at para. 125 where the Court writes: “The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.” And, at para. 127: “The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. The relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.”

⁷⁹⁴ Chartrand, *supra* note 1 at 142. And at 143 where Chartrand writes: “The historical record shows that no members of the families except the ‘children,’ as strictly defined by federal legislation, ever received the benefit of lands. The heads were given scrip to extinguish their claim to the Indian title. This issue is valid as an additional benefit conferred upon the heads, but it does not affect the breach of obligation arising from the failure to implement the ‘family scheme’ as intended by Parliament.”

see that the parents were given lands plus additional lands based on the number of children they had. As such, it is a reasonable interpretation to argue that the parents should have been entitled to a portion of the 1.4 million acres. Under such a scenario, the majority of heads of families would be entitled to a dual benefit as section 32 protected their current land holdings. This is not necessarily a problem since the heads of families would also need to have their “Indian title” extinguished. It is the communal nature of Aboriginal title which supports Chartrand’s interpretation that all family members were to be included in the grant.

VI.e. Fiduciary Duties: To Protect the Land Grant

In order to ensure that the lands for the children of the Métis were actually able to achieve the goal of settlement, those lands had to be protected from potential violation. While this duty might not seem typical in the sense that it is more general than other fiduciary duties, it is a reflection of the high degree of discretion that was conferred upon the government in the *Manitoba Act*. With the arrival of speculators and immigrants, flipping the lands in Manitoba was an easy way to make a profit. This produced a lively market in Manitoba lands. My assertion throughout this work has been that one feature of the children’s land grant was that it was never intended to be part of a market. As such, the protection of Métis lands included shielding those lands from this market economy. Monetary gain through the sale of lands was not the intention of the land grant. The *Manitoba Act* explicitly mentions settlement and it is toward those aims that protection must be directed. Further, in *Wewaykum*, the Supreme Court of Canada upheld that upon surrender of lands, the Crown is under “a fiduciary obligation to protect and preserve the Bands’ interests from invasion or destruction.”⁷⁹⁵ Having said that, it is not clear if the Court would rely upon such dicta or if it would fall back on a balancing of

⁷⁹⁵ Wilson J. in *Guerin*, *supra* note 241 as cited in *Wewaykum*, *supra* note 699 at para. 100.

interests approach which was outlined just several paragraphs earlier where the Court explained: “The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting”.⁷⁹⁶ The Court goes on to explain that Indians and non-Indian settlers were both vulnerable to the government’s discretion. However, in the case of the Métis, it was government action which facilitated the development of settler interests. Such action was clearly a breach of fiduciary duty because it came at a time when no balancing of interests was necessary. There was an opportunity and a duty to protect the Métis communities’ land entitlement prior to having any conflicting obligations to non-Aboriginal settlers.

It should be pointed out that the balancing of interests approach to Crown duties is seriously flawed. The only way that it can be justified is through largely unfounded assumptions of superiority over Aboriginal people (specifically that Aboriginal peoples are “subjects” of the Crown) and through the denial of prior statements of the Supreme Court advocating a general fiduciary duty owed to Aboriginal peoples.⁷⁹⁷ The greatest utility in adopting such an approach is to lessen potential actions against the Crown by undermining the primacy of Aboriginal interests. This understanding is helpful in coming to terms with the Court’s two-sided application of fiduciary law to Aboriginal peoples. In one moment the Court acknowledges the “general guiding principle” identified in *Sparrow*.⁷⁹⁸ This acknowledgment leads to the realization that the fiduciary duty was slowly acquired as the Crown acquired increasing control over Aboriginal lives.⁷⁹⁹ It is confusing then how the Court can abandon this understanding at the moment that fiduciary duties actually need to be applied. In place of this historic relationship, the Court explains that “[t]he fiduciary duty imposed on the Crown does not exist at

⁷⁹⁶ *Wewaykum, ibid.* at para. 96.

⁷⁹⁷ See *Sparrow, supra* note 442 at para. 1108 where the Court explains that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”

⁷⁹⁸ *Wewaykum, supra* note 699 at para. 79.

⁷⁹⁹ *Ibid.* at para. 79-80.

large but in relation to specific Indian interests.”⁸⁰⁰ These interests are “in the nature of a private law duty”⁸⁰¹ and through sheer neglect and denial the Court has refused to find a meaningful way to implement the general fiduciary obligation set out in *Sparrow*. It is time that the Courts utilize *Sparrow* in the manner which it was intended. It should serve as recognition that broadly defined duties are governed by a broadly defined duty which is no less enforceable.

In Chartrand’s view one obligation which the Crown bore was establishing settlement conditions.⁸⁰² This would ensure that the land could not easily be flipped into the hands of land speculators. It is reasonable to find that the imposition of settlement conditions both supported the purpose of the land grant and protected the land from the larger market. If these lands were meant to be easily converted into non-Métis lands, then the Red River delegates would have been just as well off if they had asked for monetary compensation with which to purchase lands in the new province. It was not the intention of the Métis to secure just *any* land base, but to preserve a particular land base. However, settlement conditions are a specific remedy which is not necessarily justified from the duty itself. Land could be protected and settlement carried out without specifically imposing settlement conditions, or specific settlement conditions. For example, the federal government could have simply created a Métis reserve which would ensure that the land was removed from the market and was not vulnerable to speculators, immigrants, or provincial government interference. They could have taken active measures to advance the farming lifestyle amongst the Métis, such as by providing farming implements, seeds, training

⁸⁰⁰ *Ibid.* at para. 81.

⁸⁰¹ *Ibid.* at para. 83.

⁸⁰² Chartrand, *supra* note 1 at 138 where he writes: “The section 31 lands were meant for settlement purposes only. No settlement conditions were ever imposed on the free, alienable grants which were made. This breach permitted the easy alienation to market speculators....”

etc. as did Treaty 8.⁸⁰³ The discretion that the Crown held ensured flexibility in meeting its goals. While settlement conditions might have been the most efficient or preferable way to accomplish these goals, it was not the only means by which the Crown could protect the Métis land grant. Recall that the *Act* refers to “settlement or otherwise”; this phrase must impart the discretion necessary to protect the land grant and keep it within Métis families. Settlement conditions may be one proper strategy. But these conditions may not necessarily be the only strategy needed, nor the most appropriate strategy at all times, to fulfill the goals of the MMT.

This duty was clearly a duty that rested with the federal power. It was acknowledged that the Métis land grant was to be protected by the Crown and that any lands which were not taken up were to remain Crown lands.⁸⁰⁴ It was also the position of the federal government that the Métis heads of families were NOT to be responsible for the distribution of such lands. While the government could, and should, pay attention to the interests of the Métis, the distribution and regulation of the land grant was reserved to federal government power. The provincial government, as an incantation of the Crown, had a fiduciary duty in the same regard.⁸⁰⁵ But this duty should not have been expressed via regulating legislation. Instead, it should have been expressed by the absence of legislation impacting the land grant.

A similar problem occurs when Chartrand states that the federal government failed “to exercise a Crown discretion in each case”.⁸⁰⁶ This asserted breach is related to the failure of the

⁸⁰³ For more on Treaty 8 see, Dennis F.K. Madill, “Treaty Research Report - Treaty Eight (1899)” Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986. Online at Aboriginal Affairs and Northern Development Canada <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t8/tre8-eng.asp>>.

⁸⁰⁴ Sir George Cartier, May 9th, 1870, Debates on the Manitoba Bill, in Morton, *supra* note 32 at 223-24.

⁸⁰⁵ Chartrand, *supra* note 1 at 138-39 [footnotes omitted] where he writes: “...Parliament, and within its sphere of legislative jurisdiction, the provincial legislature, both had a duty to enact law to protect rights entrenched in the Constitution. The laws which were in fact passed by Parliament and the legislature were designed, or at least, had the effect, of destroying the constitutional interests of the beneficiaries in a community land base...the beneficiaries were forced by government policy and administrative actions to withdraw westward to try to maintain their community and their ways of life.”

⁸⁰⁶ *Ibid.* at 139.

Crown to maintain “supervision over the intended regulated scheme.”⁸⁰⁷ The federal Crown could not, as Chartrand asserts, in effect give up its jurisdiction to the province by granting land in fee simple. This action, which effectively divested the federal Crown of its discretion would, if it came prior to fulfillment of the Crown’s duties, also be a breach of the Crown’s fiduciary obligations. While divesting itself of fiduciary obligations would result in a breach of those obligations, can the same be said for the federal Crown’s failure to exercise discretion in each case? The requirements of the fiduciary depends on the agreement and the level of both vulnerability and discretion present in a given situation. These two things are often directly related. In this case the high degree of discretion also imparted greater vulnerability. In such a situation, fiduciary duties cannot be taken lightly, however, discretion is a results oriented beast. Discretion by its very definition is not easily confined. To adopt Chartrand’s assessment that the government had an obligation “to consider the case of each individual grantee in order to determine what conditions could be reasonably expected to meet the objects of the settlement scheme”⁸⁰⁸ is to provide an effective way in which the government could have met its obligations to the Métis children. However, it is too restrictive to use as a basis for a fiduciary duty because it limits government discretion to only that strategy. While it can be argued that individual allotment would require some individual attention, I am not convinced that each case needed to be individually attended to in order to meet that duty.

One aspect of the fiduciary duty to protect the land grant is protection from government abuse. This goes to the heart of the fiduciary duty. Fiduciary duties are enforced precisely to ensure a standard of conduct in order to protect the vulnerable party. This includes the Crown’s appropriation of lands intended for the purposes of settling section 31 rights. In terms of amount

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *Ibid.*

of land to be granted, the *Manitoba Act* was quite clear. 1.4 million acres needed to be distributed and government could not simply claim these lands for its own purposes or the purposes of the immigrants. Fiduciary duties require that the fiduciary not only protect the vulnerable interest from other competing interests but also that the fiduciary itself does not take advantage of the vulnerable party.⁸⁰⁹

VI.f. *Constitutional Obligations: The Consequences of Enshrining the Negotiated Agreement*

The wording of the *Manitoba Act* displays how the Crown intended to honour its obligations set out in the Negotiated Agreement. The significance of the constitutionalization of the Negotiated Agreement, is “to protect the rights to the benefit of the scheme from ordinary legislative interference.”⁸¹⁰ More generally speaking, by enshrining the provisions in the *Manitoba Act* the Crown displayed a commitment to honour the Negotiated Agreement.⁸¹¹ Orders-in-Council were going to direct the discretionary powers of the Lieutenant-Governor. The Orders-in-Council were themselves an expression of discretionary power. However, both locations of discretion were confined and informed by the Negotiated Agreement. Where the MMF might argue that “[t]he regulations laid down in Orders-in-Council made under s. 31 should have been designed to ensure that the Crown’s fiduciary duty under s. 31 was observed”⁸¹² they are not going far enough. The Crown had a constitutional legal *obligation* to honour the Agreement that was enshrined, in part, in section 31. The Orders-in-Council were legally required to facilitate the purpose of the *Act*. Orders-in-Council were, through the “Governor General in Council”, not placed in the *Manitoba Act* with an absence of context. Not

⁸⁰⁹ *Ibid.* at 144 [footnotes omitted].

⁸¹⁰ *Ibid.* at 110.

⁸¹¹ The same purpose can be seen in section 35 of the *Constitution Act, 1982*, *supra* note 35 in the context of Aboriginal rights.

⁸¹² MMF Final Argument, *supra* note 136 at para 717.

only does the wording of section 31 provide a limiting context for such Orders, but so does the Negotiated Agreement that section 31 was, in part, attempting to implement. It seems obvious, but it is worth pointing out that “[t]he British Parliament could not have contemplated that the rights in section 31 would be placed at the discretion of the Canadian Parliament to respect or to destroy.”⁸¹³ It was not the intention of the Canadian Parliament, or the British Parliament which confirmed the actions of Canada, to make and then break commitments to the Métis. To do so would be to dishonor the Crown. Without clear and plain intention such an interpretation is simply not possible.

VI.f.1 *Constitutional Constraints on Crown Superiority*

During the period of the administration of the Métis treaty of 1870, Crown superiority was clearly intact. This superiority included the power to extinguish Métis treaty rights. Crown prerogative was only constrained on three fronts. The first of these constraints was upholding the honour of the Crown, which operates as an interpretive principle for the courts to assess Crown action. Honour of the Crown can also lead to enforceable duties. The second constraint was that the Crown must act in a manner consistent with its role as a fiduciary. These were discussed earlier. The third constraint on Crown superiority over treaty rights is found in the constitutionalization of the Negotiated Agreement. This brings with it enforceable legal obligations, as well as rules governing the division of powers.⁸¹⁴ Provincial laws of general application can apply to Indians but provincial laws may not act against treaty rights. While this principle was encompassed in *Indian Act* legislation which post-dated the critical time of

⁸¹³ Chartrand, *supra* note 1 at 115. Chartrand continues: “In fact, it has been noted that the British Parliament withheld power from Canada to legislate for Rupert’s Land until provision was made for the protection of the rights of British subjects in the territories.”

⁸¹⁴ *Ibid.* at 119. Where Chartrand writes: “The federal powers to implement section 31 are derived from the section itself, and the section operates to modify and constrain the exercise of any other federal legislative or executive powers by requiring compliance with its terms.”

administration of *Manitoba Act* grants, the legislation was reflective of a prior common law rule that responded to the tensions found in the division of powers. There is no passive way to dismiss Aboriginal and treaty rights. The federal government's failure to take action against or in favour of treaty rights would merely give rise to a contemporary legal claim against the Crown. What is evident is that merely because the Crown maintains superiority over Aboriginal and treaty rights, it is not empowered to simply ignore obligations.⁸¹⁵

One constraint brought on by the constitutionalization of the *Manitoba Act* is the ability to amend it: "Parliament has no power to amend section 31, although it has a power to *implement* its provisions...On the basis of the principle that an enactment is subject to amendment or repeal only by its enacting legislature, then only the British Parliament could have power to amend or repeal the Act."⁸¹⁶ But this point isn't so clear. Because the Parliament of *Canada* enacted the *Manitoba Act* in 1870, by Chartrand's own logic, Canada would have been entitled to amend the *Act* up until the *Constitution Act, 1871* was passed by the U.K. Parliament. As such it is plausible that amendment to the *Act* was within the federal Parliamentary power prior to the *Constitution Act, 1871* but not thereafter. On the other hand, any such amendment would be obligated to remain responsive to the MMT unless a "clear and plain" intention is shown to violate or circumvent or extinguish that agreement. Without power to amend through either federal or provincial legislation, the Crown's only alternative was to take "positive federal action for its implementation."⁸¹⁷ As described below, this power extended to provincial jurisdiction.

The inability to amend the obligations in the *Manitoba Act* extended to Orders-in-Council which

⁸¹⁵ *Mikisew Cree*, *supra* note 497 at para. 48 where Binnie writes for the Court: "There is in the Minister's argument a strong advocacy of unilateral Crown action (a sort of 'this is surrendered land and we can do with it what we like' approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect."

⁸¹⁶ Chartrand, *supra* note 1 at 116.

⁸¹⁷ *Ibid.* at 119 where Chartrand continues: "The ambit of the obligations in section 31 describe the limits of the implementing powers, and to stray over the boundary, by intention or by effect, is amendment, not implementation, and accordingly results in the invalidity of legislation."

were used throughout to implement policy which ultimately violated the commitments undertaking in the MMT. Even though discretion is imparted through Orders-in-Council, these orders could not circumvent the purpose of their enabling legislation. Examples of this being the case, will be explored in chapter six.

VI.f.2 Provincial Laws

As covered above, it is questionable whether the provincial government was ever intended to be the recipient of jurisdiction over the Métis land grant. The mere granting of individual titles does not explain the legal transfer of titles from the federal Crown to provincial jurisdiction. What is clear is that *at the very least* the province was not in a position to amend section 31, or legislate in regards to the land prior to the federal government granting titles.⁸¹⁸ The powers of the province were limited not only by the clearly asserted jurisdiction of the federal Crown found in section 31, from the Métis understanding of the MMT, and possibly supported by section 91(24), but it was also limited by the fact that the Métis lands were ungranted and carried a continuing responsibility that those lands be kept in Métis families. Further, since the federal Crown assumed jurisdiction over ungranted lands in the creation of Manitoba, these lands remained in federal jurisdiction unless patented or until the *NRTA*'s of 1930. The question for considering provincial jurisdiction then becomes: "Does the act of providing grants also transfer lands from federal to provincial jurisdiction?" If it does, what are the province's responsibilities after the grant has been made? As a Crown entity the provincial Crown would also carry the responsibility to legislate in a manner that upholds the purpose of the grants: "section 31 was intended to protect the Métif of future generations in the occupation of their lands from the speculative designs of the large immigrant influx anticipated in 1870, to

⁸¹⁸ *Ibid.*: "...the legislature of the province has no power to amend section 31. In fact, it has a constitutional duty to legislate for the protection of the rights of the beneficiaries of section 31 in areas within its legislative competence."

follow from annexation.”⁸¹⁹ Again, these duties were expressly reserved to the federal government.

VI.f.3 Fiduciary Duties: Restricting Provincial Laws as an Application of Federal Power

The Manitoba Métis Federation saw the fiduciary duty as leading to quite specific outcomes: “Canada’s fiduciary duty to the Métis children imposed a duty on it to disallow any provincial legislation which enabled sales of section 31 lands prior to grant, or which singled out Métis children to facilitate their ability to sell their land before they reached the age of majority.”⁸²⁰ The MMF puts forward the idea that it was the federal government’s duty as fiduciary to disallow provincial legislation which promoted the dispossession of Métis from their land grant.⁸²¹ And, the MMF asserts that, the federal government failed to use this power in regards to other pieces of provincial legislation:

all of the subsequent provincial measures allowing sale of section 31 lands before grant, allowing infant Métis to sell without a court order, and regularizing irregular sales, were allowed to stand by Canada, even though they were contrary to the interests of the Métis, interfered with federal property and federal obligations, and thus were contrary to Dominion interests.⁸²²

A similar idea can be found in *Blueberry River*, where the Court discussed the fiduciary obligation to correct errors:

Where a party is granted power over another’s interests, and where the other party is correspondingly deprived of power over them, or is ‘vulnerable’, then the party possessing the power is under a fiduciary obligation to exercise it in the best interest of the other ... Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band’s minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.⁸²³

⁸¹⁹ *Ibid.* at 122.

⁸²⁰ MMF Final Argument, *supra* note 136 at para. 1200.

⁸²¹ *Ibid.* at para’s 1201-1211.

⁸²² *Ibid.* at para. 1210.

⁸²³ *Blueberry*, *supra* note 697 at para. 115 per McLachlin J. (as she then was) for the minority.

If the fiduciary recognizes a mistake, or fails to act with “reasonable diligence,” the duty extends to correcting such errors.⁸²⁴

The MMF contends that since the federal government was well aware of the consequence of this legislation, failing to disallow the legislation “can only be seen as the result of its desire that the lands pass out of the hands of the Métis.”⁸²⁵ In this way, the MMF argument implies that the federal government knew the consequences of its actions and planned to dispossess the Métis of their rightful claim. Imparting a theory of specific intent upon the federal government is difficult. This is due to the nature of government bureaucracy and the resulting patchwork of evidence relating to intent. What the minister of one administration says may not convey the intent of the minister who follows. However, even if one were to observe large swings in the intentions of government, the one thing that remains consistent is the duty(s) owed by the Crown to Aboriginal peoples:

The matter comes down to this. The duty on the Crown as fiduciary was ‘that of a man of ordinary prudence in managing his own affairs’... A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.⁸²⁶

This is why the MMF asserts that the historic “documents show that an agreement was reached which was intended to be binding. The fiduciary duty assumed under s.31 was the means by which the Crown was to implement the agreement.”⁸²⁷ This assessment seems somewhat contradictory. On the one hand, the MMF rely upon the negotiations to show a binding agreement and, on the other hand, the MMF ties the fiduciary duty to section 31 of the *Manitoba*

⁸²⁴ *Ibid.* at para. 22 per Gonthier J. for the majority where he writes: “As a fiduciary, the DIA was required to act with reasonable diligence. In my view, a reasonable person in the DIA’s position would have realized by August 9, 1949 that an error had occurred, and would have exercised the s. 64 power to correct the error, reacquire the mineral rights, and effect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA’s fiduciary duty to deal with I.R. 172 according to the best interest of the Band.”

⁸²⁵ MMF Final Argument, *supra* note 136 at para. 1211.

⁸²⁶ *Blueberry*, *supra* note 697 at para. 104 per McLachlin J. (as she then was) for the minority.

⁸²⁷ MMF Final Argument, *supra* note 136 at para. 256.

Act. The fiduciary duty is a specific duty tied to obligations undertaken by the government. It is a duty that arises when the Crown opts to undertake the responsibility for an interest other than their own and imparts upon that person or group a vulnerability which can be exploited via Crown discretion. This duty was undertaken not through section 31, although it was certainly *confirmed* in that Act, but rather the fiduciary duty was undertaken when the Crown exchanged commitments with the Métis representatives. This exchange of promises placed the Métis in a vulnerable position in regards to the federal government (which held discretionary power over the Métis interest) and the Provincial government (which once later established presumed to have power over the Métis interest). It was in reliance on these promises that the Métis disbanded their Provisional Government and relinquished control over the territory and discretionary power over their own interests to the Crown. So, the question about whether the federal government had a duty to restrict provincial legislation must be answered in the affirmative. However, this should not be meant to imply that the province did not also have a duty to ensure that the Métis lands were distributed in a way which fulfilled the promises stemming from the negotiations. The province had a duty as an incarnation of the Crown, to protect those lands, or at the very least, not to hinder the proper distribution of those lands prior to grant.

VII. Conclusion

In contrast to Paul Chartrand's conceptions of obligations breached, the MMF cites three responsibilities incumbent upon the Crown: "to act promptly, to distribute the land in family blocks or clusters; and to impose restrictions on alienation."⁸²⁸ Although not referring specifically to the fiduciary duty, I would submit that these more general duties are in keeping

⁸²⁸ MMF Final Argument, *supra* note 136 at para. 642.

with the federal government's actual fiduciary duties. Certainly, despite my argument with the origins of the fiduciary duty, the MMF's assertion that "the Act provided that the means of implementation were to be set out in the regulations made pursuant to the Crown's authority under s. 31" speaks to the fundamental tenets of fiduciary duty in this case; the discretion of the Crown and the vulnerability of the Métis to that discretion.⁸²⁹ Indeed, the impact of the location of the origins of the fiduciary duty is limited to purely academic inquiry for the following reasons. The timeline of the negotiations shows that both oral and written terms (the Manitoba Bill) were part of the agreement with the Métis delegates. This means that the interrelatedness of the two loci of duty must be considered together. As the MMF correctly puts it: "the discretion conferred by s. 31 was 'informed and confined' by the agreement reached between Macdonald and Cartier and the delegates from Red River."⁸³⁰ Still, and not to belabor the point, the importance of the negotiations can only be properly attributed if we also assign the correct legal outcomes to the negotiations themselves. The MMF argues that "the fiduciary obligation here arose by statute, and was informed and confined by the agreement reached between the delegates and Macdonald and Cartier."⁸³¹ What if there was no statute? What if the Métis merely walked away with the assurances of Cartier and Macdonald thinking that they had an agreement to secure Métis lands? Let's assume that the promises for the Métis children were to be implemented entirely through Orders in Council and that they were not confirmed in the *Manitoba Act*. Do the promises fail to exist? Do the perceptions of the Métis, who would later ratify that agreement, not indicate that promises were undertaken? I would argue that the fiduciary duty arose when Cartier and Macdonald assured the Métis representatives that the children of the Métis would receive land. The reason for this is that the land for the children was

⁸²⁹ *Ibid.* at para. 643.

⁸³⁰ *Ibid.* at para. 654.

⁸³¹ *Ibid.* at para. 659.

an exception after the fact of transfer. The whole of the territory would be transferred peaceably if the Métis children received a portion of it. If, instead, the Métis asserted that they would transfer the land with the exception of specific parcels of land to be reserved for the children, one might argue that all duties rested with the Métis. It would have been the Métis duty to select lands, secure those lands, enforce the transfer to Canada, and protect incoming immigrants until the full transfer was complete. However, this was not the case. The Métis understood the urgency which Canada held towards acquiring the Northwest and they facilitated that desire by merely transferring the whole territory in exchange for assurances that the Métis children would receive land. This exchange, and the specific promises which defined it, required the Crown to act with loyalty and care in fulfilling the terms of the exchange.⁸³²

The Crown certainly showed intention to act with such loyalty and care. This is evident from the *Manitoba Act* itself, which was intended to implement the agreement reached with the Red River delegates while at the same time facilitating the legal establishment of the new province (and the will of Parliament). Indeed, this intention is a reflection of the Honour of the Crown. The MMF points out that:

[t]he very language of s. 31 connotes a fiduciary duty. Section 31 established a duty towards children, a duty arising out of the extinguishment of the Aboriginal title which, but for the *Manitoba Act*, they would continue to have enjoyed. Moreover, the duty was a duty owed to the Métis children: they were to receive the grants as the culmination of the process of appropriation, selection, division and granting of land “to the said children respectively”.⁸³³

⁸³² *Blueberry*, *supra* note 697 at para. 38 per McLachlin J. (as she then was) for the minority. Here McLachlin refers to *Frame v. Smith*, [1987] 2 S.C.R. 99; *Noberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 where she writes: “Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second ‘peculiarly vulnerable’ person. ... The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.”

⁸³³ MMF Final Argument *supra* note 136 at para. 662.

The duty under section 31 was not limited to the Métis children. By acknowledging that the land distributed to the children was to be distributed for the benefit of families, section 31 also spells out a duty to the broader Métis community. So when the MMF argues, quite correctly, “that under s. 31 the Crown had dominion over selection, division and granting”⁸³⁴ this dominion must be read in connection with the duties undertaken as fiduciary. Rather than being interpreted as meaning that dominion over selection, division and granting gives the Crown the jurisdiction to do as it pleased without any constraint, the fiduciary duty ensures that Crown action must be directed at upholding its honour and fulfilling duties owed to the Métis. The agreement with the Métis was, at its core, a simple agreement; it was an effective agreement and a mutually beneficial agreement. The agreement and negotiations should stand as one of Canada’s great accomplishments with Aboriginal peoples. Similarly, as I argue later, the failure to implement that agreement remains one of the great injustices that Canada has brought Aboriginal peoples.

⁸³⁴ *Ibid.* at para. 664.

CHAPTER 6: A TREATY DISHONoured

The bottom line is that our cause has moved forward. I realized that in '69, we started defending our rights with a handful of men; a few months later, half of the colony was already on our side; in March 1870, the entire colony was actively corroborating our cause; and eight months following the serious beginning of our fight, we obtained the sanction of all our rights by way of *a treaty that became law*. To be honest, we suffered because this treaty was violated, but again, the violation of the treaty by Canada has gradually garnered sympathy for our cause from the North West, so that today, Canada's entire Métis population in Manitoba and in the North West understands one another without having to resort to regular or express communication between various groups. Furthermore, all of Québec is now defending our cause more vigorously than ever. I can almost say that our cause is agitating the Canadian Confederation from sea to sea. Every day, our cause prevails and there will be no denying it.⁸³⁵ – Louis Riel, May 27, 1874

I. Introduction

The most contentious term in the Manitoba Métis Treaty (MMT) is the reservation of 1.4 million acres to the children of the “half-breeds”. That section is not worded in an unambiguous manner and the negotiations leading up to that section produced conflicting evidence as to what was agreed upon. Nonetheless, it is acknowledged, even by government experts, that Ritchot and the Métis understood that section 31 would result in the protection of Métis enclaves within the new province of Manitoba.⁸³⁶ There are several obvious problems with how the MMT was implemented. First, the duty to act honourably was not upheld by the Crown. Second, there was a tremendous amount of delay in distribution. Third, the actual distribution was not carried out in full or in accordance with either the wording of the *Manitoba Act* or the spirit or terms of the negotiated agreement. Fourth, in contravention of the federal government's duty as fiduciary, the Métis land grants were not protected from transgressions by new settlers or from government policy. Depending on the distribution requirements, the Métis heads of families may have had a reciprocal duty, akin to a trustee, to hold the land intended for their children in a manner which would benefit the family. This reciprocal duty would only arise once the land was distributed,

⁸³⁵ Riel to Dubuc, May 27, 1874 Exhibit 1-1001 as cited in MMF Final Argument, *supra* note 136 at 1026 (emphasis added).

⁸³⁶ Flanagan, *supra* note 7 at 229.

and if it was distributed in a manner which acknowledged that the Métis heads of families were to hold the land in trust for their children. There are indications that such a duty was not contemplated by the federal government which alone had assumed the necessary jurisdiction to effectively distribute the land to the children.⁸³⁷ As such, this chapter will focus on the government's duties and constitutional responsibilities as outlined in chapter five and make an assessment on whether or not those duties were met. As indicated above, it is the position of this chapter that government duties were not met in several significant ways.

This chapter has an emphasis on particular sources. Because I am passing judgment, and some of the arguments raised by the government and the MMF are undoubtedly related to the tests which I have set out in the previous chapter, several sources will be emphasized in this chapter. The final argument of the MMF is the source that I will consult for the primary documents. It is convenient to reference because it contains a great number of primary documents, but also because these citations can be easily checked via paragraph number. I have, therefore, attempted to cite the primary sources to that document whenever possible. The MMF Final Argument will also give insight into the arguments of the Manitoba Métis Federation. To balance that influence I have chosen the primary expert for the Crown's defence, Thomas Flanagan and his book *Métis Lands in Manitoba* as the main source for counter-opinion. Finally, I have picked a neutral academic source to ensure that I am not merely jumping into one of the litigation camps. That source is Paul Chartrand's *Manitoba's Métis Settlement Scheme of 1870*. While these are not the only sources used in this chapter, they are the key sources that I have

⁸³⁷ Primary evidence is provided later in this chapter. For a similar assessment which relies upon the *Manitoba Act*, see MMF Final Argument, *supra* note 136 at para. 37 where the MMF writes: "37. We know that, unlike in s. 22 and s. 23, the Government decided – and Parliament enacted accordingly – that since the full intent had not been set out in s. 31 the Governor in Council should have complete discretion, acting through the Lieutenant Governor, to implement the children's land grant provisions." Also see, draft Memorandum to the Minister of the Interior from Dennis, December 17, 1873, *Exhibit 1-0936*, in MMF Final Argument at 1018 where the MMF explains that Dennis "presumed that the Crown would hold this residue as 'trustee for those children.' In this he was correct. But it follows that the Crown was already trustee for all the children."

used to ensure that the tests that I outlined are assessed fairly. It should be noted that while my analysis is most sympathetic to Chartrand's views, I take issue with each of these sources in the pages that follow.

II. Honour of the Crown: Promises to be Kept

It has been argued in chapter five that the principle of the Honour of the Crown required the Crown to uphold its promises. While Flanagan has made the argument that the Crown overfulfilled its obligations, the question of which obligations it was fulfilling was not adequately canvassed in his research. After reading Flanagan's work Ogden Nash's expression came to mind: "We're making great progress, but we're headed in the wrong direction."⁸³⁸ Those who follow Flanagan's conclusions might not be aware that they are not actually studying anything in particular. Instead, they are merely reading coalated and dissected historical tidbits. Indeed, in the very last paragraph of his book he explains that the "real issue is whether the Metis should have been treated this way a hundred years ago ... or whether they should have been treated paternalistically, as our law has treated the Indians." He explains that "[t]his book will serve its purpose if it clarifies the historical record, thus allowing the real question about the Metis to come to the fore."⁸³⁹ If Flanagan wasn't studying the real issue, then what was the point of his book? Indeed, without looking at real questions how can the historical record be clarified? What is it that he is clarifying when he makes judgments such as: "[t]he evidence assembled in this book shows that the federal government generally fulfilled, and in some ways overfulfilled, the land provisions of the Manitoba Act"?⁸⁴⁰ Flanagan asserts that Ritchot's conception of the agreement differed from that of Canada's representatives. Whereas I have argued that, at least

⁸³⁸ Ogden Nash as cited in Fred A. Baughman Jr., MD and Craig Hovey *The ADHD Fraud: How Psychiatry Makes 'Patients' of Normal Children* (Victoria, BC: Trafford Publishing, 2006) at 22.

⁸³⁹ Flanagan, *supra* note 7 at 232.

⁸⁴⁰ *Ibid.* at 225.

for a time in the negotiations, Macdonald and Ritchot seemed to agree that the land would be kept in Métis families, Flanagan sees no meeting of the minds. Instead, he argues that Ritchot envisioned a “French Metis enclave” and that the government was focused on “conferring a series of discrete benefits upon Metis individuals”.⁸⁴¹ Despite the recognition that Ritchot and the Métis had a different vision of the *Act*, Flanagan gives absolutely no interpretive power to the Métis vision. In coming to his conclusion that the terms were overfulfilled, he doesn’t use the Métis interpretation of the terms either in whole or in part. As a result, his analysis is a hollow shell. One can look at deception more broadly and argue that, if we disagree, then either Flanagan and Ens’ work is deceiving for how it interprets and weighs material or my work is deceiving on the same points.⁸⁴² While I believe that, at least from a legal perspective, my position is the more reasoned of the two, I also believe that Flanagan’s position is more politically and intellectually expedient for the courts. My faith in the legal system is not an issue that I will debate here but it is worth pointing out the obvious; researchers who utilize the same biases in interpretation that the custodians of the courts are likely to use, are more likely to be understood and adopted in the courts’ judgments. Those of us who feel that the Métis perspective must be given value in the law will, no doubt, look at the evidence from the Métis perspective. Unfortunately, Canada’s courts have consistently shown an aversion to that perspective.

In regards to the principle of the honour of the Crown, we need to examine whether or not the Crown kept its promises. To answer that question we need to understand what promises were made. In looking at the historical evidence, it is reasonable to conclude that different time and circumstance will produce different answers. Indeed, self-interest may encourage the

⁸⁴¹ *Ibid.* at 229.

⁸⁴² See Appendix A for a more direct treatment of Flanagan and Ens’ research.

person(s) who hold discretionary power to alter their commitments once they have leeway to do so, so long as they can get away with it. For example, the Peace and Friendship Treaties of eastern Canada were lost to Canada's consciousness for an extended period of time. In contrast, those who are vulnerable might be likely to remember what it is that they did not receive. Whether this postulation is correct or not in the present circumstance, it is used only by way of emphasizing that the Métis interpretation must be taken into account when understanding those promises. Once we look at that interpretation, we see that it was not land for Métis individuals to enjoy as private land owners without any restrictions, but that these were lands set aside for "the benefit of families". There is no doubt that the "benefit of families" is an ill-defined clause. But it *can't* be that this phrase has no meaning whatsoever.⁸⁴³ Indeed, the meaning that it has is directly linked to the common understanding of Macdonald and Ritchot on this same point; that the Métis land grant is meant to be kept within Métis families. The benefit of families clause which Flanagan treats as being inconsequential would coincide nicely with his conclusion that the Métis were seeking "enclaves" in Manitoba.

The easiest way to honour this commitment would be to ensure that parents and their children can settle on lands immediately connected, or within a reasonable proximity to each other. The issue of parents settling on the "children's" land grant is a tough one. Imprecise language has led many, including courts and researchers like Flanagan, to interpret the *Act* using their own cultural biases. These biases act as the default position so that when the interpretation of the *Act* comes up, it is taken to mean the closest thing that a literalist interpretation would allow. This can be seen as taking the *Act* and interpreting it *only* according to its plain language. But, as mentioned above, and argued in chapter five, section 31 is anything but plain in its

⁸⁴³ Flanagan, *supra* note 7 at 8-9 seems to adopt an either/or interpretation of section 31. Either it is about the "benefit of families" or it is about the 1.4 million acres being divided amongst the children (at the full discretion of the Crown).

language. Such plain language, or literalist, interpretations usually completely reject, or effectively impart no meaning to the “benefits of families” clause. As was argued previously, reference was made to both Macdonald and Ritchot’s agreement on this point, but an alternative, or complimentary, interpretation would look at the reference made in Parliament to the Loyalist grants. It was under this system of grant that the head of the family would get a parcel of land and additional lands would be granted to that parent according to the number of children that he had. So we are left with several options. Either the land could be distributed to children only, in connected lots, with parents having a right of residency so that they can hold the land until it is to be distributed to their children. Or, the parents are granted a plot of land and the family is then given additional lands according to the number of children, in immediately adjacent lots, or reasonably proximate lots. Or, alternatively, only the children would be entitled to land or occupancy. In each case the “benefit” to the family would be reflected in clauses which kept those plots together in family blocks and which kept the lands within Métis families. Any of these interpretations would most likely be acceptable but allowing the parents land or occupancy rights seems much more feasible in practical terms and responsive to the “benefit” clause in section 31.

On the question of the meaning of the word “children”, Chartrand writes:

The Act itself made no specific provision on this question. It set no limits except that the children had to be born of a parent resident in the province in 1870. The regulatory power of the government, in these circumstances, had to be engaged in a manner calculated to promote the settlement objects of section 31.⁸⁴⁴

To meet this standard, Chartrand offers:

All the members of ‘families’ in the extended sense who resided in the province in 1870 would have received a benefit. All descendants have had access to a share of the group allotment because each child of every ‘Half-Breed’ person who was a head of family in 1870 would have received a grant.⁸⁴⁵

⁸⁴⁴ Chartrand, *supra* note 1 at 49.

⁸⁴⁵ *Ibid.*

The opposition to the inclusion of the heads of families from Ritchot and Riel is a fairly strong counter to the notion that the heads of families were to be included. If they are excluded as heads of families they cannot be brought in on the basis that most heads are themselves children of other heads of families. The distinction between the two terms within section 31 would presumably operate to ensure that claimants couldn't claim to be both a child and a "half-breed" head of family. Still, it is evident that all children were to be included, regardless of whether they were born before or after the date of transfer.

The actions of the federal government immediately following transfer support the general interpretation that the heads of families were to be included in the "children's" land grant. This was a mistake which the MMF characterizes as being in contradiction to "the plain wording of section 31."⁸⁴⁶ However, when the section is read in its entirety section 31 is anything but plain. After a period of time, the government changed the system of allocation due to a literalist reading of the legislation and advocacy from Ritchot himself.⁸⁴⁷ However, initially Macdonald was not convinced. He called the *Act* "ambiguous in that respect" noting that the heads of families also shared in Indian title and needed to have their Indian title extinguished as well.⁸⁴⁸ Likewise, Lieutenant-Governor Archibald, in setting out some recommendations for the implementation of section 31 observed that "[i]t is difficult to understand exactly what several expressions in this clause mean."⁸⁴⁹ Macdonald came around and soon the system of allotment

⁸⁴⁶ MMF Final Argument, *supra* note 136 at para. 990.

⁸⁴⁷ Flanagan, *supra* note 7 at 78 explains: "Ritchot was in Ottawa working behind the scenes to get the adults excluded from the land grant." Also see, the MMF Final Argument, *ibid.* at para. 995 where they explain that "On February 10, 1873 Morris sent a telegram to Macdonald advising that the provincial legislature was proposing to prevent heads of families from selling allotments." That telegram explained that the "... pretension is that only actual children have rights, therefore heads are trustees." It would appear that the inclusion of heads of families had widespread opposition.

⁸⁴⁸ Macdonald, as cited in Flanagan, *supra* note 7 at 77 in footnote 61.

⁸⁴⁹ Chartrand, *supra* note 1, Appendix 9, at 201.

was changed as a result of the exclusion of the heads of families. This change in policy turned the ambiguity into an anomaly. Chartrand explains:

The federal government took the view that the benefit intended by section 31 was a grant of estates in land only to the children. By so doing, it had come to terms with the anomaly of a grant, given to extinguish the claims of a group, being implemented by granting a benefit only to a part of the group. All members of families who were not children received no compensation.⁸⁵⁰

And, therefore, in 1874, the federal government passed a statute which “granted 160 acres of land to each head of family.”⁸⁵¹ It is most reasonable to conclude that the promise to be kept was that the land would be granted to the Métis in family blocks, either through the heads of families to hold for their children (with occupancy or property interests also residing in the parents) or only to the children with the federal government assuming the protective duty to those children’s lands. Whether the parents have usufructuary or proprietary interest in section 31 lands or not, the “benefit”, at the very least would coincide with the protective legislation which both Ritchot and Macdonald seem to have agreed to during the negotiations. As such, these lands were never intended to be part of the open market,⁸⁵² and legislation was to be passed which would ensure that these lands remained in the hands of Métis families.

The government did not carry out a land allocation policy which followed anything close to this. Instead, lands were granted in fee simple. Land sales were effectively encouraged by allowing these lands to be traded before patents were issued. Lands were made available to the general market which was directly against the intentions of the Métis negotiators. Lands were granted in random allotment which ensured that there was no benefit for families but only for individuals. As well, parents were excluded from the section 31 grant which ensured that there

⁸⁵⁰ *Ibid.* at 34.

⁸⁵¹ *Ibid.* at 34 in reference to *An Act respecting the appropriation of certain Dominion Lands in Manitoba*, S.C. 1874, c. 20 (37 Vict.).

