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TAKING MÉTIS INDIGENOUS TITLE SERIOUSLY:

'INDIAN' TITLE IN S. 31 OF THE *MANITOBA ACT, 1870*

BY

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Summary

In *Sparrow*, the Supreme Court of Canada stated that ss. 35(1) is “a solemn commitment that must be given meaningful content” the objective of which is to ensure that Aboriginal rights “are taken seriously.” Despite such a clear directive from the highest court, in *Manitoba Métis Federation v. Canada* [2007], MacInnes J. of the Queen’s Bench of Manitoba seemed incapable of taking seriously the Aboriginal title of the Métis under s. 31 of the *Manitoba Act, 1870*, and in no way thought of its explicit recognition as ‘a solemn commitment that must be given meaningful content’. For his part, if Scott C.J. of the Manitoba Court of Appeal was able to find a ‘cognizable Aboriginal interest’ in the expression ‘Indian title’, and thereby recognize to some extent Métis Aboriginal rights, he seemed incapable of conceiving such interests as *title*. This thesis is basically an attempt to ‘take seriously’ the common law Aboriginal title of the Métis. In order to do so, it first looks at the treatment of the concept of Indian title and the *Royal Proclamation, 1763*, in the lower courts throughout the infamous *St. Catharine’s Milling and Lumber* case. Subsequently, the existing common law doctrines of inherent Métis rights, those of the derivative rights doctrine, the empty box doctrine and the distinct Aboriginal people doctrine are all found to be inadequate to the task of providing cogency to the ‘constitutional imperative’ that was evoked in *Powley*. A fourth doctrine is therefore proposed, that of a Métis *Autochthonous* or Indigenous rights doctrine. In light of this, it is argued that the recognition of the ‘Indian’ title in s. 31 was not a mere ‘political expediency’ but is rooted in the underlying constitutional principle of the protection of minorities. Furthermore, insofar as the ‘Indian’ title of the Métis is taken seriously, it can be seen as having been extinguished through the federal power over ‘lands reserved for Indians’ under ss. 91(24). The legal implication is that they were, in the logic of the times, basically enfranchised ‘Indians’. Finally, by applying the grid established in *Sioui* for determining the existence of a ‘treaty’, it is argued that s. 31 is a ‘treaty’ or land claims settlement within the meaning of s. 35.

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Introduction

Following the adoption of s. 35 of the *Constitution Act, 1982*, in which ss. (2) recognised and affirmed the Métis as an Aboriginal people,¹ the Supreme Court of Canada subsequently held in *Sparrow* that ss. 35(1) is “a solemn commitment that must be given meaningful content”² to ensure that Aboriginal rights “are taken seriously.”³ Since then, the Métis have succeeded in having their Aboriginal *rights* under ss. 35(1) recognised in Ontario,⁴ Alberta,⁵ Saskatchewan⁶

¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.

1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed

2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.

² *R. v. Sparrow*, [1990] 1 R.C.S. 1075 at 1108.

³ *Ibid.* at 1119.

⁴ *R. v. Powley*, [2003] 2 R.C.S. 207. [*Powley*]. The Government of Ontario subsequently adopted an *Interim Enforcement Policy* to “minimize the number of instances where aboriginal people are in conflict with the Government of Ontario.” The Minister of Natural Resources signed an agreement with the Métis Nation of Ontario on 7 July 2004. In *R. v. Laurin, et al.*, [2007] 3 C.N.L.R. 316, the Ontario Court of Justice found that the “laying of these charges contravened an agreement made by no less than a Minister of the Crown not to prosecute valid Métis Harvester Card holders harvesting in their traditional territories as defined by their cards” (at para. 35).

⁵ As a consequence of *Powley*, Alberta signed an *Interim Métis Harvesting Agreement* with the Métis Settlement’s General Council. In *R. v. Kelley*, [2006] 3 C.N.L.R. 324, Judge D.C. Norheim of the Provincial Court of Alberta applied the *Powley* test and found the defendant had aboriginal harvesting rights (at para. 39). However, he also concluded that “the defendant cannot rely on the Interim Métis Harvesting Agreements as a defence” (at para. 51). On appeal, while Justice Gerald A. Verville agreed “that IMHA is not legally enforceable,” he nevertheless concluded that it was “clear that as a result of *Powley*, the Government entered into the IMHA with the MNA in an attempt to fulfill its constitutional obligations flowing from s. 35 of the *Constitution Act, 1982* and in keeping with the honour of the Crown.” See *R. v. Kelley*, [2007] 2 C.N.L.R. 332, at para. 85.

and most recently in Manitoba.⁷ However, *Manitoba Métis Federation v. Canada and Manitoba* is the only case so far that has dealt with Métis Aboriginal *title*. This case involved the explicit recognition of the Indian title of the Métis in s. 31 of the *Manitoba Act, 1870*, which was subsequently constitutionally entrenched by the *Constitution Act, 1871*,⁸ and reads as follows:

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, it is hereby enacted, that, under regulations, to be from time to time made by the Governor General in Council, the Lieutenant Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such a mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

The ostensible objective of s. 31 was to extinguish the ‘Indian title’ of the Métis and Half-Breeds and put aside 1.4 million acres of federal Crown lands for “the benefit of Half-Breed families” and to “divide the same among the children of the half-breed heads of families.”⁹ Almost immediately, the Métis and their representatives began to complain about delays and the

⁶ *R. v. Morin & Daigneault*, [1996] 3 C.N.L.R. 157 (Sask Prov Ct.) held that scrip did not extinguish Métis Aboriginal rights and recognised defendants ‘Indian’ hunting rights. Aff’d [1998] 1 C.N.L.R. 182 (Sask. Q.B.) [*Morin & Daigneault*]. In *R. v. Laviolette*, [2005] 3 C.N.L.R. 202, Kalenith J. of the Provincial Court of Saskatchewan applied the *Powley* test and “concluded that Mr. Laviolette has a Metis Aboriginal Right to fish for food” and declared “that Mr. Laviolette, as a Metis member of the Metis community of Northwest Saskatchewan, which includes Green Lake and Meadow Lake, has a right to fish for food within that Metis community’s traditional territory” (at para. 57). In *R. v. Belhumeur*, 2007 SKPC 114 (CanLII), Morris J. of the Provincial Court of Saskatchewan applied the *Powley* test and found that the defendant was “a Metis person living in Regina who has established that connections with the Qu’Appelle Valley Metis historic and contemporary community exist has the right to fish for food pursuant to s. 35(1) of the *Constitution Act, 1982*” (at para. 207); See also *Métis Act*, S.S. 2001, c. M-14.01.

⁷ *R. v. Goodon*, [2008] MB.P.C. 59 (Man. Prov. Ct.). It should be mentioned that in *R. v. Willison*, 2005 BCPC 131 (CanLII), Stansfield J. of the Provincial Court of British Columbia was “satisfied Mr. Willison has discharged his burden of proof of an aboriginal right under s.35 of the *Charter* such that the right has been proved” (at para. 142). However, his decision was reversed by Williamson J. in *R. v. Willison*, [2006] 4 C.N.L.R. 253. (S.C.B.C.)