⁸⁵² On the relevance of the market in lands, the MMF Final Argument, *supra* note 136 writes at para. 56: “There has been a lot of evidence about the sale of allotments. It is important evidence because it shows that the scheme for settlement was not implemented. The majority of the 6,034 grants had already been sold before the grants were issued. There were an additional 993 children who received no land at all; instead they were given scrip (“Canadian Tire Money”).”

was virtually no benefit *for families* but, even after parents were compensated for their unextinguished title, the benefit was focused on individuals. At times children were given no land but were only given scrip. As a result, some of the children never received an allotment. None of these violations is based on arguing that there was any malevolence or ill-intention in the government. There doesn't need to be. There doesn't need to be mass fraud amongst the purchasers or speculators. There only needs to be an action which carried out the distribution in a manner that the MMT did not account for. While government discretion left room for varying strategies, those strategies had to be true to the nature of the agreement. There is no possible way that the method that the government chose to issue the lands reflects the intention of the Métis treaty partners. That much is certain.

In addition to the above, only some children were given an allotment because the *Act* was read in a restrictive manner such that only children born at the time of transfer qualified for land. This was clearly not intended in the wording.⁸⁵³ The key phrase in section 31 of the *Manitoba Act* reads as follows: "...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..."⁸⁵⁴ The question is, are only the children who were residing in the province at the time of transfer eligible for lands? Or, are all the children of the heads of families who resided in the province at the time of transfer eligible for the land? I would submit that it is quite obvious from the choice to include any mention of heads of families that the time of residency was linked to those heads and not the children. The consequence is that a relevant census would only give a rough estimate, at best, of the actual number of children who qualify for lands because heads of families could yet produce

⁸⁵³ Chartrand, *supra* note 1 at 46 where Chartrand writes: "Parliament did not see fit, in choosing words to fit the scheme of land distribution it contemplated in Manitoba, to stipulate that only *some* children of heads of families were to be entitled to a division, and that birth by any particular date was to be a condition precedent to entitlement."

⁸⁵⁴ *Supra* note 29.

eligible children. As a result, the distribution would have to be a gradual one as children came of age.⁸⁵⁵

But the honour of the Crown goes to other issues as well. I have argued that the MMT represents the clauses which would have reflected the interests of the Métis *as Métis*. The children's land grant was the central clause, however there were other clauses which served this purpose. The following are the clauses which were a burden on the honour of the Crown to uphold as part of the MMT:

- The Crown must keep the land within the Métis families. Fulfilling this promise would keep the lands within the jurisdiction of the federal government as it was an ongoing obligation.
- The entirety of the 1.4 million acres had to be distributed. And, all heads of families *could be* included in this distribution in some manner.
- The land had to be located in family groupings. This is a recognition that the land was for the purpose of settlement (eg establishing the next generation of Métis in their own community). That is why the land was for the settlement of children.⁸⁵⁶
- The amnesty was to be given. This assurance would allow the Métis leadership to continue to advocate for their people in ensuring that their rights were respected.
- Both the French and English languages were to be equally represented.

⁸⁵⁵ See, Chartrand, *supra* note 1 at 49-50 where he writes: "... the children who were entitled were indeed those who were born *at the time of the distribution*, but the time of the distribution was subject to the discretionary exercise of the federal government's regulatory power, and that power would have been exercised in a manner that promoted the gradual settlement objects of section 31 if it had required the distribution to be made at such times as were appropriate, in individual cases, to include all the children born of 1870 resident heads of families."

⁸⁵⁶ Continuity is a key factor in other treaties. One example can be found in *Mikisew Cree*, *supra* note 497 at para. 47 where the Court writes: "*Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' right to hunt, fish and trap would continue 'after the treaty as existed before it'. This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines."

- Separate schools for both of the dominant religions at the time were to be established.

The specific ways in which the land grant was violated will be covered through an examination of duties and constitutional obligations. However, the amnesty, language and school criteria will be covered as aspects of the honour of the Crown. While the failure to provide an amnesty is fairly directly observable, the language and school promises share a close link to the section 31 land issues. As such, they will only briefly be covered below. The reader will have to examine the land question, explored in the rest of the chapter, before passing full judgment on those two matters.

II.a. *Amnesty*

In addition to Ritchot's and the Provisional Government's understanding that an amnesty was part of the MMT, Bishop Taché also received assurances of an amnesty.⁸⁵⁷ Nonetheless, an amnesty was delayed and then only partially granted. Stanley's account of the amnesty question shows much political maneuvering between Canada and the Imperial government over which government was responsible for granting the amnesty.⁸⁵⁸ In the meantime, actions were being taken as if no amnesty existed. In fact, on September 14, 1873 Canada arrested Ambroise Lépine in connection with the execution of Thomas Scott.⁸⁵⁹ Lépine was found guilty and ultimately sentenced to two years in prison and the removal of his political rights.⁸⁶⁰ Then in 1875 Prime Minister Mackenzie passed a motion in Parliament that Lépine and Riel were "both excused from murder charges conditional on a deprivation of political rights and a five-year

⁸⁵⁷ Stanley, *supra* note 21 at 147-150.

⁸⁵⁸ See generally, *ibid.* at 144-174.

⁸⁵⁹ Sprague, *supra* note 18 at 84.

⁸⁶⁰ Lépine's original sentence of execution was commuted by Governor General Dufferin. See Stanley, *supra* note 21 at 171.

banishment from British territory.”⁸⁶¹ This was no outright amnesty, but Prime Minister Mackenzie had to balance the bloodlust of the Orangemen against the allies of Riel. If the conditions of the five-year banishment were met, only then would Riel and Lépine receive an amnesty.⁸⁶²

In the meantime, the Métis were being brutalized at Red River.⁸⁶³ Stanley explains that the Métis leadership was being targeted:

Shortly after the establishment of the Provincial Government, Elzéar Goulet, who had been a member of the court-martial which had sentenced Scott, was drowned while endeavouring to escape from a hostile crowd of pursuers. An investigation was held, but, owing to the prevailing excitement, no arrests were made. A month later an English half-breed, James Tanner, who had gained the enmity of the ultra-Orange and Ontario faction, was killed by a fall when his horse was deliberately frightened by his enemies. André Nault, who had commanded the firing squad and later protected the British flag against O'Donoghue, was chased across the American boundary, kicked, stabbed and left for dead.⁸⁶⁴

The conditional amnesty that was passed by Parliament under the watch of Prime Minister Mackenzie in 1875 was virtually meaningless, since the need for the amnesty was immediate and unequivocal. The ability of the French Métis to defend their interests would have been greatly enhanced if this pledge was carried through. The fact that it wasn't ever enacted in a meaningful manner is illustrative of the dishonour of the Crown.

⁸⁶¹ Sprague, *supra* note 18 at 85.

⁸⁶² Stanley, *supra* note 21 at 174. The bloodlust of the Orangemen is recounted in a general way in A.G. Morice, *A Critical History of the Red River Insurrection* (Winnipeg: Canadian Publishers, 1935) at 29-33. And, at 29-30 he writes: “There is in the British world a set of people an excuse for the legal existence of whom we have always sought in vain, since even human law should carefully eschew all pretexts for fratricidal struggles and social strife. We refer to the order of Orangemen, whose object is supposedly to uphold the rights of Protestantism which nobody dreams of impugning, while in reality that society is primarily intended to coerce through intimidation and oppress such of their fellow citizens as cannot share their opinions.”

⁸⁶³ MMF Final Argument, *supra* note 136 at 25 where it is written: “The arrival of the Wolsley Expedition in 1870, in fact, instituted a reign of terror in the Settlement. Intent on avenging the death of Thomas Scott, the Ontario volunteers acted in defiance of all law and authority establishing virtual mob rule in Winnipeg in 1871 – 1872. It was not safe for a French Métis to be seen near Fort Garry (the location of the land office) and those that did venture into Winnipeg risked life and limb.”

⁸⁶⁴ Stanley, *supra* note 21 at 165.

II.b. French and English Language Protection

The language provisions of the *Manitoba Act*⁸⁶⁵ were contravened by the *Official Language Act, 1890*.⁸⁶⁶ Despite being ruled unconstitutional on several occasions,⁸⁶⁷ for the next 90 years the Provincial government enforced the *Act* and refused to publish its Acts in French. One example of such a challenge is found in *Forest v. A.G. Manitoba* where Freedman C.J.M explains:

The French-speaking citizens of Manitoba, including not only the famous Louis Riel but all the representatives of the French-speaking parishes (who, it must be mentioned, reached a remarkable unanimity with their English-speaking representatives) were induced to put an end to the Red River insurrection and to support the creation of a Province and its union with Canada only on the basis that their rights would be ensured for the future. The enactment of The Official Language Act deprived them of the linguistic rights which were safeguarded, or thought to be safeguarded, under Section 23.⁸⁶⁸

While the failure to carry out the terms of the *Manitoba Act* for 90 years is an obvious breach of the MMT in that the French Métis lost their ability to participate equally in the governance of the territory, there is doubt as to whether the implementation of that section would have had any more of an impact on French participation in the politics of the province. If the French Métis were secured in their communal rights they would have enjoyed much greater chance of electing representative members. As such, the real destruction of French political language rights came with the destruction of their communal land bases. This is another reason why those communal land rights are the key issue in the MMT.

⁸⁶⁵ Section 23 of the *Manitoba Act*, *supra* note 29 reads: “Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.”

⁸⁶⁶ *Act to Provide that the English Language shall be the Official Language of the Province of Manitoba, 1890* (Man.), c. 14. as cited in *Reference re: Manitoba Language Rights (Man.)* [1985] S.C.J. No. 36 [*Manitoba Language*] at para. 8.

⁸⁶⁷ For a summary of these cases see, *Manitoba Language*, *ibid.* at para. 10-22.

⁸⁶⁸ [1979] 4 WWR 229 as cited in MMF Final Argument, *supra* note 136 at para. 21.

II.c. Denominational Schools

These schools were originally protected under section 22 of the *Manitoba Act* through which public funding was assured to the denominational schools.⁸⁶⁹ It was one way to secure the Métis presence in the expected wave of immigration. That immigration brought both “linguistic and religious intolerance”⁸⁷⁰ and these schools would have been one small measure to help the Métis preserve their communities in the face of such challenges. However, to the extent that the promise of denominational schools was linked to the MMT, it was also dependent upon keeping the Métis communities together. Otherwise, these schools would have no benefit for the Métis. As I will argue below, the communities were never provided with a chance to retain their presence, as Métis, in Manitoba and as a result, this clause became meaningless to the MMT.

III. Fiduciary Duty: To Act in a Timely Manner

The Duties:

- For Canada, immigration was a highly anticipated and desired consequence of acquiring Rupert’s Land and the Northwest from the HBC. In order to secure a Métis land base, it was essential that the government act in a timely manner so that these external forces did not impede upon the Métis benefit. Timely distribution would also ensure that children, who were of age or close to age, would be able to start establishing themselves upon their designated lands. This would immediately allow the lands to start advancing the terms of the agreement and the preservation of a Métis community.

⁸⁶⁹ S.22, *Manitoba Act*, *supra* note 29.

⁸⁷⁰ MMF Final Argument, *supra* note 136 at para. 29 citing Gerhard Ens, Exhibit 35, at 24.

When the Children's land grant was adjudicated at trial the issue of delay seemed to be immaterial for the Crown, and pivotal for the Métis.⁸⁷¹ And although the MMF anticipated the Crown defence to any charge of delay would rely upon the fact that "there was, finally, a compliance with s. 31 of the *Act* in that patents were issued in the names of the Métis children"⁸⁷², I submit that, although intricately linked, the distribution and timing are very much distinct duties. That is to say, that delay, in itself, prejudiced the treaty rights of the Métis. Of course, the detriment that might be suffered due to delay will also be dependent on how the issue was finally resolved and if any wrongs were adequately compensated. While some overlap in coverage is unavoidable, the critical timeline for the delay will be covered separately from the timeline for distribution.

Since immigration was a probable result, and a goal, of opening the west up to a Canadian presence, it should have been obvious at the time that the longer that the Métis land grant went unattended, the more likely it would be that there would develop competing claims over the land. As such, the government should have acted quickly to determine the land preferences of the Métis and withdraw those lands from settlement (and from the market). However, the Crown not only did not act quickly but in the meantime it passed laws which encouraged this conflict over lands and had the effect of promoting a conflict between immigrant rights and those of the Métis.

The issue of delay provides a lens which can distort other considerations. It is this distortion which helps illustrate the detrimental impact that government delays had on the treaty benefits of the Métis. For example, if the heads of families were to receive the land to hold in

⁸⁷¹ MMF, *ibid.* at para. 128 characterizes the difference on delay as follows: "Canada says that all it was obligated to do was eventually to issue patents in the names of the children. Suppose Canada is right, that it did not matter how long it took, or who had acquired the lands in the meantime? Suppose it had taken 22 years, or 33 years? The Crown would on its interpretation of the Act have discharged its obligation." Also see, paras 63-64.

⁸⁷² *Ibid.* at para. 129.

trust for their children in order to benefit the family (or community of families) then such lands would have to be received in a timely manner. Without timely receipt of such lands the head of a family would not be able to assess and protect the value of those lands, or to put them to use for family benefit. If land was distributed only after great delay families may have moved, children may have become adults and pursued lands and opportunity elsewhere and the heads of families could no longer be expected to carry out their role as trustee in an effective manner. In such a scenario any duties upon the heads of families were very much dependent on timely government action.

However, it is apparent that the government did not see such a role for heads of families. The interest of heads of families was confined to status as beneficiary under the “benefit of families clause”. Again, in the context of this benefit, a timely distribution was necessary. It is not entirely accurate to argue, as the MMF did, that the government failed to meet its obligations and in turn state that there are no current outstanding claims because the land grant was intended for the children who were on the land in 1870.⁸⁷³ As I argued in chapter five one of the government’s duties was to ensure that the land grant was maintained within Métis families. On the other hand, there is some truth to Flanagan’s argument. Despite the failure of Flanagan to look at the issue in terms of rights or entitlements, his insistence that a market economy in lands was sufficient to illustrate that the Métis had value from the land is not totally off base. However, such an argument, if it is to apply anywhere, is only applicable to the grants under section 32. Nonetheless, the fatal (but not the only) flaw in Flanagan’s argument is government delay. The emergence of a market prior to distribution, prior to the family seeing a benefit in the

⁸⁷³ *Ibid.* at para 6: “This is not an action brought by any individual or individuals to vindicate individual interests in land, that is, it is not brought by any individual Métis who claims that one of their forebears should have received a river lot under s. 32 of the *Manitoba Act* of 1870 or that one of their forebears was one of the children who were supposed to receive a grant of land under s. 31 of the *Manitoba Act*. All the persons who were entitled under s. 31 and s. 32 are long since dead, and no claim is brought by their heirs at law.”

land, and prior to the entire grant being distributed is illustrative of the impairment of value that the Métis were seeking in the land (ie maintenance of distinct communities), and that value is not quantifiable in dollars and cents.⁸⁷⁴ Below, I will cover the key periods of the delay. It should be apparent at an early stage that the government could have done more, that despite Flanagan's apologist argument to the contrary, this delay was exorbitant and detrimentally impacted the benefit that was to accrue to the Métis.

III.a. 1870-71

As stated in chapter five, one of the primary objectives in the 1.4 million acre grant was ensuring the viability of the Métis community. Evidence that this was a shared vision comes in the form of the Order in Council of April 25, 1871 which "stated that every Half-breed resident in Manitoba, on July 15, 1870, was eligible to receive a share of the land."⁸⁷⁵ In August of 1870 a census was ordered so that the Lieutenant-Governor, Adam Archibald, could find all those who were entitled to share in the section 31 land grant.⁸⁷⁶ This census was completed near the end of 1870 and revealed a total population of just under 12,000 individuals.⁸⁷⁷ This census showed 9,800 half-breeds,⁸⁷⁸ approximately 7,000 of which were children.⁸⁷⁹

Obtaining an accurate census was only one hurdle to overcome (although this census was not necessarily accurate). A further impediment to land division was the lack of accurate

⁸⁷⁴ Flanagan argued that the Métis received fair market value and participated rationally in the market. Although, he also points out that the French Métis received less value from their lands than the English Métis. The reasons for this disparity were not explored in depth and considering that the result was exactly what the Métis were worried about pre-transfer to Canada one might expect that Flanagan would reflect back upon his interpretation of history to see if the Métis had sought protection against such a dispersion. He did not.

⁸⁷⁵ *Ibid.* at 69.

⁸⁷⁶ Sealey, *supra* note 73 at 68.

⁸⁷⁷ Archibald to Secretary of State for the Provinces, December 9, 1870 *Exhibit 1-0553*, pp.89-91 as cited in MMF Final Argument, *supra* note 136 at para. 889.

⁸⁷⁸ Sealey, *supra* note 73 at 68-69.

⁸⁷⁹ Final Argument, *supra* note 136 at para. 890. Sealey, *ibid.* at 68-69 was of the understanding that "the census statistics did not break the number of Half-breeds into the heads of families and children and thus served little purpose in terms of assisting in allocating the land."

surveys. Nonetheless, it was possible at this stage to make a rough assignment of lands, and withdraw those lands from occupation by incoming settlers. To ensure that their preferred land was protected, the Métis gathered in the spring of 1871 “in their respective parishes and adopted several resolutions, demanding that certain localities which they specified should be granted to them as their share of that reserve.”⁸⁸⁰ The Métis were then calmed by a letter from Archibald which “is sufficient to induce the belief that those reserves will be selected in the localities so designated.”⁸⁸¹ There was enough information at this stage to protect the land grants from immigrant claims. If the government erred by, say, 10% just to be safe and then trimmed each block of land back as the final survey and eventual allotments indicated, there would be virtually no detrimental impact felt upon immigration in the province. That is only one possible way in which to secure the lands quickly. And, Archibald saw things in a similar light.⁸⁸² However, at the end of 1871, even though it was only a year and half since the passing of the *Manitoba Act*, there is some evidence that the Métis were already losing faith in the government of Canada.⁸⁸³ Perhaps this was due to the impact of the Order in Council of May 26, 1871 which facilitated the influx of immigration. Flanagan explains that “the order allowed them [immigrants] to claim land in advance of the Dominion land survey, as long as they made entries for quarter sections within that system.”⁸⁸⁴ This would create some urgency to protect the Métis lands from such

⁸⁸⁰ J.A. Provencher, Immigration Agent for the Northwest January 1872, *Exhibit 1-0668* as cited *ibid.* at para. 944.

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.* at para. 957 where the MMF explains that Archibald “stated that the grant would require 68 townships – 39 for the French half-breeds and 29 for the English half-breeds. While it was easy ‘in a general way’ to select a number of townships containing sufficient land to cover the claims, ‘and situate in localities likely to present a fair average, it would have been unsafe to make an absolute selection, without more accurate information...’ Accordingly he said that the mischiefs could be arrested by withdrawing a sufficient number of townships from new settlement before making an ‘absolute selection’.”

⁸⁸³ Chartrand, *supra* note 1 at 102: “Many intended beneficiaries of section 31 did not obtain a benefit...many ‘Half-Breed’ people are reported to have joined the Indian signatories of Treaty One in 1871, because they did not expect a reasonable benefit from section 31 as a consequence of delays in implementation.”

⁸⁸⁴ Flanagan, *supra* note 7 at 67.

claims. However, this order was kept in place for another eleven months and problems arose as a result.

III.b. 1872-73

In January of 1872 an Order in Council called for a new census to be undertaken but this was not carried out.⁸⁸⁵ At this point, the Métis feared that promises were not being kept. Macdonald received a letter from one of the government agents in Manitoba which warned him that “the matter must be taken hold of promptly and dealt with decisively. Whatever the result now procrastination will now only increase the difficulty. The Métis are very uneasy at present.”⁸⁸⁶ A petition from members of the Parliament of Manitoba to the Secretary of State for the Dominion of Canada on January 22nd, 1872 urged the government not to infringe Métis land in the absence of *Manitoba Act* land distribution.⁸⁸⁷ The following month the Manitoba legislature addressed the issue again, as follows:

We ... are nevertheless of opinion that no action can be taken which may prejudice the grant given to the Half-Breed population by the 31st Clause of the Act 33 Vict., Cap. 3.

That this grant constitutes an absolute right of property in favour of the recipients, and that the considerations for which the grant was given entitle the recipients to the rights assured by common law to the owners of individual property. We submit that the Order in Council of the 25th April,

⁸⁸⁵ Sealey, *supra* note 73 at 70.

⁸⁸⁶ McMicken to Macdonald, January 13, 1872 *Exhibit 1-0675*; also see Taché, *Exhibit 1-0680* in MMF Final Argument, *supra* note 136 at para. 946.

⁸⁸⁷ Sealey, *supra* note 73 at 89-90. The petition read in part: “That the rights of the Metis of Manitoba can only be extinguished by the distribution of the 1,400,000 acres of lands appropriated by the 31st Section of the Manitoba Act in order to extinguish those rights.

That the said distribution not having been made yet, the Metis of Manitoba are in full possession of all their rights to said lands.

That moreover in virtue of an official document dated, Ottawa, 23rd May, 1870, certain areas of the Province of Manitoba have been designated as being localities in which a portion of the 1,400,000 acres of lands is to be distributed to the Metis; that the Government in Ottawa should not in any way dispose of this designated land, as long as the 1,400,000 acres will not be distributed to the Metis;

Therefore the undersigned, in the name of their electors and in their own names, humbly pray to allow them to advise the Crown’s land agent that the Public Notice of the 23rd of December 1871, by him given, could not apply to land in localities reserved by the Metis, and that they are opposed to all wood cutting and to all other works performed that would devalue the aforesaid reserved lands, ad this until each Metis will have received his share of the 1,400,000 acres.”

The petition was signed by L. Schmidt, Pierre Delorme, J. Dubuc M.P.P., J. Royal M.P.P., Andre Beauchemin M.P.P., A. McKay M.P.P., George Klyne M.P.P., Joseph Lemay M.P.P., N. Girard M.P.P., Edevin Rourke M.P.P., James Cunningham M.P.P., and Pascal Breland M.P.P.

1871, on the subject of Public Lands in Manitoba, as well as the regulations emanating from the agent of the Dominion Government since his arrival in this Province, give grounds to fear that the Public Lands of which the grant to the Half-Breeds forms a part will not be, when a division is made, in the same condition as at the time when the Half-Breed rights came into existence; and that the recipients of the grant have a right to their share of the public lands, such lands being in the same condition as at the time when the grant was made; and that this right is in preference to all other claims upon the land.

That these orders and regulations have roused a just apprehension which cannot be quieted except by a prompt division of this grant. We also respectfully submit that the reserves in block taken by the Half-Breed population, are in accordance with the letter and spirit of an official document signed at Ottawa on the 23rd of May, 1870.

That these reserves so made have received the unqualified approbation of the high functionary to whom was directed the charge of this matter by Order in Council of the 25th April, 1871, and that the result of these reserves being so laid off has been to avoid agitation which is always hurtful to a young Province; and that the confirmation of these reserves will give the greatest satisfaction...⁸⁸⁸

This address from the Manitoba Legislature reveals two competing notions of the intention behind section 31. The first is the unmistakable reference to individual property rights according to the common law. The other conception is the reference to the “reserves” that were “laid off”. The pattern of historical evidence to produce apparently conflicting results, has led this researcher to find a compromise in which both conceptions might make sense. The other alternative is to weigh the evidence and choose which position is “correct”. I think that because the evidence is so consistently ambiguous on this matter that a compromised agreement was more likely, one which was not properly explained to the wider populace. As a result, I think that “reserves” was definitely a key feature (as we think of them today in the sense of Indian reserves) but that within those reserves individuals were to be allocated private land interests. The alienability of those land interests was limited so as to keep the land in the community (this would explain the reference in the negotiations to keeping the land within Métis families) and would require legislation to that effect.⁸⁸⁹

⁸⁸⁸ February 1, 1872 “Joint Address from the two Houses of the Manitoba legislature” *Exhibit I-0687* in *ibid.* at para. 947.

⁸⁸⁹ This is not unlike the *Metis Settlements Act*, RSA 2000, c M-14, in Alberta. Online at Canadian Legal Information Institute <<http://canlii.ca/t/kxxj>> retrieved on 2012/01/3. For a history of these settlements and Métis claims in Alberta see, Metis Association of Alberta, *Metis Land Rights in Alberta: A Political History* (Edmonton: The Association, 1981). Also of interest is Catherine Bell, *Alberta's Metis Settlements Legislation: An Overview of Ownership and Management of Settlements Lands* (Regina: Canadian Plains Research Center, University of Regina,

In another response to the confusion of the historical record, Chartrand has proposed a system of grants which respond to the terms of section 31 by preceding the grant with a licence of occupation. Chartrand explains:

The character of a licence, which grants no interest in the land, is consistent with a flexible land distribution scheme whereby reallocations of the licences are possible within the groups, with a view to making adjustments towards eventual grants of estates. In the case of the early generation licencees among the 'Half-Breed' families, there would be no proprietary interest to act as a fetter on the government's discretion to regulate the whole scheme of selection, division and grant.⁸⁹⁰

Chartrand shows that granting a licence of occupation prior to issuing fee simple grants is consistent with legislation aimed at enfranchised Indians, as well as homestead legislation. For the Indian legislation,

[i]ndividuals could participate in an 'enfranchisement' scheme whereby an occupation licence was granted in respect of a particular lot within the community interest, and, in time, alienable estates were granted to the children of the enfranchised person...In time, when the 'transition' to the new order had been made, fee simple grants went to the children of those who had participated by occupying the lands and later by holding restricted interests.⁸⁹¹

I am unable to find support for the contention that protections of these lands was to only last for one, two, or three generations or to some other time of "transition". All of these seem arbitrary and do not appear to be supported by the negotiations or the legislation. This may represent an oversight or flaw in my research. If it does not, I would propose that the protective provisions of the MMT were indefinite and represented a continuing obligation of the federal government.

The federal government replied to the Manitoba Legislature a year later and asserted that "the Governor in Council is invested with the sole power by Regulations to be made, from time to time, to regulate the distribution of the grant to the Half-breeds individually and the issue of Patents therefor."⁸⁹² It would seem then, in the eyes of the federal government, the Provincial

1994). And, T.C. Pocklington, *The Government and Politics of the Alberta Metis Settlements* (Regina: Canadian Plains Research Center, University of Regina, 1991).

⁸⁹⁰ Chartrand, *supra* note 1 at 38.

⁸⁹¹ *Ibid.* at 39.

⁸⁹² January 27, 1873 Governor in Council *Exhibit 1-0802* in MMF Final Argument, *supra* note 136 at para. 949.

government had no responsibility for the land or the grants until patents had been made. The federal government had assumed responsibility for the entirety of the distribution.

April 14, 1872 saw the *Dominion Lands Act, 1872* confirm all “proceedings properly taken under the respective Orders in Council ... dated the twenty-fifth of April, 1871, and the twenty-sixth of May...”⁸⁹³ The April 25, 1871 OIC stated that all half-breeds were entitled to share in the section 31 grants. In attempting to fulfill those responsibilities, the federal government issued Order in Council, April 15, 1872, which “authorized the Lieutenant-Governor to select townships equal in acreage to 1,400,000 and, using the 1870 census figures, to begin distributing the land.”⁸⁹⁴ This Order in Council is reflective of the discretionary role which the Lieutenant-Governor had, as well as the intention of the *Act* to protect family clusters. The setting aside of townships would allow the Lieutenant-Governor to ensure the continuity of families and communities. The Order in Council recommended that enough townships be selected to make up the 1.4 million acres. However, such selection should be careful not to grant more than “a due proportion of the woodlands of the province” to the Métis. The remainder was meant for incoming settlers. This *Act* did not mark the beginning of the distribution of Métis lands. Indeed, the selections called for in this Order in Council were never carried out by the Lieutenant-Governor or his agents.

⁸⁹³ Section 108, *Dominion Lands Act, 1872 Exhibit 1-0718* in MMF, *ibid.* at para. 951.

⁸⁹⁴ Sealey, *supra* note 73 at 70-71. MMF, *ibid.* at para. 953 reproduces the April 15, 1872 OIC (Exhibit 1-0701) as follows: “...surveys in Manitoba are sufficiently far advanced to enable a selection as hereinafter proposed to be made of the 1,400,000 acres...; Colonel Dennis, Surveyor General of Dominion Lands... recommends that such selection of lands should be made by townships; ... the Secretary of State recommends that “the Lieutenant Governor be instructed to make selections of townships in such number as is necessary to make up 1,400,000 acres”; ... care be taken, however, that only a due proportion of the woodlands of the province be included in the 1,400,000 acres of land to be granted to the Halfbreeds; the remainder of these woodlands being made available for settlers; and that ... the Order in Council of the 26 May last, shall cease with regard to any lands actually selected by the Lieutenant Governor for the Half-breeds under the present order.”

In July of 1872, Lieutenant Governor Achibald seemed to be losing patience as well. He explained that the delay was causing the Métis to lose out to claims that post-dated their own.

The Metis “very naturally” wanted

their claims laid off in the neighbourhood of the place where they lived, and they saw that, though they could not get their lands allotted, others were entering upon, and acquiring rights which were denied to them...

... it was quite time, in the interests of the Country, that the selections should be defined, and the question set at rest at once and forever...⁸⁹⁵

In order to protect the Métis from such incursions by incoming settlers, Archibald proposed setting aside 68 townships from new settlement, and then obtain the necessary “accurate information” prior to making “absolute selection”.⁸⁹⁶ Archibald’s motivation for promoting a policy which would see Métis lands quickly selected and distributed wasn’t merely to quiet Métis discontent. Once the lands were distributed and Métis grievances were quieted, Archibald foresaw an open market developing whereby the Métis entitlement would be accessible to new settlers because once title was passed to the Métis, “the market for the purchase of lands will be infinitely extended...” This market would ensure that the lands would not remain “locked up.”⁸⁹⁷ Archibald, it should be recalled was not a party to the negotiations in Ottawa and he, therefore, would have relied upon the Orders in Council to guide him on the proper policy and method of distribution. It should also be recalled that it was precisely this method of enforcement which Cartier had reassured Ritchot would be adequate to fulfill their oral agreement. Still, Archibald was likely out of the loop on the true extent of the MMT and he couldn’t have known that there had been a commitment to pass legislation aimed at keeping the lands within Métis families.

Archibald proceeded with land selection and had made initial selections for all but five parishes by August of 1872. Archibald did not select land for those Parishes which did not make

⁸⁹⁵ Archibald to Aikins, July 27, 1872 *Exhibit 1-0727* in MMF, *ibid.* at para. 956.

⁸⁹⁶ Archibald to Aikins, July 27, 1872 *Exhibit 1-0727* in *ibid.* at para. 957.

⁸⁹⁷ *Ibid.* at para. 958.

an application. However, he asked for application on preferred lands to be made by the remaining parishes.⁸⁹⁸ To ensure that the Métis did not acquire too much benefit from their land grant, Archibald was not selecting land based solely on Métis desires. The wood and value of land was a key factor for Archibald even though it wasn't a factor for the Métis. The Métis selections were not rejected if they were of too little value but if they selected land with too much "wood etc." then Archibald acted, under OIC April 15, 1872 to make adjustments.⁸⁹⁹ In selecting large blocks Archibald was responding to the desires of the Métis. At this relatively early stage it is these desires which are most likely to reflect the treaty intentions of the parties. Large blocks would be more likely to maintain the Métis community so it is no surprise that the Métis were selecting their lands en mass. The family benefit was again assured on September 1, 1872 when the federal government decided that 140 acres would be given to every half-breed man, woman and child.⁹⁰⁰

Government action over the following years can be best characterized as waffling. Policies were changed or amended, distribution procedures were started and stopped, and as the Métis majority declined in the Manitoba legislature, the federal Crown seemingly abdicated its fiduciary responsibility to the discretion of the Province. But this waffling ensured that the distribution was further delayed.

Lt.-Gov. Morris⁹⁰¹ began drawing for individual allotments in February of 1873. This was a rapid process⁹⁰² and in March of 1873, three years after the passing of the *Manitoba Act*,

⁸⁹⁸ *Ibid.* at para. 964-65.

⁸⁹⁹ Archibald to Aikins, August, 12, 1872 *Exhibit 1-0730* in *ibid.* at para. 961 where in response to a Métis petition, Archibald explained: "I have been governed, in my approximate selections, by a desire, as indicated in that letter, to meet the views of the Half Breeds, as far as I can, conformably to the Governing idea of making the selection a fair average of Townships, containing no more than a reasonable proportion of wood etc. Such a selection is, of course, much easier to make in Townships, or large blocks, than if in Sections or smaller divisions."

⁹⁰⁰ Sealey, *supra* note 73 at 71.

⁹⁰¹ Morris became Lt.-Gov. of Manitoba in December of 1872. See, Stanley, *supra* note 21 at 191.

land distribution began.⁹⁰³ However, this was stalled when the Order in Council of April 3, 1873 declared that “only children of Half-breed heads of families were eligible to receive land.”⁹⁰⁴ This change in policy resulted in the entire distribution being scrubbed.⁹⁰⁵ Now, new allotments had to be calculated. We can see that as time went on the MMT became lost in the bureaucracy and the government of 1873 adopted a literalist interpretation of the *Manitoba Act*.⁹⁰⁶ In terms of legal violations, it is my position that nothing substantial turns on the inclusion of the parents. And, that the inclusion or exclusion of the parents were both reasonable positions given the ambiguity of section 31. However, it should not have taken the government three years to decide on its policy in this regard. The matter could have been dealt with immediately through further consultation with Ritchot or with the Provisional government in the months between the passage of the *Manitoba Act* and the arrival of a new Canadian government at Red River. As a result, it wasn’t until the end of the summer of 1873 that a new distribution was started. Still, this new distribution required extensive resources in proving claims:

Lieutenant-Governor Morris of Manitoba and the Department of the Interior devised a new system for giving out the Half-breed lands. The system was to assign a 190 acre lot to every Half-breed child resident in Manitoba on July 15, 1870. The Half-breed child, or his parent acting on his behalf, would prove the child a Half-breed, and after so doing, could apply for title to the land.

⁹⁰² MMF Final Argument, *supra* note 136 at para. 1003 where the MMF writes: “Morris commenced drawing allotments on February 22, 1873 and was reported to be drawing the lands at the rate of 60 per hour. This indeed seems like a reasonable speed, and indicates how long allotment should have taken. The 6034 allotments ultimately drawn between 1876 and 1880 should have taken only slightly more than 100 hours.”

⁹⁰³ Sealey, *supra* note 73 at 71.

⁹⁰⁴ *Ibid.* at 72. The MMF also explains, *supra* note 136 at para. 1010 that: “This change was given statutory effect on May 3, 1873 by the passage of *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*. However, while it removed ‘heads of families’ from eligibility for the grant, it did not define or clarify the meaning of ‘heads of families’. This led to ongoing confusion.”

⁹⁰⁵ The MMF sees this process in reverse. They blame Archibald for originally including the heads of families in the distribution against what they say is the clear wording of section 31. See MMF Final Argument, *supra* note 136 at para. 893: “First, for reasons he set out, Archibald was unable to understand the nature of the Aboriginal title of Métis people in the new province, despite its clear recognition in the wording of section 31, and he concluded that what was intended was a “boon” to the entire half-breed population. This lack of understanding led him to take liberties with the wording of the Act, and to recommend that all Métis, including heads of families, should participate in the distribution of the 1.4 million acres. This departure from the clear wording of section 31, when embraced by the Governor in Council, was to have the inevitable effect of causing delay and confusion for several years to come.”

⁹⁰⁶ This was described by an OIC as a “strict interpretation”. See, MMF, *ibid.* at para. 1009.

The Surveyor-General claimed this would create too much work for his staff. He suggested that a special commission be set up to examine Half-breed claims.⁹⁰⁷

The need for such resources meant further delay and Ritchot was already recording transgressions against the Métis interests that were resulting from delay.⁹⁰⁸ It was in mid-August, 1873 that the government began drawing lots exclusively targeted at the children. The calculations were that approximately 7000 children would produce lots of 190 acres.⁹⁰⁹ There was still an issue of validating the census returns before issuing a Patent to lands.⁹¹⁰ Rather than taking a proactive approach to investigate such claims, the Lt.-Gov. developed a plan to make the Métis claimants prove their right. Lt.-Gov. Morris was trying to “remove the burden of delay from authorities.”⁹¹¹ This strategy, however, would not remove the burden of the delay from the government. Rather, the requirement that individual children prove their claim was an effective strategy for limiting rightful claimants. For example, it is logical to assume that those who were least likely to successfully pursue such a process would be those who were illiterate and lacking in formal education. It is exactly this group which was also vulnerable to other aspects of the new order: land speculators and racial hostility.

III.c. 1874-75

On February 11, 1874, Lt.-Gov. Morris pressed his plan to defer the burden of the delay by making it the responsibility of the Métis claimants to come to the government office to prove

⁹⁰⁷ Sealey, *supra* note 73 at 73.

⁹⁰⁸ MMF Final Argument, *supra* note 136 at para. 1004 where they write: “In March 1873 Ritchot wrote a document headed “Notes on Manitoba”, in which he addressed a number of issues pertaining to sections 31 and 32. In respect of the 1.4 million acres he stressed that they were to be distributed only to the children, and that this is how it was described in the House of Commons. He also complained that parts of townships designated by Archibald on the Red River had been removed without any reason by the government, and that government agents hurried to sell the wood, destroying entirely the value of these lands. He said that protests by petition were ignored.”

⁹⁰⁹ *Ibid.* at para. 1011. Also note that the Macdonald government would lose power in November. Alexander Mackenzie would become Prime Minister.

⁹¹⁰ See, *ibid.* at para. 1015.

⁹¹¹ See, Morris to Dennis, December 12, 1873 in MMF, *ibid.* at para. 1016. Here the MMF provides the following quotation: “remove burden of (?) delay from authorities.”

their claims. Morris explained: “[i]t is true that in individual cases there would be delays, if my plan was adopted, but then the responsibility for such delay would rest upon the claimants, and not upon the Government.”⁹¹² On May 1, 1874 scrip was created whereby half-breed heads of families had the choice of taking 160 acres of land or \$160.⁹¹³ This was a result of the change in policy which removed the heads of families from the 1.4 million acre grant. Once they were removed it was realized that their Indian title had not been extinguished. However, the legality of extinguishing “Indian title” through individual grants or compensation is questionable. It would seem that the entire exercise of issuing scrip for the purposes of extinguishing title is vulnerable to legal challenge. As the Supreme Court has noted, Aboriginal title is a *collective* interest.⁹¹⁴ As such unilateral, and clear and plain, extinguishment could apply to a collective. However, title does not reside in individuals but, rather, in the political community which exercises jurisdiction over those lands. In the absence of unilateral Crown extinguishment, only a collective decision of the community can relinquish such title. Where the 1.4 million acre grant provided a mechanism to extinguish the “Indian title” of the Métis heads of families (by incorporating them in the “benefit of families” clause), removing them from the section 31 benefit created a legal wasteland where the Métis collective land interests were dealt with in a facile manner that promoted expediency over principle.

If the delays had no effect one wouldn’t expect to see the Métis petitioning the government to take action on their claims. However, the Métis of South St. Andrew wrote to David Laird in 1875 as follows:

1. That the Manitoba Act of 1870 section 31 sets apart 1,400,000 acres of land in the Province of Manitoba for the benefit of the Children of Half-breed Heads of families in the Province to be given to them under regulations to be from time to time made by the Governor General in Council.

⁹¹² Morris to Laird, February 11, 1874, *Exhibit 1-0953* in *ibid.* at para. 1020.

⁹¹³ Sealey, *supra* note 73 at 74.

⁹¹⁴ *Delgamuukw*, *supra* note 248 at para. 115.

2. That nearly five years have elapsed since the passing of said Act and there is not yet one Half-breed in the Province in possession of one acre of said lands or deriving any benefit therefrom.
3. That 1,400,000 acres of lands in the Province having been set apart as Halfbreed Reserves and so continuing to be set apart, and not being in the hands of the Half-breeds either to cultivate or to dispose of is having a very damaging effect upon the prosperity of the Province, inasmuch as during the past and preceding years hundreds of Emigrants from Ontario and elsewhere have come to this Province intending to make it their home, and when after examining the country, go to the Land Office to enter a Homestead are told "that is the Half-breed Reserve" and having again and again selected Locations are met with the same answer, many have then left the Province for the United States, or elsewhere, thereby doing the Province irreparable injury.
4. That the lands so set apart are very materially depreciating in value on account of the large amount of timber annually cut in and taken away from them and sold by parties having no interest in claim therein and that the Dominion Land officials here have tried to protect said lands and have expressed themselves unable to do.
5. That a feeling of very great dissatisfaction and uneasiness exists amongst the Half-breeds of this Division and in the Province generally, owing to the great length of time that has elapsed since the Grant was made, and as yet they see no prospect of early possession, and also because they see daily, and are unable to prevent the plundering of timber from those lands.
6. That many young men of this Division who are entitled to participate in this grant have refrained from availing themselves of the Homestead privilege in expectation of having their grants allotted to them at an early date, to them especially such delay is a source of great anxiety and loss of valuable time...⁹¹⁵

A claims commission was established in April, 1875 by the Department of the Interior. Its dual purpose was to examine the adult claims to scrip, and the children's land claims. Sealey explains that "[d]uring 1875, almost 9,300 claims were examined. Each claimant had to swear he was a Half-breed, have two others fill out an affidavit affirming his statement, and prove he was resident in Manitoba as of July 15, 1870. At that point he was listed as eligible for land."⁹¹⁶ As Sealey notes, the major problem with this process was its lateness. However, the Commission was not a cure-all. Its role was limited to validating claims for those who had already been assigned land. The Commission was not empowered to examine newly arising claims from Métis children who might be eligible to share in the benefit.⁹¹⁷

⁹¹⁵ John Norquay to David Laird, Petition from South St. Andrew, Feb. 23, 1875 Exhibit 1-1041 as cited in MMF Final Argument, *supra* note 136 at para. 1028. The MMF notes at para. 1029 that "[i]t does not appear that these petitions received any reply."