⁸ *An Act respecting the establishment of Provinces in the Dominion of Canada*, 1871, 34 and 35 Vict., c. 28. [*Constitution Act, 1871*]

⁹ The use of “Half-Breed” in the English version of the *Manitoba Act* and “Métis” in the French version “was the beginning of the confounding of the terms Half-Breed and Métis” who had hitherto been distinguished. See John Giokas and Paul Chartrand, “Who are the Métis? A Review of the Law and Policy” in Paul Chartrand, ed. *Who Are Canada’s Aboriginal Peoples?* (Saskatoon: Purich Publishing Ltd., 2002) at 86. [Giokas and Chartrand, “Who Are the Métis”] [P. Chartrand, *Canada’s Aboriginal Peoples*]

method of implementation.¹⁰ With the influx of Anglo-Protestant migrants, the Métis ended up losing “all political power in the legislature and any power they might have retained for protection of their land rights.”¹¹ Accusations of fraud and corruption in the traffic of Métis lands were confirmed as early as 1881 by the Manitoban *Commission of Inquiry into the Administration of Justice as to Infant Lands and Estates*, which implicated the judiciary at the highest levels, including Chief Justice Woods.¹² In 1881, 1883, 1884 and 1885, the Legislative Assembly passed retroactive statutes that legalised all previous “irregular” sales of Métis lands.¹³ The *Official Language Act, 1890*, which suppressed French as an official language, was declared unconstitutional on two occasions, but the decisions were simply ignored by the Government and the Legislature.¹⁴ In 1886, Federal Parliament, insofar as it was “within the legislative authority of the Parliament of Canada” to do so, unilaterally repealed s. 31.¹⁵ In 1921, the Federal Parliament modified the Criminal Code “to prohibit prosecutions related to any offence relating to or arising out of Métis land transactions.”¹⁶

In the late 1960s, the Manitoba Métis Federation (MMF) began to investigate the matter more systematically and found that some 11,500 acres had never been distributed.¹⁷ In 1979, a francophone Métis, Georges Forest, succeeded in having the *Official Language Act, 1890*, declared unconstitutional. The Supreme Court of Canada declared that s. 23 of the *Manitoba Act*

¹⁰ Gerhard J. Ens, “Métis Lands in Manitoba” (1983) 5 *Manitoba History* 2 at 2. [Ens, “Métis Lands”]

¹¹ *Ibid.* at 5.

¹² *Ibid.* at 9.

¹³ *Ibid.* at 8-10.

¹⁴ Jacqueline Blay, *L'article 23* (Saint-Boniface: Éditions du blé, 1987) at 33-39.

¹⁵ Paul Chartrand, *Manitoba Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, 1991) at 8. [P. Chartrand, *Métis Settlement Scheme*] Chartrand states that Parliament “purported to repeal” s. 31 since, in his view, such an Act of Parliament was unconstitutional. However, the law presumes that Acts of Parliament are constitutional until they are proven to be otherwise. Peter W. Hogg. *Constitutional Law of Canada* (Scarborough: Carswell, 2002) at 373-4. [Hogg, *Constitutional Law*]

¹⁶ Paul Chartrand, “Aboriginal Rights: The Dispossession of the Métis” (1991) 29 *Osgoode Hall L. J.* 457 at 476. [P. Chartrand, “Dispossession of the Métis”]

¹⁷ Émile Pelletier, *The Exploitation of Métis Lands* (Winnipeg: Manitoba Métis Federation Press, 1975) at 17. [Pelletier, *Exploitation of Métis Lands*]

did not form part of the “Constitution of the Province” and was therefore not open to being amended by the Province by way of ss. 92(1).¹⁸ This gave some hope to the Métis that the same legal principles may very well apply to s. 31.¹⁹ Finally, in 1981, the MMF took the federal and provincial governments to court over the maladministration of s. 31.²⁰

However, the federal government delayed the trial on the substantive issues for a decade by making a request that aimed at having the plaintiff’s statement of claim struck on the ground that there was no cause of action. In 1987, Judge Barkman of the Court of the Queen’s Bench dismissed the application on the part of the defendant.²¹ However, a year later in 1988, the Manitoba Court of Appeal reversed his decision and allowed the application.²² Finally, in 1990 the Supreme Court of Canada reversed the decision of the Court of Appeal and confirmed the decision of the lower court.²³ However, the *Métis Nation Accord*, which was negotiated as part of the *Charlottetown Accord* in 1992 and would have included the Manitoba Métis in ss. 91(24) of the *Constitution Act, 1867*,²⁴ temporarily suspended the litigation. Following the failure of the *Charlottetown Accord* in 1992, litigation was resumed with renewed vigour. While it took more than two decades for a trial to be held, in April 2006, the Manitoba Métis finally had their day in Court.

The Manitoba Métis Federation sought declaratory relief: 1) that enactments (both statutes and orders in council) of the Parliament of Canada and the Legislature of Manitoba were

¹⁸ *R. v. Foster*, [1979] 2 S.C.R. 1032.

¹⁹ Thomas Flanagan, *Métis Lands in Manitoba* (Calgary: University of Calgary, 1991) at 51. [Flanagan, *Métis Lands*]

²⁰ When considering the doctrine of laches, judge MacInnes reproached the Métis that “no court proceedings were commenced in respect of sections 31 and 32 of the *Act* until the present action, on April 15, 1981.” *Manitoba Métis Federation v. Canada (Attorney General) and Manitoba (Attorney General)*, [2007] 223 Man. R. (2nd) 42, at para. 437. [MMF (Man. Q.B.)]

²¹ *Dumont v. Canada (Attorney-General)*, [1987] 2 C.N.L.R. 85. [*Dumont* (Man. Q.B.)]

²² *Dumont v. Canada (Attorney-General)*, [1988] 3 C.N.L.R. 39. [*Dumont* (Man. C.A.)]

²³ *Dumont v. Canada (Attorney-General)*, [1990] 1 S.C.R. 279. [*Dumont*]

²⁴ See “Appendix 5D: Proposed Métis Nation Accord,” in Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Department of Supply and Services of Canada, 1996) at 376-382. [Canada, *RCAP Report*] See the 14th clause at 380.

unconstitutional or *ultra vires*; 2) that Canada failed to fulfil its obligations, properly or at all, to the Métis under sections 31 and 32 of the Act, and pursuant to the undertakings given by the Crown; 3) that Manitoba, by enacting certain legislation and by imposing taxes on lands referred to in sections 31 and 32 of the Act prior to the grant of those lands, unconstitutionally interfered with the fulfilment of the obligations under sections 31 and 32 of the Act; and 4) that there was a treaty made in 1870 between the Crown in the right of Canada and the Provisional Government and the people of Red River.²⁵ When the trial judge, Alan D. MacInnes of the Manitoba Queen's Bench, rendered his decision in *Manitoba Métis Federation v. Canada (MMF)* on 7 December 2007, he found against the plaintiff on all four counts.