⁹¹⁶ Sealey, *supra* note 73 at 75.

⁹¹⁷ The MMF explains, *supra* note 136 at para. 1035: "Allotment was to be completed for each parish before the Commission was to publish a list of allottees for that parish. Its function was to receive applications and proof that an allottee was indeed entitled to participate in the Grant, and then, upon the Commission's approval, the patent was to issue "forthwith" or upon the claimant reaching the necessary age. It was a process of application for patent, not application to participate in the allotment process. While the Commission could take new applications, successful applicants would, presumably, be able to participate in the grant in some other way."

Almost five years after the date of transfer many half-breeds left the new province.⁹¹⁸ As such, special provision had to be made to hear the claims of those who had left the province.⁹¹⁹ While it can be argued that as the population left their benefit left with them, it can just as easily (and in the context of Aboriginal land interests, more easily) be argued that the benefit was never intended to be individual and, as such those who went west were more than entitled to return to the Métis land base at a future date. However, this is where delay and method of distribution deal a double whammy to the Métis treaty rights. I will examine the method of distribution later in this chapter, but at this point it is worth noting so that readers don't get the impression that delay was the *only* problem occurring.

III.d. 1876-77

Canada was well aware of the ongoing trade in Métis lands. Senator Girard noted that “nothing had been done” and that “[t]hese minors’ lands were being sold every day in Winnipeg under bond from the parents...”⁹²⁰ Secretary of State, R.W. Scott, replied: “the distribution of the half-breed grant was attended with many embarrassments, and the reserves were being allotted as rapidly as possible.”⁹²¹ But as Senator Sutherland pointed out, after seven years it was “...natural enough that the claimants should be very disappointed because the allotments had not been made.”⁹²² It appears that at this stage that Archibald had correctly predicted the problem of delay, namely moving land from the Crown to settlers would prove harder than having the market move those lands from Métis to settlers. With only an assignment of land, the Métis had

⁹¹⁸ For more on the persistence of the Métis settlers see Thomas Flanagan and Gerhard Ens, Exhibit 19 in the case of *MMF1*, *supra* note 14 at 57-60. Note also that their conclusions as to cause are implied from a lack of evidence rather than the evidence itself.

⁹¹⁹ Sealey, *supra* note 73 at 76 where he explains: “A magistrate, Matthew Ryan, was authorized to continue hearing claims for another two years on behalf of the commission, in an effort to deal with those who were no longer resident in the province.”

⁹²⁰ March 14, 1877 Senator Girard, *Exhibit 1-1268*, p. 171 in MMF Final Argument, *supra* note 136 at para. 1111.

⁹²¹ March 14, 1877 R.W. Scott, *Exhibit 1-1268*, p. 171 in *ibid.* at para. 1112.

⁹²² March 14, 1877, Senator Sutherland, *Exhibit 1-1268*, p. 171 in *ibid.* at para. 1113.

nothing that they could capitalize on. In order to benefit from the grant they needed a patent which would make the land theirs to farm, sell, settle etc. An assignment or allotment merely forewarned of who would be receiving a patent. With six or seven years having passed, those Métis who were still waiting for their benefit would have been growing eager to see something come from their patience. As a result, they were willing to sell their land before patent.

Senator J.C. Aikins, pointed out that the Métis were unable to use lands after allotment and prior to patent.⁹²³ So when the Secretary of State was challenged on the pace of distribution he could only point out that allotments were being made. Aikins told him that the problem was not the allotments but the lack of patents. The delays in issuing patents after allotment were also extensive and could take months or years.⁹²⁴ It would seem that delay was caused by government attempts to divide the entirety of the 1.4 million acres amongst the *current* children on an individual basis. By comparison, Indian treaty partners were “given” their reserves in whole, each member had a right of occupancy.⁹²⁵ If this concept was applied to the Métis reserves, once the land was set out the membership and residency criteria could be fine-tuned after that. Alexander Morris and David Laird were both treaty commissioners and were fully

⁹²³ See, Senator Aikins, March 14, 1877 *Exhibit 1-1268*, p. 171 in *ibid.* at para. 1114 where he states: “If the patents were issued the difficulty referred to would be in part met, as they could dispose of the lands or settle on them, but they could do neither at present.”

⁹²⁴ Flanagan “Historical Evidence” *Exhibit 18*, p. 58 as cited *ibid.* at para. 1118 where he states: “Depending on administrative difficulties, weeks, months, or years might elapse between the Lieutenant Governor’s certification [of the allotments] and the Department’s approval of the grant. Thus, most grants for St. Boniface/St. Vital and St. François-Xavier/Baie St. Paul were dated 1881, even though the drawing for the former parishes had been completed in 1878 and for the latter parishes in 1880.

The bulk of grants had been approved by 1881, but in all parishes there were difficult cases that had to sit unapproved in the registers until new information could be gathered. And so individual grants continued to be approved throughout the 1880s and 1890s.

And: The next step was to prepare a patent; elegant penmanship and official signatures could take months.”

⁹²⁵ See, Daugherty *supra* note 551 and 787. Also note that a map of 12th of September 1875 shows that the “halfbreed” adhesion to treaty 3 was conceived of as a collective entitlement where the entirety of the land “reserve” is to be set out in a blocks of land for the “HalfBreeds” to “live on as a Village” and another block for farming land. See, J.H. Dennis, Surveyor General, “Map relating to Western Treaty No. 3; Northwest Angle Treaty - IT 271.” Library and Archives Canada. Online: <http://collectionsCanada.gc.ca/our/res.php?url_ver=Z39.88-2004&url_tim=2011-08-29T18%3A57%3A47Z&url_ctx_fmt=info%3Aofi%2Ffmt%3Akev%3Amtx%3Actx&rft_dat=3974408&rft_id=info%3Aid%2FcollectionsCanada.gc.ca%3Apm> (accessed on August 29, 2011).

aware of this alternative approach that could be applied to the Métis land reserves. Refusing to see the obvious utility of such a design for the Métis land grant simply because of a perception that government policy would never have envisioned such a distribution for the Métis, is to make ones reasoning reliant upon Eurocentric bias. It is the same nonsense that leads judges and historians to discount the Métis desire for enclaves simply because they perceive that the government didn't share that vision. Isn't that the point of all those interpretive principles found in treaty law? Aren't they designed to get at the Aboriginal understanding? If we take those principles for what they are intended to do it is much easier to see the relevance of comparing the section 31 grant to the policy of setting out reserves for the Indians. The Métis perspective has to matter at some point.

Even though there were no barriers to issuing patents at this stage, no such patents were issued. During the ensuing delay, questions started to arise about the size of allotments.⁹²⁶ This led to “one of the most egregious steps in the administration of section 31”.⁹²⁷ This egregious error was the re-estimation of the total number of Métis beneficiaries of the Section 31 grant. The new number was estimated at 5,814 total claimants. The original number, based on the census of 1871 was just under 7,000. The difference surprised Codd (Dominion lands agent) but he had a convenient explanation:

I need not say to you how surprised I am at this state of affairs, for the number of those supposed to be entitled as estimated from the census of 1871 was nearly 7000. It can only be accounted for by supposing that the number of families wrongly taken as being resident at that time in the Province; whereas they were really resident in the Saskatchewan, was much more than was supposed.⁹²⁸

⁹²⁶ See, MMF Final Argument, *supra* note 136 at para. 1044 where Dennis wrote to Codd, July 12, 1876 Exhibit 1-1188 wondering if “the 1,400,000 acres will be sufficient, in allotments of 190 acres each, to satisfy the number of claims of Half-breed children likely to be proved under the Act.”

⁹²⁷ *Ibid.* at para. 1045.

⁹²⁸ Codd, letter August 10, 1876 *Exhibit 1-1192* as cited in *ibid.* at para. 1046.

Codd also found some convenience in rounding the numbers to 5833 so as to create 240 acre allotments:

I need not point out to you how the grant of so convenient a quantity as a quarter section & a half, instead of the proposed quantity of 190 acres in legal subdivisions will simplify the distribution, it will be sufficient for one to say that I am confident that with, say one extra clerk, I can recommend them for Patent as fast as the Lieut-Governor, or his Deputy can draw them.⁹²⁹

After several attempts at calculating the proper size for individual allotments, “[a]n order in council of September 7, 1876, cancelled all previous drawings and definitively fixed the size of individual allotments at 240 acres.”⁹³⁰ Lands originally selected for allotment by Lt-Gov. Archibald, and drawn by Lt-Gov. Morris were not distributed and, because the government was waiting for the commissioners to finish their investigation of claims they cancelled the prior allotment.⁹³¹ This cancellation caused several problems⁹³² and marked yet another delay in the distribution of Métis lands. This distribution was not necessary since none of the allotments needed to be measured out by individuals. Having set the reserves aside the government could have simply established a reasonable lot size and began distributing lands. There was no need to exhaust the reserves by ensuring that each individual received an equal part of the entire grant. The Métis had a tradition of commonly used lands and there is no reason to believe that they wouldn’t also make similar use of their section 31 land reserves.

The commission which was established to identify half-breed claims, found 5,314 claims. 569 further allotments reserved for late applications. Final distribution of the 1.4 million acres started on October 30, 1876.⁹³³ By January 1877 Codd was complaining that he did not have

⁹²⁹ *Ibid.*

⁹³⁰ Flanagan, *supra* note 144 at 12.

⁹³¹ Order in Council, Septemeber 7 1876 *Exhibit 1-1200* as cited in MMF Final Argument, *supra* note 136 at para. 1049.

⁹³² *Ibid.* at para. 1050 where the MMF writes: The cancellation of the allotment threw the process into disarray and brought about further delay. It also constituted an expropriation of the interest that allottees had in their 190 acre parcels. The new allotments of 240 acres would be in different, randomly chosen locations, that might or might not be of equivalent value.

⁹³³ Sealey, *supra* note 73 at 76.

enough time to draw lots in an expedient manner.⁹³⁴ Even at this late stage, it would seem that the government was willing to let its machinery play out at a slow pace. The government took no active steps (other than posting a public notification) to seek out Métis beneficiaries.⁹³⁵ Some seven years after the creation of Manitoba, the Crown was aware that delay was occurring,⁹³⁶ and it was a lingering issue for the settlement of Manitoba lands by either new settlers or the Métis children.⁹³⁷ But the delays were causing problems. The Métis were concerned about ever getting their land, and the new settlers were eager to acquire the Métis entitlement.⁹³⁸ Finally, on August 31, 1877 receipt of the first batch of patents was acknowledged to have been received in Winnipeg.⁹³⁹ And the bulk of the allotment would not be completed until 1880,⁹⁴⁰ ten years after the MMT.

III.e. 1878-87

In 1878, Minister Mills put faith in the leisure time of the new Lt-Gov. of Manitoba to help explain the delay and propose a response:

... no allotments had been made since those mentioned in his annual report, and consequently he could give no further information in reply to the question. They had done all they could with a view to hurrying on the work of allotting those lands, but the Lieut. Governor, being busily engaged, was only able to give a portion of his leisure to this work. When the late governor retired, this work was incomplete, and when Mr. Cauchon was appointed he was instructed to proceed with all rapidity with the allotment of the Half-breed reservation, but he (Mr. Cauchon) had protested against the allotment proceeding on the basis of the reports of the parties appointed

⁹³⁴ See, MMF Final Argument, *supra* note 136 at para. 1054.

⁹³⁵ See Surveyor General Dennis' comments in MMF Final Argument *ibid.* at para. 1127 where he writes: "It is not necessary to look up parties who have claims. If they care for their interests, they will themselves come forward and establish their claims."

⁹³⁶ March 14, 1877 Senator Girard noted that "but nearly seven years had elapsed, and nothing had been done" Exhibit 1-1268, p.170 in *ibid.* at para. 744.

⁹³⁷ Senator J.C. Aikins noted that the delay left the children and their lands in limbo: "If the patents were issued the difficulty referred to would be in part met, as they could dispose of the lands or settle on them, but they could do neither at present." Exhibit 1-1268, p. 171 in *ibid.* at para. 745.

⁹³⁸ *Ibid.* at para. 1074 where they explain: "But there was also no doubt that pressure to enable binding sales before grant had continued to grow in the province, not only from speculators and new settlers, but from many Métis who, tired of the never ending delays and hoping to obtain some benefit from the land promised to them, contemplated selling their land or that of their children."

⁹³⁹ Codd to Dennis, August 31, 1877. Exhibit 1-1305 as cited in *ibid.* at para. 1129.

⁹⁴⁰ See *ibid.* at para. 1053.

to attend to the matter. The Government had written to Winnipeg to ascertain how the matter stood, with a view to giving directions. Until a reply was received no action could be taken. He trusted that the allotment of the Half-breed reservations would be begun at an early day, and would be completed before the session terminated.⁹⁴¹

The Manitoba Legislature again intervened in the distribution in 1880 and pointed out the differences between the treatment of French Métis and English Métis. The Legislature explained to the Governor General that “a great portion of the grant of lands given to the Half-Breed population of Manitoba, under the terms of the *Manitoba Act*, yet remains unallotted ... long and unnecessary delay occurred in the allotment of said grant”. There was also an accusation that the delay was especially detrimental to the French parishes.⁹⁴² The recommendations for issuing scrip and remarkably, considering the government’s delay in allotting land, for imposing a time limit on Métis claims, were eventually accepted.⁹⁴³ The time limit was an attempt to deal with additional claims which revealed themselves as a result of the severe underestimation of section 31 claimants in 1876. That recount increased the land allotment and resulted in the grant being exhausted before all claimants obtained a share.⁹⁴⁴ These claims were met with scrip instead of land.⁹⁴⁵

After the deadline had passed more claims remained. Order in Council, May 21 1887 allowed such claims despite the earlier time limit.⁹⁴⁶ And another Order in Council on July 4, 1878 removed virtually all restrictions, including age, and called for the immediate grant of patents to all claimants.⁹⁴⁷ As late as 1886, the federal Crown anticipated that section 31 claims remained. Paul Chartrand points out that Canada attempted to repeal section 31 in 1886, “provided that the ‘repeal’ should not affect any right existing at the time of

⁹⁴¹ Minister Mills, 1878 Exhibit 1-1344 as cited in *ibid.* at para. 1055.

⁹⁴² Manitoba Legislature, Feb. 11, 1880, Address to Governor General, *Exhibit 1-1441* in *ibid.* at para. 1140.

⁹⁴³ Order in Council, April 20 1885 as cited *ibid.* at para. 1171.

⁹⁴⁴ *Ibid.* at para. 1169.

⁹⁴⁵ *Ibid.* at para. 1171.

⁹⁴⁶ Order in Council, May 21, 1887 Exhibit 1-1772 as cited *ibid.* at para. 1173.

⁹⁴⁷ *Ibid.* at para. 758.

repeal...Consequently, allotments were made to individuals, purportedly under a section 31 entitlement, after 1886.”⁹⁴⁸ Indeed, the government was tidying up the remaining bits of the children’s land grant until the mid-1890’s.⁹⁴⁹

III.f. Delay Summary

It is impossible to argue that delay did not occur in the distribution of the section 31 land grant. The change in government policy is enough proof of that. However, the interpretation of both the impact and cause of that delay is varied. Litigation has produced the extreme positions expected in such a venue. For the MMF, the delay was a central feature of how the federal government failed to carry out the section 31 grant. For the government, delay was not as much of a concern, in part, because each of these parties had a different view of what type of distribution was intended. While I have argued that the delay was a violation in itself, the extent of damage caused by the delay will undoubtedly be linked to the intended method of distribution. Considering the evidence above, one can speculate that regardless of the type of distribution chosen, the land reserves could have been set aside and reasonably distributed well within three years of the passage of the *Manitoba Act*.⁹⁵⁰ The fact that the majority of claims took between seven and ten years to patent is excessive and, as the Métis petitions indicate, this delay left families in limbo and detrimentally impacted their children’s ability to start out on their own with their own families.⁹⁵¹

⁹⁴⁸ Chartrand, *supra* note 1 at 8-9. [footnotes omitted].

⁹⁴⁹ See MMF Final Argument *supra* note 136 at paras 1174-1177.

⁹⁵⁰ This does not include any lands which would be reserved for children yet to be born. Also, this figure is based upon the drawing of lots at a rate of 60/hour as was reported earlier, *supra* note 902, plus the nine months that it took the Machar and Ryan Commission to carry out their work, see *ibid.* at para 1036. With a reasonable amount of time secured at the end to draft and issue patents (a formality which should not have prevented the Metis from using their lands) and at the beginning for either settling the details with the Métis parishes or setting up the necessary machinery, three years seems reasonable.

⁹⁵¹ Chartrand, *supra* note 1 at 71 where he writes: “Furthermore, the delay in distributing the lands to the beneficiaries intended by the Act is itself a breach of obligation. The initial distribution was stopped, and no patents

The major problem with the delay, in itself, was the failure to adequately remove the totality of the 1.4 million acres from the grasp of incoming settlers. The actual assignment of lands could take a bit longer but the lands needed to be secured immediately. Chartrand explains:

The pressure of immigration that was anticipated when section 31 was drafted suggests that the selection was intended to take place without delay. Although it was thus essential to establish the *location* of the lands immediately, there was no equivalent pressure to effect an immediate division. The benefit of an immediate appropriation could be immediately secured to the families by permitting them to settle the lands selected. The purpose of section 31 was to settle families. Furthermore, the ‘ownership’ of the lands might have been secured by the appropriation for the benefit of the group.⁹⁵²

We can see that the distribution scheme is intricately linked to the timing of division.⁹⁵³ However, securing the reserves was not dependent upon any distribution scheme and could have been facilitated in short order by consulting with the parishes regarding the preferred locations of their land reserves or by sticking to one interpretation of the *Act* rather than changing it almost three years into the process. One doesn’t need to argue about Government malevolence when its incompetence is so clear.

IV. Fiduciary Duty: The Best Interests of the Children of the Half-breeds

The Duty:

- To respect the desires of the community in regards to the location of their land grants. The most logical way to do this would be to grant lands as organized through parishes and located close to existing communities.

were issued before 1877. The delay failed to implement the settlement scheme with the sufficient speed and efficiency necessary to secure the 1870 ‘Half-Breed’ population upon lands in such places and in such circumstances as would permit the maintenance of the families within their preferred community.”

⁹⁵² *Ibid.* at 91. Chartrand also mentions at: “many ‘Half-Breed’ residents had, by 1877, moved elsewhere, and were thus not secured in their possession of Manitoba lands as section 31 intended. Third, the delay permitted the intervention of third-party interests, which made it practically impossible to reconstruct the dismembered communities.”

⁹⁵³ *Ibid.* where he writes: “The only requirement of the text that imposes some time restriction is that of making the grants to the same children among whom the lands are divided.”

One of the facets central to the distribution of land to Métis children was that the land be distributed for the benefit of Métis families.⁹⁵⁴ A review of the negotiations reveals that deference was to be shown towards Métis preferences toward the land selection. Indeed, the Métis, English and French alike, were under the impression that they were entitled to select the lands as they wished for their children's grant.⁹⁵⁵ This impression was clearly articulated by Riel who argued that the letter of assurances which Cartier gave to Ritchot, embodied the commitment to allow the Métis to select their lands.⁹⁵⁶ Such a vision was, effectively, shared by the Lt.-Gov. when in June, 1871 he asked the Métis to make such selections.⁹⁵⁷ Most of the French Métis parishes had already made their selections.⁹⁵⁸ The most obvious implication of the children's land grant in the MMT is that families would benefit from their children receiving grants in close proximity to the land held by their parents, siblings, extended relatives and current community. Métis actions in the years following the transfer of the Northwest to Canada lend support to the contention that the Métis intended the children's grant to benefit families by keeping families intact in established communities.⁹⁵⁹

⁹⁵⁴ For a similar assessment, see Chartrand, *supra* note 1 at 56 where he writes: "Section 31 gave the lieutenant-governor a duty to select 'such lots or tracts in such parts of the Province as he may deem expedient' to the extent of 1.4 million acres... The discretion of the lieutenant-governor, although stated to be unfettered by federal regulation, was not to be construed as absolute. The discretion was to be exercised in such a way exercised in such a manner as may be reasonably expected to promote the objects of section 31. On this basis, the lands selected had to be fit for their purpose; they had to have such characteristics, and be in such locations, as to promote the objects designated by section 31."

⁹⁵⁵ Adams Archibald, memorandum, December 7, 1870 *Exhibit 1 – 0548*, p. 4 in MMF Final Argument, *supra* note 136 at para. 77 stated that the English half-breeds "would prefer to have the liberty of selecting their lands where they may think fit." And at para. 78 the French "prefer having the lands to which they are entitled laid off in one block."

⁹⁵⁶ Riel to Dubuc, June 5, 1871, *Exhibit 1-0613 ibid.* at para. 917, where it is written (translated from French): "This privilege of making the original choice was promised by the Ministers who treated with us about the affairs of the North West in the name of the Imperial government and through His Excellence the Governor General and guaranteed through that document."

⁹⁵⁷ See, *ibid.* para. 79.

⁹⁵⁸ Flanagan, *supra* note 7 at 68. Also, Flanagan, *supra* note 144 at 9.

⁹⁵⁹ Archibald to Ottawa, December, 27, 1870 *Exhibit 1-0548*, pp. 3-4 as cited in as cited in MMF Final Argument, *supra* note 136 at para. 894 where Archibald, the lieutenant-governor in Manitoba, summarized the French Métis position as follows:

The locations selected by the Crown were, largely, responsive to Métis desires. However, there are several ways in which this was not the case. First, the Crown failed to honour the vision for Métis lands set out in the MMT or, as an alternative, show flexibility in regards to the different visions being offered by the French and English parishes.⁹⁶⁰ That is, the English Métis preferred “the liberty of selecting their lands where they may think fit.”⁹⁶¹ On the other hand, the French saw the land as a vehicle for community preservation. They had a vision of enclaves where their unique culture could be protected from the immigrant influx.⁹⁶² Crown agents saw quite clearly that the Métis were not selecting lands based on the material value of the land. Instead, their community visions were at play. For example, McMicken explained in December of 1871 that:

...the selection as made in behalf of the Half-breeds was not “per Se” [sic] on the ground of the better quality of the land, but more especially in view (as regards the French Half-breeds more particularly) of keeping them intact as a community, in contiguity to their old settlements, and with a view to securing and maintaining their religious and political interests and privileges. Their representative men readily admit, as is truly the case, that the material interests of the Half-breeds would be greatly enhanced by another system of distribution than that adopted by themselves; but

“I am inclined to think that if the feelings of the Half-breed population, particularly the French, are consulted, the lands will be laid out so as to throw the Reserve as much as possible into one block, or rather into two blocks, one for the English and one for the French.

This Country has been settled almost altogether on the plan of keeping those of one Race, Religion and Language, in a community by themselves. At this moment, Parishes are English, English Speaking and Protestant, or they are French, French Speaking and Catholic. The disposition to continue this arrangement is very strong, particularly with the French, and they will be found to be anxious to have their Reserve laid off in the vicinity of existing Parishes of their own people...

...

It is only because the French Half-breeds, and their leaders, treat the question, not as one of business, but rather as one of race, and breed and language, and because they are unwilling that their people should form part of a mixed community, that they prefer having the lands to which they are entitled laid off in one block.”

⁹⁶⁰ Chartrand, *supra* note 1 at 108 where he writes: “In exercising his discretion on selections, the lieutenant-governor was required to consider the choices made by the ‘Half-Breed’ people themselves, on the basis that section 31 was to be interpreted according to the understanding of the people for whom it was enacted. This means that the promises of the Canadian ministers to Abbé Ritchot in this respect had to be honoured.”

⁹⁶¹ Archibald, Memorandum, December 7, 1870. *Exhibit 1 – 0548, p. 4 in MMF Final Argument, supra* note 136 at para. 77.

⁹⁶² *Ibid.* at para. 78. where Archibald acknowledges that the French wanted “the lands to which they are entitled laid off in one block.”

they fear interference with their religion, and their deprivation of all voice or influence in the Legislature of the country. On these points they are sensitive.⁹⁶³

We can see from this quotation why the issues of language and denominational schools were essentially dependent upon the successful implementation of the land grant. If the Crown was unwilling to show the flexibility in adapting the grant to the preferences of these communities, then they were bound to choose the vision employed in the negotiations.⁹⁶⁴ As a result, both the French and English would be bound by the French vision for the lands since this was the vision that Ritchot secured in the negotiations. Indeed, while flexibility was an ideal political position, in the context of the MMT it may not be defensible as the fulfillment of a treaty obligation.

Flanagan tries to show that Lt. Governor Archibald took great efforts to meet the wishes of the Métis. However, there were exceptions. Whether these were full breaches of the broad duty to the entire “half-breed” community is questionable, however, it is clear that there were breaches of this duty in particular instances. Métis choices were clearly rejected due to government favoritism of new immigrants in the following cases:

- The Métis of St. Charles and St. Francois Xavier were denied their preferred locations (near Rivière aux Ilets de Bois) because immigrants had settled upon the

⁹⁶³ McMicken, Immigration Agent for Winnipeg, Annual Report, December 30, 1871, Exhibit 1 – 0664, as cited *ibid.* at para. 80. Also see, J.A.N. Provencher, Immigration Agent for the North West, Annual Report, January, 1872, *Exhibit 1 – 0668*, where he writes: “Besides, the value of the lands has been quite unconnected with the considerations which influenced the half-breeds their choice, and instead of wishing to monopolize the best lands in the Province, they only desire to remain collected together in the new settlements, as in the old, and not to be removed too far from the latter.” This realization goes against one of the early worries associated with allowing the Métis to choose their own lands. Chartrand, *supra* note 1 at 62 explains that a report commissioned by the lieutenant-governor in October of 1870 (Chartrand also lists this report as being produced in January of 1870) “cautioned the lieutenant-governor that, although allowing recipients of section 31 lands to choose their own locations would be most calculated to suit their requirements, such a scheme would, ... on the other hand, allow the possibility of the 1,400,000 acres being taken in the most desirable parts of the unoccupied lands of the Province.”

⁹⁶⁴ December 30, 1871 G. McMicken, Immigration Agent for Winnipeg, annual report Exhibit 1 – 0664 as cited in MMF, *ibid.* at para. 80 where the motivation for community maintenance is apparent in how these selections were carried out. The Immigration Agent for Winnipeg was aware that the half-breeds did not make their selections in an attempt to secure the “better quality of land” but, rather, selected their lands with a view “of keeping them intact as a community, in continuity to their old settlements, and with a view to maintaining their religious and political interests and privileges.” This was done because the Métis leaders feared “interference with their religion, and the deprivation of all voice or influence in the Legislature of the country. On these points they are sensitive.”

lands. The immigrants were empowered by the Order in Council of May 26, 1871 which imparted legal rights upon the settlers which, in this case, contravened the rights of the Métis. Flanagan writes: “the Metis never did settle there, although they later established the parish of St. Daniel six miles to the north.”⁹⁶⁵

- The Métis of High Bluff and Poplar Point had their selections rejected in August of 1872 because Archibald preferred to see such valuable lands (north of the Assiniboine and south of Lake Manitoba) in the hands of immigrants who could make better use of it.⁹⁶⁶ Note that this action was consistent with the Order in Council of April 15, 1872 which sought to ensure that only “a due proportion of the woodlands of the province” were reserved for the Métis. To the extent that such considerations impacted upon the Métis preference for their land reserves, it was a clear violation of the fiduciary duty to act in the best interests of the children.

Even after these land selections were made, some children were unable to procure an allotment within the selected townships. One of the MMF objections to the allotment of lands was that “many of the claimants were allotted land that lay far outside of the reserved townships.”⁹⁶⁷ This is a problem which arises from Order in Council April 25, 1871 which set out that Lt-Gov. Archibald’s township selections were to be used for allotment. By selecting lands outside these selections, which were made by consulting the various Métis parishes, the allotments were “contrary to law, and without any indication of conforming to ‘the wishes of the half-breeds’”.⁹⁶⁸

⁹⁶⁵ Flanagan, *supra* note 7 at 69.

⁹⁶⁶ *Ibid.* at 73.

⁹⁶⁷ MMF Final Argument *supra* note 136 at para. 1058.

⁹⁶⁸ *Ibid.* at para. 1058.

Government surveys were not very far advanced when the Métis made their land selections. As a result, “the Metis stated their claims with reference to geographical features.”

Flanagan notes that the French parishes claimed lands which were, for the most part,

all very large and contiguous with each other. They would have converted the southern part of Manitoba into something like Ritchot’s Metis enclave, appropriating the riverfront land with its all-important supplies of timber, not just on the Red and Assinboine where the Metis already lived, but on the lesser rivers such as the Seine, Salle, Rat, and Ilet de Bois.⁹⁶⁹

While Archibald was willing to acknowledge these selections (once they were adjusted for appropriate size) he also had to ensure that they fit within the system of government surveys.⁹⁷⁰

Chartrand explains that this was a concession that the Métis had to make for the public interest.

The only concession asked for by Archibald, required by the public interest was the requirement to make the selections conform with the surveys.”⁹⁷¹ But was such a concession necessary?

Could the surveyors not simply survey irregular lots along the borders of the Métis reserves as they would have done to accommodate the irregular river lot holdings already in place around Red River? It might not seem like much of a concession for the Métis to make but there was really very little justification for it. Plus, having to wait for proper surveys would only delay the land distribution further.

The effect of the OIC of April 25, 1871 was to take an organized and systematic (yet still imperfect) process and fill it with chaos. Archibald initially “advised the reservation of townships in the vicinity of the existing parishes to continue the established separation between ‘English’ and ‘French’ communities.”⁹⁷² Here Archibald was attuned to the desires of the people. Archibald initially desired “selecting blocks of land, and immediately in back of existing

⁹⁶⁹ Flanagan, *supra* note 7 at 68.

⁹⁷⁰ In December of 1870, Archibald recommended the system of rectangular surveys that had been adopted in the United States. See, Flanagan, *supra* note 144 at 8.

⁹⁷¹ Chartrand, *supra* note 1 at 60.

⁹⁷² *Ibid.* at 62-63 [footnotes omitted].

river lots”⁹⁷³. This was the most logical method of achieving the vision of the “benefit of families” by keeping the communities together. However, the benefit of such a structure was almost simultaneously undermined by the April 25 OIC which indicated that the mode of distribution would be random draw.⁹⁷⁴

Overall, the selection of the lands for the Métis reserves was imbued with few errors. However, these errors were significant. Flanagan explains that the effect of this situation is unclear: “It is a matter of judgment as to whether the degree of impact was enough to violate Cartier’s promise to Ritchot that ‘the regulations to be established from time to time by the Governor General in council, respecting that reserve, will be of a nature to meet the wishes of the half-breed residents.’”⁹⁷⁵ And yet, in the cases bulleted above, Cartier’s promises were indeed violated. The cause of this violation does not have to be due to any presence of malice or lack of effort. Rather, it can be due to government incompetence, or misjudgment. If the level of analysis is such that one can only take into account the entirety of the Métis population when measuring a breach in duty, the conclusion is not clear. However, duties can only be measured in proper context. The maintenance of the community required that the government be responsive to *each community* and since it was through parishes that the Métis community was organized, the parish provides the appropriate level of analysis. It is clear, therefore, that in the cases cited above the government failed to live up to its duties to the Métis communities in selecting the land reserves.

⁹⁷³ *Ibid.* at 64.

⁹⁷⁴ *Ibid.* at 72 [footnotes omitted] agrees: “Although the public had by then been surveyed and blocks of land had been set aside for section 31 purposes, the system of drawing lots for individual allotments to children did nothing to promote settlement in communities.”

⁹⁷⁵ Flanagan, *supra* note 7 at 75.

V. Fiduciary Duties: To Distribute Lands for the Benefit of Families

The Duty:

- No matter how the *Act* is interpreted in regards to parents being included in the 1.4 million acres or not, family clusters, and legislative protections to keep land in the hands of the Métis families, were necessary features of the Crown's duty.

V.a. Family Clusters within the Larger Grant

I have stated repeatedly throughout this thesis that “the benefit of families” clause, must have some interpretive weight. Choosing the family unit to characterize the benefit means that section 31 must carry some form of benefit for the family as a whole rather than simply as individuals. Further, since these lands were intended to maintain the Métis community, it is reasonable to characterize that benefit as a reassurance that the families would be grouped together when the lands were divided up. Indeed, as argued previously, the reference to Loyalist grants helps illustrate how this could have been accomplished. However, there are other analogous situations which help us understand what the Métis at Red River may have been seeking. One example is described by Karen Travers. In her article, Travers uses several attributes to establish that the Métis people of Drummond Island thought of themselves as a distinct people. Travers recounts descriptions of Métis dress, language, and economics to show the unique attributes of the Métis people. However, most revealing is her account of what occurred after the international border between the United States and Canada ascribed Drummond Island to the United States. Many of the residents of Drummond Island left in order to be allocated land on the British side of the new international divide. These settlers established themselves at Penetanguishene and Lafontaine. When Travers examined the township of Tiny a concentration of Métis residents is noted primarily in two subdivisions. Travers concludes:

“Nearly all of the families indicated as Métis (half-breed) are in subdistrict five, which encompasses the village of Lafontaine.”⁹⁷⁶ Rather than being mere happenstance, it would appear that the Métis chose lots “so that their properties were together.”⁹⁷⁷ What is most significant here is that the original migration from Drummond Island occurred some seventy years prior to the census data that Travers was examining. Even after all those years and “[d]espite massive immigration that overpowered other regions of the township, the residents at Lafontaine created a space that was dominated by people of Native-French ancestry.”⁹⁷⁸ The major distinctions between Lafontaine and Red River were first, Lafontaine was created during immigration to new lands and second, the concept of Aboriginal title was never employed. Neither of these serves to undermine the usefulness of the comparison. Protecting a community that is already on specific lands seems a less arduous task than establishing a community in a new location. As well, asserting Aboriginal title serves to reinforce the notion of belonging to a particular place. The absence of such a notion at Drummond Island is a reflection of the times and the migration itself. Aboriginal title wasn’t something being actively pursued at that date and it is nearly impossible to assert title to lands that you did not previously occupy. The usefulness of the Drummond Island-to-Lafontaine example is that a distinct people want to live together in community. It is logical that these people would seek to ensure that families and communities were guaranteed land allocations which kept the community intact.

Another example is offered in the *Cote* decision where the Court explains that Aboriginal rights frequently have “an important link to the land ... As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of

⁹⁷⁶ Travers, *supra* note 41 at 226.

⁹⁷⁷ *Ibid.* referring to A.F. Hunter, *A History of Simcoe County in Two Parts*, vol. 2. (Barrie, ON: Historical Committee of Simcoe County, 1948) 223.

⁹⁷⁸ *Ibid.* at 227.

land.”⁹⁷⁹ There should be little doubt that Indian title would only be able to be practiced appropriately on specific tracts of land. Further, it would be practiced in particular ways according to the customs of the people. The Métis were not a randomly arranged society. Yet, rather than ensuring that the lands were distributed in a manner which benefited the families, the government focused on individuals and made no effort to ensure that those individuals received a relatively equal benefit. The government chose to distribute the lands through a process of random assignment which, I argue, was a violation of their duty to distribute lands for the benefit of families.

V.b. Random Allotment as Violation of Family Clusters

The method of random distribution which was carried out in regards to section 31 lands is described by Sealey as having three components. First, eligible persons were placed on a list. Second, location details of specific plots of land were placed on tickets. Finally, as a name was read off the list a ticket was pulled to match the name.⁹⁸⁰ Random selection was introduced through Order in Council of April 25, 1871 and the random draws began on Feb. 22, 1873. Due to the randomness of the draw, no special care needed to taken. The arbitrary allotments took about one minute each to complete. This system provided both a simple, and wholly inappropriate, method of assignment. Even after allotment was stopped and restarted,⁹⁸¹ the random draw remained a consistent component of the distribution scheme. Yet, inexplicably, extensive delays ensued: “The 6034 allotments ultimately drawn between 1876 and 1880 should

⁹⁷⁹ Cote, *supra* note 268 at para. 39.

⁹⁸⁰ Sealey, *supra* note 73 at 77.

⁹⁸¹ Chartrand, *supra* note 1 at 101-103 where he writes: “The distribution of section 31 lands was effected only in 1876-77. Before that, ...several aborted attempts at a distribution had been initiated. Although the earlier Acts were purportedly nullified by the eventual distribution, the mere failure to act according to the requirements of section 31 forthwith on its enactment was a breach of obligation.”

have taken only slightly more than 100 hours.”⁹⁸² 100 hours was all that was needed to ensure that families gained virtually no benefit from the land reserve.

The OIC that introduced the random allotments also included the Métis heads of families in the grant.⁹⁸³ The MMF points out how these measures were detrimental to Métis interests. The MMF writes:

Both measures were to have the effect of encouraging sales of the lands. To the extent that adult Métis, including heads of families, were to participate in the grant, more of the land would come on the market immediately, rather than being “locked up” until children reached the age of majority. And to the extent families’ land was to be distributed at random, rather than in blocks, it was more likely to be sold.⁹⁸⁴

In order to avoid those effects, the MMF explains that: “[u]nless the land was granted in family clusters, and held in federal guardianship until it was patented and in any case until the children reached the age of majority, it was not ‘for the benefit of the families.’”⁹⁸⁵ There seems to be an assumption here that federal guardianship would end when the children reached the age of majority.⁹⁸⁶ If one is to interpret Ritchot and Macdonald’s understanding that legislative protections would accompany the grant in order to ensure that the land remain in the hands of Métis families, what justification do we find for limiting that protection to a set point in time? I see no justification for it and, therefore, it is my argument that this was an ongoing obligation on the part of the federal government. While it may be conceivable that these lands were to be made available in a restricted market place which was adequately protected by legislation to ensure that the lands remained in the hands of Métis families, it is not a given to assume that these lands were supposed to be vulnerable to the general market. As such, the real problem

⁹⁸² *Exhibit 1-0835* MMF Final Argument, *supra* note 136 at para. 1003.

⁹⁸³ *Ibid.* at para. 990.

⁹⁸⁴ *Ibid.* at para. 991.

⁹⁸⁵ *Ibid.* at para. 91.

⁹⁸⁶ The MMF inserts this arbitrary time into their argument despite acknowledging *ibid.* at para. 90 that “The whole object was not to sell the land, but to settle the land, so that the families would hold land that could be passed on to future generations.”

with the random allotment is not that they were more likely to be sold, but that they had no benefit to families.

On the other hand, if the Métis were paid and chose to sell their land was there not a monetary benefit? Sales resulting from delays in allotment, or land which was randomly drawn and therefore not of benefit to the families cannot be said to have been children's land grant sales. The Métis families had collectively gathered and shown the government how to benefit their families. Through parish meetings, and throughout the negotiations in Ottawa, the Métis did not ask for monetary compensation as a way to benefit families. They did not ask for the government to create a market in lands. Instead, they asked for land. Through their selections they displayed that communities were more important than the value of the land itself. Their families were benefitted by distributing land which would keep these communities together.

It is difficult to see how this method of distribution responded to the "benefit" clause in the *Manitoba Act*. Under random selection, families would only be located near each other by luck. In addition to the raw locations, the benefit that individuals would receive was also based on luck of the draw:

If the land could be located it might be found to be hilly, swampy, sandy or in other ways not suitable for agriculture. In addition, the Half-breeds, unaccustomed to bureaucratic procedures, were not aware that a patent would be issued, and that they had to formally register their land to obtain title.⁹⁸⁷

This is important. The role of speculators was to gather assignments from the Métis and present these in Winnipeg to obtain patents. It was the speculators, familiar with the process and

⁹⁸⁷ Sealey, *supra* note 73 at 78. Also see Chartrand, *supra* note 1 at 141 where he explains: "Section 31 required that the lands be of such characteristics as would yield a reasonable prospect for successful settlement in the economic and geographic conditions of Manitoba in the 1870s. It appears that these conditions would have dictated the allocation of lands close to the rivers where all the agricultural activity took place at that time."

formalities of land registration who knew exactly how to take advantage of the Métis land grant before the Métis ever had a chance to use it.⁹⁸⁸

If section 31 was merely a land grant for the prior residents then such a guarantee could have been inserted into the *Manitoba Act* without referencing either Indian title or family benefit. The inclusion of both of these terms was recognition that the Métis were attempting to secure a future for their people based upon their status as prior occupants to Canada's entrance.⁹⁸⁹ This future could not have been conceived based on individual randomized land grants. Family benefit could only be achieved if the government paid attention to existing communities.

The Crown would need to take the community selections and find a way to distribute the land so that family clusters would emerge. Instead, the Crown chose to distribute the land randomly. Dr. Flanagan points out that this would not have benefited the Métis:

Even if the Métis had wanted to remain in Manitoba to become commercial farmers, they would not necessarily have wanted to settle on their particular children's allotments. The Métis tended to move in large, clan-like groups of relatives, consisting of parents and children, brothers and sisters, and in-laws. But the partition of reserve land into 240 acre parcels made it difficult to resettle as a group; it would only be chance if a group of relatives happened to get allotments near each other. The Métis did in fact found a number of new villages in Manitoba in the late nineteenth century, such as St. Daniel and St. Eustache, even though they did not settle on children's allotments.⁹⁹⁰

The method of distribution (and the delay) was so unpalatable to the Métis that they established new communities in both Manitoba and Saskatchewan. But even in that recognition, Flanagan misleads his readers by referring to the Métis becoming "commercial farmers". This reference helps him locate the cause of Métis dispersal, not in government policy or ineptitude, but rather

⁹⁸⁸ Sealey, *ibid.* at 77 where Sealey explains that the Métis would face challenges in actually claiming this land: "Lack of roads, the difficulty in those days of travelling hundreds of miles through trackless wilds, the problem of identifying surveyors posts to locate exact acreages of land---all these made it almost impossible for people, most of whom were illiterate, to ever find the land assigned to them."

⁹⁸⁹ At the Supreme Court of Canada, the MMF emphasized the Métis claim in terms of "minority" rights. See Manitoba Métis Federation, *Factum of the Appellant*, MMF v. Canada and Manitoba, Supreme Court of Canada (2011) at para. 64-79. See para. 64 where the MMF writes: "In the *Secession Reference* (sic) [1998] 2 S.C.R. 217, at paras. 79 to 82, the Court emphasized this country's long tradition of protecting the rights of minority peoples, extending back at least to 1867. The Appellants submit that the provisions of sections 31 and 32 of the *Manitoba Act* were early examples of this tradition; one entrenched in our history and in our Constitution.

⁹⁹⁰ Flanagan, "Historical Evidence," at p.92 as cited in MMF Final Argument, *supra* note 136 at para. 123.

in Métis occupational preference. He would have us believe that they chose to sell their interest because they preferred the hunt over farming. These things need not be related. It is merely an attempt to muddy the waters. If pull and push factors are both present, how can we ever be certain that the cause of the Métis dispersal from Manitoba was the push factors? No matter how the Métis did or did not respond to a faulty implementation of the *Manitoba Act*, this does not negate the fault. And that fault here is so obvious that its substance is acknowledged by both advocates and detractors of the Métis cause. Paul Chartrand has accurately characterized the random allotment process as one in which the “government sponsored a scheme of dispersal.”⁹⁹¹

V.c. Legislative Duty to Keep Land within Métis Families

It was apparent to the Manitoba Legislature that the beneficiaries of the grant needed protection.⁹⁹² The federal government asserted (rightfully so) “the sole power” to make regulations, “from time to time, to regulate the distribution of the grant to the Half-breeds individually and the issue of Patents therefor.”⁹⁹³ Here, on the issue of patents the government looks clumsy. It is also through an examination of the forms of patents that we can see signs that the government abandoned its obligations to protect the Métis lands.

Emile Pelletier undertook a detailed examination of the grants of children’s allotments for the Manitoba Métis Federation in 1975 and seems to have set the standard for chronicling these grants through the individual source material. Flanagan and Ens acknowledge Pelletier’s work but do not seriously critique it or challenge its results.⁹⁹⁴ The accounting carried out by Pelletier

⁹⁹¹ Chartrand, *supra* note 1 at 76. This, despite the fact that the Government of Canada “knew well how to allot land in such a way as to enable a community to live as such.” O’Sullivan J.A., in *Dumont* as cited in MMF Factum, *supra* note 989 at para. 130.

⁹⁹² See MMF Final Argument *supra* note 136 at para. 948.

⁹⁹³ Governor in Council to Manitoba Legislature, January 27, 1873, *Exhibit 1-0802, ibid.* at para. 949.

⁹⁹⁴ Flanagan and Ens, *supra* note 918 at 41. And Flanagan, *supra* note 7 at 4-5 where he writes: “Using criteria that are obscure to the reader, the book categorizes the sale of each grant as legal, illegal, ambiguous, or speculative. Pelletier’s work is confusing, but it certainly leaves the impression that wrongdoing took place on a large scale.”

and Flanagan is really a case of whose parameters the reader prefers and what level of scrutiny is revealed in the research. I, for one, prefer Pelletier's. But it is not because Pelletier accounts for more irregularities, and illegalities, in the paper work. Indeed, I find that method of research to be based on an unconvincing level of analysis. Rather, I prefer Pelletier's work because it shows the required insight to identify broad implications from the minute details. One such problem is the form of patent. The problem occurs in the form of patent which was designed for the "Half-breed" land grant. The form reads as follows:

- (a) Whereas pursuant to Section 31 of the Manitoba Act, 1,400,000 acres of land were set aside, to be divided between ----- children of the Half-breed head of families;
- (b) and whereas 1,400,000 acres were selected and divided among such children, and,
- (c) whereas the lands hereinafter described are part of the lands so set apart, and have been duly allotted to: Mr. -----,
To have and to hold said parcels forever.⁹⁹⁵

Only 3501 patents were issued under this form, comprising 840,000 acres of land. Pelletier shows that after 1890 a unified form was used for all grants except for grants under section 31. However, the grants post-3501 were issued under the *Dominion Lands Act*. That form provided as follows:

- (a) whereas A, B, applied for land;
- (b) Now Know Ye, that by those present we grant to A, B, all those parcels of land described as follows: "....."⁹⁹⁶

Pelletier notes that some of these grants carry a notation which indicates that they were made as part of the "H.B. allotment".⁹⁹⁷ Pelletier points out the serious implications of irregularity and questions if such grants were actually made pursuant to section 31 obligations. Pelletier inquired into this anomaly with Indian Affairs and "[t]heir reply was in effect, that no matter what form of grant was used, it was a Half-breed land grant."⁹⁹⁸ This problem is completely disregarded by Flanagan who writes (in a footnote): "Pelletier suggests that the change of form was illegal, but I

⁹⁹⁵ Emile Pelletier, *Exploitation of Métis Lands* 2nd ed. (Winnipeg: Manitoba Métis Federation Press, 1979) at 11.

⁹⁹⁶ *Ibid.* at 12.

⁹⁹⁷ *Ibid.* at 13.

⁹⁹⁸ *Ibid.* at 16.

fail to see why.”⁹⁹⁹ Flanagan could find the answer in the following passage from Pelletier: “the form of the grant does not comply with the regulation made by the Lieutenant Governor, and does not state the consideration why was the said land given to the applicant...”¹⁰⁰⁰ The explanation of Indian Affairs may seem to adequately explain general government incompetence in keeping proper books,¹⁰⁰¹ but it does not address, nor does Pelletier or Flanagan, the apparent change in terms. The first series of Patents, issued through a form designed for the unique circumstances of section 31 referred to the lands “set aside” and “set apart” out of which a parcel was “allotted” to A “To have an to hold said parcels forever.” In contrast, the new form merely “granted” lands without any conditions or limitations. The overall tenor of the original grant is indicative of land which has been reserved from ordinary land holdings for specific purposes. In this case, the purpose was settlement, not sales, as the words “hold....forever” would indicate. Flanagan’s failure to see any implication in such a change in these forms is confounding.¹⁰⁰²

The OIC of March 23, 1876 shows that the government felt a duty to protect the lands from speculators who were trading in lands prior to patents being issued.¹⁰⁰³ However, the government did not seem to recognize that the purpose of the *Act* doesn’t magically change once a patent is issued. As such the change in patent forms was a reflection of a change in the policy which had developed as a default position. If the government had taken the time to look at the

⁹⁹⁹ Flanagan, *supra* note 7 at 99. See footnote 111.

¹⁰⁰⁰ Pelletier, *supra* note 995 at 15.

¹⁰⁰¹ Note that Flanagan, *supra* note 7 argues that it was the government’s attention to detail which helped create delays in issuing patents, at 86 where he writes: “The elegant penmanship and official signatures required to prepare a Crown patent required additional months.”

¹⁰⁰² Flanagan, *ibid.* at 86 writes: “A special printed form, reciting the particulars of s. 31 of the Manitoba Act, was used for approximately the first half of these patents, until it was replaced by a generalized printed form. This was part of a move by the Department of the Interior to simplify the issue of patents by developing a single form to cover all headings under which Manitoba lands were granted (s. 31, s. 32, commutation of rights of hay and common, homestead, purchase, military bounty warrants, etc.).”

¹⁰⁰³ OIC March 23, 1876, *Exhibit I-1171*, as cited in MMF Final Argument *supra* note 136 at para. 738 where OIC states: “with a view to discourage the operations of speculators in these lands, no prospect has been at any time held out that such assignments [of land before patent] would be recognized by the Government; and, believing such policy to be directly in the interest of the persons for whose benefit the lands were appropriated, he respectfully recommends that the same now receive the authority of the Privy Council.”

original form they would have found a policy which was more reflective of the MMT than their actions had indicated in distributing the grant. Near the beginning of the section 31 saga, the government began distancing itself from the protective provisions of the MMT, insisting that once lands were granted there would be no restrictions.¹⁰⁰⁴ In contrast, “[t]he federal government created rules to govern the inheritance of scrip in cases where the claimant had died before receiving it. Benefits intended for one generation of Metis were thus passed on to the next.”¹⁰⁰⁵ We can see that the government was not immune to envisioning intergenerational “benefits”. So the failure is not in its capacity to understand the Métis, but it may lie in the government’s capacity to listen to or to respect the Métis. It is not clear whether this was the result of a conscious change in policy post-1876 or a bureaucratic neglect for the original protections. Either way, the terms of the MMT were violated by the lack of protective encumbrance over the Métis land reserves; Paul Chartrand summarizes the error as follows:

Once the 1.4 million acres had been appropriated by the Act, there was a constitutional obligation to perform the terms of section 31 in such a way that those lands provide a benefit for the group. In the social context, that required provisions for securing the lands within the families. In individual cases of breach of settlement conditions by children grantees, the lands should have reverted to the federal Crown to be held for the benefit of the group. Making isolated free grants was entirely outside the ambit of such obligation.¹⁰⁰⁶

The effect of the dual government neglect of random allotment and free grants of land is nowhere better illustrated than in the distribution of scrip.

V.d. Scrip as Violation of Legislative Responsibility for the Maintenance of the Family Interest

The Crown showed signs of acting in direct contradiction of the children’s best interests when the Dominion lands agent, Gilbert McMicken devised a plan in 1872 to issue scrip and to

¹⁰⁰⁴ *Ibid.* at 1042. Archbishop Taché didn’t share this vision and arguing in a letter to David Mills, Minister of the Interior and Superintendent General of Indian Affairs, on January 22, 1877 that: “...the preservation of their grant may be the only way to secure a footing for them in their native country.” At *ibid.* para. 739-741.

¹⁰⁰⁵ Flanagan, *supra* note 144 at 12.

¹⁰⁰⁶ Chartrand, *supra* note 1 at 107.

make the scrip redeemable for small pockets of land which would prevent any collective settlements. Flanagan reports that Bishop Taché and the Manitoba Legislature responded to McMicken's plan by calling upon the government to respect the desires of the Métis. Flanagan also captures this protest in the words of Pascal Bréland who explained that the Métis "would not be pleased with any arrangement that did not give them their lands en bloc by themselves entirely."¹⁰⁰⁷ McMicken's plan was not endorsed by the federal government but scrip was later introduced to satisfy certain irregular claims. The need for scrip arose, in part, through the exclusion of the heads of families from participation in the section 31 land grant. As a result, the heads of families were deemed to still have Indian title.¹⁰⁰⁸ Scrip was issued in an attempt to extinguish that interest.

Scrip was also used to meet the claims of children who were left over when the 1.4 million acres had been allotted. Inflated land grants were allotted as a result of Codd's underestimation of the number of children eligible for grants. When faced with these additional claims, the deputy Minister of the Interior suggested the issuance of scrip:

The only way in which such claims can now be satisfied is by an issue of scrip. Although scrip to the extent of \$160 only has been granted to each of the halfbreed heads of families in compensation for the loss of their share in the allotment, ... in the end 240 acres of land were granted to all the Half Breed children who had proved their claims prior to the time when the reserve of 1,400,000 acres was exhausted, I think it would be equitable that the issue of scrip to each half-breed child who has since proved his or her claim should be for \$240.00, the same to be accepted as in full satisfaction of such claim.¹⁰⁰⁹

But whether it was for the heads of families or for the children, scrip was problematic. Scrip did not locate lands within the community selections so it violated the provision (indeed, the central purpose) of the MMT which required that lands be distributed for the benefit of families.

¹⁰⁰⁷ Flanagan, *supra* note 7 at 71.

¹⁰⁰⁸ See the preamble to *An Act Respecting the appropriation of Certain Dominion Lands in Manitoba*, 1874, 37 Vict. C. 20 as cited in MMF Final Argument, *supra* note 136 at para. 116.

¹⁰⁰⁹ A.M. Burgess, Deputy Minister memorandum to Minister of the Interior, May 1884 Exhibit 1-1655 Exhibit 18, p. 63 as cited in MMF Final Argument, *ibid.* at para. 1170. Scrip was again issued in 1887 for the same purposes. See para. 1173.

The issuance of scrip was considered, and eventually imposed, by the government despite recognition that scrip was fraught with problems for those who were to benefit from it. The granting of scrip for the purpose of section 31 had been considered as early as Jan. 3, 1871. Archibald received a report where it was indicated that the use of scrip:

would inevitably lead to chicanery and fraud, the spoilation of ignorant men and the accumulation of land in the hands of speculators. The evil effects of a scrip system in parts of the United States is cited in opposition to the introduction of the same system here ... the Scrip system as proposed is calculated to be more mischievous than beneficial...¹⁰¹⁰

This consideration of scrip was seen alongside the need to obliterate the Métis culture.¹⁰¹¹ And, even though scrip was not immediately adopted, the effects of the distribution of the children's grant mirrored, in many ways, the issuance of scrip. For example, both scrip and the random allotment allowed the Lt.-Gov. to abdicate his constitutional responsibility: "[t]he text required the lieutenant-governor to exercise his personal discretion in selecting the lands. Any distribution, including the distribution of scrip that was made, that by-passed the exercise of that discretion was contrary to the demands of section 31, and, consequently, of no force or effect."¹⁰¹² Scrip was quite simply a complete neglect of government responsibilities and it imparted no benefit which can be attributed to either the MMT or Aboriginal interests. While one might argue, as Chartrand seems to, that the random assignment of scrip "by-passed the exercise" of government discretion, it could also be argued that it is merely an inappropriate use of such discretion. It should also be noted here that if one was to find that the parents did have a duty to act as trustees for their children's land interests that no such duty could possibly attach to

¹⁰¹⁰ Report, Molyneux St. John January 3, 1871 to Archibald Exhibit 1-0557, p. 11 as cited *ibid.* at para. 908.

¹⁰¹¹ January 3, 1871 Molyneux St. John to Lt. Gov. Archibald, Exhibit 1-0557, p. 10 *ibid.* at para.906 where he explains that the French Métis should not be allowed to remain together: "... for such an arrangement must not only be extremely inconvenient for a large number of the inhabitants but it would also tend to perpetuate distinctions which should be obliterated as speedily as possible."

¹⁰¹² Chartrand, *supra* note 1 at 75 [footnotes omitted]. And at 74 he writes: "The issue of scrip must be a breach of the requirement in section 31 that the discretion of the lieutenant-governor be exercised in selecting the location of the lands. It was the intention of section 31 to protect the beneficiaries of the land grant by requiring the Crown's exercise of discretion in selecting lands that were fit for the settlement purposes of section 31. The granting of scrip circumvented the exercise of that personal, positive obligation."

scrip since the issuance of scrip was not consistent with the nature of the MMT. The parents could not be tasked with supervising over a flawed process, effectively being burdened with fixing the government's error in issuing scrip in the first place. The parent's lacked the necessary discretionary authority to convert the flawed scrip process into a process consistent with the MMT.

Flanagan explains that government deadlines were extended at "least four times" to receive applications from entitled Métis children. It makes sense that the government would have trouble accounting for all the claimants through a scrip program which never should have been imposed to begin with. Flanagan continues: "[i]n the end, 993 scrips for \$240, worth \$238,320, issued to Metis children or their heirs."¹⁰¹³ This marks 993 violations of the MMT. The imposition of what was recognized as being a calculated mischievous system should raise some questions about the honourable nature of the Crown.

VI. Fiduciary Duties: To Protect the Land Grant

The Duty:

- The land grant had to be protected from potential violations so that the reserve could fulfill its purpose. The fiduciary responsibility in this case means that the government must protect the Métis lands from competing interests such as settler interests, as well as avoid taking advantage of the Métis lands itself.

The government failed to protect the land on several fronts. The land must have value consistent with its purpose. If a population is to settle on the land, the land must not be stripped of its capacity to sustain the community. While the protective legislation argued for in the previous section could be seen as a duty which post-dated the allotment of the Métis reserves, the

¹⁰¹³ Flanagan, *supra* note 144 at 13.

present duty is one which ran concurrent with the all of the government's dealings with Métis lands. This duty was violated by focusing on the monetary value of lands and ensuring that the land would be available to the general market. Other specific violations include the issuing of Orders in Council which allowed settlers to claim lands in advance of survey. This ensured that the new immigrants would inevitably find their way onto Métis reserves. As well, the government failed to protect the lands from pillage by immigrants. As such, the settlement value of Métis lands was reduced.

VI.a. Why Was it Necessary to Honour this Duty?

It is important to keep in mind that the benefit of the families requirement ensured that the land grant could not be achieved by merely making free grants to individuals. Indeed, there were other considerations which had to be met. With that in mind, it should be apparent that in many critical ways, the federal government failed to meet these considerations and did not live up to its duty as fiduciary. This is a critical point. A fiduciary needs to actively perform its duties. It is not enough to let the vulnerable parties fend for themselves.

The Crown's role in protecting the land which was to be distributed to Métis children was vital. As minors the Métis children were in no position to protect their Aboriginal inheritance. As a fiduciary, the federal Crown was the sole locus of protection for such land. Distributing the children's land grant was also a responsibility which was directly placed at the feet of the local Crown representative.¹⁰¹⁴ It was important that this land be protected prior to an influx of immigrants who would also be seeking land. This is especially true for the French communities who felt most vulnerable to the rising English speaking population. In the case of the MMT

¹⁰¹⁴ This discretionary power was vested in the Lt.-Gov. See, *Manitoba Act*, *supra* note 29. Also see Chartrand, *supra* note 1 at 108 writes: "The federal Crown was required to regulate the selection and division of the 1.4 million acres of public lands appropriated by the Act of 1870. That regulatory power had to be exercised in a way that would promote the objects of section 31, namely, to settle the families on lands."

there is no doubt that the Métis negotiators, and the residents of Red River, envisioned the maintenance of their communities for future generations.¹⁰¹⁵

The need for protection was obvious to those close to the Métis. The Manitoban argued that the intended recipients of the children's land grant needed protections to ensure that the grant remained intact:

Is it an interference with the liberty of the subject, to say to a man who has taken up a homestead, you must be five years in possession before you can have a patent? Or is it interfering with the liberty of the subject to say to a young man, not Half-breed, you are too young, you must wait till you are twentyone years of age before you can have your patent? What we argue for is the same protection in these respects to the Half-breed as to the full breed. Why restrict the Homestead patent to twenty-one years of age, and throw it to the Half-breed at eighteen? And were our Legislature to do nothing else than restrict the power of sale to five years' possession, they would in our opinion do an act which would redound at once to their patriotism and sagacity. It is now or never in this matter.

Let this opportunity slip, and it will be felt by many to their sorrow that afterwards is too late.¹⁰¹⁶

The government's failure to protect Métis lands as they protect Indian lands can be taken as a reflection of the view of the federal government that the Métis were not in need of similar protections as Indians. However, the very fact that the Métis were displaced from their lands, and endured decades of hardships after the passing of the *Manitoba Act* is indication that the Métis did need protections. The Métis knew this. It is precisely because the Métis needed protections that they banded together and negotiated a treaty with the federal Crown.

VI.b. Encouraging Sales as a Violation of the Duty to Protect the Land Grant

By 1872-73 the Métis were already selling their interests.¹⁰¹⁷ While it is troubling to reconcile sales prior to drawing of allotments, because individual Métis families could very well get lucky and have much land distributed in family clusters, a market had already been created.

¹⁰¹⁵ *Ibid.* at 70-71 where he writes: "Action in purported implementation of section 31 should be tested for sufficiency and conformity by determining whether the actions are reasonably calculated to meet the purposes of section 31. It is apparent from the evidence that the purported actions would fail to secure the community of 'Half-Breed' people, the Métif in particular, on lands where they could be reasonably expected to protect their interest in the public land market and to maintain their community structure."

¹⁰¹⁶ *The Manitoban*, February 15, 1873 *Exhibit 1-0820* as cited in MMF Final Argument *supra* note 136 at para. 1002.

¹⁰¹⁷ *Ibid.* at para. 992.

Considering the parish meetings which expressed a desire for communities to remain together it is difficult to conclude that early sales were merely a reflection of a Métis desire to take the cash and run. The inability of Flanagan to reconcile the market forces with the government's errors in distribution is a major flaw in his argument that the Métis were simply using the market to their advantage. That might be so but we can never know what the impact of other forces were on that participation. However, one force does reveal itself quite starkly; the government's failure to protect the Métis lands from the general market by ensuring that the lands would remain with Métis families.

By allowing the sale of lands, the Crown was violating terms of the agreement. The Provincial Legislature wanted to enact legislation to prevent sales of grant lands because, as Prime Minister Macdonald was informed, the local "... pretension is that only actual children have rights, therefore heads are trustees. See Manitoba Act and said order [April 25, 1871] which declares heads to be entitled. Reply."¹⁰¹⁸ Lt.-Gov. Morris received a reply from the Minister of the Department of the Interior, Alexander Campbell, indicating that the province would not be able to prevent sales by heads of families:

No law dealing exceptionally with the rights of the half breed heads of families and preventing them from making conveyances which any other of Her Majesty's subjects can make, would be constitutional. Should your legislature pass any Bill infringing on this principle it should I think be reserved by you.¹⁰¹⁹

There is little merit in such a legal assertion. While it might be correct to argue that the Province was excluded from dealing "exceptionally" with the Métis because the Métis treaty interests were an exclusive federal responsibility, the justification used by Campbell actually disregards the MMT (and the governmental duties assumed therein). Indeed, since the land was to be kept within Métis families, prevention or restriction of conveyances was a requirement of the MMT.

¹⁰¹⁸ February 10, 1873, Morris to Macdonald Exhibit 1-0812 as cited *ibid.* at para. 995.

¹⁰¹⁹ February 12, 1873, Campbell to Morris, Exhibit 1-0817 as cited *ibid.* at para. 998.

Campbell's insistence that the province was not in the proper position to act upon such interests might be correct but he makes such an assertion without properly acknowledging the federal government's responsibilities toward the Métis.

The speculation and sales are illustrative of a profound indifference from the federal Crown to ensure that the Métis actually received land and received a benefit from those lands. While the method of distribution and the selection of lands, is related to sales, the sales can stand on their own to illustrate federal apathy toward protecting Métis lands. This apathy is displayed, in part, by the provincial legislature's attempt to protect Métis from speculation. On March 8, 1873 the provincial legislature passed an Act which found it "expedient to discourage the traffic now going on in such rights, by protecting the interests of the persons entitled to share as aforesaid, until the Patent issue."¹⁰²⁰ Rather than taking a cue to extend protections on their own, the federal Crown opted to, eventually,¹⁰²¹ support the provinces actions:

... having reference to the circumstances under which the appropriation of Dominion lands was made for half-breeds and that it is recited in the bill that very many persons entitled to participate in the grant had agreed to sell their right, whilst, at the same time they were in perfect ignorance what that right or its value eventually might be, the Act would be beneficial in perfecting their interests.¹⁰²²

However, these lands were not the responsibility of the province until after they had been granted¹⁰²³ (if they were at to fall under provincial purview at all). With the backdrop of no patents to land being issued for three more years, the quickest way that the Métis would see a

¹⁰²⁰ *Half-Breed Land Grant Protection Act*, S.M. 1873, c. 44, *Exhibit 1-0843* *ibid.* at para. 1065.

¹⁰²¹ Morris originally reserved the Bill. On March 17, 1873 Morris wrote to Howe, *Exhibit 1-0849* as cited *ibid.* at para. 1007: "I have no sympathy with those who may have purchased these claims to land at inconsiderable prices, or in an unfair manner, but as the law is novel and retroactive in its character, I feel compelled to reserve it for the signification of the pleasure of the Governor General; though it must be borne in mind also that if the Act be sanctioned, it may be taken as a precedent for other restrictions with regard to the holding of these lands." Although questionable constitutionally, this Provincial legislation became effective in 1874. See, para. 1008 where they argue that this Act was not constitutional: "the Act was unconstitutional in that by dealing with transactions in Dominion Lands prior to their patent, the province was trenching on section 91(1A) of the Constitution Act, 1867, and by singling out halfbreeds and their lands it trenched on section 91(24)."

¹⁰²² February 21, 1874 A.A. Dorion, Minister of Justice, *Exhibit 1-0259*, pp. 778-779 in *ibid.* at para. 1068.

¹⁰²³ *Ibid.* at para. 1069.

benefit from their portion of the grant would be to sell.¹⁰²⁴ The federal government was not paying attention to the duty identified by the local legislature; someone needs to be watching out for the children's interests. The Manitoba Legislature saw that duty as residing in the parents, but with the federal government effectively cutting the provincial legislature out of the section 31 project, it was the federal government's responsibility alone to protect the children's interest. The failure of the federal government to live up to its responsibility meant that the Province was forced to act, in the breach (and in breach of the law) by directing legislation towards an area that was within exclusive federal jurisdiction.

The importance of making a land grant rather than providing money or allowing sales of land was pointed out by Archbishop Taché, who wrote: "Scarcity of land in a few years hence may render the children of Half-Breeds better able to appreciate its value than their relatives do at present, and the preservation of their grant may be the only way to secure a footing for them in their native country."¹⁰²⁵ In contrast to Taché's vision, the MMF argues that Lt. Gov. Morris, made "continued efforts to take steps that will enable land to vest, and hence be capable of being sold without waiting for patents to issue."¹⁰²⁶ For example, Morris wanted to follow up the drawing of allotments by publishing lists of these allotments in each parish. These lands "should be held to vest the land in the allottee subject to proof of their right and quantity to participate..."

This was done to give the land a "marketable value":

... What I desire is that the land should at once legally vest in the allottee of the land subject to such proof of right thereto as the Privy Council may direct. This [plan / place] would at once give the rights of the Métis a marketable value would give them a feeling of ownership in the land and would protect them in fact from the speculators who have been in the habit of purchasing their rights which now attach to no known and determinate lots, for very small sums...¹⁰²⁷

¹⁰²⁴ *Ibid.* at para. 1074.

¹⁰²⁵ Archbishop Taché, January, 22, 1877 to Minister of the Interior and Superintendent General of Indian Affairs, David Mills Exhibit 1-1243 as cited *ibid.* at para. 741.

¹⁰²⁶ *Ibid.* at para. 1017.

¹⁰²⁷ Morris to Laird, Feb. 11, 1874 Exhibit 1-0953 as cited *ibid.* at para. 1020.

Morris did not want to publish a description of the lands in his parish allotment listings, because as Dennis understood it, a list “will satisfy the claimants of the fact of land being allotted to them.”¹⁰²⁸ Also concerned with the speculation in Métis allotments, Dennis was of the opinion “that the claimant would get much more for his property when in possession of the Patent than he would for the mere right to the allotment.”¹⁰²⁹ Here the concern seemed to be how to increase the value on the market rather than ensuring that the Métis actually receive land. Codd, expressed to Dennis that once the allotment was drawn, a list should be published and title should be vested in the claimants “to such an extent as will enable them to dispose of their lots, subject to proof of being Half breed resident children...”¹⁰³⁰ Despite the professed desire to secure value for Métis land, Dennis did not incorporate these suggestions into his report to Ottawa.¹⁰³¹

After this work was complete, there were no further barriers to issuing patents. Indeed, Order in Council of March 23, 1876 set out to “discourage the operation of speculation in these lands” and therefore, asked that assignments made prior to patents not “be recognized by the Government; ... believing such policy to be directly in the interests of the persons for whose benefit the lands were appropriated.”¹⁰³² The MMF says that this Order in Council was important because the policy contained therein, served to ensure that grants of land would be made to Métis claimants by refusing to recognize prior assignments of land made to speculators.¹⁰³³ This OIC was, however, a failure. Not having met their burden to protect the

¹⁰²⁸ Dennis to Minister of the Interior, December 17, 1873 Exhibit 1-0936 as cited *ibid.* at para. 1019.

¹⁰²⁹ *Ibid.*

¹⁰³⁰ Codd to Dennis, Feb. 28, 1874 Exhibit 1-0959 as cited *ibid.* at para. 1022.

¹⁰³¹ Dennis to Minister of the Interior, December 17, 1873 Exhibit 1-0935 as cited *ibid.* at para. 1024.

¹⁰³² Order in Council, March 23, 1876 Exhibit 1-1171 as cited *ibid.* at para. 1041.

¹⁰³³ *Ibid.* at para. 1042 where they write: “The only question had been whether or not assignments granted before patent would be recognized. And by this Order in Council, Canada made it abundantly clear that such assignments would not be recognized. Not only was this to discourage speculation, and to protect the interests of the children, the

Métis land grant, in 1893 the government acknowledged that their earlier statement on the non-recognition of assignments of land prior to patent failed to discourage speculation.¹⁰³⁴ And, in April of 1894 the Deputy Minister of Justice sanctioned previous assignments of the children's land grant.¹⁰³⁵

This failure was a long-term one. The need to protect the land from speculators, and the government's duty to do so, were both recognized in the House of Commons soon after Canada acquired jurisdiction over the Northwest. During debate on the implementation of the children's land grant, Mr. Ferguson suggested that settlement duties were necessary to ensure that the land stayed in Métis hands. However, Cartier rejected this idea offering instead that settlement duties were impractical because many of the children were minors and it was the government's role as guardian to ensure that speculators did not interfere with the land grant.¹⁰³⁶

The problem of sales and the fraudulent activity of speculators were clearly recognized at the time, by Chief Justice Wood who wrote:

Margaret Dennet is a halfbreed and, as such, was entitled to share in the halfbreed grant made by the Parliament of Canada in 1870 by 33 V.C. 3, Dec 31, of 1,400,000 acres of land in Manitoba, under the specious guise of the extinguishment of the Indian title to the lands in the Province of Manitoba, but in truth for the benefit of the half breeds. The promoters of this measure were doubtless influenced by the best motives and really believed they were conferring lasting benefit upon the half breed population; but experience has shown that the whole policy of the Government in this direction, including the land scrip to the half breed heads of families, was a most serious mistake. The result has not realized the expectations of the promoters of the bounty. For years these reservations unallotted, have kept Winnipeg in the midst of a desert prairie, and repelled settlers, and retarded the advance and prosperity of the Province. Much of the land allotted, and of that unallotted has for a mere trifle found its way into the hands of sharpers and speculators. The average half breed, in dealing with his land right, and selling it for a few dollars as often and as many times as he could find a buyer, is now destitute of land, and thoroughly demoralized. The sharper and speculator have alone benefitted by the bounty of the Crown. The action of the Legislature, through its unwise and ineffective legislation on this subject, has contributed not a little to this result. The case before me is an illustration of the truth of these observations.¹⁰³⁷

Plaintiffs say that it was consistent with the implied provisions of OIC April 25, 1871 (no restrictions on dealing with the land 'when granted') as well as with the entire scheme of granting the land for settlement, not sale."

¹⁰³⁴ Order in Council, Dec. 4, 1893 Exhibit 1-1955 as cited *ibid.* at para. 1176.

¹⁰³⁵ Letter, Deputy Minister of Justice to Secretary of the Interior, April 13, 1894 Exhibit 1-1958 *ibid.* at para. 1177.

¹⁰³⁶ Exhibit 1-0601 House of Commons debates, April 13, 1871 as cited *ibid.* at para. 910-11.

¹⁰³⁷ Chief Justice Wood *Aikins v. Black*, Q.B., heard July 4, 1879, unreported *Exhibit 1-1419 pp. 217-218* in *ibid.* at para. 1078.

In 1876-77, the Lieutenant Governor, Legislative Assembly of Manitoba, and the Federal government, all proceeded to encourage or actively took steps to encourage the sale of half-breed land. The Lieutenant Governor, for example, promoted a scheme whereby half-breed grants would be published and, after that date, but prior to actual allotment of land, the intended allottee could sell or take up the land.¹⁰³⁸ The first direct opening up of half-breed grants to sale was titled the *Half-Breed Land Grant Protection Act* which was passed by the Provincial Legislature. It purported to uphold any sales of land that half-breeds made.¹⁰³⁹ It mattered not that the distribution of land was a federal responsibility or that the Province did not gain any authority over the land until the federal government had transferred a legal title (and because of ongoing federal duties over these lands, it is unlikely that any justification can be found for a transfer from federal to provincial jurisdiction).¹⁰⁴⁰

The Federal government recognized that the Métis were not going to accrue a benefit from the grant under the current legislative conditions. For example, Dennis wrote to Taché on behalf of the Minister of the Interior, David Mills:

... owing to the designs of Speculators the Majority of Claims of Half Breed Children, as the same mature, will pass from the owners for comparatively a mere nominal consideration; and the other serious objection alluded to, is likely to result jointly from the lands falling into the hands of Speculators, and from the delay necessarily involved in the distribution of the portion of the Grant allotted to Minors, ownership over which can only be exercised as the Class of Claimants severally attain the age fixed upon with that view.¹⁰⁴¹

Dennis continued:

¹⁰³⁸ See, Morris to Sir Richard Scott, Nov. 2, 1876 *Exhibit 1-1215* *ibid.* at para. 1081. This was echoed by the Executive Council of Manitoba *Exhibit 1-1220*.

¹⁰³⁹ *S.M. 1877, c. 5, An Act to Amend the Act passed in the 37th year of Her Majesty's reign, entitled the Half-Breed Land Grant Protection Act, Exhibit 1-1261* as cited *ibid.* at para. 1091.

¹⁰⁴⁰ *Ibid.* at para. 1092 where the MMF writes, of this Provincial Act: "It was also inconsistent with the stated federal policy and enactment (OIC March 23, 1876), that assignments before patent would not be recognized in order to discourage the activities of speculators. As Macdonald and Cartier had told the House of Commons, the land was to be for the purpose of settlement by the children, not for the benefit of speculators. The provincial statute frustrated this intention and was therefore unconstitutional."

¹⁰⁴¹ January 22, 1877 Dennis to Taché *Exhibit 1-1236* *ibid.* at para. 1101.

... the probable practical operation of the Grant as proposed, will (for the reason already given) fall very far short of realizing the benefit to the claimants which was contemplated, and there remains also the serious objection to the scheme, above alluded to, that is to say, the locking up for years of the greater portion of the lands.¹⁰⁴²

Instead, of the current scheme, the Minister's representative sought Taché's opinion on granting the Métis a fixed amount of cash instead of land.¹⁰⁴³ While the Archbishop asserted that the Métis who were old enough to receive land could deal with it as they wish, he did not see a course around actually granting land to Métis:

The Manitoba Act having received the sanction of an Imperial Act, its provisions cannot be re-adjusted by the Canadian Parliament, and I am very doubtful as to the willingness of the Imperial Parliament to enact for the disposal of lands set apart for minors. For my part I would not feel justifiable in recommending any action which minors, when of age, might deem as having been prejudicial [sic] to their interests.¹⁰⁴⁴

These motions by the Minister of the Interior hinted at the type of "jobbery" that speculators were usually blamed for and came at the same time that other federal politicians were espousing federal duties to protect Métis interests.¹⁰⁴⁵ To ensure the administration of land to the Métis the federal government issued OIC July 4, 1878 which provided that the issuance of Patents would "vest the lands in the several claimants, in fee simple, free of any conditions as to settlement, or otherwise..."¹⁰⁴⁶ This "made it clear that title vested on the issue of patent, and not before."¹⁰⁴⁷

¹⁰⁴² January 22, 1877 Dennis to Taché *Exhibit I-1236 ibid.* at para. 1103. See para. 1102 where it is noted that 2,164 half-breed claimants had reached 18 years old and were eligible for their patents, but 3,669 were under 18 and it would take another 12 years for them to receive their allotments.

¹⁰⁴³ *Ibid.* at para. 1105.

¹⁰⁴⁴ Taché to Dennis February 5, 1877 *Exhibit I-1243 ibid.* at para. 1108.

¹⁰⁴⁵ R.W. Scott, Secretary of State, in Senate March 14, 1877 *Exhibit I-1268 ibid.* at para. 1119 where they write: "... it was a subject attended with a great deal of embarrassment. There was no object in issuing patents to minors who could not make use of their property. It would be very unfortunate if the Province of Manitoba should remove the disability of minors to sell their lands, as it would open a way to a great deal of jobbery. The Government were the guardians of these people, and it was their duty to see that they were protected in their rights to their properties. It might be an advantage to give the half-breeds the power to dispose of their lands when they arrived at eighteen years of age, but the Government would be open to censure if they gave the half breeds facilities to dispose of their lands at an earlier age." The MMF argues that the age of 18 was an odd number. See, MMF at para. 1120 where they write: "Scott was acknowledging the fiduciary relationship when he described the government as the 'guardians of these people'. But he did not explain why 18 year old half-breeds should have the 'power to dispose of their lands' when the age of majority for non-Métis children was 21, or why Canada would not protect the children from the enactments of Manitoba that removed the disability of 18 to 20 year olds to sell their lands and that opened the way to 'jobbery'."

¹⁰⁴⁶ OIC July 4, 1878 Exhibit I-1363 as cited *ibid.* at para. 1133.

This OIC also removed conditions providing that patents would only be issued once the Métis children reached 18 years of age.

As the government's man on the scene, Dennis was arriving at the conclusion that the Métis were not receiving a benefit from the land grant. On December 20, 1878 Dennis wrote the following to Macdonald:

Some uneasiness is felt by the Half-Breed element in the Territories, in consequence of no steps having yet been taken towards the recognition of the demands put forward on their behalf. It must be freely admitted they have a claim to favourable consideration; and the question is – How is that claim to be satisfied so as to benefit the Half-Breeds, and, at the same time, benefit the country? Certainly the experience gained in Manitoba – that is: absolute grants of land to the parents and children respectively – has not been such as would justify a similar policy with regard to the Half-Breeds of the North-West Territories. Indeed, it is anything but probable that a proposition of that nature could be again carried in Parliament. What then are we to do for them? They have, as natives, as good a right to the protection of the Government as the Indians, and unfortunately they are very little better able than are the Indians to take care of themselves...

...
[granting scrip] would result in the last state of the recipients of the scrip being worse than the first, for the reason that the Half-Breed, having no idea whatever of thrift, or of the necessity for making provision for the future by locating his scrip and securing the land for the benefit of his family, would, as our experience in Manitoba proves beyond all doubt, sell the scrip for whatever he could get for it, which in most cases would be a mere trifle...¹⁰⁴⁸

This illustrates that the Métis were in need of government protection. The rationale for treating the Métis as different from Indians on the basis of the Métis being better able to protect their own interests was only partially justified. While the Métis elites were able to form a provisional government, negotiate with the federal government and have Métis title recognized, the average Métis citizen was still illiterate and did not value their land for its value, but rather for the community which resided upon it. The government's failure to protect the Métis is not a reflection of the "civilized" advancement of the Métis, but rather a misstep by the Crown. To argue that the Métis were savvy and knowledgeable in their land dealings is to ignore the evidence which supports Dennis' observations that land was being sold for "a mere trifle". For such a population, protections were needed. It was the speculators who had both the opportunity

¹⁰⁴⁷ *Ibid.* at para. 1134.