To decide the issues, MacInnes J. first went over the facts material to the adoption of the *Manitoba Act* in general and the inclusion of sections 31 and 32 in particular, then those material to the implementation of each article. Before analysing the historical material, MacInnes J. concluded in favour of the federal and provincial governments' arguments that the plaintiff's claims, apart from that of declaratory relief, were statute-barred due to the *Limitation of Actions Act* and that even declaratory relief failed due to the equitable doctrines of laches and acquiescence.²⁶ Once he reached this conclusion, any questions concerning the aboriginal title or Indian status of the Métis became purely academic. As Peeling and Chartrand have pointed out, the principle of parsimony is "a basic tenet of the law" and "an essential limit on judicial power in a parliamentary democracy."²⁷ From this point of view, Judge MacInnes' decision reads like a determined point by point refutation of every claim the plaintiff raised in order to quash any possible judicial recognition of their Aboriginal rights or status.

²⁵ *MMF*, *supra* note 20 at para. 5. (Man. Q.B.)

²⁶ *Ibid.* at para. 447 and 460.

²⁷ Albert Peeling and Paul Chartrand, "Sovereignty, Liberty, and the Legal Order of the 'Freemen' (Otipahemsu'uk): Towards a Constitutional Theory of Métis Self-Government" (2004) 67 Sask. L.J. 339 at 342. [Peeling and Chartrand, "Legal Order of the Otipahemsu'uk"].

MacInnes J. first found that there was no treaty or agreement between the Red River delegates and the government of Canada. His analysis turns on the presumption that, since the *Manitoba Act* is an Act of Parliament, it could not be a treaty. Secondly, he dismissed the possibility that it was a treaty with aboriginals since the Red River delegates represented the entire population of the North West and not simply the Métis and Half-Breeds and that they had no authority to conclude a treaty. Finally, in terms of s. 31 in particular, MacInnes J. found that no agreement had been reached on the precise acreage that was to be allotted to the Métis and Half-Breeds under s. 31.

The trial court judge then considered the interpretation of the *Act* and concluded that it was “only in the event of uncertainty or ambiguity [that] there is any need to look beyond the plain language of the *Act*.”²⁸ He briefly considered the plaintiff’s arguments that the integrity of the Crown was at stake because it was dealing with an Aboriginal people, but found that it was only to the degree that it “would have an impact on the aboriginal rights of the Métis to the extent that such rights existed or were impacted. In this case, the aboriginal right, if any, in issue is that of aboriginal title.”²⁹ After dismissing the application of the *Nowegijick* principle to the Métis concerning the provinces taxation of their lands, MacInnes J. refused to apply the underlying constitutional principle of the protection of minorities to sections 31 and 32 on the basis that the Métis and Half-Breeds were not a minority at the material time.³⁰ After providing some preliminary remarks about the weight that should be given to *Hansard Debates*, Judge MacInnes proceeded to his analysis of s. 31. His consideration of the issue of Aboriginal title must be read in conjunction with his conclusion that “Parliament, as a matter of law, could not create

²⁸ *Ibid.* at para. 518.

²⁹ *Ibid.* at para. 521.

³⁰ *Ibid.* at para. 537.

aboriginal title.”³¹ MacInnes J. therefore deemed it necessary to determine whether the Métis had any ‘existing’ common law Indian title to surrender at the time that s. 31 was drafted.³² In order to do so, he applied the three *Delgamuukw*³³ criteria for establishing Aboriginal title and found the plaintiffs’ claim wanting.³⁴ One of the criterion of the *Delgamuukw* test demands that “the land must have been occupied prior to sovereignty.”³⁵ However the Manitoban judge allowed for a modified test concerning the relevant time period and claimed to take into account the criterion established by Supreme Court of Canada in *Powley* for the recognition of Métis rights at law, which replaced the *Van der Peet* cut-off date of ‘pre-contact’ with that of ‘effective control’.³⁶ As the plaintiffs did not raise this argument, they did not submit evidence that specifically addressed the issue and such evidence that was submitted and potentially relevant was not argued in support of such a claim. It therefore came as no surprise then that the judge should find that on “the evidence, the plaintiffs have not proved the existence of [...] aboriginal title, even allowing for modification consistent with *Powley*.³⁷ He then concluded that the Métis “did not hold at July 15, 1870, or at any time prior, aboriginal title to the lands which were to become Manitoba and serve as the source of the section 31 grants.”³⁸

MacInnes J. then relied heavily on the Supreme Court of Canada’s finding in *Blais* that the Métis of Manitoba were not Indians.³⁹ Having found that the Métis did not hold Aboriginal title and were not Indians, MacInnes J. was then well positioned to dismiss the plaintiff’s arguments that the Crown had a fiduciary obligation toward the Métis while implementing s. 31 and that the

³¹ *MMF*, *supra* note 20 at para. 652. (Man. Q.B.)

³² *Ibid.* at para. 561.

³³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R 1010. [*Delgamuukw*]

³⁴ *MMF*, *supra* note 20 at para. 566. (Man. Q.B.) Citing *Delgamuukw* *ibid.* at para. 143.

³⁵ *Ibid.* at para. 566.

³⁶ *Ibid.* at paras. 573-7.

³⁷ *Ibid.* at para. 589.

³⁸ *Ibid.* at para. 594.

³⁹ *Ibid.* at paras. 595-616.

honour of the Crown was at stake.⁴⁰ The trial judge's reasoning reached its pinnacle when he concluded with the reminder that it is only "in the event of uncertainty or ambiguity [that] there is any need to look beyond the plain language of the section."⁴¹ Curiously, MacInnes J. decided that the inclusion of the expression "towards the extinguishment of the Indian Title to the lands of the Province" in s. 31 "was not intended by Parliament either to recognize the half-breeds as enjoying Indian title or to be entitled to share in Indian title."⁴² He arrived at this conclusion, not by looking at the plain language of the section, but by looking beyond it to the very sources he had cautioned against giving too much weight: *Hansard Debates*, the various *Lists of Rights*, Ritchot's journal and his speech to the Legislative Assembly of Assiniboia.⁴³ As "the Métis did not hold aboriginal title, there was nothing to surrender or cede"⁴⁴ that s. 31 would have merely recognized or affirmed. Since "Parliament, as a matter of law, could not create aboriginal title,"⁴⁵ the trial judge then dismissed the explicit reference to the 'Indian' title of the Métis by deeming it nothing more than a simple "political expedient."⁴⁶ Despite what MacInnes J. claims, the implication of reasoning is that the reference to 'Indian title' in s. 31 is indeed uncertain or ambiguous and therefore requires the aid of extrinsic evidence to be interpreted.