¹⁰⁴⁸ Dennis to Macdonald, December 20, 1878 *Exhibit 1-1380* as cited *ibid.* at para. 1136 and 1137.

to practice their craft and who understood and were aware of the laws. The Métis merely had their claim, or that of their children to sell. If a mistake was made or the land undervalued they did not have the chance to correct it. Indeed, in 1881 the Manitoba Legislature passed an Act which intended to confirm previous sales which were made in order to “put them beyond doubt and save litigation.”¹⁰⁴⁹

Sales and barter of Métis lands began almost immediately after survey. Rather than earning a benefit from the land, Chief Justice Wood explains that the Metis were given very little for this trade:

As soon as the 1,400,000 acres was set off and surveyed en block, and while the half-breed may be said to have owned them in common – having an individual ownership to the extent of their “claim” as it was called, in the whole parcel, but in no particular parcel – they began to traffic in “bargain and sell” the share or portion that should be ultimately allocated to them. I infer that this was carried on with them by speculators to a considerable extent, and that adult half-breeds were being paid almost nothing, in goods, truck, trade and otherwise for their individual interests in these lands.¹⁰⁵⁰

Provincial legislation which purported to protect half-breed lands, proved to be a catalyst in speeding up sales.¹⁰⁵¹ According to Chief Justice Wood, the situation created by provincial

¹⁰⁴⁹ A.W. Ross, in *Manitoba Daily Free Press* May 14, 1881 *Exhibit 1-1503* as cited *ibid.* at para. 1142.

¹⁰⁵⁰ Chief Justice Wood, Inquiry into the administration of justice in the Province of Manitoba, relating to half-breed lands, *Exhibit 1-1539* *ibid.* at para. 1145.

¹⁰⁵¹ *Ibid.* at para. 1146 where Justice Wood writes: “Between the 28th Feb. 1874 and the 1st July, 1877, the buying and selling of halfbreed claims had been carried on to a very large extent. The only effect of the Act of prohibition seemed to have been, not to deter persons from buying, but to reduce the price. Hundreds and thousands of “claims” were bought at a trifling sum in store goods and trash, or for \$30, \$40 or \$50 or less in cash, and all sorts of artifice were resorted to in the way of powers of attorney to execute deeds, deeds executed in blank, and otherwise, to evade the statute and to get over the real or imaginary difficulty which it interposed; and the half-breeds getting almost nothing for their “claims” felt, it seems, at liberty to sell as often as they could find a purchaser and make him believe he had not already sold. The consequence was an entire destruction of any moral principle on the part of the half-breeds and those dealing with them. The enactment of 40 V., C. 5 [the 1877 amendments] was well calculated to aggravate, and did aggravate the evils introduced by the first Act on the subject, 37 V., C. 44 (which came in force the 28th Feb. 1874). The speculators at once set to work to procure deeds, assignments, powers of attorney, deeds of conveyance with the description of the lands, that should be allotted, left blank, executed by the half-breed and attested by a subscribing interest, and all sorts of instruments and contrivances were resorted to secure priority. But one difficulty, in their estimation, was in their way, which they could not overcome. They supposed that they could not, in the meantime, secure priority by registration, as there was as yet no allotment to individual half-breeds of particular parcels. The dealing in half-breed “claims” was more brisk than ever. The same half-breed would sell his “claim” a half a dozen or more times, if he could find a purchaser without exposure. True, he got little for it, and the successful purchaser in the end paid little for it. When the allotment was published there was a tremendous excitement. Then, there was indeed, “a hurrying to and fro in [illegible]” to fill in the parcel allotted and to race to the registry office to secure priority. This scene was repeated in every successive allotment of a parish being

legislation led to abuse by both the Métis and the speculators. This “peculiar” legislation “created dishonesty in the parties dealing with the Halfbreeds, and sapped the foundation of the morals of the Halfbreeds themselves, who, seeing that they got almost nothing for their claims, felt morally justified in selling them just as often as they could.”¹⁰⁵² The Métis, Wood explained lacked the knowledge of land value:

From the nature and education of the Halfbreeds it has resulted that they do not regard land as of any value, seeing the whole wide prairie stretching before them, they seemed incapable of putting any value on land at all. The shanty was the only thing that they valued; but as for the land they were resolved to get rid of it at any price. And it would be astounding to us at this day if an account could be taken of the Halfbreeds of 18 years of age and over who have parted with their claims, and of the prices they got for the land thus conveyed away.¹⁰⁵³

And, the “land sharks” would take all necessary action to obtain Métis land.¹⁰⁵⁴ The issue of provincial interference and indeed disregard for protecting Métis land is complemented with the actions of the judiciary. Vast orders eliminated any protections which the Provincial Acts might have provided:

By these orders lands to the amount of many tens of thousands of acres have been ordered to be sold. In the making of these orders, the learned Judges have dispensed with every one of the safeguards provided by the terms of the Act and by the general orders for the protection of the interests of the infants. They have been made upon petitions presented in the names of the infants, and one or other of their parents as next friend but really by the purchaser from them. The

published. The normal average price paid for half-breed “claims” would not exceed from \$40 to \$100 – the medium being about \$60. The present Attorney General and Premier I presume were not, and are not ignorant of these facts. During all this time the traffic in half-breed “claims” was with adults not with minors. The “claims” of minors seemed to have been beyond the reach of the speculators. It would have been well for minor half-breeds had they remained so; but the Legislature thought otherwise.”

¹⁰⁵² *Ibid.* at para. 1149.

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ *Ibid.* at para. 1150 where Justice Wood writes: “From my own knowledge, I may say that the traffic going on in these minors claims, is appalling. Land sharks would make a contract for the purchase of an infant’s right when he got to be of age, and took mortgages from the father on the homestead they had for the performance of the contract. They would pay, perhaps from \$30 to \$70 – or pretend to pay it. They now hold these mortgages on the father’s property for the conveyance of these lands; and some of these have been in Court. I need scarcely say that number of purchases made before the issue of the patent and before the allotment of these lands, would scarcely be credited – that is, purchases from adult minors. All sorts of conveyances were resorted to. Deeds were executed beforehand in blank. A power of attorney was taken to fill them up, or they were filled up without it. And so soon as the allotment came up, there was such a race to the Registry offices with the conveyances, to get registered first, that horses enough could not be found in the city of Winnipeg for that purpose. In some cases a man would be at the Registry office with his deed, and they would telegraph him the number of the section, when he would fill it in, and thus be enabled to put in his deed first – five or ten minutes perhaps before half a dozen others would come rushing into the office with deeds for the same lands. The Halfbreed lost all moral rectitude, and would sell to every man as fast as they possibly could – all the contest was as to registering the papers first.”

petitions and affidavits in support of them, have been, almost invariably, prepared by the purchaser himself or by his solicitor. They contain almost no information as to the circumstances of the infant or his estate. They are almost all identical in form and substance, nearly always printed except as to one clause which as the witness M.T. Hunter, said, might just as well have been printed, for it was always the same.¹⁰⁵⁵

The lack of judicial protection was vital to the loss of Métis land because it countered any political power that the Métis may have held for the first few years after transfer:

However, while the Métis controlled political power in Manitoba until 1879, they had little control over the courts; the judicial system was instead almost completely controlled by settlers from central Canada. In the courts Métis were accorded few legal rights. Here, as in the political context, the Métis Land Question fits into a wider context, for Manitoba was in the process of being transformed from a non-industrial “pre-modern” society to an industrial capitalist or “modern” one. The Métis land grant, regarded by the courts, judiciary, and the incoming Ontario population as improvident and contrary to modern development, had to be appropriated legally or illegally.¹⁰⁵⁶

This court action, or inaction, was “facilitated by irresponsible neglect” on the part of the federal government which made “no attempt” to “protect the legal rights of the Métis.”¹⁰⁵⁷

Paul Chartrand concludes that the legal effect of free grants was to “transfer the legislative jurisdiction over the subject lands to the province.”¹⁰⁵⁸ However, I am not convinced that this is clear. While that might have been applicable to general grants, it does not necessarily follow that it applied to Indian title grants. It would seem that the federal government would have to somehow abdicate its constitutional jurisdiction over these lands in order to facilitate provincial jurisdiction over these lands. Since there was no such transfer, I see the impact of free grants to be largely limited to encouraging the sale of Métis lands and abandoning the government’s responsibility to protect the Métis grant. The assumption of provincial authority over the lands illustrates that neither the province nor the federal government were prepared to accept the unique nature of the MMT or the *Act* which gave it constitutional power. This may

¹⁰⁵⁵ T. Beverley Robertson, commission counsel, Inquiry into the administration of justice in the Province of Manitoba, relating to half-breed lands *Exhibit 1-1541, paras. 17-18* *ibid.* at para. 1154.

¹⁰⁵⁶ Gerhard Ens, “Metis Lands in Manitoba”, p. 14 as cited *ibid.* at para. 1163.

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ Chartrand, *supra* note 1 at 90. Also see 102 where Chartrand explains that the April 25, 1871, Order in Council attached no conditions on the Métis grants. “The effect was to abdicate jurisdiction and responsibility in favour of a transfer of jurisdiction over the granted lands to the province under section 91(13).”

have been due to the government succumbing to political pressure. Nonetheless, understanding the reason does not negate the flaw.¹⁰⁵⁹

VI.c. Order In Council, May 26, 1871 as Violation of Duty to Protect the Land Grant

Throughout the early years of Canadian authority in Manitoba, the Métis at Red River asserted their claims to their preferred land choices, and concerns about such claims being recognized. This was done through parish meetings and through the Métis representatives in the Manitoba Legislature.¹⁰⁶⁰ But protection was not immediately coming. In contrast, the rights of incoming settlers were quickly recognized. This recognition occurred in a manner which placed settlers' claims over those of the Métis. By Order in Council of May 26, 1871 the federal government effectively provided "new settlers with first choice of lands that might otherwise have been selected as part of the 1.4 million acres, or that might be claimed by persons seeking title under subsections 32(3) and (4) or rights under 32(5)", for the purpose of protecting "new settlers who settled on and improved lands prior to survey."¹⁰⁶¹ However, through recognition that the Métis were promised a choice in which lands were to be granted, or through recognition that granting land according to Métis desires was the fairest policy, Archibald made a commitment to the Manitoba Legislature that he would "consider that the fairest mode of proceeding will be to adopt, as far as possible, the selections made by the Half-breeds

¹⁰⁵⁹ *Ibid.* at 103 where he writes: "The reason the government freed the lands of restrictions on alienation was the political pressure built up by the desire of the Ontario-based speculators to permit a free market in the lands." And this pressure worked. Despite the Métis wishes, delays in distribution and selection meant that the Métis "saw that, though they could not get their lands allotted, others were entering upon, and acquiring rights which were denied to them..." July 27, 1872 Archibald wrote to Aikins, *Exhibit 1-0727* MMF Final Argument *supra* note 136 at para. 956.

¹⁰⁶⁰ MMF Final Argument, *ibid.* at para. 914 – 915.

¹⁰⁶¹ *Ibid.* at para. 916. Order in Council 1871-1036 is available online at: Library and Archives Canada <www.collections.gc.ca>. Reference: RG2, Privy Council Office, Series A-1-a, For Order in Council see volume 288, Reel C-3297.

themselves.”¹⁰⁶² This fairness is reflected in Archibald’s understanding of the Métis as the first claimants.¹⁰⁶³

In reaction to Archibald’s commitments to the Métis, Ottawa attempted to circumvent the *Manitoba Act* and remove Archibald’s discretion from the equation. In November of 1871, Joseph Howe wrote:

I regretted very much seeing your letter giving countenance to the wholesale appropriation of large tracts of Country by the Half-breeds. As I understand the matter, all the lands not in actual occupation are open to everybody, Half-breeds, volunteers and Emigrants. Either of these classes can establish rights in 160 Acres any where by actual occupation, but none of them have authority to set off and appropriate large tracts of country until these have been surveyed and formally assigned by the Land Department, with the sanction of the Dominion Government. Your answer to everybody is I have nothing to do in the matter. This is the view I take, and I would, if I were you leave the Land Department and the Dominion Government to carry out their policy without volunteering any interference.¹⁰⁶⁴

Indeed, Joseph Howe saw no priority in the Métis rights, nor a substantial role for Archibald in the distribution of Métis lands.¹⁰⁶⁵

¹⁰⁶² Archibald to Joseph Royal, June 9, 1871 *Exhibit 1-0620 ibid.* at para. 919. It is also noted by the Plaintiffs that Archibald was well within his authority to execute distribution under this plan. (at para. 920, 926) But Archibald did not always follow the Métis selections. Archibald explained his reluctance to acquiesce to Métis choice of lands in High Bluff and Poplar Point on August 12, 1872 when he wrote to Aikins, (*Exhibit 1-0730 ibid.* at para. 961): “I have been governed, in my approximate selections, by a desire, as indicated in that letter, to meet the views of the Half Breeds, as far as I can, conformably to the Governing idea of making the selection a fair average of Townships, containing no more than a reasonable proportion of wood etc. Such a selection is, of course, much easier to make in Townships, or large blocks, than if in Sections or smaller divisions.”

¹⁰⁶³ Archibald to Howe, *ibid.* at para. 927 where Archibald writes: “Under this rule of ‘First come, first served’ the Half-breeds, from the time of their application, would be entitled to the lands they selected if there were no [previous] rights existing.” Archibald defended his position as follows at para. 928: “I am convinced it is the only course that would not have led to serious trouble. I believe, too, that it is the course suggested alike by the interests of the Half-breeds and those of the Immigrants. It locates the Half-breeds at once and leaves the great bulk of the lands of the Province free to be occupied by immigrants. It avoids the evils accident to the delays in the surveys and finally it prevents (which is the most important result of it) dangerous collisions, which would have arisen, from throwing suddenly among the French Half-breeds, a body of newcomers differing from them so widely as they do in language and race, in habits and Faith.”

¹⁰⁶⁴ *Ibid.* at para. 935. *Exhibit 1-0658*

¹⁰⁶⁵ Also see, MMF Final Argument, *ibid.* at para. 939. The MMF notes at 937 that “Archibald was entirely within his authority in selecting land for the purposes of section 31” and that Howe was confused about government policy, at 938 where it states: “But it also appears that Howe confused the ability of “everybody, Half-breeds, volunteers and Emigrants” to homestead or preempt 160 acres, with the implementation of section 31 which, at that time, was to be 140 acre lots within selected townships. And his statement that selection needed to await the completion of surveys had the effect of turning the original law on its head. Under *OIC April 25, 1871* selection of section 31 land could proceed immediately. Then by *OIC May 26 1871* new settlers did not have to await surveys prior to taking up land. Now, by Howe’s direction, selection must await survey.”

Howe's insistence that all land be surveyed and then distributed with no apparent regard for what kind of claim was being asserted was intended to ensure that the land remain open for incoming colonists. However, the land that the Métis preferred was not based on the value of the land, but rather, with a view to "keeping them intact as a community".¹⁰⁶⁶ Howe had no reason to worry because even after the Métis selections, the Immigration Agent of the Northwest noted that the total amount of Métis land left significant areas open for immigration and that the Métis were not desirous of the most valuable land:

the value of the lands has been quite unconnected with the considerations which influenced the half-breeds in their choice, and instead of wishing to monopolize the best lands in the Province, they only desire to remain collected together in the new settlements, as in the old, and not to be removed too far from the latter.¹⁰⁶⁷

The federal government, both in Ottawa and in Manitoba, was focused on distributing the Métis land in such a manner that it was not locked up to incoming settlement and that the children's land grant did not make use of the most valuable portions of land. The OIC of May 26, 1871 placed pressure on Archibald to act quickly to protect the Métis communities or to wash his hands of it. Even if Archibald was inclined to recognize Métis choice of lands, he was unable to respect all those claims because much of the land had already been taken by new settlers "and rights have thus been acquired which cannot be set aside."¹⁰⁶⁸

Still, despite the cases where Archibald felt the land was too valuable, he was eager to make the selections because the sooner land was transferred the sooner the market could unlock

¹⁰⁶⁶ Gilbert McMicken, Dominion Lands Agent, December 30, 1871 *Exhibit 1-0664 ibid.* at para. 943. McMicken continues "... in contiguity to their old settlements, and with a view to securing and maintaining their religious and political interests and privileges. Their representative men readily admit, as is truly the case, that the material interest of the Half-breeds would be greatly enhanced by another system of distribution than that adopted by themselves; but they fear interference with their religion, and their deprivation of all voice or influence in the Legislature of the country. On these points they are sensitive."

¹⁰⁶⁷ J.A. Provencher, Immigration Agent for the Northwest January 1872, *Exhibit 1-0668 ibid.* at para. 944.

¹⁰⁶⁸ August 12, 1872 Archibald wrote to Aikins, *Exhibit 1-0730 ibid.* at para. 962.

it.¹⁰⁶⁹ Here Archibald is acting in concert with the intentions of the May 26, 1871 OIC; to open up as much land as possible to incoming settlers. Aikins sent a letter to Lieutenant Governor Morris on December 6, 1872 asking him to confirm the selections made by former Lieutenant Governor Archibald.¹⁰⁷⁰ However, the following month Morris ran into Archbishop Taché who was complaining that much of the preferred lands were being taken up by the Land Department, rather than being protected for Métis reserves.¹⁰⁷¹ In a telegram to Macdonald, Morris acknowledged that the Métis selections were being circumvented by other claims:

You would have been amused with Dennis yesterday. I had arranged for him and McMicken to see the Kildonan men about a half-breed allotment he had promised them in a claims settlement. I asked for a map to be prepared, shewing the occupied lots and the whole township was found to be taken up! I have got the matter right and will select another Township.¹⁰⁷²

In this way, the preferred lands of the Métis were not respected at all. But, seeing as the river bank lands were the most valuable, those lands in the Settlement Belt were withheld from Métis selection by instruction from Lieutenant Governor Archibald.¹⁰⁷³ And later, an Order in Council formally withdrew the outer two miles from consideration for the children's land grants.¹⁰⁷⁴

The May 26, 1871 Order in Council was in direct conflict with the duty to protect the land grant. By allowing new immigrants to settle upon unsurveyed lands the government was giving immigrants a privileged position over the treaty rights of the Métis. This only served to

¹⁰⁶⁹ July 27, 1872 Archibald wrote to Aikins, *Exhibit 1-0727 ibid.* at para. 958 where he writes: "Once the selection made, and the title passed, the market for the purchase of lands will be infinitely extended... From the competition arising from these different quarters, there will be little danger of the lands being locked up. I am inclined to think that land will be more easily procurable than if it were all in the hands of the Crown." And, at para. 962, in relation to the lands in High Bluff and Poplar Point, "In the interests of the public it is better that the lands there situate should be in the hands of purchasers and settlers, and so be open to the General market, rather than that they should be assigned to Half Breeds, many of whom, being under age, would be incapable of conveying, and thus form a serious obstruction to the development of one of the most valuable spots in the Province."

¹⁰⁷⁰ Aikins to Morris, Dec. 6, 1872 *Exhibit 1-0755 ibid.* at para. 968.

¹⁰⁷¹ Taché to Morris, Jan. 14, 1873 *Exhibit 1-0792 ibid.* at para. 971.

¹⁰⁷² Morris to Macdonald, Jan. 15, 1873 *Exhibit 1-0794 ibid.* at para. 972.

¹⁰⁷³ *Ibid.* at para. 975.

¹⁰⁷⁴ OIC September 6, 1873 *ibid.* at para. 978.

empower the immigrants who had little respect for the Métis rights.¹⁰⁷⁵ While that OIC was effectively overturned on April 15, 1872, the transgressions upon Métis lands had already had an impact.¹⁰⁷⁶ Indeed, “[t]he historical record shows that anything but good faith governed the actual selection of lands for immigrant settlers in 1871. Incoming settlers established themselves on lands selected by the Métif parishes, and in some cases refused to relocate.”¹⁰⁷⁷ Before, the May 26, 1871 OIC was rescinded, the *Dominion Lands Act* was brought into force (on April 14, 1872) and affirmed “the rights of those who had settled on unsurveyed lands (including lands claimed by the Métif) if these settlers had conformed to the order of May 26, 1871, which authorized them to take up unsurveyed lands and offered them protection in their enjoyment.”¹⁰⁷⁸ Then, one day later, an order in council was passed (April 15, 1872) which stated that section 31 grants should be distributed with some urgency. However it did nothing to resurrect the claims of Métis parishes who had already lost their lands to immigration.¹⁰⁷⁹

VI.d. *Pillage of the Métis Land Grant*

A continuing concern of the Métis was that new immigrants were cutting the wood on either their current or prospective land holdings. The Métis took action by writing petitions to the federal government. One such petition was endorsed by members of the provincial legislature who told the federal government that they were “opposed to all wood cutting and to all other works performed that would devalue the aforesaid reserved lands...”¹⁰⁸⁰ On

¹⁰⁷⁵ *Ibid.* at 922 where Archibald explains: “The French Half-breeds have all along understood that they were to have a first choice, but the immigrants now arriving do not take that view. Many of them challenge the rights of the half-breeds and assert that Immigrants are free to go where they choose, to take possession of any land that suits them. In fact that the right to a preference is in them, and that the Half-breed may come in after everybody else is served, and take what he can get.”

¹⁰⁷⁶ Flanagan, *supra* note 7 at 71-75..

¹⁰⁷⁷ Chartrand, *supra* note 1 at 65 [footnotes omitted].

¹⁰⁷⁸ *Ibid.* at 67.

¹⁰⁷⁹ *Ibid.* Also see 70 where Chartrand writes: “In effect, then, the order of April 15, 1872, purported to ratify the actions of settlers who took up Métif lands in spite of the protestations and public notices of the occupants.”

¹⁰⁸⁰ Sealey, *supra* note 887.

November 4, 1873 the Métis at the Parish of St. Agathe also complained of wood cutting and noted that they will use “all honest means” to oppose “whoever will deprive of the best part of our property.”¹⁰⁸¹ Government land agents were, at the time, reported to be active in the plundering of Métis lands:

The newspaper ‘Le Metis’ of the 10th of April, 1872, reports that immigrants were coming in groups of four or five, and were cutting wood not only on the wood reserves marked by Metis, but that they even dismantled buildings and stole the timber....
It was also noted that these immigrants had been directed towards the Metis reserves to cut their wood by government land agents rather than towards the wood lands of unsettled areas.¹⁰⁸²

Petitions of protest were ignored. Early in 1872, Métis communities began to meet. Those who “had chosen blocks of land along the Red River expressed regret that, despite their protestations, their lands were given to speculators by Dominion land agents, and the wood was removed from their lands.”¹⁰⁸³ This reflects a broader policy of the Crown to ensure that the Métis did not receive too large of a benefit from their grant.¹⁰⁸⁴ While the attack on the value of Métis lands is not quantifiable due to the distance of the historical record, the nature of individual rather than communal grants, and the fact that the Métis viewed the land with different values than the incoming settlers, the existence of the plunder of these lands is acknowledged in the historical record. To the extent that the government encouraged or failed to prevent such abuses, it is in violation of its duty to protect the Métis land base.

¹⁰⁸¹ Sealey, *ibid.* at 91-92 see footnote 8.

¹⁰⁸² *Ibid.* at 93.

¹⁰⁸³ Chartrand, *supra* note 1 at 66. And, at 84 Chartrand explains: “Ontario immigrants arrived immediately after the 1870 union and were soon to be found destroying the wood supplies along the river lands claimed by the Métif. The government of Canada, instead of making regulations pursuant to section 31 to prevent such destruction, aided the immigrants through its land agents, who directed the newcomers to the Métif lands. These consideration support the contention that one purpose of section 31 was to protect the beneficiaries in the enjoyment of the lands set aside for them through the lieutenant-governor’s selection. One purpose of the regulatory power in the federal executive was to make regulations to prevent frauds, abuses and impositions by ‘white speculators’ in respect to the section 31 lands.”

¹⁰⁸⁴ Lt.Gov. Archibald was instructed to ensure that the Métis only received a “due proportion of the woodlands”.

VII. Constitutional Obligations: Consequence of Enshrining the Negotiated Agreement

VII.a. *Constitutional Constraints on Crown Superiority*

The Constitution placed several constraints upon the exercise of government power and discretion. One example is Orders in Council which are not supreme to the will of Parliament. Even before the *Manitoba Act*, technically, became constitutional law, the discretionary power utilized through Orders in Council was confined by the purposes of the *Act*.¹⁰⁸⁵ Since the *Act* was meant to embody the agreement with the delegates, the Métis understanding of the MMT would also serve to confine government discretion. As such the constitutional constraints can be stated as follows:

- Orders in Council were restricted to carrying out the purposes of the *Act*. These orders were limited by the context of the legislation as well as the MMT.

The OIC of May 26, 1871 is the most obvious violation of this constraint.

- Parliament cannot amend the *Act* post June 29, 1871 and because the *Act* was meant to facilitate the MMT, Parliament cannot legislate in contradiction to the MMT.

This meant that the government was under an obligation to fix the problem that it had created with the OIC of May 26, 1871, an obligation which became a constitutional responsibility with the coming into force of the *Constitution Act, 1871*. Prior to that date, the government could have recognized that the OIC was a violation of the *Manitoba Act* and to that extent it was of no legal force. After that date, the OIC was unconstitutional and also of no legal force.

- The federal government had to carry out its responsibilities under section 31.

¹⁰⁸⁵ See Laskin C.J. writing for himself and three others in *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 (Canlii) at 433 where he writes: "Rather what is at issue is the right of the Crown, although duly protected by an order in council, to bind its subjects in the Province to laws not enacted by the Legislature nor made applicable to such subjects by adoption under authorizing legislation. There is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or order in council to bind citizens where it so acts without the support of a statute of the Legislature: see *Dicey*, *Law of the Constitution* (10th ed. 1959), pp. 50-54."

The Federal government abdicated its responsibilities by allowing the Province to infringe upon its exclusive jurisdiction.

VII.b. *Provincial laws*

- Provincial laws dealing directly with the 1.4 million acre grant were ultra vires. This is because federal jurisdiction was expressly set out in the *Act* itself. As a result, there was a constitutional constraint upon the province to not interfere with the Métis land grant either before or after distribution or patent. While the federal government could affect distribution it could not divest itself of the continuing responsibility to ensure that the land remained with Métis communities.
- If by some argument that I am not aware, one can argue that after the grant, these lands fell under the jurisdiction of the provincial Crown, then the province would have inherited the corresponding responsibilities to ensure that those lands are retained by Métis families.

Normally courts and/or the federal government will interfere with the provincial laws which attempt to legislate in regard to an item of federal responsibility. However, because the federal government did not challenge (for the most part) the provincial laws, the province was effectively allowed to interfere in Métis lands. It does not matter what the intention of these Acts were, or what affect these Acts may have had. It is enough to point out that the Province interfered, unconstitutionally, in a matter of exclusive federal jurisdiction (articulated in the *Manitoba Act* itself). I will provide a few select examples.

In 1873, the Provincial government passed the aforementioned *Half-Breed Land Grant*

Protection Act, S.M. 1873, which acknowledged in its preamble that it is infringing on the domain of the Orders in Council.¹⁰⁸⁶ The Lt. Gov. initially reserved the Bill because it didn't meet the government's policy objectives.¹⁰⁸⁷ However, the reservation of this Bill was only temporary and it became law in 1874.¹⁰⁸⁸ Years later when sales were reaching one of their booms,¹⁰⁸⁹ the province allowed sales by 18 year olds through powers of attorney.¹⁰⁹⁰ Two years later, the province removed all age restrictions on sales.¹⁰⁹¹ The provincial legislation reached a crescendo in 1885 when the Métis were largely excluded from using the courts to address past wrongs.¹⁰⁹² Such legislation serves an obvious purpose: "to regularize transactions which were

¹⁰⁸⁶ *Half-Breed Land Grant Protection Act*, S.M. 1873, c.44, Exhibit 1-0843, MMF Final Argument, *supra* note 136 at para. 1005.; "And whereas in consequence of the condition of the surveys in the Province not permitting the distribution of the said lands in manner as fixed by the Order in Council mentioned has not yet been effected and in the meantime very many persons entitled to participate in the said grant in evident ignorance of the value of their individual shares have agreed severally to sell their right to the same to speculators receiving therefore only a trifling consideration; And whereas it is expedient to discourage the traffic now going on in such rights, by protecting the interests of the persons entitled to share as aforesaid, until the Patent issue; ..."

¹⁰⁸⁷ Morris to Howe, March 17, 1873 *ibid.* at para. 1007 where Morris writes: "I have no sympathy with those who may have purchased these claims to land at inconsiderable prices, or in an unfair manner, but as the law is novel and retroactive in its character, I feel compelled to reserve it for the signification of the pleasure of the Governor General; though it must be borne in mind also that if the Act be sanctioned, it may be taken as a precedent for other restrictions with regard to the holding of these lands." This was in accordance to Morris instructions from Ottawa where Campbell explained to Morris on February, 12, 1873 that: "No law dealing exceptionally with the rights of the half breed heads of families and preventing them from making conveyances which any other of Her Majesty's subjects can make, would be constitutional. Should your legislature pass any Bill infringing on this principle it should I think be reserved by you." It was policy, not constitutional considerations which motivated the federal government to take this position. For an alternative take on this telegram by Campbell, see MMF at para. 999.

¹⁰⁸⁸ *Ibid.* at para. 1008 where the MMF draws the following conclusions: "Morris was carrying out federal policy (although not the policy required by the *Manitoba Act*) in seeking to ensure that the lands were easily alienable, and he did not want to allow a precedent that might lead to the enactment of measures tending to preserve the lands in the hands of the Métis. Indeed, the Plaintiffs say that the Act was unconstitutional in that by dealing with transactions in Dominion Lands prior to their patent, the province was trenching on section 91(1A) of the *Constitution Act, 1867*, and by singling out halfbreeds and their lands it trenched on section 91(24). Nonetheless, in the absence of any federal measure to prevent sales before grant, as is suggested by *OIC April 25, 1871*, it is clear that the Legislature felt compelled to act. Canada ultimately allowed the Act, and it came into force in 1874."

¹⁰⁸⁹ Flanagan writes about the market at the booms in, *supra* note 144 at 85-92.

¹⁰⁹⁰ *An Act to amend the Act intituled: An Act to enable certain children of Half-breed heads of families to convey their land*, 43 Vic., c. 11, Exhibit 1-1416 in MMF Final Argument, *supra* note 136 at 1139

¹⁰⁹¹ *An Act respecting Half-Breed Lands and quieting certain titles thereto*, 44 Vic. C.19, Exhibit 1-1505 *ibid.* at para. 1143.

¹⁰⁹² See, Gerhard Ens, "Metis Lands in Manitoba", p.13 as cited *ibid.* at para. 1162 where he summarizes the effects of *An Act relating to the Titles of Half-Breed Lands*, S.M. 1885, c. 30 as follows: "all transactions involving infant Métis lands patented, allotted or to be allotted, were hereby declared legal and binding, notwithstanding any defect, irregularity or omission in the carrying out of the sale. It also declared that vesting orders, decrees, and the recitals and conveyances of the Métis were to be accepted as conclusive evidence against all parties in court. Another section of the same act declared that in all sales, alienations, conveyances and half-breed assignments made or

obviously of doubtful validity.”¹⁰⁹³ The Manitoba legislature passed several Acts designed to clarify the ways in which Métis minors could dispose of their land grant.¹⁰⁹⁴ And despite some legal formalities, the decision to dispose of lands would ultimately reside in the parents. The MMF criticizes the Manitoba legislation as follows:

If a father had agreed with a purchaser as to the disposition of one of his children’s lands, is it really likely that the child would tell a judge or justice of the peace that he or she did not really consent? ...The special legislation for Métis 18 to 20 year olds can have only been to enable sales at the parents’ initiative, without the need for a judicial opinion that the sale was in the best interests of the child.¹⁰⁹⁵

We can engage in this type of analysis where the effects of the legislation are used to determine its damage or we can, more pointedly, judge Crown actions on principle. While one can speculate on the ultimate damage that such legislation caused, the greater issue is why did the federal government not step in to stop this illegality?¹⁰⁹⁶

VII.c. *Fiduciary Duties: Restricting Provincial Laws as an Application of Federal Power*

All of the provincial Acts which attempted to regulate sales, or protect the Métis from speculators, were outside of the sphere of provincial jurisdiction because they acted upon lands which were subject to exclusive federal authority and obligation.¹⁰⁹⁷ To the extent that the

intended to be made under sections 3, 4, and 5 of Chapter 42 of the Consolidated Statutes of Manitoba, including all powers of attorney and sales made by them, the proper parties had joined therein and that the child had been eighteen. This piece of legislation virtually eliminated recourse to the courts and throughout the 1880s sales of Métis land continued under these conditions.”

¹⁰⁹³ *Ibid.* at para. 1164.

¹⁰⁹⁴ *An Act respecting Infants and their Estates*, 41 Vic., c. 7 as cited *ibid.* at para. 1130. And, *An Act to enable certain children of Half-breed heads of families to convey their land*, 41 Vic., c. 20 as cited *ibid.* at para. 1131.

¹⁰⁹⁵ *Ibid.* at para. 1132.

¹⁰⁹⁶ The Attorney General of Manitoba sets out its argument for the validity of its legislation concerning the Métis in, *Factum of the Respondent*, MMF v. Canada and Manitoba, Supreme Court of Canada (2011) at paras 97-127. In that argument two central factors are present. First, that the grants were made to individuals. There is no acknowledgement of a community (or family) interest. Two, that there was no ongoing obligations to these Métis individuals. And three, it is obvious that the Attorney General has chosen to adopt a strict literal interpretation of the *Act*. The MMF, in *Factum of the Appellant*, *supra* note 989 at para. 181 sums up the disagreement as follows: “The point is that the provincial legislation undermined the s.31 scheme.”

¹⁰⁹⁷ On this point the MMF writes, *ibid.* at 1199: “The Plaintiffs have argued that the impugned provincial legislation was unconstitutional in that it trenched on federal jurisdiction under subsections 91(1A) and (24) of the *Constitution*

province felt that it was obliged to regulate the sale of these lands, the federal government was under an obligation to assert its authority over such lands and prevent the province from acting in contravention of the *Act* or the MMT. This duty was not carried out. Rather, provincial laws were assessed for the internal policy and approved or disallowed accordingly. However, all laws that dealt with the children's grant in any material way should have been disallowed. The federal government cannot merely turn its back on its constitutional powers, and corresponding duties, when it wishes to wash its hands of a problem.

Further, "[i]n 1877, the Manitoba legislature again amended the Half-Breed Land Grant Protection Act, prospectively validating sales made after July 1, 1877, but not retroactively changing the unenforceability provision of the Act of 1873."¹⁰⁹⁸ The federal government allowed this amendment even though it was in relation to the Métis land grant. While Flanagan argues that the provinces were allowed to regulate sales under s. 92(13) of the *Constitution Act, 1867*, he does not explain how the transfer of lands takes place between the federal government's obligations undertaken in the *Manitoba Act* and the province's obligations under 92(13). Provincial regulations were set out to manage the sale of the children's land grant between 1878 and 1885.¹⁰⁹⁹ However, none of these regulations were rejected by the federal government. The Métis land grant did not automatically convert to provincial jurisdiction upon grant because these grants were made for specific purposes.¹¹⁰⁰

Act, 1867. The Plaintiffs have also argued, in the alternative, that if the provincial legislation was valid, it was nonetheless in conflict with valid federal legislation and was, therefore, to the extent of the conflict, of no force and effect, by virtue of federal paramountcy."

¹⁰⁹⁸ Flanagan, *supra* note 144 at 14.

¹⁰⁹⁹ *Ibid.* at 15.

¹¹⁰⁰ Chartrand, *supra* note 1 at 144 [footnotes omitted] where he writes: "Once lands had been selected by the lieutenant-governor for the purposes of section 31, those lands fell into a special constitutional category; they were lands set aside to carry out the constitutional purposes of section 31; they were not lands available for public purposes."

VIII. Conclusion

The original intention of the delegates was to have the Métis protect the land themselves. By gaining provincial status for the new territory and ensuring that the local Legislature had control of the distribution of lands, the Métis majority would be able to protect the land from incoming settlers.¹¹⁰¹ But the federal Crown took the responsibility for these lands as well as jurisdiction over the ungranted lands and the resources of the new province. By taking on the responsibility over the vulnerable interests of the children the federal Crown engaged its role as fiduciary. The existence of this duty is obvious because “[t]he discretion lay with the Crown – only the Crown could enact the regulations, while it was the Métis who were vulnerable.”¹¹⁰² The Métis had transferred the territory in exchange for certain promises. It was the federal Crown’s responsibility to carry out those promises. The Honour of the Crown depended on it. In addition, the federal negotiators involved with the Red River delegates recognized the government’s duty to protect the children’s land grant. Speaking of the land grant, Cartier stated: “a great many of those entitled to land were children. Until the children came of age the government were the guardians of the land, and no speculators would be suffered to get hold of it.”¹¹⁰³ This fiduciary responsibility was also recognized by the federal Cabinet which wrote, in reply to a request from the Legislative Assembly of Manitoba to name “guardians to take charge of the administration of the land reserved and set apart for the Half-breed minors”¹¹⁰⁴, that “the Governor in Council is invested with the sole power by Regulations to be made, from time to time, to regulate the distribution of the grant to the Half-breeds individually and the issue of

¹¹⁰¹ MMF Final Argument, *supra* note 136 at para. 59.

¹¹⁰² *Ibid.* at para. 760.

¹¹⁰³ Cartier stated this on April 13, 1871, just 12 days before the Order in Council April 25, 1871 *ibid.* at para. 730.

¹¹⁰⁴ February 8, 1872, Legislative Council and Legislative Assembly of Manitoba to Governor General *Exhibit I-0867* as cited *ibid.* at para. 734.

Patents therefor.”¹¹⁰⁵ So it is clear that it was up to the federal Crown to honour its promises and agreements with the Métis.

The selected lands were always meant to be land grants. So while the Métis wanted the benefit of the family to be both effective and substantial,¹¹⁰⁶ Archibald was pushing for a free market in lands so as to ensure that “thrift might come into the place of improvidence”.¹¹⁰⁷ Rather than ensuring that the land grant was a benefit to the Métis families, Archibald was more concerned with ensuring that the land grant did not impede the development of the country. Indeed, from the beginning of his tenure in Manitoba, Archibald was contemplating ways in which the government could avoid distributing land to the Métis in the first place.¹¹⁰⁸ This view coincided with that of some opposition MPs who felt that the children’s land grant was “very disastrous” because it left too little land for incoming settlers and that it would have been preferable to “have been able to lay out the whole land for settlement and pour in it a tide of settlers who would open up the whole country.”¹¹⁰⁹ Prime Minister Macdonald was concerned with the Opposition’s criticisms of the *Manitoba Act* and advised Lieutenant-Governor

¹¹⁰⁵ January 27, 1873, Federal Cabinet *Exhibit 1-0802* as cited *ibid.* at para. 735. Also see the statement of Sir Richard Scott *Exhibit 1-1268*, p. 172 at para. 746.

¹¹⁰⁶ Archibald to Ottawa, December, 27, 1870 *Exhibit 1-0548*, pp. 4-6 as cited *ibid.* at para. 897 where Archibald writes: “The French, or their leaders, wish the lands to be so tied up, as to prevent them at all events, for a generation, from passing out of the family of the original grantee.”

¹¹⁰⁷ *Ibid.* at para. 897 where Archibald writes: “An absolute deed, entitling the party to convey, carries with it a corrective against the land remaining unsettled. Those who do not occupy, deriving no benefit from their ownership, will, as a class, be ready to convert their land into something they can use and will be sure to sell.”

¹¹⁰⁸ *Ibid.* where Archibald writes: “The French, or their leaders, wish the lands to be so tied up, as to prevent them at all events, for a generation, from passing out of the family of the original grantee.”

¹¹⁰⁹ *Ibid.* where Archibald writes: “But if the other principle should obtain, and you decide to tie up the lands by restraints upon alienation, then it occurs to me you should render settlement a condition anterior to, and a *sine qua non* of, a grant – you should withhold the patent till the condition is complied with. You should retain unappropriated portions of the lands reserved for the Half-breeds, and grant them only when the applicant had brought himself within the condition of settlement, which by the Act is impliedly intended as preliminary to his right. If this course were taken, a great many of the Half-breeds would never apply at all. One thousand of them are at this moment living on the Prairies. They are hunters by profession, not farmers. Where the Buffalo go, they go. They could not bear the restraints which cultivation of a farm implies. They would rather forfeit their lots, than settle on them, if by settlement was meant, some degree of cultivation and improvement on the Lots.”

¹¹⁰⁹ Alexander Mackenzie, May 7, 1870, House of commons debates *Exhibit 1-0467*, p. 1420 *ibid.* at para. 884.

Archibald to take “energetic action in the way of provision for a general immigration.”¹¹¹⁰

Nonetheless, the children’s land grant had been assured and it was now the government’s duty to take action to secure the land for the children. As illustrated above, the government failed to live up to its duties to the Métis community.

¹¹¹⁰ Macdonald to Archibald, November 1, 1870 *Exhibit 1-0533 ibid.* at para. 887.