On 10 July 2010, Chief Justice Scott for a unanimous five member Manitoba Court of Appeal upheld lower court decision.⁴⁷ Scott C.J. asserted that, with "very few exceptions [...] there was evidence, and in many instances overwhelming evidence, to support the trial judge's conclusions with respect to the context and purpose of s. 31 of the *Act*, as well as the inferences he drew from

⁴⁰ *Ibid.* at paras. 617-646.

⁴¹ *Ibid.* at para. 648.

⁴² *Ibid.* at para. 656.

⁴³ *Ibid.* at paras. 649.

⁴⁴ *Ibid.* at para. 631.

⁴⁵ *Ibid.* at para. 652.

⁴⁶ *Ibid.* at para. 656.

⁴⁷ *Manitoba Métis Federation Inc. v. Canada (Attorney General) and Manitoba (Attorney General)*, [2010] 3 C.N.L.R. 233. [MMF (Man. C.A.)]

them.”⁴⁸ Among these, one finds his conclusion that “s. 31 was essentially a political expedient to bring about Manitoba’s entry as a new Canadian province.”⁴⁹ After summarising the findings, Chief Justice Scott repeated that he found “the evidence strongly supports the trial judge’s conclusions. None of the foregoing findings of the trial judge constitute error, let alone palpable and overriding error.”⁵⁰ He then specifically came back to “the trial judge’s conclusion that s. 31 was essentially a political expedient and the reference to ‘extinguishment of Indian title’ was the vehicle of convenience chosen to accomplish it.”⁵¹ Finally, although it had never been specifically pleaded, the Court held that “this is not a traditional historic land claim.”⁵²

While it was arguably unnecessary, as previously mentioned, for Judge MacInnes to have taken into consideration a common law ‘Indian’ title of the Métis in the *MMF* case, his decision nevertheless raised the question of the potential source(s) of Métis title. To be sure, Scott C.J. thought that, notwithstanding “the fact that these proceedings are barred by virtue of the combined operation of the limitations legislation, laches and mootness, it is highly desirable that the issues surrounding s. 31 (and s. 32 as well) be considered in these reasons. [...] In my opinion, it is in the interests of justice that this court, to the extent that we are able to do so, provide our opinion with respect to these issues.”⁵³

The Court of Appeal did, however, overturn the trial judge’s conclusions of law on several points. Scott C.J. noted that while “the trial judge found that the Métis were not Indians, the more relevant question is whether or not they are Aboriginal.”⁵⁴ As if to admonish MacInnes J. for what amounted to little more than lip service to the recognition and affirmation of the Métis as an

⁴⁸ *Ibid.* at para. 238.

⁴⁹ *Ibid.* at para. 238.

⁵⁰ *Ibid.* at para. 240.

⁵¹ *Ibid.* at para. 242.

⁵² *Ibid.* at para. 245.

⁵³ *Ibid.* at para. 376.

⁵⁴ *Ibid.* at para. 382.

Aboriginal people under ss. 35(2), the Chief Justice recalled that the Manitoba Court of Appeal “implicitly recognized the Métis as Aboriginal peoples in *Blais*.”⁵⁵ However, he softened the blow by asserting that “nothing in his judgment questions their status as an Aboriginal people.”⁵⁶ Nevertheless, MacInnes J. failure to fully recognize the Métis as an Aboriginal people is arguably why Scott C.J. ended up having to fault him for not finding that the case involved both the honour the Crown and the Crown’s fiduciary obligations toward the Métis as an Aboriginal people. He first stated he was “of the opinion that the honour of the Crown was at stake with respect to s. 31 of the *Act*”⁵⁷ and then that “that the Métis are beneficiaries of the fiduciary relationship that exists between the Crown and the Aboriginal peoples of Canada.”⁵⁸ Ultimately, while Scott C.J. overturned MacInnes J.’s decision on these points, he nevertheless concluded that the “trial judge did not commit palpable and overriding error when he rejected the appellants’ assertions that Canada had breached any duty that might have been owed to the Métis. The appellants’ appeal with respect to the issues surrounding s.31 of the *Act* therefore cannot succeed.”⁵⁹

Despite the admonition of the highest court in the country in *Sparrow* that lower courts ‘take Aboriginal rights seriously’, Judge MacInnes’ dismissal of the affirmation of the Indian title of the Métis as a mere political expedient showed no consideration of s. 31 as ‘a solemn commitment that must be given meaningful content’. For his part, Scott C.J. found the trial judge had erred concerning the fiduciary obligations of the Crown toward the Métis because the latter limited his analysis to “aspects of fiduciary duty cases pertaining to surrenders of land”⁶⁰ when what was required was “first, a *specific or cognizable Aboriginal interest* and second, an

⁵⁵ *Ibid.* at para. 379.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at para. 405.

⁵⁸ *Ibid.* at para. 433.

⁵⁹ *Ibid.* at para. 668.

⁶⁰ *Ibid.* at para. 470.

undertaking of discretionary control over that interest by the Crown in the nature of a private law duty.”⁶¹ The judge also decided to ignore the *Delgamuukw* test altogether, since *pre-existing* “Aboriginal *title* is not a mandatory prerequisite to find a fiduciary obligation,” he did “not find it necessary to decide whether the Métis had Aboriginal *title*.”⁶²

As Paul Chartrand has pointed out, when it comes to the pre-existing ‘Indian’ title that the Métis surrendered, the fact that it was statutorily recognized in s. 31 means that it “does not require a legal basis for asserting Indian title on the part of the ‘Half-Breed’ population in 1870.”⁶³ How does one explain that, insofar as the substantive content of s. 31 reflects the will of Parliament, both MacInnes J. and Scott C.J. ignored that Parliament found it “expedient [...] 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 [...] *towards the extinguishment of the Indian Title to the lands of the Province.*” Far from taking Parliament’s affirmation of Métis title seriously, MacInnes J. deemed it a mere “political expediency.” If Scott C.J. found a ‘cognizable Aboriginal interest’ in the expression ‘Indian title’, and thereby at least recognized to some extent that s. 31 is ‘a solemn commitment that must be given meaningful content’, one is left wondering why he did not simply defer to the will of Parliament and call it what a plain language reading of the *Act* says it is: *title*. How does one explain the apparent unwillingness or reluctance of the Court of the Queen’s Bench and the Court of Appeal of Manitoba refuse to take Métis title seriously?

Part of the answer may lie, as Catherine Bell and Michael Asch have noted, in the “*uncritical acceptance of legal principles based on discriminatory assumptions* about the nature of

⁶¹ *Ibid.* at para. 468. Emphasis added.

⁶² *Ibid.* at para. 474. Emphasis added.

⁶³ Chartrand, *Métis Settlement Scheme*, *supra* note 15 at 78-9.