CONCLUSION

The failure of Canadian law to respond to the views/beliefs/worldviews/best interests of Aboriginal people has been well documented. As the *MMF v. Canada* case shows, this pattern is continuing. Part of this is a reflection of the adversarial process where each side takes absolutist positions and the judge, typically, adopts one of the arguments. In the *MMF v. Canada* case virtually every argument that the MMF made was rejected outright at trial, including their interpretations of historical events and documents. For example, the trial judge viewed the note by Macdonald, which seemed to reflect an agreement on terms between himself and Ritchot, as merely Macdonald recording Ritchot's point of view. The judge does not cite any other correspondence from Macdonald which illustrates that this was a regular pattern of note taking. Instead, he comes to the conclusion in part by discounting Ritchot's recording of the same period as merely being a reflection of the internal agreement amongst the delegates and not an agreement between the delegates and Macdonald and Cartier. As a result, in the absence of a direct, unambiguous notation in one of the historical documents the judge does not see any meeting of the minds. Instead, he looks to the legislation and Macdonald's words in the House as a reflection of the commitments that Macdonald was prepared to make.

The assumption behind this reasoning is, however, suspect. What it does is draw us back to Sprague's statement, which was mentioned earlier in this thesis – the one that Flanagan thought was convoluted. Let's recall that Sprague said:

The presumption of benevolence is not appropriately replaced by one of consistent malevolence, but the exodus of the Métis from their original homeland and their difficulties in resettlement is more explicable by processes of formal and informal discouragement emanating from Canada than by alleged preference of the Métis for the wandering life of homeless hunters.¹¹¹¹

¹¹¹¹ Sprague, *supra* note 18 at 184.

The judge ultimately rests his reasoning on an assumed benevolence of Macdonald. He does this by expressing doubt that Macdonald would make an agreement with the delegates and then almost immediately march over to Parliament and represent that agreement as something other than what it was. But Macdonald was a politician and, while they are not all inherently dishonest, politicians need to strategically package their message to achieve their goals. Would Macdonald have been as likely to succeed in getting his legislation passed if he had walked over to Parliament and stated that 1.4 million acres was going to be removed from the lands of the new province to be protected under federal authority with corresponding legislation to ensure that subsequent generations of Métis would be able to benefit from that land? Probably not, but he could get Parliamentary approval for the general recognition of Indian title in a style similar to loyalist grants.¹¹¹² Don't forget that Ritchot was upset with the way in which that Bill was presented and he sought assurances from Macdonald and Cartier that their verbal undertakings would be carried out. It was only after he received such assurances that he dropped his opposition to the terms. This wasn't a reflection of a loss in the negotiations but rather a success. The Parliamentary process was, after all, out of Ritchot's hands. To him, it was the agreement that mattered. Assuming the benevolence of Macdonald allows the court to turn key pieces of evidence against the Métis and effectively give no weight to the Métis understanding of that agreement. Once established, the pattern continues throughout the judgment where the nuance is abandoned for absolute determinations. The typical pattern is that wherever evidence provides a contradiction to the MMF's interpretation, that evidence is used as proof of the government theory. The larger problem with merely examining evidentiary tidbits is that the worldview is

¹¹¹² See Flanagan's assessment of the changes that Parliament brought to the proposed bill in *Metis Lands*, *supra* note 7 at 37 where he writes: "These changes arose because of difficulties Macdonald foresaw in getting the bill through Parliament. The exigencies of Canadian politics would undo large parts of the compromises negotiated between Ritchot and the ministers, thus setting the stage for subsequent disputes about interpretation." But even here we can recall that Ritchot was able to receive his assurances in other ways. For the negotiators, the Bill was a viable means to carry out the Negotiated Agreement, whether Parliament knew this or not.

never challenged. This is a problem that pervades virtually all interactions between Aboriginal peoples and the law.

With our understanding of law and history continually being rejected in the courts due to the underlying ideologies of the judges and counsel, how are we to obtain real protections for our cultures? This is especially concerning in cases involving land. Land issues strike at the heart of the Canadian state's illegitimacy. It can be argued that the Métis negotiated with that State, and in so doing, sanctioned the application of the State's power over the Métis. That is partly true, but the State earned that legitimacy only by actually carrying out the terms that it had negotiated with the Métis. In absence of the fulfillment of those terms, the State has undermined its rightful claims to the territory.¹¹¹³ There is a similar concern with the way in which treaties are generally understood. Gordon Christie explains that treaties are not seen as land surrender agreements by Aboriginal peoples. Yet, even in cases where no land is discussed, such as the peace and friendship treaties, the courts have interpreted them in a way which effectively turns them into land surrenders. It is as if the judges are big kids playing a highly advanced game of make-believe. They make it up and people believe the hype. Well, I don't believe the hype. And it is the assumption of the Court's authority over Aboriginal people in the face of such obvious racism that I refused to directly tackle those decisions in the body of this thesis. The history found in the judgements of the MMF cases in particular are so Eurocentric and anti-Aboriginal biased that systematically addressing and unpacking it would take an entire thesis project on its own. The same might be said of Flanagan's research but his research shares other flaws as well. Aboriginal researchers must resist this tendency to merely respond to an agenda established by

¹¹¹³ A similar sentiment is shared by Minnawaanagogiizhigook (Dawnis Kennedy), *supra* note 444 at 77 where she writes in relation to Annishnabe territory: "The settlers shought to create for themselves a space within these lands that would provide for the establishment fo their communities and the development of their traditions. However, since Indigenous peoples already governed these lands, settlers could not create such a space except by way of their relations with Indigenous peoples."

colonial institutions and, instead, encourage research and debate which is crafted on our own terms.

This last point is the most important reason for steering clear of the systematic deconstruction of what might seem to be the most relevant case law. To systematically deconstruct it is to implicitly advocate for treatment within that system. If I undertake a substantive judgment, rather than a formulaic legal judgment, of Métis history I can still substantially address the law while at the same time avoiding the major point of corruption. The closer that a principle is related to its incorporation into specific legal disputes, the more that principle becomes utilized for the purposes of dispossessing Aboriginal peoples. Now, a principle might in itself be corrupted at the point of original creation. Indeed the entirety of colonial law could be questioned through the racism that is stated outright in *Sparrow*.¹¹¹⁴ However, one of the points of this thesis is that the principles are not entirely the problem (although some of them are indeed problematic). Instead, the corruption of those principles breaks down at the point of application in the courts. Whether it is Justice Binnie equating First Nations interests with those of an individual (in *Little Salmon*),¹¹¹⁵ or Justice McLachlin turning Aboriginal rights into common law rights (in *Marshall; Bernard*),¹¹¹⁶ the breakdown in the

¹¹¹⁴ *Sparrow*, *supra* note 442 at para. 49: “It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, 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”

¹¹¹⁵ See *Vermette*, *supra* note 9 for more analysis on *Little Salmon*.

¹¹¹⁶ In *Marshall; Bernard* at para. 48 McLachlin C.J. describes this as a process of “translation”: “The Court’s task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the

principle occurs primarily at the application stage. There are, of course, exceptions. For example, one must realize that *Sparrow* and *Delgamuukw* contextualize the domination that is apparent in the case law to follow.¹¹¹⁷ Yet, even in that context we must realize that judges have *options*.¹¹¹⁸ Judges have *discretionary* authority. The question is, what can they do with that discretion? This thesis presents one option. By avoiding system, and sticking to principle, I am presenting one alternative way in which law makers (not necessarily confined to courts) could interact with the MMT and to the extent that is possible under a colonial legal system, honour the agreement that was undertaken in 1870.

Just to reinforce the idea that the point of corruption occurs at the point of application, without spending a great deal of the reader's time on it, I will bullet a few of the areas in which the Court illustrates its ideological and interpretive bias against Aboriginal peoples:

- The Manitoba Court of Appeal fails to understand that the Métis either had, or *at the very least* created, a cohesive community voice and political culture which was distinct from the Crown when their title was extinguished. Instead, the Court relies upon

legal right claimed.” While McLachlin notes that “a generous view of the aboriginal *practice*” is necessary, she does not impart any notion that the Aboriginal perspective will be required to interpret the law itself. As a result, the Court seems satisfied to work within the colonial framework, and to use all the racist doctrines which have justified the dispossession of Aboriginal lands, cultures, languages and so forth. For without requiring more from the Aboriginal perspective in terms of worldview (including legal and governing traditions) and imparting more interpretive and creative powers to such “perspective” all that the Court has to fall back on are the colonial doctrines of the past.

¹¹¹⁷ *Sparrow*, *supra* note 1114 and *Delgamuukw*, *supra* note 248 at 165 where the Court writes: “The general principles governing justification laid down in *Sparrow*, and embellished by Gladstone, operate with respect to infringements of aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.”

¹¹¹⁸ For a review of the options which were open to colonial judges see Gordon Christie, *supra* note 16.

generalities of lifestyle to draw the Métis into the Canadian fold: “In both the French and English communities, for the most part the Métis did not practice a communal lifestyle; rather, they owned land or squatted on an individual basis.”¹¹¹⁹ In that same paragraph, the Court undermines the Métis community by emphasizing that “even in the French Métis communities there were divisions between the wealthy and influential merchants and the poorer Métis.” The error here is that, even if we assume the Court’s preference of individual attributes over communal attributes is correct, the individual still remains based in the communal. That is, the individual ownership is based in the Métis customs and authority which continue to prevail over their land base and NOT in Canadian authority. The importation of the one into the other without justification represents a complete rejection or dissolution of the Métis political community that negotiated the MMT. While it can be argued that much of that political control was divested to the Crown, there was 1.4 million acres over which some of that was intended to be preserved.

- The Court uses evidence of Métis independence from Indians as evidence that they were not in need of fiduciary protections. For example, the Court of Appeal writes: “The Métis considered themselves to be, and were, distinct from the Indians. They were not wards of the state, believed in private enterprise, and regarded themselves as full citizens in every respect. There is no evidence that they regarded themselves to be a vulnerable people.”¹¹²⁰ The Métis may have believed a lot of things. In the same judgment the court cites a research report by Catherine Macdonald where she explains that the Métis considered themselves to be a “Nation” and that they felt that the lands

¹¹¹⁹ *MMF2*, *supra* note 14 at para. 33

¹¹²⁰ *Ibid.* at para. 34.

they used outside of the Settlement belt were under their jurisdiction.¹¹²¹ Still, the Courts don't give any interpretive weight to that presumption of the Métis.¹¹²²

- The Court confused Métis individual interests with collective interests. The Court explains that “there is no doubt that prior to the enactment of the *Act*, the Métis were enfranchised citizens who were full participants in the economic and political life of Assiniboia.”¹¹²³ The extent of their citizenship was defined by the local circumstances. As such, their loyalty was not primarily dedicated to Great Britain or Canada. In the same paragraph the Court continues: “It cannot be assumed that totally restricting the options of individual Métis with respect to selling their s. 31 grants, for example by creating a Métis land base, would necessarily have been in their best interests.” Here the court takes the individual interests and concludes that they are superior to the interests of the group (the negotiated Métis land base).
- The Court justifies untoward conduct by looking towards the *intentions* of the actors. One such example can be found in relation to the extreme error of Codd's reassessment of the Métis population where they explain that Codd acted with no bad faith or “sharp conduct”.¹¹²⁴ This, of course, is completely irrelevant to measuring whether the conduct of a fiduciary was reasonable or prudent.

¹¹²¹ *Ibid.* at para. 39.

¹¹²² *Ibid.* The Court questions whether the Métis even truly had Aboriginal title at para. 505 and it does not see Indian title as being extinguished outside the settlement belt at para.28-29.

¹¹²³ *Ibid.* at para. 638. Also see para. 629.

¹¹²⁴ *Ibid.* at para. 630 where the Court writes: “In all of the circumstances, I conclude that Canada did not breach its fiduciary obligations when it provided 993 eligible beneficiaries under s. 31 of the *Act* with scrip. The appellants (in oral argument) characterized Codd's miscalculation as the most egregious example of error leading to delay. But the trial judge's conclusion that there was no bad faith or sharp conduct on the part of Codd or Dennis, neither of whom he found were motivated by mischief or malice, is amply supported by the facts before him. The evidence falls far short of justifying the conclusion that Canada was in breach of a fiduciary obligation to the s.31 beneficiaries, or a finding of unconscionable behaviour, as urged by the appellants.”

- Similar to the above, the Court fails to consider incompetence as a basis for breach of fiduciary duty. As a result, breaches can occur so long as a person with discretion is of good faith and has reasons for carrying out an action.¹¹²⁵ This is clearly against the established case law.¹¹²⁶
- Throughout the entire process Métis explanations and even evidence which supports the Métis position is given little or no weight. For example, the Court of Appeal concludes that “[t]here was nothing in his [Ritchot’s] diary to indicate that the delegates sought assurances at any time about grants being in family blocks or clusters, conditions of settlement or entailment.”¹¹²⁷ There is also nothing in his diary to indicate that Ritchot was a lawyer or that he had any reason to not trust the verbal reassurances that he was receiving from Macdonald and Cartier. While Black was a judge, he was not responsible for the negotiations of the children’s land grant. Further, there IS in fact evidence that the land was to be granted in family clusters and this evidence is reproduced in the Judgment of the Court of Appeal. For example, the Court refers to Ritchot’s diary entry of May 2, where Ritchot explains that agreement was reached that “the local legislature ought itself to distribute these parcels of lands to the heads of families in proportion to the number of children existing at the time of distribution”.¹¹²⁸ In the next paragraph, the Court cites Macdonald, writing on the same day, as saying that the distribution should have “regard to the usages and customs of the country”.¹¹²⁹ And finally, the Court notes that Cartier saw the division being initially distributed to the heads of families so that they could

¹¹²⁵ *Ibid.* at para. 628

¹¹²⁶ See *Wewaykum*, *supra* note 699 at para. 80 where the Court notes that “the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct and ineptitude.”

¹¹²⁷ *MMF 2* *supra* note 14 at para. 76.

¹¹²⁸ Ritchot diary entry May 2, 1870 as cited in *MMF* Final Argument *supra* note 136 at para. 63

¹¹²⁹ Macdonald as cited in *ibid.* at para. 64.

settle their children.¹¹³⁰ The Court seems to be under the impression that reasonable inferences are disallowed from its purview. How could heads of families possibly be considered as the ones to divide the said lands amongst their children if the lands were not clustered into family units? It makes no sense. Indeed the Court needs to fill in gaps with reason and appropriately deferring to the Métis position since, as the Court acknowledged, there are “potential frailties” in the historical record.¹¹³¹

This last point is illustrative of the Court’s tendency toward literalism in the interpretation of historical documentation. This tendency is also shared by Flanagan, which helps explain why Flanagan is a go-to expert witness for the government.¹¹³² However, this leaning towards literalism is not always the location of the Court’s failings. In other cases, the Court’s have waxed on about how to best bring history into a modern setting. Justice Binnie’s confiscation and mutation of the Two-Row Wampum is reflective of the courts game of make-believe. Justice Binnie saw that the Two-Row Wampum did not support the court’s interpretation and so, he proceeded to turn the Wampum into something other than what it was. Rather than being an instrument which supported the coexistence of two societies, Binnie turned it into an instrument of assimilation. He couched this as being a “modern interpretation” but it is just plain racist. Intention is not important here. Binnie’s technique of historical modernization was used to undermine the legitimate interpretation of the Wampum belt and ensuring that his

¹¹³⁰ *MMF2*, *supra* note 14 at para. 66.

¹¹³¹ *Ibid.* at para. 79.

¹¹³² See, *Ermineskin v. Canada*, 2005 FC 1623 (CanLII) online: <<http://www.canlii.org/en/ca/fct/doc/2005/2005fc1623/2005fc1623.html>>. Also see, *Benoit v. Canada*, 2002 FCT 243 (CanLII) online: <<http://www.canlii.org/en/ca/fct/doc/2002/2002fct243/2002fct243.html>> at para. 194 where the judge recognizes Flanagan’s literalist bias: “As explained in Section III above, Dr. Flanagan is a proponent of the literal interpretation of the Treaty Report, and, based on this approach and his understanding of the context in which the Treaty was negotiated, argues that the tax assurance was nothing more than ‘an explanation of existing government policy as embodied in the *Indian Act*.’ Thus, for Dr. Flanagan, there was no treaty promise respecting tax. I have already found that the assurance constitutes a Treaty promise, and, thus, do not accept Dr. Flanagan’s conclusion.”

new interpretation would sanction the Canadian state's control over First Nations people. Binnie dehumanizes Aboriginal peoples by ensuring that they are not worthy of being listened to. They become a voiceless people. Rather than finding a way to meet the understanding found in the Two-Row Wampum, Binnie just strips it of all meaning so that he can rewrite it in a way which doesn't inconvenience Canada.¹¹³³ I have also not proposed remedies in this thesis because I do not want to confine such a discussion to the legal sphere.¹¹³⁴ This is the same process of controlling Aboriginal peoples which has no problems articulating that a "ship of state" has run roughshod over Aboriginal peoples and they should just learn to accept it. How can Aboriginal people trust the courts in the face of such obvious manipulation? Answering that question leads to one of the flaws with this present study.

The short answer to the question above is that Aboriginal people cannot trust the courts. Period. However, there is a certain degree to which the courts must be used. For some, the quest is to find a way to use those structures to our advantage.¹¹³⁵ The nature of this inquiry is such that it is almost completely impractical for such a purpose. Courts have already ruled in contradiction to some of the findings in this thesis on both interpretations of historical evidence and interpretations of law. Yet, I wrote in the introduction that I was not seeking to be practical in that sense. I was under no illusion that this work would be picked up by judges or lawyers and would start a revolution in legal thinking. It is neither responsive enough to the particularities of the legal *system* nor it is a revolutionary thesis.

¹¹³³ *Mitchell, supra* note 251 at para. 130 where Binnie J. massacres the two-row wampum as follows: "to return to the nautical metaphor of the 'two-row' wampum, 'merged' sovereignty is envisaged as a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas. The vessel's components pull together as a harmonious whole, but the wood remains wood, the iron remains iron and the canvas remains canvas. Non-aboriginal leaders, including Sir Wilfrid Laurier, have used similar metaphors. It represents, in a phrase, partnership without assimilation."

¹¹³⁴ For arguments surrounding the redress of historic wrongs see, Douglas Sanderson, "Against Suppersession" *Can. J. of L. and Juris*. Vol. XXIV, No.1 (January 2011) 155 - 182.

¹¹³⁵ See for example, Dale Turner's conclusions in *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).

When engaging in academic research it would be nice to be able to say that our research was meaningful in some way or, that it was practical, that people could use it and be inspired by it. Is this thesis any of the above? I have no doubt that it adds to the existing literature (even though I reject the restrictiveness of how that particular academic guideline is interpreted at times), but I question the practical usefulness of this thesis. It neither fully adopts the norms of the colonizer (even though I use legal principles as a basis for analysis) nor does it fully distance itself from those norms. It is stuck in a position that many Aboriginal Peoples are stuck in. Like a damaged spaceship approaching the event horizon of a black hole, a rescue operation needs to take place immediately before it is lost forever. But if those who are equipped to mount the rescue don't give a damn, or better yet, are gaining materially by the disappearance of that ship, a rescue is unlikely. There is a lot of work to do and little time to do it. While it might be nice to talk theoretically or philosophically about Aboriginal issues we need to find a way *to get work done*.

The work in this case, then, can be seen as providing some insight into the locations of the State's oppression of the Métis. Understanding our oppression is the first step. It is frustrating that we haven't moved beyond that. My interpretation is one of a (hopefully) reasonable external observer of the law, rather than a participant within it. With the acknowledgement that a great deal of Canada's laws dealing with Aboriginal peoples are just arbitrarily invented by the courts, this thesis can be contrasted with the court's arbitrary invention to illustrate that an alternative interpretation is possible. The proximity of this interpretation is what makes this project important. Reaching a finding that provides life support to Métis culture does not require a reinvention of law but merely a moderate re-interpretation of the law already invented.

What I hope the reader takes from this is that judges make choices. That the law is designed to serve particular interests but that it *doesn't have to blindly* serve those interests. After 1870, Métis communities were fragmented through government incompetence and racism which defined the Métis interests according to Canadian material interests.¹¹³⁶ 140 years later, Métis culture is being denied the life support that it desperately needs as a result of the desire to maintain the gains that were made in 1870.

¹¹³⁶ This includes not only the desire to open up the lands to incoming settlers but also the desire to protect the woodlands from the Métis, and to individualize the Métis group interest in the land.

Epilogue All That's Left

As I reached through that last bush and glimpsed my peoples' lands I knew it was but a fleeting moment. I knew my people would never return here. Yet, in that moment, as the warmth of the sun washed over me at the edge of that clearing, I knew I was home. And as I stepped forward into the overgrown grass I felt a tug and was thrown off my feet.

They have come for me.

I told them what I had found. They told me I was not on the path. I told them the path leads to my people's destruction. They told me that justice is done in particular ways. They have taken great care in carving paths to accommodate the needs of all individuals.

As I am pushed along the path, I look back for the clearing that I found, but it is already gone. Disappeared behind hastily planted bushes. I notice that my guides have left me ... at a crossroads. To my left is the deep forest. To my right is the shore. Head down, cap in hand, I step to my left and I am jarred into the present by whispers that I hear coming from further down the path:

...the Attorney General of Manitoba submits that in deciding this case, this Court must be cognizant of its role in our constitutional framework. It is the role of historians, not courts, to question past events, to criticize decisions and to ponder what might have been if different policy choices had been made. It is the role of the courts to apply legal doctrines to established facts for the purpose of resolving live disputes that have a real impact on legal rights. Courts should not involve themselves in furnishing bare legal opinions about historical events for the sole purpose of influencing political and policy outcomes.¹¹³⁷

And I realize that each step in that direction is another step away from my People, myself and my family. With nowhere else to go, I turn around. And again, I am at the water's edge. In the distance my people slowly drown. I have been gone so long that they don't recognize me anymore. I can barely see them.

¹¹³⁷ *Supra* note 1096 at para. 166. Here the Attorney General of Manitoba has tried to ensure that the left hand of the colonial machine does not attempt to duplicate or redress those tasks that the right hand has already undertaken.

Beside me my children play with the rocks on the shore. Knowing what lurks beyond, I cannot take my children back into the forest. We will live here on the rocky shore ... alone. I have failed them.

My feet never did touch that clearing.

Only now do I realize that I wasn't close at all.

Appendix A: Rejecting the Standard Discourse

It is perfectly possible to have internally consistent, even clever, debates that begin with a shared premise, and to continue to do so if that premise is never questioned, never problematised. If, however, the initial premise is flawed, misplaced, erroneous or downright crazy all the subsequent sophisticated discourse in the world will not negate the flaw, the misplacement, the error or the craziness.¹¹³⁸

I. Introduction

The modern debate on Manitoba Métis land entitlements has been formed largely from researchers working for the litigants in a case that originally emerged in the mid-1980s. Thomas Flanagan is probably the most prolific and well-known of these authors. Another researcher who has worked for the government on his own, and in concert with Flanagan, is Gerhard Ens. Both of these men have written reports for the government defence in the litigation. The major voice on the Métis side has been D.N. Sprague. This appendix does not concentrate on Sprague to a great extent. But this Appendix is not a typical literature review. Instead, I will attempt to articulate why the standard discourse on Métis lands in Manitoba has not been met head on in the body of my thesis. Therefore, it is most logical to focus on the most preeminent of these scholars and that would be Thomas Flanagan. This does not mean that the entirety of their historical research is inappropriate. Rather, their argumentation is flawed and to combat it in the body of the thesis would be a major distraction to my argument. As such, I will not be responding to a debate that I think is misguided. Indeed, if I were to engage in this debate with Sprague, Flanagan and Ens, I would be committing a fallacy of historical research where mass opinion is taken as a method of verification.¹¹³⁹ However, if I am adopting a view of history which rejects

¹¹³⁸ Michael Tracey, Inaugural lecture of the Chair of International Communication, University of Salford, England UK 1995 online: <<http://www.duesberg.com/viewpoints/mere-smoke.html>>.

¹¹³⁹ David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* (New York: Harper & Row Publishers, 1970) at 52 writes: "The *fallacy of the prevalent proof* makes mass opinion into a method of verification."

the standard discourse only two choices present themselves: I can ignore the interpretive strategies or I can unpack those strategies to justify my rejection. I have chosen the second option but have placed my unpacking in an Appendix so that it would not detract from my argument. Indeed, this Appendix will explain how the current orthodoxy is faulty.¹¹⁴⁰ In doing so, I do not intend to engage in an argument with that line of thinking. Rather, I will simply point out how the historical accounts are deceptive, misguided, or unworthy of response.

Thomas Flanagan is the foremost “expert” on the Métis land entitlements in the *Manitoba Act*. Or at least he is the most prominently known. The curiosity of Flanagan’s prominence in regards to Métis history can be measured in the following statement: “The poor condition of the logical analysis of history is shown by the fact that neither historians, nor methodologists of history, but rather representatives of very unrelated disciplines have conducted the authoritative investigations into this important question.”¹¹⁴¹ The problem is not merely related to the logical analysis of history, but also to the histories themselves. That a political scientist is the predominant voice on Métis history speaks volumes about the type of debate that the courts are willing to hear. Neither trained historians nor scholars of law carry as much renown on this topic as does Flanagan. However, this is truly the least worrying facet of his work for scholarly talent need not necessarily be forever confined to one area of specialization.

Flanagan’s basic thesis in regards to the Manitoba Métis is as follows: “Metis land sales and emigration were part of a broad social movement rather than a narrow response to supposed violations of the Manitoba Act.”¹¹⁴² This either/or construction is false and does not reflect an

¹¹⁴⁰ In *First Nations? Second Thoughts* (Montreal: McGill-Queen’s University Press, 2000) at 3 Thomas Flanagan has characterized his opposition to the Report of the Royal Commission on Aboriginal Peoples as “confronting...a new orthodoxy, widely and firmly accepted in all circles exercising any influence over aboriginal policy.” For the most part I could use the same characterization for Métis lands in Manitoba. And Flanagan is part of that *standard* orthodoxy.

¹¹⁴¹ Max Weber as cited in Fischer, *supra* note 1139 at ix.

¹¹⁴² Flanagan, *supra* note 144 at 5.

attempt to balance the historical analysis. Rather, it is worded as if he is preparing for litigation (and he was). The strategy employed by Flanagan is simple and it is convincing to those who share his view of the world. This strategy is carried out in four ways: **first**, Flanagan provides a history which is focused primarily on governmental actions, inactions, motivations, reasoning and the like. For example, in his “Outline of Events” Flanagan makes 8 points relating to the time period from 1811 to 1867.¹¹⁴³ The next period, “Initial Actions of the Dominion” begins on May 12, 1870 and Flanagan uses the remainder of that section to outline events into the early 20th century.¹¹⁴⁴ There is no mention of the Métis reasons for negotiating with Ottawa, or what the Métis thought they had achieved in those negotiations. If you are tasked with assessing whether the provisions of the *Manitoba Act* were implemented, it might be a good idea to get a full understanding of what the intention of the *Manitoba Act* was. This technique is designed to diminish the relevance of the Métis as creators of this document. It is designed to give the appearance that the Métis view does not matter.

Second, on virtually every occasion when conduct unbecoming of the Crown reveals itself, Flanagan offers an apologetic turn and, perhaps, an indication of government good faith (or, alternatively, an indication that there was no bad faith). The goal here is, obviously, to undermine the perceived impact of the errors. The implication is that these errors were not significant enough to explain the dispossession of the Métis. As a result, the Métis were either not dispossessed at all or someone other than the government must have dispossessed the Métis (Flanagan offers that it was the Métis themselves,¹¹⁴⁵ while Sprague locates the underlying

¹¹⁴³ *Ibid.* at 6-7.

¹¹⁴⁴ *Ibid.*

¹¹⁴⁵ Flanagan, *supra* note 7 at 232.

causes in fraud of speculators and government agents).¹¹⁴⁶ Keeping with this fashion of debate, Flanagan, also tries to illustrate that there was no *intention* to deprive the Métis. The implication is that the government can't really be faulted because if malfeasance is found, it was merely an accident.

Third, with this framework set, Flanagan adopts an interpretive lens which is easily brought into and understood by members of the bench, and the western scholarly community in general. For Flanagan and others, the individual is the key location of fairness and the economy is the location of opportunity. It is not really in doubt that these values have a comfortable spot in the mind of the western thinker. Yet, it should also not be a surprise that these foundations can be seriously questioned. Indeed, the application of such a lens needs to be justified rather than arbitrarily applied. Flanagan gathers up information about *individuals* and produces statistics upon which he then overlays his theory about the market economy to show that it was a *choice* of the Métis and not a sinister plan which led to their lack of a land base. Here Flanagan is careful to avoid any analysis of cause and effect; opting instead to merely assert a theory based on general associations (the Métis' natural response to the market dictated their land sales and ultimate move from Red River).

Fourth, Flanagan's work reveals a bias against Aboriginal cultures. While he is better at hiding this bias in his government funded work, his fragmented and reductionist historical account still completely disregards the desires, intentions, or needs of the Métis community. One might counter this by saying that Flanagan's bias in regards to the Manitoba Métis is only reflected to the extent that he chooses to adopt a frame of reference in which Aboriginal peoples are mere individuals and extol the virtues of the market economy. Under such a view, the

¹¹⁴⁶ See, D.N. Sprague, "Dispossession vs. Accommodation in Plaintiff vs. Defendant Accounts of Métis Dispersal from Manitoba, 1870-1881" in Patrick C. Douaud, ed. *The Western Métis: Profile of a People* (Regina: Canadian Plains Research Center, 2007) 125-144.

market is the great equalizer and as long as the Métis could sell their lands on the open market, then the government has met its obligations. Indeed, it is with these strategies that Flanagan does a very good job at talking in the direction of Aboriginal people without actually talking about them.¹¹⁴⁷ To me this reveals a lack of perspective which is so extreme that it must manifest elsewhere. Flanagan's lack of perspective impacts his historical interpretation to such an extent that most critical eyes would seriously doubt his conclusions. Flanagan's choice to not critically assess government action demands answers. So, what is behind it? Since, Flanagan doesn't provide these answers in his government work; I will go looking for answers in his other work. This is done, not to hold Flanagan up to arbitrary scrutiny (after all, all the works I will consult are his own), but to understand the context from which he writes.

Finally, I will look at what the totality of deception that these points of error produce for the history of the Manitoba Métis. The faults in these arguments are not easy to unpack, if we are to engage in the same discursive that Ens and Flanagan have set out for us. Indeed, the most logical way to counter Ens and Flanagan is to simply reject the analysis altogether. We do this by digging it up at the roots, rather than climbing the tree and getting lost in its branches. But to do this we have to be convinced that it is, in its analysis, misguided. Such worth depends on how the researchers ask their questions and where they focus their investigation. One factor that might be at play is the degree to which researchers are willing to look for their answers in the Métis themselves. Such a change in focus not only allows the researcher to examine the relevance of intention differently, but also to add a new lens for examining the effectiveness of government action.

¹¹⁴⁷ For more of the same see Flanagan, *supra* note 1140.

II. The Government Can Do No Wrong

There is no evidence that anyone in the federal government – in Parliament, cabinet, or the public service – intended to implement the Manitoba Act in such a way as to deprive the Metis of their legal benefits or to encourage them to sell land and scrip and leave the province. On the contrary, there is a great deal of evidence that federal officials and statesmen conscientiously tried to meet the desires of the Metis in carrying out the Act.¹¹⁴⁸

Flanagan gets an early start in his government sympathizing by refusing to examine the validity of the Royal Charter of 1670. He explains that the 1670 grant of Rupert's Land to the Hudson's Bay Company "has been challenged, from the perspective of competing French claims as well as from the vantage point of aboriginal title, but its validity is accepted in Canadian law and will be assumed here."¹¹⁴⁹ So, Aboriginal title never has a chance. We are still stuck on the old racist notions of terra nullius, settlement without consent, or sovereign good will (as outlined in *St. Catherine's Milling*) which were used to effectively bar Aboriginal claims. From the get go Flanagan has set the tables so that his study will reach the desired results. When it comes to the matter of the Métis asserting claims, justly or unjustly, they are not accorded the same privilege as a sovereign from across the ocean. One may note that I have basically accepted the validity of the Royal Charter as well since most of my argument hinges upon law that is indirectly linked to the validity of this Charter. However, rather than accept the validity, (which I do not)¹¹⁵⁰ I am discarding the need for reviewing the document altogether. I challenge its relevance to an examination of the Métis resistance, land claims, culture, and the like. On the other hand, Flanagan's acceptance of the document (without critical review) is illustrative, even

¹¹⁴⁸ Flanagan, *supra* note 144 at 5. As my thesis indicates, both of these assertions are fundamentally untrue. However, Flanagan does not pursue the fundamentals of the agreement reached in Ottawa and, instead, bases his entire argument on the government perspective. In Flanagan's rhetorical style, one might also point out that there is no evidence that the cow dreamt of jumping over the moon. On the other hand, there is no evidence that the cow **didn't** dream of jumping over the moon. More to the point, there is no evidence that anyone in Parliament didn't intend to deprive the Métis of their lands. Personal intention is a virtually worthless consideration in this debate. As Flanagan himself points out, the distribution of lands involved a bureaucratic mess. While this mess can't hold "intent" it can manifest itself in such a way that its operation denies the rights of the Métis people.

¹¹⁴⁹ *Ibid.* at 26.

¹¹⁵⁰ See my chapter two *supra*. Also see McNeil, *supra* note 180.

at this early stage in his writing, of his willingness to concede points of debate to the government side. In short, it is illustrative of his perspective.

If this is splitting hairs there are more substantial matters to discuss. Flanagan begins his assessment of the allocation of the Métis land grants by studying the Red River land holdings. He notes that the only treaty signed in the area was the Selkirk Treaty of 1817. This treaty was contested on the grounds that the Saulteaux were recent arrivals to the area and had no title to cede to Selkirk. Later, Chief Peguis denied selling any land. And finally when Canada negotiated Treaty One it did not take into consideration that the land had already been ceded.¹¹⁵¹ Rather, the government of Canada merely ignored the existence of the Selkirk Treaty. Instead of viewing the validity of this treaty in equally dubious light, Flanagan elevates it to even greater importance than the 1670 grant. Indeed, Flanagan does not attribute the Charter of 1670 as being the basis of the HBC's land granting powers. Instead, he seems to pin it directly to the Selkirk Treaty: "The Company paid its annual quit rent of tobacco to the Indians, made grants of land within the two-mile 'Settlement Belt,' and never made any grants of land outside it."¹¹⁵² If title emerged as a result of the Treaty, rather than the Royal Charter, the Company must not have seen the 1670 Charter as granting "ownership" as Flanagan claims that it rightfully did (or at least he was going to assume it did).¹¹⁵³ What we get from this is that the Charter and the role of the HBC government are both questionable on issues of authority and effective control. In the meantime, the Métis were settling the lands and, where appropriate, were defying the HBC government to suit their purposes. While the practical authority of the HBC government might be a valid issue for some of these studies, it can't be denied that the Métis made a habit of

¹¹⁵¹ Flanagan, *supra* note 144 at 27.

¹¹⁵² *Ibid.*

¹¹⁵³ Flanagan's words, *ibid.* at 26, are that the charter "gave the Hudson's Bay Company ownership of the lands drained by rivers flowing into Hudson's Bay, including all of present-day Manitoba as well as large parts of Minnesota and North Dakota drained by the Red River."

defying that authority where it suited them and the HBC could, more often than not, do nothing about it. This raises issues about the effectiveness and ultimate meaning of both the Charter and the Selkirk Treaty. The failure of Flanagan to critique these elements sets the stage for, perhaps, the longest monologue in the entirety of historical theatre.

In elevating the Treaty to such unquestioned validity, Flanagan is just continuing with his strategy of avoiding a critical analysis of governmental activities. This is especially true where those activities, in some way, impact upon Aboriginal interests. The reason for this is simple. If Flanagan refuses to undermine the actions of the government through detailed contextual analysis, he can rely upon the *official historical record* in its *literal* form. If the books were cooked, Flanagan just sits back and enjoys the soup no matter how much contextual evidence is encouraging regurgitation. Sprague has made this point elsewhere. In response to Flanagan's uncritical acceptance of the documentation of the Dominion Lands Office Sprague has maintained that there was widespread fraud:

To maintain that there was wholesale fraud one must have a plausible basis for impugning the validity of the records of 'more than ten thousand separate transactions'. We do. We have the sworn testimony of witnesses including the chief justice of the Manitoba Court of Queen's Bench to the effect that 'all sorts' of devices were resorted to and the prices indicated by the sales documents bore little relation to the value of the received. Because of that cloud, we have great difficulty in determining which sales were bogus and which were genuine. That is the reality Flanagan ignores.¹¹⁵⁴

Sprague's critique here is not designed to say that Flanagan is necessarily wrong. However, the critique does point out that Flanagan is not providing his readers with a comprehensive analysis. Sprague has shown that there is a very solid reason to question some of the official historical record. Flanagan just plugs his ears, closes his eyes, and refuses to engage that material; for it might muddy the waters of his pristine conception of government. And, there is every reason to scrutinize government sources with extra zeal:

¹¹⁵⁴ D.N. Sprague, Book Review of Thomas Flanagan, *Metis Lands in Manitoba*, University of Calgary Press, 1991 in *The Canadian Historical Review* 261-63 at 263

The writing of history, Voltaire believed, should be one form of battle in the age-old war for our intellectual emancipation. Too often, however, history is written and marketed in such a way as to be anything but liberating. The effect is not to enlighten but to enforce the existing political orthodoxy. Those who control the present take great pains to control our understanding of the past.¹¹⁵⁵

Instead, of recognizing the problems with taking his sources at face value, Flanagan just forges ahead.

Flanagan's accounting only proves that the government kept extensive books. It does not ensure the accuracy of those books or negate other problems. Consider the "quantitative fallacy ... which consists in the idea that the facts which count best count most."¹¹⁵⁶ "[T]he quantitative fallacy is ... a criterion of significance which assumes that facts are important in proportion to their susceptibility to quantification."¹¹⁵⁷ Thus, Flanagan is apt to assert that the government "overfulfilled" its obligations because he can quantify the amount of land distributed.¹¹⁵⁸ He does not offer a qualitative assessment which convinces the reader *the way in which the government distributed those lands*, was in fact the correct method. Nor does he take on any problems which may have been encountered at the point of production of the historical record. Michael Parenti gives some insight into problems with blind adherence to archival material: "Those engaged in the manufacturing of history often introduce distortions at the point of origin well before the history is written or even played out. This initial process of control is not usually left to chance but is regularly pursued by interested parties who are situated to manipulate the record."¹¹⁵⁹ If the contemporary sources used by Sprague are *at all* accurate in noting that fraud was prevalent, a decent fraudster is not going to keep a paper trail of that fraud in official government documents. Indeed, they will try to conceal it.

¹¹⁵⁵ Michael Parenti, *History as Mystery* (San Francisco: City Lights Books, 1999) at xi.

¹¹⁵⁶ Fischer, *supra* note 1139 at 90.

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ Flanagan, *supra* note 144 at 4 where he writes: "The major finding of my research is that the federal government appears to have fulfilled or even overfulfilled its obligations under ss.31 and 32 of the Manitoba Act."

¹¹⁵⁹ Parenti, *supra* note 1155 at 129.

Ens and Flanagan are operating a counter-narrative against previous researchers who argued that government delays and incompetence (or neglect and malfeasance) directly resulted in the dispersal of the Métis from Red River. As a result, Flanagan and Ens' works read like they are government apologists rather than academic researchers. One might be willing to write this off to the fact that they were commissioned by the government to undertake their research. However, it must be realized that in order to make an effective apology it is sometimes necessary to *deny* the extent or nature of the problem. So while Ens does take the time to point out some of the ways in which Métis demands were not met, his approach as an apologist for governmental actions (or lack of actions) is to argue that these were not fundamental problems and that they were dealt with fairly by the federal government. If one does not buy into the assumptions which underlie Ens' work, then his report reads like a litany of violations rather than as an argument that the Crown met their obligations. Frankly, I don't care about either of these narratives. It doesn't matter to me if the Crown was nefarious or overcome with goodwill, but it does matter how/when the land was actually distributed to the Métis, what type of interests were being protected, and if there is any reflection of Métis desires, or their best interests, in that exchange. After all, the Manitoba land "grant" was a result of a negotiated agreement. The *Manitoba Act* didn't arrive in Parliament out of a vacuum. Métis representatives were there to negotiate terms of that entrance and they later ratified their understanding of those terms through the Provisional government in Red River.

Like Flanagan, Ens doesn't seem to give any weight to the social pressures that pushed the Métis from Manitoba (which he acknowledged would influence people to abandon their lands); nor does he reflect upon governmental responsibility. Citing an American Consul in Red River, who wrote about how the Métis were insistent upon continuing the buffalo hunt despite its

diminishing returns, Ens fails to pay any attention at all to the American Consul's statement that public improvements would bring along increased taxation which along with "voluntary sales and otherwise" would cause the lands to be passed to the "hands of immigrants and that a large portion of the halfbreeds would have to resort to the plains."¹¹⁶⁰ Is this merely a forward-looking statement, based upon American experience with similar issues? And what does he mean by "otherwise"? Is this American consul aware of the less than savory ways in which land can be obtained? If so, was the Canadian government aware? And, did they do anything about it?

One way in which Ens attempts to show that the government met its obligations is by illustrating that the children received their land grants in the areas that the Métis chose. Ens provides a historical background to show that the government made its best efforts to accommodate the Métis desires. Almost immediately upon his arrival, Lt. Gov. Archibald noted that the English and French wished to keep their communities separated. Archibald's response was to suggest locating the English lands north of Fort Garry and the French lands south of the Fort.¹¹⁶¹ Although there was a difference of opinion amongst Métis individuals as to where they would like to take their share of the land, the final say was left to the Lt. Gov. in consultation with the community parishes. Order-in-Council, April 25, 1871 designated that the Lt. Gov. would determine which townships were to be selected. Individual grants would then be drawn from these townships.¹¹⁶² Ens understates the problem when he asserts that "[t]he matter was made more complicated and contentious" after May 26, 1871, just one month after the OIC which set out the process for selecting and granting Métis lands, ordered that settlers would be

¹¹⁶⁰ Oscar Malmros to J.C.B. Davis, Acting Secretary of State, January 6, 1870. In *The James Wickes Taylor Correspondence 1859-1870*, edited by Hartwell Bosfield (Winnipeg: Manitoba Record Society, 1968), 103 as cited in Gerhard Ens, "Manitoba Metis Study: The Metis Land Grant and Persistence in Manitoba", Report submitted by the Department of Justice, Exhibit 36, March, 2006, at 17.

¹¹⁶¹ *Ibid.* at 22.

¹¹⁶² *Ibid.* at 23 citing OIC, 25 April 1871. NAC, RG15, D-II-1, Vol. 228, File 798. This OIC was confirmed by the Dominion Lands Act, SC 1872, c. 23.

allowed to claim lands even when such lands are unsurveyed.¹¹⁶³ Some of these claims directly infringed upon lands claimed by the Métis as part of the constitutional responsibility held by the federal government. When the government failed to remove all the settlers from one such location, Ens notes that the Métis “began to become suspicious of the government’s good faith.”¹¹⁶⁴ This is not surprising since such a transgression was the foreseeable result of government policy.

These initial transgressions occurred on lands used by the Métis of St. Charles and St. Francois Xavier. Ens also points out that “settlers also located on lands desired by the St. James Métis and those of High Bluff and Poplar Point. When possible the government tried to mitigate its effects and generally accommodate Métis demands, as well as they could be, given the protection that the Order-in-Council of May 26, 1871 had given to settlers.”¹¹⁶⁵ Ens seems to treat the OIC as not representative of government action. It is as if the OIC was a result of Mother Nature rather than a policy initiative of the very government which was responsible for protecting the Métis land grant. It is akin to saying “I tried to protect your face with my right hand given the fact that my left hand was punching you in the face.” Are the Métis supposed to thank the government for their consideration? If Ens called it like it is, he would be able to see the full extent of the violation which the OIC represented. Instead, he focuses on the government’s *intention* to correct its wrongs, as if those intentions alone provided the fix.

Taking a moment to comment on the method of survey we can see another turn of the page which Ens uses to bypass the problems associated with the Métis land grant. In his report, Ens notes that the parishes of St. Norbert, St. Vital, and Ste. Agathe selected various lands, the total of which exceeded their portion of the 1.4 million acres. As such a compromise was

¹¹⁶³ *Ibid.* at 23.

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ *Ibid.*

needed. To reach this compromise Lt. Gov. Archibald used Archbishop Taché as a mediator. Ens quotes, at length, a letter from Taché which outlines the process of negotiation and the general agreement reached between the parishes, Taché and Archibald. Picking up at the point where Taché and Archibald are finalizing the land selections, Taché's letter reads:

The numbers were checked repeatedly; So I got pretty satisfied that we understood one another. Then I reported to the people who accepted with pleasure his Excellency's decision.

Now, to my great astonishment, I find out that Mr. Archibald, in his official documents, instead of mentioning the selection of the whole of the said townships, merely alludes to that portion of them. And the Land Department taking advantage of this, seems determined to withdraw from the reserve the lots adjacent to the river, while they are the very portion insisted upon and promised.

Without passing any remark on such a proceeding I cannot refrain from expressing my deep regret at the occurrence. I shall take the liberty to insist on the selection as understood and explained to the people in order to avoid the dissatisfaction which would follow the knowledge of what would be considered as a deceitful act.¹¹⁶⁶

Now, on a simple reading of this we can see a clear breach in the agreement that was reached with these parishes. Rather than focusing on the breach and its impact on the broader goals of the parish in selecting those lots, Ens simply turns the page by referring to government regulations which required a breach of the agreement. The implication, because with Ens and Flanagan much of what we read is implied rather than spelled out, is that the Lt. Governor was a) not to be blamed for the mix-up and b) both the Lt. Gov. and the Government were well within their power to make the choices that they made, even if these choices went against the desire of the Métis. To get to this position, Ens explains that Taché was notified about the reason for the mix-up by J.S. Dennis, the government surveyor, who found that some of the land had to be removed because it was part of the settlement belt, the same area that was to be granted to individual settlers according to section 32 of the *Manitoba Act*.¹¹⁶⁷ And, Ens also explains, that an OIC required that Métis lands be selected from surveyed townships.¹¹⁶⁸ In keeping with the

¹¹⁶⁶ *Ibid.* at 28-29 quoting: A.A. Tache to Lt. Gov. Morris, January 14, 1873, PAM, MG12, B2, #20.

¹¹⁶⁷ *Ibid.* at 29 quoting J.S. Dennis to A.A. Tache, April 11, 1873. NAC, RG15, Vol. 230, file 2454.

¹¹⁶⁸ *Ibid.* where Ens quotes the OIC of April 15, 1872 as follows: "The Secretary of State therefore recommends that the Lieutenant Governor of Manitoba be instructed to make selections of Townships, in such number as is necessary

government plan of making the entirety of its new western acquisition a checkerboard survey, Ens points out that the same OIC differentiates the township survey system recently employed from the river lot system.¹¹⁶⁹ As such, it can be implied that the Lt. Gov. was just following orders. As a result, Ens never feels compelled to retrace his steps and offer a different interpretation of the agreement reached with these parishes. Instead, he just moves on to outline the selections of other parishes. In light of the government policy which was applied retroactively to the agreement reached with the Métis, Taché and Archibald, Ens should have rethought his original interpretation that “all evidence” showed “the Métis were satisfied” with the selection Archibald made.¹¹⁷⁰ No citations are provided to point the reader to this evidence and the only evidence that Ens does provide illustrates that the Government was undermining the very agreement that Archibald had reached with these parishes. It is one example of many, where the reader is left feeling as if Ens has written his assessment and gathered his evidence in two completely different paradigms. The evidence seems to be the work of a detailed historian; the assessment seems to be that of a government apologist with a veritable lack of context. Throughout, the most glaring omission is any sense of Métis agency.

A similar approach is used in regards to the Métis of St. Charles. Here Ens outlines how the Métis had chosen land along the Riviere aux Ilets de Bois but, rather than granting them such lands, the Lt. Gov. gave them two townships in the vicinity. Rather than tackle the question of why the Métis wishes weren't respected or accommodated, Ens gives an overview of how the Métis relocated themselves to form their own communities after allotments were given out. His conclusion is narrowly focused on Métis adaptability (another trait used to excuse the harshness

to make up 1,400,000 acres, reserving in all cases from every Township so selected, Sections 8 and 26, or so much thereof as may be hereafter designated as Hudson Bay Company lands, and Sections 11 and 29, which may be required for School purposes.” NAC, RG15, Vol. 228, File 1089.

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ *Ibid.* at 28.

of government ineptitude or deceit).¹¹⁷¹ Well, this might be so (as it pertains to Métis individuals), but it is also a reflection of the fact that their preferred selections were not honoured and that the very purpose of the children's land grant was undermined (to benefit families...ie/ preserve communities). This characterization by Ens also outlines a significant point of contrast between his interpretation which lacks any Métis agency and my own interpretation which argues that as soon as the Métis individuals were given title in fee simple the Métis *community* was landless.

Ens continues the practice of focusing on the individual efforts of government agents in order to justify the Crown's treatment of the Métis. For example, in regards to High Bluff and Poplar Point, Ens provides an account of how the Métis were denied the selections that they were made (or were only partially granted those that they made) and he dismisses the violation of the Métis interest by stating that Archibald made reasonable efforts to accommodate the Métis (as if Archibald's *efforts* are a sufficient end point in judging the bounds of fairness, or legality).¹¹⁷² It is here, after presenting this evidence, that Ens concludes that "Archibald made reasonable *efforts* to accommodate the desires of the Metis in reserving the lands they wished."¹¹⁷³ The point in criticizing Ens for looking at efforts or intentions is to illustrate that such strategies are used to avoid the real issues. By placing emphasis on the personal performance of particular government agents, the actions of *the Crown* are never fully examined. It was the Crown which sanctioned the intrusions of settlers and refused to remove them so that Métis demands could be met. It was the Crown, through Archibald, which placed the demands of the market ahead of demands of the Métis. It was Archibald who, with the market in mind, decided that the Métis

¹¹⁷¹ *Ibid.* at 31 where he writes: "By 1880 the Parish Priest from St. Francois Xavier was making regular trips to what came to be known as St. Daniel. Eventually a church was built and a regular priest was sent to the locality. It is an indication that sale of both river lots and children's allotments did not mean the Métis were leaving the province or were landless."

¹¹⁷² Ens' analysis on these parishes can be found *ibid.* at 31-33.

¹¹⁷³ *Ibid.* Emphasis added.

were not entitled to benefit from things such as a town or the vicinity of the railway. Nor were they entitled to select lands which had any value above that of regular farming lands. How is it that one can say that Archibald's response was reasonable? Well, in order to make it reasonable, we have to accept the broader transgressions of the Crown as either inevitable or appropriate. And, we have to reduce the Métis rights to be equal with those rights of incoming settlers. I am prepared to do neither of these things since both of them are entirely inappropriate and remove the examination from its broader context.

To Ens' credit, he does mention *some* of the broader context. However, he addresses it in a manner which makes it seem as if the government itself should be given some sympathy over the inconveniences caused by its own bumbling actions.¹¹⁷⁴ To get further into the details and impacts of the May 26, 1871 OIC, Ens performs a case study of St. James Reserve. His justification is as follows: "An examination of the case of St. James Reserve is both possible and instructive because it has been well documented, and because it highlights the complexity of the issue and the *attempts* of the government to mitigate the problems."¹¹⁷⁵ As Ens writes it, the reader might be forgiven for forgetting that these are problems that the government *caused*.¹¹⁷⁶ In reference to the encroachments caused by the OIC of May 26, 1871 Ens notes that the majority of claims made on St. James lands were "not made by recent immigrants to Manitoba but by pre-1870 residents... Both white old settlers and Metis had taken advantage of the OIC of May 26, 1871 to make claims on lands they desired."¹¹⁷⁷ Ens makes it seem almost as if this "advantage" was a benefit merely because old residents used it rather than new immigrants.

¹¹⁷⁴ *Ibid.* at 34 where he writes: "The Order-in-Council of May 26, 1871 which had allowed immigrants to make entries on lands prior to survey until the Metis reserves had been designated by Archibald in July 1872, created numerous headaches for the government and discontent among the Metis."

¹¹⁷⁵ *Ibid.* Emphasis added.

¹¹⁷⁶ See *ibid.* at 34-35.

¹¹⁷⁷ *Ibid.*

What he is missing, because it never enters his discussion, is the contrast in the type of claims being made. The parish of St. James acted to protect their collective interest from the start. They were prompt, they were thorough and they were not relying upon each individual member to protect their claim. The OIC of May 26, 1871 gave access to individuals, as private land owners, to make entry upon lands, some of which carried a *collective* interest. The issue is not whether it was Métis violating Métis interests or if it was immigrants violating Métis interests. The issue is that the interests of *individuals* were allowed to trump the interests of the collective. Private ownership was placed above what had all along been a community interest. The nature of the Métis interest is characterized in Ritchot's initial justification for a land grant for Métis children and it is characterized by the parishes representing the collective interest of each Métis community through their collective action in selecting lands. Buried within the fact that the Métis approved claims of those people who were familiar to them is the motivation to have a block of lands upon which the community can be maintained. In such a context it is perfectly understandable why the Métis would not reject those claims of their previous neighbours.

The continuation of discontent reveals that this was a sore spot for the Métis. Here Ens writes: "The recognition of these claims continued to irritate the Metis of St. James until the late 1870's, and for the next seven years the land office would *try* to determine which claims had enough improvements to qualify for homesteads, cancelling some and approving others."¹¹⁷⁸ Indeed, Ens notes that "[b]y 1879 the greatest remaining source of discontent among the St. James Metis related to those claims that had been allowed to stand in what had once been considered the Outer Two Miles of their parish, as this prevented some river lot owners from

¹¹⁷⁸ *Ibid.* at 35-36 points out in footnote 66 that "This process is detailed in MA File 2." See, G. McMicken to John A. Macdonald, July 17, 1872. NAC, MG 261, Vol. 246, pp. 110723-28.

acquiring their OTM.”¹¹⁷⁹ Ens doesn’t explain if “greatest” actually meant “only”. If it meant that this source of discontent was merely the greatest of several sources of discontent, he doesn’t let us know what those other sources are. Nor does he let us know how he balances the evidence or lack of evidence to determine “greatest” vs. not so important areas of discontent. And, while he outlines in some detail the particular claim of Thomas Howard, concluding finally that the government could not expel him because he had made the claim under the OIC of May 26, 1871 and “Howard had built a house and broken 23 acres”¹¹⁸⁰, Ens fails to keep the reader attuned to the fact that Howard’s claim violated the selections made by the Métis. Indeed, reviewing his map of the “Final Disposition of Twps 11 & 12 Rge 2E” one can see a multitude of ways in which the St. James Métis had their claim violated. It is apparent that despite the efforts of government officials and Lt. Governors, the Métis claim had been violated by lands reserved for the HBC, by private sales, and by Military Bounty Grants (of which Howard’s was one example), and homesteads.¹¹⁸¹

Ens even paints a picture that would have the Métis being the source of any failure on the part of the government to respect their desires:

Previous analysis has already shown that Lieutenant-Governors Archibald and Morris selected Metis reserves for the various parishes based on the desires and requests of the Metis themselves. While the correspondence between the spontaneous demands of the Metis and the reserves selected are not an exact match, it is clear that government listened to the Metis requests. The greatest divergence between the demands and the reserves arose from the fact that the Metis requested more land than their population or the Manitoba Act allowed for.¹¹⁸²

So, here, are Metis at fault for being greedy? Whether he is insinuating that the Métis were at fault or merely trying to explain the reasons for Archibald’s failure to honour the Métis selections, the assessment doesn’t correspond to the reality that Flanagan and Ens actually set

¹¹⁷⁹ *Ibid.* at 38.

¹¹⁸⁰ *Ibid.* at page 38 referencing Memorandum to Mr. Burgess, Deputy Minister of the Interior, August 1890. NAC, RG 15, D-II-2, Vol. 140, File MA 2.

¹¹⁸¹ See *Ibid.* Figure 5 at 39.

¹¹⁸² *Ibid.* at 46.

out. Some of the vast array of violations, which have been set out in this thesis, come from the history that Flanagan and Ens present. It is a wonder how they could have come up with such a conclusion. Take for example the following quotation:

Given the overlapping claims of the various parishes, the complications introduced by the Order in Council of May 26, 1871 that for a time allowed immigrants to make entries prior to survey, the instructions that Archibald and Morris were not to grant any parish more than a fair average of woodlands, and the fact that Archibald and Morris were working with rough and often inaccurate numbers of Metis eligible for the land grant, it is apparent that both lieutenant governors were faced with a very difficult task. The documentary evidence certainly indicates that both Archibald and Morris took their duties in allocating this grant very seriously, and that both tried to administer it as fairly as possible.¹¹⁸³

It should be obvious here that attempts at fairness do not equate to actual fairness. Further, attempts by individual governmental officials do not characterize the entirety of government action. Even within this brief summary, we can find several violations of the land grant: the OIC of May 26, 1871, the fair average of woodlands policy, and the delays caused by reliance upon inaccurate numbers, all indicate violations or locations of potential violations. All of these violations are eliminated from consideration by directing the reader's focus (and sympathies) to the efforts and difficulties suffered by government officials.

III. Rhetoric Over Reason

While some of the information covered previously could fit into this section to the extent that it encourages a limited analysis of the issues, this section will look more directly at the use of language and deceptive analysis used to taint or enhance evidence. Flanagan and Ens share the argument that the misadministration of Manitoba lands has nothing to do with the Métis dispersal from Red River. In fact, the aforementioned assumptions are used to support the overall argument that the Métis were willing and savvy land dealers who chose to sell their lands and see the benefit in terms of dollars. Flanagan and Ens embark on apologist maneuvering to

¹¹⁸³ *Ibid.* at 48-49.

account for government actions or inaction in distributing the land. The purpose seems to be to show that any violations of the promises made in conjunction with the *Manitoba Act*, were minor and did not affect the otherwise honourable dealings between the government and the Métis. Once the land is shown to be granted, or mostly granted, Ens and Flanagan can show that any loss is a result of Métis decision-making internal to individual members of the group, rather than to external forces. And so it is that the market emerges into the equation. The only remaining question at that point is: Did the Métis get a fair price? If so, then they were compensated adequately for their lands and have nothing to complain about. And this is the point that opens and closes the work of Ens and Flanagan. For Flanagan and Ens, our political scientist and historian turned accountants, the market is the key factor in proving that the Métis lost their land by their own intention, that they were paid a fair price and because the market didn't discriminate, the Métis are ultimately responsible for their own dispossession. Neither author, on his own or in collaboration, justifies the application of the market as the even playing field. This is not surprising since that type of contextual analysis is all but ignored throughout their argumentation. Why is the market the measuring stick? Was the market even supposed to apply to the Métis treaty? We are never given any answers.

Their argument is that there was a competitive market and based on the average value of sales, it is evident that a great many Métis did well, in both buying and selling lands. All of this serves a classic maneuver in "blaming the victim".¹¹⁸⁴ Unfortunately, despite the Eurocentric nature of this thinking, the research of Flanagan and Ens has been winning the day. It is, for most people, easy to follow and it operates on the general understandings of personal freedom and individual equality which are common pillars of fairness in today's society. Their argument is however, misleading and inaccurate. Take for example, one of Flanagan's stronger statements

¹¹⁸⁴ See William Ryan, *Blaming the Victim*, revised, updated ed. (New York: Vintage Books, 1976) at 3-30.

that: “There is also no evidence that the way in which the Manitoba Act was implemented encouraged the movement of the Metis out of Manitoba.”¹¹⁸⁵ Well, this is patently false. Simply because Flanagan chooses not to examine the evidence or doesn’t know how to fit it into his quantifiable models, does not mean that there is *no* evidence.

While it might be said that Flanagan and Ens erred in not proving that fee simple and individual titles were adequate to fulfill the government’s responsibility,¹¹⁸⁶ both of these historians carry out further errors with their assessment of negative evidence: “The *fallacy of the negative proof* is an attempt to sustain a factual proposition merely by negative evidence. It occurs whenever a historian declares that ‘there is no evidence that *X* is the case,’ and then proceeds to affirm or assume that not-*X* is the case.”¹¹⁸⁷ In Flanagan and Ens’ histories these statements are quite frequent.¹¹⁸⁸ Here is one example from Ens: “there is nothing in the historical record to indicate that these latest selections, made in consultation with the inhabitants of these parishes, were unsatisfactory to the Metis.”¹¹⁸⁹ And, so we are left with the impression there were no hiccups. A person could as easily write the sentences as follows: “there is nothing in the historical record to indicate that these latest selections made in consultation with the inhabitants of these parishes, were ultimately satisfactory to the Métis.” Such statements are not reporting *anything* of substance but they are implying a great deal. We simply don’t know if they were satisfactory or not. Such statements are merely a ruse to try and distract us from other reasonable arguments. If a person can cast the illusion that there is no evidence for discontent then anyone raising such an argument will immediately be looked at with suspicion. In such an instance, the complainer must be stretching, being extremely liberal with other (tangential)

¹¹⁸⁵ Flanagan, *supra* note 144 at 5.

¹¹⁸⁶ Fischer, *supra* note 1139 at 48 where he writes: “The *fallacy of the presumptive proof* consists in advancing a proposition and shifting the burden of proof or disproof to others.”

¹¹⁸⁷ *Ibid.* at 47. Emphasis in original.

¹¹⁸⁸ See again, Flanagan, *supra* note 144 at 5.

¹¹⁸⁹ Ens, *supra* note 1160 at 42-43.

evidence, or just making things up. But the world that Flanagan and Ens are creating is made up as well. They are creating the illusion of peace and contentment where there is no direct evidence for it. This is surprising considering their literalist interpretation of historical material. If there were direct evidence for it, they would have written the sentence as follows: “the historical record indicates that these latest selections, made in consultation with the inhabitants of these parishes, were satisfactory to the Metis” and supplied a corresponding footnote. Because they cannot write that, they do the next best thing and try to prove a point through absence of evidence. The project that they employ is one of distraction and selectively casting the evidence, or lack thereof, to suit their particular agenda (which happens to correspond favourably with the government’s agenda).

A more subtle example of the above can be found in Ens’ understanding of the Métis resistance. For example, he writes: “In fact, many Metis had agitated for union with Canada since the 1850’s. It was *only* the actions of Schulz during 1868-69 and Canada’s disregard of the inhabitants of Red River that had raised doubts among the Metis about Canadian intentions.”¹¹⁹⁰ Ens transmits evidence in a way which uses the absence of evidence to prove a point. How many Métis agitated for union? And could it be that the Métis had no reason to have doubts because a transfer had not been completed and as a result there was no threat to their interests? Or could those who did have doubt simply not appear in the historical record because without the immediate threat of a transfer, there was nothing to worry about? It is not mere coincidence that evidence of the Métis desire to protect their lands arises when there is a manifest threat against their interests. The lack of evidence before 1868-69 does not exclude that the Métis would have limitations about being transferred to any foreign governing authority without due consideration to their interests. Indeed, their prompt response in 1869 should show that the Métis did not have

¹¹⁹⁰ Ens, *supra* note 7 at 130. Emphasis added.

to think very long about the situation. Instead, they knew what interests they had and acted to protect them.

Again, in regards to the parishes of St. Francois Xavier and Baie St. Paul, Ens outlines the Metis selections and Archibald's selection which was "more or less in the area they had requested" and concludes that "[t]here is no evidence that this selection met with disapproval".¹¹⁹¹ Again, no footnotes are provided to illustrate how this disapproval would normally be voiced and what sources Ens consulted to come to his conclusion. He does not address the broader question concerning the correctness of the Lt. Gov's selections. Regardless of Métis approval or disapproval was the Governor correct in making the selections as he made them? All that we know for sure is that Ens couldn't find any evidence. But we do not know if the actions of the government were reasonable and if it was even likely that they would have been met with either approval or disapproval.

To show that the Métis were complicit in the process of land selection, Ens makes general statements about the lack of evidence such as, "It does not appear that these alternative selections resulted in any discontent after 1872, or at least no evidence of continuing discontent has been found."¹¹⁹² After all, Ens points out that the more contentious issue was "related to homestead and sale entries made prior to land being set aside as reserves by Archibald and Morris."¹¹⁹³ This is understandable since, the way Ens characterizes it, there were no major violations of the agreement that can be linked to the selection of lands.¹¹⁹⁴ Rather than examine how these substitutions may have detrimentally impacted the Métis, Ens merely looks to the

¹¹⁹¹ Ens, *supra* note 1160 at 30.

¹¹⁹² *Ibid.* at 34.

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Ibid.* where he writes: "In almost all cases Archibald reserved lands that were within the areas requested by the Metis. Though the Metis of St. Charles did not receive lands they had requested along the Riviere aux Ilets de Bois, they did receive two townships along the Sale River which they had also requested fulfilling the requirements of that parish. Only in the cases of Headingley, High Bluff and Poplar Point did Archibald substitute some alternative townships close to the parishes in question."

efforts of the Lt. Gov. to write them off as small matters: Archibald made efforts and that is all that can be expected. To support this dismissive tact Ens talks about non-evidence explaining that he can find no evidence that the Métis were still perturbed by Archibald's actions.

At times, the characterizations that Ens uses seem deliberately intended to cast dispersions upon Riel's leadership and the resistance in general: "On October 11, a group of militant French Metis led by Louis Riel stopped the Canadian survey and began the resistance that would ultimately result in Manitoba's entry into Confederation as a province."¹¹⁹⁵ What makes this group militant? If there is someone trespassing on my property and staking it out for new unseen owners and I step on their measuring tape and ask them to leave, am I militant? Ens seems to think that they were militant at the point when they stopped this initial Canadian aggression. Nobody was hurt during this encounter. By all accounts it was peaceful. The surveyor wrote down the names of the Métis and left. It is as if Ens applies the militant characterization because he doesn't feel that the Métis had any reason to interfere. After all, raising arms is self-defence but raising arms *unreasonably* (or against people with which you sympathize) is militant. And so it is that with the work of Flanagan and Ens we are left, in more than a few instances, with rhetoric taking the position of reason. Although I have alluded to this problem above, there is one point of rhetoric which needs to be examined on its own terms; the individual as the unit of analysis. I will undertake that discussion below.

IV. Individuals as the Unit of Measure

Flanagan describes his historical work as "highly detailed".¹¹⁹⁶ I would not refute that description. I would caution the reader against taking highly detailed as meaning thorough.

¹¹⁹⁵ *Ibid.* at 127.

¹¹⁹⁶ Not surprisingly, Flanagan *supra* note 1140 at 3-4, takes a different view of his work: "I had been doing research on aboriginal issues for a quarter of a century, writing highly detailed historical studies on subjects such as Louis

Rather Flanagan's research is as highly selective as it is detailed and it is framed in a completely inappropriate level of analysis. For Flanagan, the heart of the matter rests squarely in the actions and motivations of individuals. As long as individuals were all provided with the same, or similar, access to the market it is assumed that they were treated fairly. Flanagan supports this analysis through studies tracking the value that the Métis sold their lands for and comparing that to the average value that the land was worth in the market of the day. The assumptions behind the work are threefold: If the individuals were treated fairly, then so too was the collective (to the extent that Flanagan actually would recognize collective interests); that the method chosen by the Crown to meet its *Manitoba Act* obligations was fair; and that if the Crown tried to meet their obligations to the Métis then any infringement upon those obligations was minor. These assumptions run through the tenor of Ens' work as well. There are times in Ens' work when he seems distanced from his overall argument. At these times he seems to simply be outlining historical events. The failure in his work becomes obvious when he again dives into interpreting that history, at which time he adopts the same assumptions as Flanagan. The fact that Ens and Flanagan's work is so similar is reflected in part by the fact that they do collaborative work together and that a large part of that work is paid for by the Crown to support its defense against Métis claims of wrongdoing in regards to Manitoba lands.

Flanagan's lack of perspective is evident in his crude mathematical analysis of the federal government's land grants. Flanagan calculates the amount of individual scrip that was distributed. When he discovers that more than the guaranteed 1.4 million acres was distributed, Flanagan comes to the conclusion that the government over fulfilled its obligations. The possibility that the federal government fulfilled obligations which it did not have (ie/ giving

Riel and the North-West Rebellion, Metis land claims in Manitoba, and the never-ending Lubicon conflict in northern Alberta."

individual titles to land) and entirely failed to fulfill obligations which it did have (ie/ giving the Métis community land) does not even enter into Flanagan's analysis because he refuses to look critically at government actions. This all goes back to the unjustified use of the individual as the key unit of measure.

Ens tracks Métis individuals in order to find patterns of persistence and economy, he extrapolates these patterns without measuring the impact of the provisions of the *Manitoba Act*. That is to say, even if we can assume that some individuals left Red River due to economics rather than racism, or the failings of the Canadian government to honour the promises in the *Manitoba Act*, what does this have to do with securing a Métis land base in Manitoba? The answer is that it has nothing to do with that. If 50% of the individuals that once comprised a collective leave to pursue individual interests, this does nothing to the interests of the collective. Ditto with 60%, 75%, or 90%. If, after the *Manitoba Act* was passed, 90% of the Métis journeyed over the Rockies, boarded a boat, sailed to China, *and never returned*, the Métis collective was still entitled to 1.4 million acres for their children to benefit the families. The collective interest is only undermined by collective consensus, not by individual decisions.

Sprague, who so far has not been the subject of my criticism, also engages in the tactic of accounting for individuals to get a sense of the pattern of the dispersion.¹¹⁹⁷ His use of this technique is more limited than Flanagan and Ens and exists largely as an attempt to counter the results of the method employed by Flanagan and Ens. However, it is still misguided, especially as it pertains to the children's allotment. While Flanagan and Ens offer the most persistent examples of this method, readers should keep in mind that I am critical of its use by all researchers. It should be noted however, that Sprague's analysis does not tidily fit with this method. That is, he does not use the gathering of individual statistics to impute any particular

¹¹⁹⁷ See generally Sprague *supra* note 1146.

understanding upon those people's intentions. Rather, like a professional historian should, Sprague finds meaning for those numbers in a broader context. That is, he does not rely upon the individual as an interpretive strategy. The context Sprague analyzes is open to critique and is understood by reference to other sources of historical information. So, in fairness to Sprague, his use of this technique is really the least problematic of the bunch.

V.a Methodological Individualism as an interpretive strategy

Flanagan breaks down the Métis land beneficiaries individual by individual in an attempt to show that they did in fact receive their land. By reducing the collective interest to individuals, Flanagan can argue that *individuals* made choices with their *individual* title and, since we hold individual liberties in high esteem, we must honour those decisions and not show redress for the fact that the Métis do not have a land base today. Indeed, how can redress be given for something that was essentially the fault of the individual Métis who chose to sell their land? To illustrate how this line of reasoning is faulty, we must explore Flanagan's framework (Methodological Individualism) in more detail.

I will start by giving the reader a sense of what is meant by Methodological Individualism:

In the language of contemporary philosophy, this emphasis on individuals and their acts as units of analysis has been called 'methodological individualism' as against 'holism'. The latter principle asserts that societal facts cannot be properly reduced to psychological facts and that whatever macroscopic laws one may discover in sociology are *sui generis*, apply to entities larger than individuals. By contrast, proponents of methodological individualism maintain that social processes and events should be explained by being deduced, in principle at least, from statements describing the behaviour of participating individuals.¹¹⁹⁸

¹¹⁹⁸ K.W. Kim, "The Limits of Behavioural Explanation in Politics", *The Canadian Journal of Economics and Political Science*, Vol. 31, No. 3 (Aug., 1965), 315-27 at 316. For perhaps the most thorough undertaking of the topic of methodological individualism, see Rajeev Bhargava, *Individualism in Social Science: Forms and Limits of a Methodology* (New Delhi, India: Oxford University Press, 2008).

The failure in the logic of his approach should be obvious. But I will borrow an example to help illustrate how this preference for individual analysis breaks down:

The first question that arises is, why stop? Methodological Individualism legislates that the ‘right place’ to stop in our investigation, our ‘explanatory bedrock,’ is when we run into ‘what individuals think, choose, and do,’ but why put the stop-sign there? Can we not, in principle, develop an account of ‘thinking’ in terms of brain chemicals, blood flows, and the like? And is that account not itself reducible (again, ‘in principle’) to the behaviour of atoms? Can we not break atoms themselves down further?

We can go the other direction, too. We have a world with many societies, and our world is only one in this solar system, which is only one in this galaxy, and there are ‘billions and billions’ of galaxies...

The stipulation of MI to stop at what individuals think, choose, and do is a **preference**, and not some kind of scientific principle.¹¹⁹⁹

Methodological Individualism is a method of analysis which is crafted to help researchers look at the world in a particular way. Rather than getting to the essence of matter, by focusing on individuals in the context of group interests, the methodological individualist actually completely disregards any existing group interest.

V.b. Methodological Individualism in practice

So how do we know, after having made our preference for which level of analysis we want to use, to what extent we should incorporate other details (by either reducing or expanding our frame of reference) in order to develop a greater understanding of the phenomena under consideration? Well, the fundamental question can be asked: Is it relevant? And, as is explained at various points throughout this thesis, a statistical analysis of individual land sales in connection with the children’s land grant is *not* relevant. Similarly, where Ens criticizes other researchers for being too focused on the Métis nation and ignoring the inner workings of the class divisions within Red River society, he does not ask the question: Are the inner workings of the economy and class stratifications at Red River relevant to those researchers’ studies? Historians can cast their net as wide or as narrowly as they need to in order to answer whatever

¹¹⁹⁹ Roland Chrisjohn et al., *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada*, revised edition (Penticton, B.C.: Theytus Books Ltd., 2006) at 109-10.

fundamental question to which they seek an answer. For Ens, the net is small but it has fine webbing. He attempts to paint a detailed picture of the economics at play in Red River. However, he fails to incorporate the broader picture to ask the fundamental question: What were the forces which determined what options were available to the Métis in this economy and *after* the economy? Specifically, let's assume that the Métis left the Red River region due to economic pressures pulling them to the west. How can we explain the absence of a Métis land base? Indians from the reserves move to the city all the time for much the same reasons. They, however, have a land base (however miniscule most of these are) to return to.

Consider how deep this problem of Methodological Individualism can run. D.N. Sprague wrote a review of Flanagan's work in which he was critical of Flanagan's lack of justification for the conclusions he provided. Sprague wrote:

In Flanagan's view, Canada's recognition of the supposed purchaser of riverlots was equivalent to recognizing the original occupants, and Manitoba's legislation concerning 'half-breed lands' was 'beneficial' to the nominal recipients of children's allotments. To make such a case even minimally plausible, Flanagan must show that the sales of Métis lands were genuine contracts between consenting parties competent to enter into such agreements, and that there were reasonable returns for the vendors.¹²⁰⁰

While he is critical of the lack of consideration that Flanagan gave to counter evidence, Sprague takes Flanagan's norms and runs with them. He merely asks Flanagan to provide more evidence rather than justify his underlying *assumptions*. Indeed, Flanagan has to go further. He has to show that these lands were *ever* supposed to be made available for sale. Individual allotment does not necessarily equate with individual capacity to sell his or her share of a community interest to those outside of the community. Even if the sales took place in a fair market, they

¹²⁰⁰ Sprague, *supra* note 1154 at 263.

were not supposed to have taken place in the first place because they were limited by a community interest.¹²⁰¹

Flanagan's preference for individual agency plays out in how he views Riel's contribution. Flanagan explains that "[t]he historical record is clear..." – I would say that the historical record is clearly biased in a way which reflects the colonial society, its norms, values and judgments and that these are features which Flanagan just adopts into his own work without critique – and the quotation continues, in reference to Louis Riel: "...that he provoked the North-West Rebellion of 1885 for his own purposes."¹²⁰² These purposes, according to Flanagan, were purely selfish and one might be excused for wondering if Flanagan has a point here since Riel's personality seemed to be both volatile and self-indulgent but Flanagan does not address the fact that Riel was in the United States when he was sent for by the Métis of the North West. They came to get him! What was it about Riel that they desired? The focus on Riel's personality quirks or personal greed are merely a reflection of Flanagan's behaviourist approach to political history. This approach is a tangent of Methodological Individualism and can be understood as follows:

Behaviouralism in political science thus seems to be a political application of a much broader principle in the social sciences which denies the ontological reality of social entities larger than (physically identifiable) individual persons. This, however, may be too strong a statement. Most of the political behaviourists may not have thought out the logical implications of their adoption of individuals as the only legitimate units of analysis. If political behaviouralism is unambiguously committed to the kind of methodological individualism suggested above, what happens, for instance, to the status of the group in the so-called interest group theories? Logically speaking, there is no reason to suppose that groups have any more reality than 'the society as a whole.' In the end both concepts are reducible to a set of psychological observations about individuals and their acts. It is, however, doubtful whether the students of politics are prepared to endorse such a thorough-going psychological reductionism. Short of this methodological

¹²⁰¹ Att. Gen. of Can., SCC Factum, *supra* note 594 at para. 147 where the Attorney General tries to use the government's flawed interpretation and implementation as a basis for determining the very nature of the Métis entitlement: "...as the trial judge found, the appellants' attempt to frame this case a claim of a collective nature is 'fundamentally flawed' because it is 'underpinned by a factual reality that is individual.' The benefits provided by ss. 31 and 32 of the *Manitoba Act* enured to individual persons, not collective or corporate entities."

¹²⁰² Tom Flanagan, "Are we really quite certain we want to sanctify Louis Riel?" Alberta Report, Vol. 25, Issue 6, p. 12 1998. Online: Business Source Premier.

principle, it seems best to assume that *the behavioural emphasis on individuals is merely a recommendation* of a particular strategy in political research.¹²⁰³

So we can see that Flanagan takes a *preference* and applies it as if there is no alternative. The reason he is so unconvincing is that he does not justify his position. At least Flanagan is consistent. Maybe when Flanagan criticizes Preston Manning for once saying “that Louis Riel is a bridge-builder...”¹²⁰⁴ he should follow that with praise for Manning’s insight rather than a diatribe of narcissistic historical rendering designed to ensure that Aboriginal peoples never see a cent of taxpayer money. It is no wonder that Flanagan opts for historical interpretation which regurgitates the racial bias of previous writers and assumes that all government action is benevolent (or on its way to being benevolent).¹²⁰⁵ As stated above, Flanagan’s preferred method is to individualize the actions of the Métis. When assessing the resistance, it is all about Riel. When assessing the scrip process, it is all about the choices made by individual Métis to sell their lands. In contrast, Ottawa and Canada are the preferred terms for describing those forces which create the conditions under which the Métis individuals have to react. There is never any responsibility attached to the choices made by government (for a government is not an individual and does not carry such responsibility and does not act in the world but for the individuals that act within that government). To the extent that he does critique those actions it is only by way of reference to *intention* of individual actors.

¹²⁰³ K.W. Kim, *supra* note 1198 at 316.

¹²⁰⁴ Flanagan, *supra* note 1202 where he writes: “The manipulation of Riel’s image raises important contemporary considerations. Canada faces hundreds of aboriginal land claims. Most of these are Indian claims, but Metis leaders are also launching their own cases. Such claims depend crucially on exact reconstruction of history. To ignore the historical record in an attempt to rehabilitate Louis Riel will set a precedent for these claims that will prove costly for Canadian taxpayers.”

¹²⁰⁵ *Ibid.* where he writes: “True, the Metis of the Saskatchewan Valley had grievances involving river lots and land scrip, but Ottawa was well on its way to dealing with these.”

Ens' report also begins with a flawed base. While he purports to address "whether the Métis received the land they wanted in the 1.4 million acre land grant"¹²⁰⁶ he never once looks at *how* the Métis expected to receive that land or why. These questions are central to understanding if the government actually honoured the agreement. Instead, it is just assumed that the land was to be divided amongst individuals as units of private property. He leaves this role to Thomas Flanagan by referring the reader to Flanagan's own research for the Department of Justice,¹²⁰⁷ and Flanagan's book entitled *Métis Lands in Manitoba*.¹²⁰⁸ For the reasons above, I think that this is a pretty flimsy base upon which to found your work.

While Ens does use maps to help argue that the Métis received their lands in the areas that they wanted, he does not question that these lands were to be distributed as individual lots of private alienable property. Everything that Ens does cover leads to the understanding that these land grants were to be collective grants. He starts by looking at Lt. Governor Archibald's understanding in December 1870 that the Métis wished to locate their own land grant. Why? If all they wanted was a fair share in the market then all they needed was a grant *anywhere*. The prime locations were already taken up by the settlers grant. Virtually the entire river way was going to be claimed by Métis and non-Aboriginal settlers who had a preexisting claim through an HBC grant or had rights as squatters. Archibald recognized that the Métis wanted to maintain their community. As Ens summarizes: "[Archibald] noted that the English and Protestant parishes, and the French and Catholic parishes wished to keep this division in the allocation of lands."¹²⁰⁹ This is equally evident in the way in which the Métis made their choices for lands.

¹²⁰⁶ *Supra* note 1160 at 1.

¹²⁰⁷ *Ibid.* at 1. See footnote 1.

¹²⁰⁸ *Supra* note 7.

¹²⁰⁹ Ens, *supra* note 1160 at 22.