Aboriginal societies.”⁶⁴ In terms of “discriminatory assumptions”, Robert Williams has asserted that “the Supreme Court [of the United States] will not take Indian rights seriously if the justices are not first confronted with the continuing force of negative stereotypes and hostile racial imagery that have been directed at Indians throughout the legal history of racism of America.”⁶⁵ Bell and Asch have argued, it is these discriminatory assumptions “combined with the sanctified legal rationales for anchoring present decisions in the past, renders judges who wish to remain true to the discipline of legal reasoning formidable and unyielding.”⁶⁶ Again, Williams maintained in a similar light that *stare decisis* “by its very nature, represents a persistent danger for the protection of minority rights in our legal system [...]. Even without possessing a hostile intent toward any particular minority group, a judge who feels bound to enforce prior precedents because of the doctrine of *stare decisis* can perpetuate, in the most subtle of fashions, a system of racial inequality.”⁶⁷ It may be true in so far as *stare decisis* is concerned that “the argument ‘we are bound by previous decisions’ is a position of convenience adopted by a court reluctant to embrace meaningful change and diversity in Canadian law.”⁶⁸ However, the question of “discriminatory assumptions” in itself is arguably one of an unconscious mental block that results in a sort of cognitive incapacity, rather than a conscious reluctance or unwillingness, to conceive of Aboriginal title outside of established categories of perception.

To be sure, as Bell and Asch’s remarked, it is not simply “discriminatory assumptions” that are at work, but perhaps even more importantly their “uncritical acceptance”. As Peggy Davis has

⁶⁴ Cathering Bell and Michael Asch, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation,” in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada. Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997), at 38. Emphasis added. [Bell and Asch, “Challenging Assumptions”]

⁶⁵ Robert A. Williams, Jr. *Like a Loaded Weapon. The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005) at xxxvi. [Williams, *Like a Loaded Weapon*]

⁶⁶ Bell and Asch, “Challenging Assumptions” *supra* note 64 at 38.

⁶⁷ Williams, *Like a Loaded Weapon*, *supra* note 65 at 23.

⁶⁸ Bell and Asch, “Challenging Assumptions” *supra* note 64 at 39.

written, “it is difficult to change an attitude that is unacknowledged.”⁶⁹ In other words, if there is a sort of ‘cognitive incapacity’ to seriously consider the ‘Indian title’ of the Metis both as *Indigenous* and *title*, it only remains so as long as such discriminatory assumptions remain unchallenged by a position of critical reflexivity. A classical example of this ‘cognitive incapacity’ is to be found in the preface of economist John Maynard Keynes’ *General Theory of Employment, Interest and Money*. The latter admitted that “I myself held with conviction for many years the theories which I now attack.” He commented that the relation between his *General Theory* and in his previous work, *Treatise on Money*, “may sometimes strike the reader as a confusing change of view.” This was due to his “lack of emancipation from preconceived ideas” which showed itself where he was “still moving along the traditional lines” of what he termed “the classical theory.” For Keynes, the “composition of this book has been [...] *a struggle of escape from habitual modes of thought and expression*. [...] The difficulty lies not in the new ideas, but in escaping from the old ones, *which ramify, for those brought up as most of us have been, into every corner of our minds*.”⁷⁰ To suggest that judges are *uncritical* necessarily implies that they are unaware of the discriminatory assumptions they perpetuate. To maintain that judges are simply unwilling or reluctant implies that they are perfectly aware of such discriminatory assumptions and nevertheless consciously choose to apply them.

In his dissenting decision in *Korematsu*, Justice Jackson wrote that the Supreme Court of the United States had “for all time [...] validated the principle of racial discrimination” because their decision would thereafter lie “about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds the principle more

⁶⁹ Peggy C. Davis, “Law as Micro-Agression,” Yale L.J. 98 (1989) at 1565. Williams, Cited in Williams, *Like a Loaded Weapon*, *supra* note 65 at 11.

⁷⁰ John Maynard Keynes, *General Theory of Employment, Interest and Money* (New York: Prometheus Books, 1997) at ix-xii. Emphasis added.

deeply in our law and our thinking and expands it to new purposes.”⁷¹ Paraphrasing Jackson J.’s statement in *Korematsu*, Williams wrote that “the Marshall model functions just like a loaded weapon,” because the weapon is “aimed and ready to discharge the unconscious racist impulses and beliefs that still lie buried deep down.”⁷²

The idea that a colonial court invariably rules in favour of the colonial power is certainly not new. Long before the Marxist instrumental view of law as a tool of domination of the State that serves the interests of capital and the bourgeoisie, Plato had Thrasymachus exclaim that “each form of government enacts the laws with a view to its own advantage, a democracy democratic laws and tyranny autocratic and the others likewise, and by so legislating they proclaim that the just for their subjects is that which is for their – the rulers – advantage.”⁷³ A classical example of this can be found in Chief Justice Marshall of the Supreme Court of the United States decision in *Johnson v. M’Intosh* where he wrote, in a rare moment of judicial transparency, that “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”⁷⁴ More recently, Derrick Bell put forward what he termed the “interest convergence dilemma”⁷⁵ whereby “minority rights are only recognized by the dominant society when that society perceives that it is in its own best interest to do so.”⁷⁶

The problem with explaining “discriminatory assumptions” toward the Métis on the *stare decisis* argument is that there are hardly any legal precedents that apply to Métis rights under s.

35. As Flanagan remarked at the time that s. 35 of the *Constitution Act, 1982* was adopted, there

⁷¹ *Korematsu v. United States*, (1944) 323 U.S. 214.

⁷² Williams, *Like a Loaded Weapon*, *supra* note 65 at 133. By the “Marshall model”, Williams is referring to the series of decisions of Chief Justice Marshall of the Supreme Court of the United States in the early 19th century, notably *Johnson v. M’Intosh*, (1823) 21 U.S. 543 and *Worcester v. Georgia*, (1832) 31 U.S. 515.

⁷³ Plato, *The Republic* (Cambridge: Harvard University Press, 1937) at 49.

⁷⁴ *Johnson v. M’Intosh*, *supra* note 72, at 588.

⁷⁵ Derrick Bell, “*Brown v. Board of Education* and the Interest Convergence Dilemma,” *Harvard Law Review* 93 (1980): 518: 524-5.

⁷⁶ Williams, *Like a Loaded Weapon*, *supra* note 65 at xxxiii.

was “no well articulated and continuing body of precedent, convention or practice to give concrete meaning to the legal abstraction of Métis aboriginal rights.”⁷⁷ In this regard, Paul Chartrand and John Giokas largely agree that the “definition of ‘the Métis people’ in section 35 is the hard case of Canadian Aboriginal law” in that “there are no precedents available, and no principles that have been derived from a line of decided cases.”⁷⁸ While there are now some precedents involving Métis rights, as previously noted, there are as yet no decisions that address the specific issue of Métis title. Since it is to the extent that legal precedents “n’apportent pas de réponse claire que la doctrine est porteuse de solutions de droit positif” and that legal doctrine plays a role “suggestif et générateur [...] dans l’œuvre jamais terminée de l’amélioration du droit,”⁷⁹ it is necessary that a ‘focussed argument on this critical component of Métis rights take place’ to develop and deepen legal doctrine in order to fill the juridical void.

One of the few scholars to have carried out a serious in-depth exploration of the source of Métis title is Catherine Bell, who grounded it in the natural law tradition.⁸⁰ For their part, Larry Chartrand, Joseph Magnet as well as Dale Gibson and Clem Chartier have also explored to some extent various possible sources of Métis title outside of s. 31.⁸¹ On the other hand, political scientist Thomas Flanagan has been seriously critical of the common law Aboriginal title of the

⁷⁷ Thomas Flanagan, “The History of Métis Aboriginal Rights: Politics, Principles and Policy” (1990) 4 Canadian Journal of Law and Society 71 at 90. [Flanagan, “Politics, Principles and Policy”]

⁷⁸ Paul Chartrand and John Giokas, “Defining ‘The Métis People’: The Hard Case of Canadian Aboriginal Law,” in Chartrand, *Canada’s Aboriginal People*, *supra* note 9 at 268. [Chartrand and Giokas, “Defining ‘The Métis People’”] As with Flanagan, what is meant here is not the customary or traditional law of the Métis themselves, who had their own ideas about their rights, but rather ‘aboriginal rights’ in the sense of colonial conceptions of the rights of the prior inhabitants of Turtle Island.

⁷⁹ Henri Brun et Guy Tremblay, *Droit constitutionnel*, (4^e éd.) (Cowansville: Éditions Yvon Blais, 2002) at 39.

⁸⁰ Catherine Bell, *Métis Aboriginal Title* (LL.M. Thesis, University of British Columbia, 1989). [Bell, *Métis Aboriginal Title*]

⁸¹ Larry N. Chartrand, “Métis Aboriginal Title in Canada: Achieving Equity in Aboriginal Rights Doctrine,” in Kerry Wilkins, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon: Purich Publishing Ltd., 2004) [L. Chartrand, “Métis Aboriginal Title”]. Joseph Elliot Magnet, *Métis Land Rights in Canada* (Ottawa: Report Prepared for the Royal Commission on Aboriginal Peoples, 1993) [Magnet, *Métis Land Rights*]; Dale Gibson, “Appendix 5A: General Sources of Métis Rights” in Canada, *RCAP Report*, *supra* note 24 at 271-319. [Gibson, “General Sources of Métis Rights”] Dale Gibson and Glem Chartier, “Appendix 5B: Special Sources of Métis Nation Rights” in *ibid.* at 320-332.

Métis.⁸² As the Federal Department of Justice's primary expert witness in the *MMF* case,⁸³ his influence on its outcome is undeniable and it is necessary to specifically address the line of reasoning he employs in opposing Métis rights. Furthermore, because the strategies of the federal government have consisted of either denying that the rights of the Métis are still 'existing',⁸⁴ of denying having any jurisdiction over the Métis,⁸⁵ or rejecting their claims by relying on the argument that they do not know whom precisely the legal category 'Métis' includes,⁸⁶ the development of legal doctrine has tended to concentrate on the question of the inclusion of the Métis in ss. 91(24)⁸⁷ and on the identification of the Métis for the purposes of s. 35 and Métis

⁸² Thomas Flanagan, "The Political Thought of Louis Riel" in Antoine S. Lussier, ed. *Riel and the Métis. Riel Mini-Conference Papers* (Winnipeg: Manitoba Métis Federation Press: 1979) at 131-160 [Flanagan, "Political Thought"]; "Aboriginal Title" in *Riel and the Rebellion: 1985 Reconsidered*. Saskatoon: Western Producer Prairie Books, 1983) at 75-100; "Louis Riel and Aboriginal Rights" in Ian A.L. Getty and Antoine S. Lussier, eds. *As Long as the Sun Shines and Water Flows. A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) at 247-263 [Flanagan, "Riel and Aboriginal Rights"]; "The Case Against Métis Aboriginal Rights" (1983) 9 Policy Analyst 314 [Flanagan, "Case Against"]; "Métis Aboriginal Rights: Some Historical and Contemporary Problems" in Boldt and Long, *Quest for Justice*, *infra* note 85 at 230-245 [Flanagan, "Métis Aboriginal Rights"]; "Louis Riel: A Review Essay" (1986) 21 *Journal of Canadian Studies* 157; "From Indian Title to Aboriginal Rights" in Louis A. Knafla, ed. *Law and Justice in a New Land. Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) [Flanagan, "Indian Title to Aboriginal Rights"]; "Francisco de Vitoria and the Meaning of Aboriginal Rights" (1988) 95 *Queen's Quarterly* 421 [Flanagan, "Vitoria and Aboriginal Rights"]; "The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy" (1989) 22 *Canadian Journal of Political Science* 589; "Politics, Principles and Policy" *supra* note 77; "Métis Land Claims in Manitoba" in John W. Friesen, ed. *The Cultural Maze* (Calgary: Detselig Enterprises Ltd., 1991) [Flanagan, "Métis Land Claims"]; *First Nations? Second Thoughts* (Montréal/Kingston: McGill-Queen's University Press, 2000) [Flanagan, *First Nations, Second Thoughts*]; "Aboriginal Title" in *Riel and the Rebellion: 1885 Reconsidered*, 2nd ed. (Toronto: University of Toronto Press, 2000) at 85-113. [Flanagan, *1885 Reconsidered*]

⁸³ Flanagan has been a historical consultant and expert witness for the Federal Department of Justice since 1986 in the *Dumont* and *MMF* cases. See Flanagan, *Métis Lands*, *supra* note 19 at vii.

⁸⁴ Catherine Bell and Clayton Leonard, "A New Era in Metis Constitutional Rights: The Importance of *Powley* and *Blais*" (2004) 41 *Alta. L. Rev.* 1049 at 1052.

⁸⁵ Très honorable Pierre Elliot Trudeau, "Statement by the Prime Minister of Canada to the Conference of First Ministers on Aboriginal Constitutional Matters, 8-9 March 1984" in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 153 [Boldt and Long, *Quest for Justice*].

⁸⁶ Robert K. Groves and Bradford W. Morse, "Constituting Aboriginal Collectivities: Avoiding New Peoples 'In Between'" (2004) 67 *Sask. L. Rev.* 257 [Groves and Morse, "New Peoples"].