Ens' research reveals that the Métis grants were to be contiguous blocks of land chosen by the *community* to benefit the *community*.¹²¹⁰ Individuals were not making these selections. Indeed, a "Parish of Half-breeds, or any body of Half-breeds" would make the selection as a *community*. With all this evidence staring him in the face, one might wonder why Ens would be comfortable in referring his readers to Flanagan's analysis of individual allotments. But here am I not merely criticizing Ens for referring his readers to Flanagan's research? Well, no. Ens also likes to use individual assessment where there is little reason or benefit in doing so. As a result, Ens and Flanagan's research is filled with irrelevant information and examples. Here is one such example: "The example of the Lafontaine family, however, demonstrates that the sale of river lots and children's allotments did not constitute a bar to settling on land in other parts of the province. The sale of these lands, in fact, could provide the necessary financial stake to facilitate the transition to an agricultural economy."¹²¹¹ This example is used to illustrate that the Métis suffered no ill-effects from having their lands made subject to market forces. Indeed, if not for the sale of such lands, it is insinuated, the Métis would not have been able to transition to

¹²¹⁰ See generally *ibid.* at 24. And, specifically footnote 42. Also see, *ibid.* where Ens cites Lt. Gov. Archibald to Joseph Royal et al., June 9, 1871 as printed in *The Manitoban*, June 17, 1871: "Wherever, therefore, any Parish of Half-breeds, or any body of Half-breeds, shall have made a choice of a particular locality, and shall have publically notified the same in such manner as to give notoriety to the fact of their having made such a selection and having defined the limits thereof, so as to prevent settlers entering upon the tract in ignorance of the previous selection, I shall, if the duty should fall to me of acting under the rule laid down by the Governor-General, be guided by the principle I have mentioned, and confirm the selection so made, so far as this can be done without doing violence to the township and sectional series." Ens also recognized that Metis communities were seeking land for the *community* in Gerhard Ens, "Metis Ethnicity, Personal Identity and the Development of Capitalism in the Western Interior: The Case of Johnny Grant" in *From Rupert's Land to Canada* (Edmonton, The University of Alberta Press, 2001) 161 – 177 at 163-64 where he writes: "The contingent nature of Metis ethnicity is illustrated by those Red River Metis who returned from Montana after the buffalo disappeared in the late 1870s and early 1880s, and congregated at Turtle Mountain in northern North Dakota. They returned because they believed they could acquire land from the American government during the treaty negotiations with the Ojibwa of that region. The American government, however, did not legally recognize the Metis and so they redefined themselves as the Turtle Mountain Chippewa (Ojibwa), entered treaty and obtained a reservation in the Turtle Mountains...This type of instrumental ethnicity and identity was much more common than is usually recognized." Ens is confirming for us that Métis *communities* preferred treaties elsewhere and were willing to do what was necessary to obtain one. See Ens, *supra* note 7 at 139 where he writes: "Metis leaders hoped that the Red River Settlement could remain a Metis homeland. This required political cooperation, the maintenance of the Metis land base, and a rapid adaptation to an agricultural economy."

¹²¹¹ *Ibid.* at 52-53.

agriculture. But neither Flanagan nor Ens explain why, if the Métis wanted money (and a fresh start) they didn't simply negotiate for money (or why they went through the pretense of selecting children's land grants through the parishes). If financial compensation is equated with an interest in land, then why were the settlers who occupied lands under the May 26th, OIC not required to leave those lands and simply given scrip or financial compensation? What happens to *Halfbreed* lands in this scenario? The convenience of the fee simple allotment was that it effectively negated the "reserve" lands which had been carved out for the Métis. In a similar vein, Ens also notes the following: "Ritchot's actions in buying up many of these claims shows that land buyers provided a valuable service in a time of volatile land market."¹²¹² Ens never does explain why this market existed in the first place or if that market was appropriate. It is quite simple really, if the Métis wanted money, they would have negotiated for money. Put another way, if we are going to use the assumptions that the Métis knew the free market and had experience in engaging in it, why wouldn't they have simply asked for money in the negotiations? Surely they would have been aware that different lands would be worth differing amounts on the open market. How could negotiators justly argue that some of their members were entitled to greater gain than others? They couldn't. So, they asked for lands which would have an equal value to all since it was a community interest. And, because they asked for lands it is more logical to assume that they did not want to partake in the open market. These were Métis lands, they were not settler lands.

Ens concludes that changes in economy, delays in granting land, critical food shortages, new immigrants squatting on Métis lands, and trouble adapting to a new political system, all contributed to the Métis selling their lands and moving west.¹²¹³ It is significant that Ens doesn't

¹²¹² *Ibid.* at 54.

¹²¹³ *Ibid.*

analyze the way in which the lands were actually distributed. If the *Manitoba Act* was conceived of and implemented illegally then all the other reasons for migration are not so relevant anymore. If the *Manitoba Act* carried the purpose of maintaining a Métis homeland at Red River then it is reasonable to assume that the grant was meant to be distributed in a manner where it would likely accomplish that goal. But Ens shows a lack of appreciation for what the *Manitoba Act* actually meant. Indeed, Ens is less than precise when he characterizes the nature of the *Manitoba Act*:

The Manitoba Act preserved the status quo: it confirmed the land grants of the Hudson's Bay Company and the rights of pre-emption to persons in peaceable possession of land at the time of transfer; it promised that rights of common hay privileges would be equitably handled; *and it guaranteed that 1.4 million acres of land would be divided among the Metis children living in Manitoba.*¹²¹⁴

There is no mention of “children *living in Manitoba*” in the *Act* (although the *Act* does refer to “heads of families residing in the Province at the time of the said transfer”) and there is no weight given by Ens to the “for the benefit of families” clause. It would seem that for Ens, Flanagan and the government, that essential clause was pointless.

Despite the abundance of evidence which points to a contrary level of analysis Ens still chooses to adopt Flanagan's methodological individualism approach. The approach is neither justified nor correspondent to the problems at hand.¹²¹⁵ While Methodological Individualism has been characterized as a preference, our preferences have to be reasoned and responsive to the

¹²¹⁴ *Ibid.* at 140. Emphasis added.

¹²¹⁵ Further examples can be found at Ens, *supra* note 7 at 149 where Ens writes of the role of the Métis politicians in the Provincial Legislature: “Their policies at this time were aimed at ensuring survival as a group, and of effecting a moderate transition into a new economic and social order.” And, at 161: “Land grants to Metis children and Metis heads of family were also main points in the negotiations leading up the Manitoba Act. The Metis realized that the land question involved nothing less than their stake in the new province. As *Le Metis* editorialized, ‘Nous revenons encore sur cette question c’est la question du jour, question brulante et delicate. Pour le Metis, c’est leur patrimoine et celui de leurs enfants.’” And again at 162. See footnote 54 where he explains that the priest of St. Francois Xavier “complained that while the Metis of his parish had designated the lands promised them in the Manitoba Act, this had scarcely stopped the Orangemen from Ontario from occupying the same land... While these land issues also created problems for the English Metis of St Andrew's, the language and religion they shared with the newcomers made the issue of contiguous reserves less important, and the conflict over land less bitter.”

context. Because Methodological Individualism is not responsive to the Manitoba Métis land grant, it must be rejected.

V. Flanagan's Underlying Bias Against Aboriginal Cultures

I hesitate to point out the elephant in the room for fear of coming across as if I am writing down to my readers. However, since Flanagan only directly addresses the matter in some of his work and avoids it in his advocacy work for the government, in the interests of thoroughness, I need to bring up the possibility that some of the issues outlined above could merely be a reflection of Flanagan's articulated bias against Aboriginal cultures.

While he used the strategy of taking historical records at face value, ignoring accounts from the period, and not critiquing government action in his litigation based work,¹²¹⁶ (and these reasons might be enough) Flanagan has produced other sources which reveal a deep ceded skepticism about the worth of Aboriginal cultures. One location of these other sources is his book reviews, which he uses as another opportunity to share his wider political views. These help give some insight into his frame of reference.

Take for instance, Flanagan's belief that Aboriginal cultures should be left to die:

Although I agree with Boldt's critique of contemporary Indian politics, I have to conclude that his vision of 'surviving like Indians' is a fantasy. As he himself points out, their traditional cultures lie in ruins. Their languages, with few exceptions, are extinct or virtually so. Their traditional hunting and gathering economy is marginal in the modern world. And their tribal political systems have been largely supplanted by bureaucratic structures. Drumming, pew-wows [sic] and sweat lodges have been revived for ceremonial purposes, but this hardly counters the pervasive influence of North American popular culture.

Sadly, but probably irreversibly, traditional Indian cultures of self-sufficiency have been replaced by the 'culture of dependency.' Based on Prof. Boldt's own evidence, the chances for 'cultural revitalization' seem miniscule. Cultures cannot be revived and maintained under

¹²¹⁶ D.N. Sprague, Book Review of Theodore Binnema, Gerhard J. Ens and R.C. Macleod, eds. *From Rupert's Land to Canada: Essays in Honour of John E. Foster*. University of Alberta Press, 2001. Native Studies Review 14, no. 2 (2001) 137 at 137-38 where D.N. Sprague brings forward a similar criticism of another work, which indicates that Flanagan's approach to lack of critical awareness in historical analysis is not unique: "If these essays provide a fair sample of the current range and depth of these branches of western Canadian studies, the inescapable conclusion is that the field tends towards excessive detail, avoidance of theory, and an anti-critical bias with respect to any and all institutions of the economy and state."

conditions radically different from those for which they evolved and were suited. Society is not a museum.

...
[Indians] are not one people, but many, and their traditional cultures, where were not codified in literary traditions, were adapted to stone-age levels of technology. Under these conditions, their survival as cultural nations is more likely to resemble the Gypsies rather than the Jews – a sad existence on society's margin, trapped in a morass of social pathologies.

Prof. Boldt's heroic defence of culture survival notwithstanding, I am more than ever convinced that assimilation is the only realistic option for Canadian Indians.¹²¹⁷

For Flanagan the answer for Aboriginal people is not only assimilation but promoting individualism, because "the problems of the underclass...are essentially problems of the human spirit" and targeted programs to ameliorate the problem actually exacerbate the problem for black Americans and they "have had precisely the same effect on our aboriginal people."¹²¹⁸ Since Flanagan acknowledges that the trend to sympathize with the underclass and provide them some sort of helping hand, emerged in the 1960's one has to wonder what led to the social conditions that would have tied Canada's Aboriginal people to the underclass prior to 1960? No matter for Flanagan, since the conservative element provides the solution that he desires, history is irrelevant to his message.¹²¹⁹

Even when Flanagan has no to reason to include Aboriginal peoples in his reviews, he finds a way. It is this lack of understanding of the differences between the black and Aboriginal experience that really undermines Flanagan's conservative message. However, if the solution is ultimately the same, Flanagan probably doesn't feel a need to explain those differences to his readers. Here is another such example:

...the dogma of cultural racism undermined the teaching of people like Booker T. Washington that blacks must lift themselves up. The present 'culture' of the black underclass (70% of children

¹²¹⁷ Tom Flanagan, "Can Indians survive as 'cultural nations'?", *Alberta Report*, Vol. 21, Issue 36, p. 42 1994 (Book Review of 'Surviving as Indians: The Challenge of Self-Government,' by Menno Boldt. Online: Business Source Premier

¹²¹⁸ Tom Flanagan, "Why the poor are fated to stay that way", *Alberta Report*, Vol. 20, Issue 46, p. 42, 1993 (Book Review of "The Dream and The Nightmare: The Sixties' Legacy to the Underclass," by Myron Magnet. Online: Academic Search Premier

¹²¹⁹ See L.F.S. Upton, "Indian Policy in Colonial Nova Scotia 1783-1801" 88 *The Acadiensis Reader*: 1 for some insight into the destitution of the Indians of the time.

illegitimate; one third of young men in jail or on parole; rampant alcoholism and drug addiction) needs condemnation and reformation, not sympathetic understanding from relativist liberals. Whatever the role of white racism in the remote origins of this destructive way of life, it is now self-perpetuating. Whites are involved only in that they fund it through welfare payments and try to contain it through policing. Otherwise they try to avoid it as much as possible.

Thus white racism, which once kept blacks in bondage, now serves as an excuse for blacks to keep themselves in degradation....

[This book] will also help Canadians to understand the very similar problems of our large and growing native underclass, which is also impeded by cultural relativism from reforming itself.¹²²⁰

For Flanagan, cultural relativism is one of the great evils because it should be obvious that certain cultures are better than others: “civilization as explained here is an objectively definable way of life, and societies that adopt it obtain a demonstrable increase in power over nature and over uncivilized societies.”¹²²¹ Flanagan, might as well have added, “and therefore, civilized societies can act like brutish assholes and steal other peoples stuff.” The fact that he didn’t add this is only explained by his unwillingness to see that taking Aboriginal lands is either stealing, brutish or particularly asshole-ish.

Flanagan has found a way, in his own mind, to justify the taking of Aboriginal lands and he even tries to implicate Louis Riel in his schema, noting that “[i]nterestingly, Louis Riel, the great Canadian symbol of aboriginal resistance, recognized the force of the argument developed by Locke and Vattel”, which is the argument that Flanagan ultimately adopts. He quotes Riel from his trial for treason in 1885 as follows:

civilization has the means of improving life that Indians or half-breeds have not. So when they come in our savage country, in our uncultivated land, they come and help us with their civilization, but we helped them with our lands, so the question comes: Your land, you Cree or half-breed, your land is worth to-day one-seventh of what it will be when civilization will have opened it? Your country unopened is worth to you only one-seventh of what it will be when opened. I think it is a fair share to acknowledge the genius of civilization to such an extent as to give, when I have seven pairs of socks, six, to keep one.¹²²²

¹²²⁰ Tom Flanagan, “Why blacks remain in social degradation” Alberta Report, Vol. 22, Issue 45, p. 42 1995 (book review of “The End of Racism: Principles for a Multiracial Society” By Dinesh D’Souza. Online: Academic Search Premier.

¹²²¹ *Ibid.* at 46.

¹²²² Louis Riel, address the court, 1 August 1885, in Stanley et al., *Collected Writings of Louis Riel*, vol. 3, 548 as cited in Flanagan, *supra* note 1140 at 43.

Flanagan, neither analyzes the context in which Riel said these glowing remarks, like say, perhaps he was trying to save his life nor does he answer the question: If he is so appreciative of Riel's contribution here, shouldn't 1/7th of the land belong to Aboriginal peoples? Where is the Métis share of this?

Flanagan does not see the need to defend the institution of private property or more specifically fee simple style land grants or land scrip because the benefit is so self-evident that it needs no defense. For Flanagan, the justifications which accompanied the expansion of British colonies in the Americas are still a sufficient justification. Namely, he incorporates civilization and agriculture in a two-headed aesthetic of the pinnacle of human achievement in a sequential historical line. As such, it would be illogical to reject it. There is no right or wrong in such a world, where social Darwinism is in full force: "Both of these processes are so prominent in human history that it seems almost beside the point to raise questions about morality. It is like asking whether it is right or wrong that childbirth is painful, or that everyone eventually has to die, or that floods and droughts occur."¹²²³ Therefore, Flanagan sees agriculturalists as rightfully dispossessing hunter-gatherers of their excess lands (with or without a state apparatus, but it helps if they have a state).

Let me put this argument in the simplest terms. Initially, all people, whether hunters or farmers, have an equal right to support themselves from the bounty of the earth. But the hunting mode of life takes up a lot of land, while agriculture, being more productive, causes population to grow and leads to civilization. As their numbers increase, civilized peoples have a right to cultivate the additional land necessary for their support. If the hunters deny them that opportunity by keeping their hunting grounds as a game preserve, they impede the equal access of the farmers to the bounty of the earth.¹²²⁴

This logic is about as solid as air. Being more productive may be a good thing. Let's assume that it is (although in the sense of population growth this would need to be justified). But all that that means is that you are wealthier in some sense. Perhaps your people grow taller and stronger

¹²²³ *Ibid.* at 39.

¹²²⁴ *Ibid.* at 42-43

because they have a better diet, you may have a larger population etc. Why does this justify taking another people's land? How far into the minutiae of human behaviour do we go? If my neighbour and I both farm and he uses genetically modified crops which grow 25% taller and produce more crop-per-acre, does he have the right to use my land for his crops? Or do I have to start using genetically modified crops on my land? After all, my neighbour has made use of a significant advancement. What if neighbouring nations have the same problem? One uses GMO and one bans its use? Well, I assume that Flanagan would uphold the right of the state rather than justify the invasion of one state by another. It is because Flanagan doesn't see Aboriginal peoples as comprising nations that he can allow such an exception to arise. Indeed, while, Flanagan continues:

It is wrong for the hunters to insist on maintaining their way of life; rather, they should adopt agriculture and civilization, which would actually make them better off while allowing more people to live. The farmers are justified in taking land from the hunters and defending it as long as they make the arts of civilization available to the hunters.¹²²⁵

After all of that analysis, Flanagan admits that agriculture is not really the issue instead, for him "[t]he contest is really between civilization and savagery, not between agriculture and hunting."¹²²⁶

So, what does Flanagan mean by civilization? He is kind enough to give us an answer by listing the following essential characteristics:

- Intensive agriculture,
- Urbanization,
- Division of labour among cultivators, craftsmen, merchants, soldiers, rulers, and priests.
- Intellectual advances such as record-keeping, writing, and astronomy.
- Advanced technology.

¹²²⁵ *Ibid.* at 42-43. For more on how this line of thinking has been employed to take or justify the taking of Aboriginal lands, see William T. Hagan, "Justifying Dispossession of The Indian: The Land Utilization Argument" in Vescey & Venables eds. *American Indian Environments: Ecological Issues in Native American History* (1980) 65-80. And, Thomas Flanagan, "The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy" (1989) *Canadian Journal of Political Science*, XXII:3, 589-02, also see Nicholas Griffin "Reply to Professor Flanagan" (1989) *Canadian Journal of Political Science*, XXII:3, 603-06.

¹²²⁶ *Ibid.* at 42.

- Formalized, hierarchical government – that is, a state.¹²²⁷

And yet, Flanagan doesn't justify why any of this is better. He doesn't explain how he knows that civilization is the logical next step in human development. Or why all of these are necessary. For example, why do we need division of labour? That hasn't worked out well for the marginalized classes. "The collective advance of civilization" hasn't ensured, as Flanagan indicates, that "superior resources" are placed "in the hands of the individual."¹²²⁸ He must be talking about the exploiters of lands and the accumulators of wealth which stand in stark contrast to resources that reside in the hands of colonized peoples the world over. Flanagan isn't so blind as to not see that some people might have a problem with this idea:

Fencing and plowing the woodlands and prairies will inevitably reduce the quantity of game and inhibit the hunters' access to whatever does survive. So the claim that there is surplus land is valid only from the agricultural, civilized point of view, and I can see no moral justification for telling the hunters that they must give up one way of life and adopt another. On the other hand, I cannot see a moral justification for telling the agriculturalists that they cannot make use of land that, from their point of view, is not being used.¹²²⁹

I have one justification for stopping the agriculturalists from stealing the hunters land; it belongs to the hunters! The agriculturalists should count the blessings of their profoundly advanced society and not steal other people's lands simply because they can't find a way to maintain their obscenely large populations. It is important that we see Flanagan's civilization argument for what it is; an arbitrary ideology:

We take ideology, broadly, as an accumulation of doctrines, beliefs, or opinions that guide a group of people or constitutes the group's organizing principles. An ideology is **arbitrary**, in that proofs of correctness of an ideology, however frequently attempted, are without force: an ideology is simply the way **this** group chooses to see things, do things, and talk about things. Ideology is a source of conflict, because groups often treat their beliefs as beyond question; to challenge another group's ideology is to challenge the group itself. However, ideology is not merely reactive. Masquerading as fact, it often provides the pretext for behaving in an oppressive or dismissive manner, particularly when there is a power disparity between groups holding different ideologies.¹²³⁰

¹²²⁷ *Ibid.* at 33.

¹²²⁸ *Ibid.* at 34.

¹²²⁹ *Ibid.* at 44.

¹²³⁰ Chrisjohn, *supra* note 1199 at 107. Emphasis in original.

His lack of recognition of the arbitrary nature of his argument results in circular reasoning. We know that civilization is better because it dominates people and it dominates people because it is better. Flanagan can convince himself that this is not racist because he sees it as an objective argument. Setting out criteria for civilization is one such ploy. Why those criteria? Why not talk about the vast disparity in wealth, or the oppression of certain classes of people by those elites who have economic interests, or the abuses of power which seem to be inherent in hierarchical government? Exploring any such questions would require Flanagan to actually justify his position. Something which he seems unwilling to do.

Criticism of Flanagan's social Darwinism would be unfathomable since civilization is clearly better than savagery. When he turns to the Métis we can see that Flanagan is equally oblivious to the notion of community interest, the value of different cultures, or governance structures. Indeed, since these things are clearly better with civilization, Flanagan opts to just accept such a position and move straight to the market economy.¹²³¹ Michael Parenti has written a critique about other scholars but it applies here as well:

For a group of social scientists, including Ernest Van den Haag, Nathan Glazer, and Stanley Rothman, who believe that capitalism is the finest economic system ever devised, the continued opposition to it from intellectuals and others defies logic. Such hostility, they reason, can be understood only by putting aside economic arguments and concentrating on the psychological disturbances of the anticapitalist critics: the 'emotional and irrational causes' that leave consumers frightened by the very freedom the free market breeds, the guilt feelings some have about their good life, the envy that others feel toward the more affluent, and so forth.¹²³²

This helps explain why Flanagan insists on focusing, for example, on Louis Riel's individual mental failings rather than viewing Riel as merely the head of a large beast of social unrest. The former means that he can exclude the latter entirely, if not for the head, the beast would not have

¹²³¹ Flanagan, *supra* note 144 at 104 where he examines the virtues of land speculation: "The much maligned speculators were in fact benefactors of the community. Hard as it may be to believe today, the policies of the Dominion government had created a land lock in this new province on the boundless prairie....Speculation in scrip, and later in children's allotments, introduced an element of flexibility into this rigid, bureaucratic system." For a look at social Darwinism in the legal history of Aboriginal title see, Kent McNeil, "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s" (1999) *Journal of the West*, 38:1,68-76.

¹²³² Parenti, *supra* note 1155 at 243.

caused trouble. However, other researchers might point out that the body of the beast was suffering from disease or injury and the head responded in a logical attempt to save itself.¹²³³ Now, one might say that Flanagan does acknowledge the body of the beast by his systematic coverage of the section 31 land grant. However, here too he is too focused on individual psycho-economic explanations to see the broader context which might influence the rational choice of these individuals to sell their land. One could say that this was a problem with bias since Flanagan's research was commissioned by the Canadian Government to defend itself from the indefensible. However, that is only part of the explanation. Instead, we must be prepared to view Flanagan's research as seriously flawed in its conception so that we can do with it what is rightfully done with useless interpretations and that is to dismiss his interpretation entirely. For it offers virtually nothing to understanding Métis history. Instead, it serves to illustrate the end game of colonial ideology.

VI. All of This Adds Up to Bad History and Misrepresented Issues

Merely because Thomas Flanagan practices as a political scientist it would not be fair to discount his historical work because he is not *technically* a historian. Indeed, let's consider what it means to be a historian: "History is, in short, a problem-solving discipline. A historian is someone (anyone) who asks an open-ended question about past events and answers it with selected facts which are arranged in the form of an explanatory paradigm."¹²³⁴ This paradigm may be crafted in a variety of ways but "[a]lways, it is articulated in the form of a reasoned

¹²³³ *Ibid.* at 265: "But it is one thing to say that personality may affect political reality – who can deny the impact of a Lenin or a Gandhi? – and quite something else to argue that political actors, both leaders and masses, are really displacing upon the manifest content of political life their unresolved hidden psychological agendas. It is this latter assertion that I take to task without wishing to dismiss in toto the role of psychological factors in the timing, formulation, and expression of political actions."

¹²³⁴ Fischer, *supra* note 1139 at xv.

argument.”¹²³⁵ My readers could be forgiven if they see that Flanagan is doing this exact project. However, I take two points from this definition. One, Flanagan’s reasoning isolates facts rather than incorporates them into a broader discursive. And two, as a consequence of the first, he does not ask open-ended questions. Instead, as should have been made clear from the above, his questions are limited and, as a logical consequence, so too is his reasoning.

By mere association, it would seem that Flanagan is at risk of suffering from another fallacy, that of the declarative question: “If a historian goes to his sources with a simple affirmative proposition that ‘X was the case,’ then he is predisposed to prove it. He will probably be able to find ‘evidence’ sufficient to illustrate his expectations, if not actually to sustain them.”¹²³⁶ This might help explain why Flanagan never ventures into an examination of what the real nature of what the *Manitoba Act* was. Was it merely a piece of federal legislation? If so, what is the significance of the ratification of the *Act* by the Métis? Was it an agreement? If so, what were the terms? Are the terms exactly as they are written, or is there a context which can provide us with a deeper understanding? What is the significance of the Métis actions immediately following the transfer?

The issue of open-ended questions arises in Ens’ research as well. Ens’ work gives us an example of an inappropriate question guiding analysis: “In 1990 Thomas Flanagan and I researched and wrote a study that attempted to answer two questions: first whether the federal government granted the Metis of Manitoba the various benefits of land and scrip to which they were entitled under the Manitoba Act, and second if the Metis received these benefits, what did

¹²³⁵ *Ibid.*

¹²³⁶ *Ibid.* at 24. Also of relevance here is the Pragmatic Fallacy which is stated at 82 as follows: “The *pragmatic fallacy* selects useful facts – immediately and directly useful facts – in the service of a social cause. Most historians hope that their work is, or will be, useful to somebody, somewhere, someday... [The pragmatic fallacy] consists in the attempt to combine scholarly monographs and social manifestoes in a single operation. The result is double trouble: distorted monographs and dull manifestoes.”

they do with them?”¹²³⁷ Well, this is wrong. How can a *question* be wrong? In this case, the question is wrong as the basis of analysis for this topic. Can I understand the nature of tree growth if I correlate the results with how grass grows? At the very least, the results will certainly be muddled. Similarly, can Flanagan and Ens understand the resolution of the *Manitoba Act* obligations if they refuse to examine the nature of the benefits which were actually supposed to be granted? Where in the *Manitoba Act* does it state that the Métis were supposed to receive scrip? Nowhere. The issuing of scrip was not a fulfillment of the terms. It is more accurately characterized as a changing of the terms. As well, in relation to what the Métis did with their benefits, the first question should be “what were they entitled to do with their benefits?” If benefits were properly distributed, that distribution may have had a corresponding duty which was retained in those lands. It is perfectly feasible that the Métis were entitled to do very little with their individual lots.

Whether you start with Sprague or Flanagan, their debate surrounding the sales data can be characterized as follows:

[T]here is something more specifically deficient about a counterquestion. If the original question, which is under attack, is mistaken, then its basic assumptions are probably faulty. But a counterquestion, in its reflexive inversion of the original, tends to repeat the original assumptions, faults and all, and thereby to perpetuate the error. Counterquestions repudiate conclusions but reiterate premises. The resultant revision is objectionable not because it is revisionist but because its revisionism is incomplete and superficial.¹²³⁸

As an example, let’s look at Flanagan’s interpretation of emigration data:

The Metis had begun to emigrate before 1870, and continued afterwards, mainly because their principle economic activities – hunting buffalo, trading furs, and conducting cart trains – were shifting westward. It is noteworthy that the Metis of Pembina and St. Joseph, Dakota, where the Manitoba Act could have had no relevance, moved west in even greater proportions than their cousins in Manitoba. Metis land sales and emigration were part of a broad social movement rather than a narrow response to supposed violations of the Manitoba Act.¹²³⁹

¹²³⁷ Ens, *supra* note 1160 at 49.

¹²³⁸ Fischer, *supra* note 1139 at 29.

¹²³⁹ Flanagan, *supra* note 144 at 5.

Another explanation could be that the Métis were driven off their lands in both places by racist settlers. After all, the Métis in St. Joseph left due to the massive influx of Scandinavian immigrants. Without any hope for protecting their lands, it is not surprising that the Métis of St. Joseph would leave in even greater numbers. Indeed, the influx was so great that St. Joseph was renamed Walhalla.¹²⁴⁰ So, in Red River where land was supposed to be protected you would expect a slower migration. Both instances are consistent with a community that is turned on its head by newcomers. If both communities had intended to have a communal land base (as examples indicate) then it is perfectly understandable that they would move on when that dream was dashed (or agreements were broken). The most logical place to move would be where economic advantages were greatest. Flanagan acts as if the presence of the economy excludes these other motivations. And, the problem is then that the reader is forced to accept underlying presumptions of Flanagan without knowing fully what these are. Granted this is present in all writing. We can't explain everything in its infinite detail with its entire surrounding context. However, as illustrated throughout this Appendix, the points that Flanagan misses are big issues.

Intention is interesting here. Did the Metis intend to sell their land? Well, on the one hand it is clear that, in the absence of outright fraud, many individuals did intend to sell their land. However, this doesn't mean that the sales were legitimate, or that the "loss" of a Metis land base was the responsibility of the Métis. Here is where Sprague takes a different tact. His counter-narrative attempts to show that "the North West Rebellion in 1885 was not the result of some tragic misunderstanding, but of the government's manipulation of the Manitoba Métis since 1869."¹²⁴¹ Generally, manipulation requires foresight, planning, and a strategic vision. If that is what Sprague means, then my legal analysis has no room for such a discussion. Even

¹²⁴⁰ Maggie Siggins, *Riel: A Life of Revolution* (Toronto: Harper Collins Publishers Ltd., 1994) at 197.

¹²⁴¹ Sprague, *supra* note 18 at 184.

Sprague's connection between the North West Rebellion and the Canadian Pacific Railway (CPR) is not of material concern to my analysis. Instead, like Flanagan, I am interested in actions. Unlike Flanagan, I am also interested in the broader discourse so that I can place those actions in proper context. That is where Sprague is useful. Indeed, the very last sentence of his book captures the conflict between himself and Flanagan:

The presumption of benevolence is not appropriately replaced by one of consistent malevolence, but the exodus of the Métis from their original homeland and their difficulties in resettlement is more explicable by processes of formal and informal discouragement emanating from Canada than by the alleged preference of the Métis for the wandering life of homeless hunters.¹²⁴²

The "presumption of benevolence" is, no doubt, a dig at Flanagan's research.¹²⁴³ While, Sprague cautions the replacement of that benevolence with consistent malevolence, I am not sure why this intentional argument is relevant to the Métis. If I am walking down the street and get punched in the face and the perpetrator bounds off before I can do anything about it, does it matter if the punch was intentional or merely careless dance choreography? In both cases the impact upon me is the same. If we focus on the wounded, there is no need for intention to play any role whatsoever because the answer to the question: "did you get punched in the face?" will be "yes" in both instances. Once the injury is revealed neither the dancer nor the puncher can find justification for the continuation of such action.

While Sprague's connection between the expansion of the railway and the fight for Métis lands is intriguing, it is not relevant here. Even if we assume that there was a conspiracy it only becomes relevant if that conspiracy directly impacted on the Metis loss of their lands. More to

¹²⁴² *Ibid.*

¹²⁴³ Sprague has also criticized Flanagan for errors in chronology. See, Sprague, *supra* note 1154 at 262 where he writes: "Flanagan's use of previously cited documents illustrates other important errors, one of which is misplaced chronology. For example, he argues that even if a few occupants of riverlots were overlooked by surveyors, the lack of recorded improvements was no barrier to establishing a claim in the 1870s...The proof is a Justice Department opinion dated 18 May 1883, rather than the rulings of the 1870s. Chronology is key because by 1883 the Métis dispersal was complete. With the dissolution of the potential Métis enclave in southern Manitoba, claims routinely barred or stalled in the 1870s became acceptable in the 1880s."

the point, the malfeasance of the Prime Minister or his minions would need to have a detrimental impact upon the Métis for it to become relevant. While intention can provide context, it is not enough to reach a conclusion on action. The fact that the railway project gained at the expense of the Métis is not materially relevant to the Métis land loss. So I haven't incorporated that theory into my work. Of more concern are the potential violations outlined by these authors. Direct action, inaction, blundering or illegalities which impacted upon the nature of the agreement reached between the Red River delegates and the Government of Canada. Impact can be the issuance of contrary law or policy, it doesn't have to be shown that those particular laws or policy led directly to wholesale dispossession of Métis lands.

As some of the examples previously produced in this Appendix show, logic is not necessarily a foundation upon which Flanagan is willing to rest his interpretation. "The secure foundations of deductive and inductive logic have been battered to pieces by the *ascertainable* facts, so that we really have no choice; we must cling to the *ascertainable* facts though they slay us."¹²⁴⁴ Regardless of the abuses done to the broader context, the Métis perspective, and the logical meaning of the *Manitoba Act*, Flanagan clings only to the ascertainable facts. Though there is evidence that these facts may not be an accurate reflection of history, Flanagan still maintains his allegiance to such literalist readings. As such, Flanagan's history is isolated from rather than woven into the material conditions which determined the fate of the Métis land base: "By not examining the effects of, for starters, institutional racism and sexism, interpersonal racism and sexism, religious oppression, economic discrimination, intellectual oppression, and much more, we develop an isolated and incomplete understanding of the dynamics."¹²⁴⁵ Although to a lesser degree, Ens' history suffers from the same problem of isolation. Ens will,

¹²⁴⁴ Carl Becker, *The Heavenly City of the Eighteenth Century Philosophers* (New Haven, 1932) p. 25-26 as cited in Fischer, *supra* note 1139 at x. Emphasis added.

¹²⁴⁵ Chrisjohn, *supra* note 1199 at 237. Appendix D.

after all, acknowledge context but will proceed to give it no weight in his analysis. For example, while Ens acknowledges that the first few years were characterized by extreme abuse of the Métis by settlers, he does not look at how this trend persisted in the years after, nor does he weigh that atmosphere of abuse as a significant push factor in the Métis dispersal. Instead, for Ens all is explained through the economy: “When this dualistic economy disappeared from the northern plains in the 1880s and 1890s, a Metis identity was no longer instrumentally advantageous. It was during this period that the Metis began drifting back to their native roots (entering treaty or reserves), or assimilating to a Euro-Canadian identity.”¹²⁴⁶ By solely focusing on the economy, Ens is providing us with a long winded answer to something that is entirely obvious in certain circumstances “[b]eing Metis ... was no longer economically or socially advantageous.”¹²⁴⁷

Ens has further problems with discovering which factors are related, or not, to the land question. Not related, but which Ens places great emphasis on, is the question of the buffalo robe trade. Leaving your territory to conduct trade explains nothing about how that land disappeared as a communal land base to which the Métis were entitled to return. Related, but which Flanagan and Ens assert is not related, is the rampant racism of the time. Flanagan and Ens assert that:

[i]n addition to these pull factors, there were also push factors not associated with the land issue in Manitoba. The soldiers from the Wolseley Expedition along with incoming Ontario settlers created a social and political climate in the new province which the Catholic French-speaking Metis found repugnant. As Governor Archibald observed in 1871, the French Metis were very excited, ...not so much, I believe by the dread about their land allotment as by the persistent ill-usage of such of them as have ventured from time to time into Winnipeg from the disbanded volunteers and newcomers who fill the town. Many of them actually have been so beaten and outraged that they feel as if they were living in a state of slavery. They say that the bitter hatred of these people is a yoke so intolerable that they would gladly escape it by any sacrifice.¹²⁴⁸

¹²⁴⁶ Ens, *supra* note 1210 at 174.

¹²⁴⁷ *Ibid.*

¹²⁴⁸ Letter of A.G. Archibald to John A. Macdonald, October 9, 1871. Reprinted in Journals of the House of Commons of the Dominion of Canada 37 Vic., (1874) Vol. VIII, ‘Report of the Select Committee on the Causes of the Difficulties in the North-West Territories in 1869-70,’ Appendix No. 6 as cited in Flanagan and Ens, *supra* note

Flanagan and Ens' inability to see how these issues are associated must be related to the partisan nature of their research. Indeed, before conducting work for the government, Ens *did* see an association. Ens pointed out that the emigration from St. Francois Xavier was much higher than that of St. Andrews between 1870 and 1881. He writes:

Further, this large increase in emigration from St. Francois Xavier cannot be fully explained by a greater commitment of the French Metis to the buffalo-robe trade... Rather, much of the difference in migration rates between the two parishes after 1870 must be attributed to the linguistic and religious intolerance of the new settlers arriving from Canada.¹²⁴⁹

Indeed, in that same work Ens even noted that delay played a factor: "Doubtless the delays of the government in dealing with Metis lands affected the migration of Metis from Red River."¹²⁵⁰ It is hard to tell what to take from this, as Ens has been known to contradict himself (sometimes in the same paragraph). For example, at the start of one paragraph Ens states: "Metis emigration from Red River, at least before 1875, was the result largely of their involvement in the buffalo-robe trade." And, at the end of the same paragraph: "The coercion involved in the Metis exodus from Red River after 1870 was related to the intolerant actions and behaviour of the incoming

918 at 25. Also reported in Ens, *ibid.* at 161-62 citing Lt.-Gov. Archibald at footnote 52 where Ens provides the following assessment: "The arrival of the Wolseley expedition in 1870 signalled the beginning of these difficulties...Canadian settlers and Ontario volunteers acted in defiance of all law and authority and established virtual mob rule in Winnipeg during 1871-2. It was not safe for a French Metis to be seen near Fort Garry (the location of the land office), and those who did venture into Winnipeg risked life and limb."

¹²⁴⁹ Ens, *ibid.* at 161. And, at 145 he writes: "The behaviour of these Ontario settlers, particularly during the federal election riots of 1872, gave pause to even the most confident Metis. Mobs, incited by 'Orangemen' Cornish and Mulvey, invaded St. Boniface polls with bludgeons and later smashed James Cunningham's press. These outrages, sometimes supported by soldiers stationed in the province, made the Metis wonder whether the authorities had enough power to punish the culprits. Their skepticism was reinforced in March 1873 when Curtis Bird, an English Metis and speaker of the Assembly, was tarred for his opposition to a bill to incorporate the Town of Winnipeg." It is this type of information (which Ens presents) but is not terribly good at incorporating into an overall picture of the time and telling the reader what impact it had or if it represented a larger problem. Ens is, however, good at presenting and relying upon his data and charts, even if the conception of that data is somewhat suspect. Another example of such information is found at Ens, *ibid.* at 159 where he writes: "In the 1880s, infant mortality rates in St Francois Xavier continued to rise, while those in St Andrews fell considerably." Ens points to the possibility that different experience with agriculture coincided with the different trends in infant mortality. He then continues on the same page: "In addition, the arrival of Wolseley's expeditionary force and the immigration of Ontario settlers inaugurated a sharp increase of racism and hostility directed at the French Metis. This made adaptation to the new order more difficult for the French Metis than the English Metis. Infant mortality probably reflected these cultural difficulties, and must be taken into consideration to understand the much lower rates of persistence of the French Metis on their river lots after 1870."

¹²⁵⁰ *Ibid.* at 164.

Protestant settlers from Ontario, not to government illegalities.”¹²⁵¹ So which one is it? Can it be both? Were they coerced to leave or did they prefer to chase the buffalo? It was probably both but Ens doesn’t give us a sense of how important these factors were. Also, he is mistaken to assume that government illegalities were not implicated here. The government did not provide a safe atmosphere for their residents by maintaining law and order. These “settlers” were initially, the remnants of an expeditionary force which the government had sent to Red River. Surely, the government’s inability to control these volunteers after their discharge is a moral, if not legal, burden on the Government.

VII. Conclusion

What is revealed through Ens’ and Flanagan’s history of the distribution of Métis lands is that the Métis understood that the lands were a community interest. Here, actions speak louder than words. The Métis acted in a manner consistent with the understanding that each parish was (as the community representative body) supposed to select lands. Or, more specifically, they acted in a manner consistent with the understanding that the Lt. Gov. was supposed to respect the Métis wishes for land selection. If they were merely lobbying or making suggestions then why would the Métis have been so adamant? Do we also chalk up the Lt. Gov’s response to the largess of that individual? To do so is to discount the meaning of the context after the fact; a context which, in this scenario, is needed to fill in the evidentiary gaps.

There doesn’t need to be malevolence or conspiracy to establish that the government failed to fulfill the *Manitoba Act*. Lands negotiated for the benefit of a community must be given to the *community*. We can’t assume what the Métis intended, nor can we assume what they didn’t intend. But we can see some indications in the wording of the agreement, in Ritchot’s

¹²⁵¹ *Ibid.* at 170.

journal, and in Métis actions immediately following the passing of the *Act*. Ritchot had envisioned a land grant being given for many generations. In effect, as the Métis population grew so too would the Métis land base. This idea was rejected by the ministers but the implication of the argument remains. Ritchot wasn't seeking *compensation*. If he was he would have asked for money or some other "windfall benefit". The reason for the land was to maintain the Métis community. The wording of the *Manitoba Act* also holds this to be the ideal when it acknowledges that these lands are for the "benefit of families". While money might be beneficial, money was not negotiated for. Individual Métis are entitled to partake in the benefit (if they so choose) but they cannot diminish it, or the benefit which is to accrue to future generations, by selling the land as a fee simple interest. As such, granting lands in this liquid manner was a violation of the agreement.

The lack of justification in the histories around the *Manitoba Act* has, for the reasons above, led me to reject some arguments entirely. Because the arguments are pinned down by faulty assumptions I must also reject the methods. My research was guided by focusing on two key factors which have been neglected in other histories: one, what was the nature of the agreement? and two, was the nature of the agreement fulfilled? This approach showed the futility in Flanagan and Ens' arguments because, to the extent that they seek the same answers, they neglect to give any weight to the first question when answering the second. This finding also explains why I have used an Appendix, rather than the body of my thesis to critique their work. Doris M. Smith is credited with saying, quite rightly, that "Arguing with a fool proves there are two". While I am not saying that the scholars mentioned in this Appendix are fools. I am saying that their line of argument is not worthy of interrupting my own argument.

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