⁸⁷ See Bell, *Métis Aboriginal Title*, *supra* note 80 at 26-33, 60-91; Clem Chartier, "Indians': An Analysis of the Term As Used in Section 91(24) of the *British North America Act, 1867*" (1978) 43 *Sask. L. Rev.* 37; Bryan Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (Kingston: Institute of Intergovernmental Relations, Queen's University Press, 1985), at 213-47 [Schwartz, *First Principles*]; Hogg, *Constitutional Law*, *supra* note 15 at 580; Don McMahon and Fred Martin, "The Métis and 91(24): Is Inclusion the Issue?" in Patrick Macklem et al., *Aboriginal Self Government: Legal and Constitutional Issues*, Ottawa, Department of Supply et Services Canada, 1995; Bradford W. Morse and John Giokas, "Do the Métis Fall Within Section 91(24) of the Constitution Act, 1867?" in *ibid.*; Bradford W. Morse and John Giokas, "Coverage

rights under s. 35.⁸⁸ As for s. 31 specifically, much of the historical and legal studies that have been undertaken concentrate on the implementation of the 1.4 million acre land grant rather than on the recognition of the pre-existing ‘Indian’ title of the Métis.⁸⁹

In order to contribute to the efforts of the previously mentioned scholars to fill in the doctrinal void surrounding Métis title, I will first look at how the ‘Indian’ title of the Métis was treated in the *MMF* case in the first chapter. I will then review the attempts to qualify Indian title in the *St.*

Under Section 91(24)” in Canada, *RCAP Report, supra* note 24 at 209; Larry N. Chartrand, “Are We Métis or Are We Indians: A Commentary on *R. v. Grumbo*” (1998) 31 Ottawa L.R. 267 [Chartrand, “Are We Métis”]; Robert K. Groves and Bradford W. Morse, “Métis and Non-Status Indians and Section 91(24) of the *Constitution Act, 1867*” in Chartrand, *Canada’s Aboriginal People, supra* note 9. See also Groves and Morse, “New Peoples” *supra* note 86; Dale Gibson, “When is a Métis an Indian? Some Consequences of Federal Constitutional Jurisdiction over Métis” in Chartrand, *Canada’s Aboriginal Peoples, supra* note 9. [Gibson, “When is a Métis an Indian”]; Mark L. Stevenson, “Section 91(24) and Canada’s Legislative Jurisdiction with Respect to the Métis” 2002) 1 Ind. L. J. 237; Mark L. Stevenson, “Métis Aboriginal Rights and the ‘Core of Indianness’” (2004) 67 Sask. L. Rev. 301.

⁸⁸ Catherine Bell, “Who Are the Métis in Section 35(2)?” (1991) 2 Alta. L. Rev. 351; Catherine Bell, “Métis Constitutional Rights in Section 35(1)” (1997) 36 Alta. L. Rev. 180 [Bell, “Métis Constitutional Rights”]; Larry N. Chartrand, “The Definition of Métis Peoples in Section 35(2) of the *Constitution Act, 1982*” (2004) 67 Sask. L. Rev. 209; Giokas and Chartrand, “Who Are the Métis” *supra* note 9; Chartrand and Giokas, “Defining the ‘Métis People’” *supra* note 28; Groves and Morse, “New Peoples” *supra* note 86. See also the section “Identifying Métis Persons” in Canada, *RCAP Report, supra* note 24 at 205.

⁸⁹ Herbert Douglas Kemp, “Land Grants under the Manitoba Act” (1954) 3 Papers Read Before the Historical Society of Manitoba 33; D. Bruce Sealey, *Statutory Land Rights of the Manitoba Métis* (Winnipeg: Manitoba Métis Federation Press, 1975) [Sealey, *Statutory Land Rights*]; Émile Pelletier, *The Exploitation of Métis Lands, supra* note 17; Thomas Flanagan, “The Half-Breed Land Grant” in *Riel and the Rebellion, supra* note 82 at 58-74 [Flanagan, *Riel and the Rebellion*]; Gerhard J. Ens, “Métis Lands” *supra* note 10; John Leonard Taylor, “An Historical Introduction to Métis Claims in Canada” (1983) 3 Canadian Journal of Native Studies 151; Paul Driben, “The Nature of Métis Claims” (1983) 3 Canadian Journal of Native Studies 183; Douglas N. Sprague, “The Manitoba Land Question, 1870-1882” (1980) 15 Canadian Studies Journal 74; Douglas N. Sprague, “Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887” (1980) 10 Man. L.J. 414; Nicole St-Onge, “The Dissolution of a Métis Community: Pointe-à-Grouette, 1860-1885” (1985) 18 Studies in Political Economy 149; Douglas N. Sprague, “Persistent Settlers: The Dispersal and Resettlement of the Red River Métis, 1870-1885” (1985) 17 Canadian Ethnic Studies 1; Douglas N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo: Wilfrid Laurier University Press, 1988); Flanagan, *Métis Lands, supra* note 19; Chartrand, *Métis Settlement Scheme, supra* note 15; Chartrand, “Dispossession of the Métis” *supra* note 16; Samuel W. Corrigan, “Some Implications of the Current Métis Case” in Samuel W. Corrigan and Lawrence J. Barkwell, *The Struggle for Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991); Joe Sawchuk, “The Métis: A Bibliography of Historic and Contemporary Issues” in *ibid.*; Douglas N. Sprague, “Dispossession vs. Accommodation in Plaintiff vs. Defendant Accounts of Métis Dispersal from Manitoba, 1870-1881” (1991) 16 Prairie Forum 137; Magnet, *Métis Land Rights, supra* note 30; Brad Milne, “The Historiography of Métis Land Dispersal, 1870-1890” (1995) 30 Manitoba History 30; Thomas Flanagan and Gerhard Ens, “Métis Land Grants in Manitoba: A Statistical Study” (1996) 27 Social History 65; Gerhard J. Ens, *Homeland to Hinterland: The Changing World of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996); Gerhard J. Ens, “Métis Scrip” in Samuel W. Corrigan and Joe Sawchuk, ed. *The Recognition of Aboriginal Rights* (Brandon: Bearpaw Publishing, 1996); Dale Gibson, Clem Chartier and Larry Chartrand, “Appendix 5C: Métis Nation Land and Resource Rights” in Canada, *RCAP Report, supra* note 24 at 333-350; Thomas Flanagan, “The Métis Land Grant” in *1885 Reconsidered, supra* note 82 at 64-84.

Catharine's Milling and Lumber case, which took place in the period shortly after the 'Indian' title of the Métis was extinguished. What is implied here is that the underlying presumptions in 19th century legal precedents on Indian title are still playing themselves out in both MacInnes J. and Scott C.J.'s legal reasoning. From there, I will argue that while s. 31 was incorporated into an Act of Parliament, it was no different in this regard than the *Royal Proclamation*, which the Judicial Committee of the Privy Council recognized in *St. Catharine's* was very much a part of the Imperial common law at the time. In the second chapter, I will then review the existing common law doctrines of inherent Métis rights, those of the derivative rights doctrine, the empty box doctrine and the distinct Aboriginal people doctrine and their respective inadequacies. After considering the implications of the 'constitutional imperative' justification for recognizing Métis Aboriginal rights, I will then propose a fourth doctrine, what I call the Métis Autochthonous rights doctrine, although it might also be called an Indigenous rights doctrine. I will then try to show that this doctrine provides a more convincing undergird of the rationale that drives the 'constitutional imperative' to recognize Métis rights by further developing its underlying logic on the basis of the *de facto* possession doctrine. This notably involves reading the terms *autochtone* and *ancestral* from the French version of s. 35 – or in the alternative, the term 'indigenous' in international law – into the expression 'Indian' in both s. 31 and 91(24).

In the third chapter, I will first demonstrate that the argument that the recognition of the 'Indian' title in s. 31 was but a mere 'political expediency' is not based on cogent reasoning as it places undue weight on extrinsic evidence and results from a misapplication of the excluded middle to 'compromises' and 'principles'. I will then argue that Métis rights are rooted in the underlying constitutional principle of the protection of minorities. Since the mention of the 'Indian' title of the Métis in s. 31 must be taken seriously, I will argue it could only have been extinguished through the federal power over 'lands reserved for Indians' under ss. 91(24) insofar

as the latter head of power can be taken to mean ‘lands reserved for *Aboriginals*’. The legal implication is that, in the logic of the times, the federal government basically treated the Métis like enfranchised ‘Indians’ once their Indigenous title was extinguished. Finally, in the fourth chapter I will further explore the idea that s. 31 is a ‘treaty’ within the meaning of s. 35. Counsel for the plaintiff in *MMF* notably put forward the argument that the *Manitoba Act* is a treaty,⁹⁰ but both the Queen’s Bench and Court of Appeal of Manitoba rejected it.⁹¹

⁹⁰ *MMF*, *supra* note 20 (Man. Q.B.) (Factum of the Plaintiff at 2, 4, 5, 22).

⁹¹ *MMF*, *supra* note 20 at para. 510 (Man. Q.B.); *MMF*, *supra* note 47 at para. 238. (Man. C.A.)

1. The ‘Precise Quality’ of ‘Indian Title’

Flanagan has argued that the British “invented the concept of aboriginal status” and that “Indians have been endowed with aboriginal rights under British law because of their level of social development.”⁹² Taiaiake Alfred and Jeff Corntassel agree that ‘aboriginalism’ is “purely a state construction that is instrumental to the state’s attempt to gradually subsume Indigenous existences into its own constitutional system and body politic since Canadian independence from Great Britain – a process that started in the midtwentieth century and culminated with the emergence of a Canadian constitution in 1982.”⁹³ However, is not only terms like ‘aboriginal’ and ‘Indian’ that are colonial inventions, but the very idea of ‘levels of social development’ was implicit in the very word ‘colony’ –from the Latin term *colere* (‘to cultivate’).⁹⁴

But Flanagan falls into the classical logical fallacy of confusing ‘is’ and ‘ought to’ when he attempts to apply to the social sciences what is termed in jurisprudence ‘originalism’,⁹⁵ that is, that words and expressions must be interpreted as the framers originally understood them or meant them be understood. He maintained that the word ‘aboriginal’ must necessarily mean

⁹² Flanagan, “Case Against” *supra* note 82 at 322.

⁹³ Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism” in *Government and Opposition* (Oxford: Blackwell Publishing, 2005) at 598. [Alfred and Corntassel, “Being Indigenous”]

⁹⁴ *Dictionnaire Latin de Poche*, 1st ed., s.v. “colo”.

⁹⁵ Michel Troper, *Philosophie du droit* (Paris: Presses Universitaires de France, 2003) at 105. [Troper, *Philosophie du droit*]

‘uncivilized’ and “cannot be stripped of these connotations.”⁹⁶ He traced the “true origin of aboriginal rights” to the third section of Francisco de Vitoria’s *De Indis* (1539),⁹⁷ where the latter notably put forward the doctrine of trusteeship.⁹⁸ On this basis, Flanagan’s next move was then to claim that it is a “misconception that Riel had such a theory [of Aboriginal rights],” since he “accepted none of those paternalistic assumptions” and “developed a theory of the rights of Indians and Métis as nations [...] under the law of nations” where they “were not qualitatively different from the rights of other nations.”⁹⁹ Yet, this view can also be traced to the second section of Vitoria’s *De Indis*.¹⁰⁰ It may be true that emphasizing the second section, where Vitoria recognized Indians as rational beings who were true owners of both public and private property, and thereby as equals under the law of nations, at the expense of the third section constitutes a reading that, “although not incorrect, is misleading because it is partial and one-sided.”¹⁰¹ But I fail to see how emphasizing the third section at the expense of the second and claiming that the trusteeship notion alone is ‘the true origin of aboriginal rights’ is any less ‘partial and one-sided’. The simple fact of the matter is that both of these doctrines can be found in Vitoria’s writing.

What I am concerned with in the first half of this chapter is the hegemony of the trusteeship doctrine of ‘Indian title’ in Canadian courts of law, which is then used as a stick to measure how ‘Aboriginal’ (or ‘Indian’) the Métis are. In *Blais*, the Supreme Court of Canada concluded that the “stark historic fact is that the Crown viewed its obligations to Indians, whom it considered its

⁹⁶ Flanagan, “Indian Title to Aboriginal Rights” *supra* note 82 at 82-83.

⁹⁷ Flanagan, “Vitoria and Aboriginal Rights” *supra* note 82 at 429.

⁹⁸ Vitoria hesitantly asserted an eighth possible source of Spanish title, saying it “may be mentioned for the sake of the argument, though certainly not asserted with confidence; it may strike some as legitimate, though I myself do not dare either to affirm it or condemn it out of hand. It is this: these barbarians, though not totally mad, [...] are nevertheless so close to being mad, that *they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms.* [...] It might therefore be argued that for their own benefit the princes of Spain might take over their administration, and set up urban officers and governors on their behalf, or even give them new masters, so long as this could be proven to be in their interests.” Francisco de Vitoria, *Political Writings* (Cambridge: Cambridge University Press, 1991) at 290.

⁹⁹ Flanagan, “Riel and Aboriginal Rights” *supra* note 82 at 248.

¹⁰⁰ See for example Bell, *Métis Aboriginal Title*, *supra* note 80.

¹⁰¹ *Ibid.* at 421.

wards, as different from its obligations to the Métis.”¹⁰² Subsequently in *MMF*, MacInnes J. held that the Métis could not be considered ‘Indian’ as they “did not live in the Settlement in bands nor have one leader or a council of leaders”¹⁰³ and because “Indians were considered to be in a state of pupillage. [...] Indians were not enfranchised, were not able to own property individually and were not treated as citizens of the community. Not so the Métis.”¹⁰⁴ As we shall see, this is particularly relevant in the derivative Indian rights doctrine. For the moment, the objective is to ‘bracket’ the definition of Indian title, that is, to render what is unquestioned problematic. I will not attempt to understand or explain here why and how the trusteeship doctrine of Aboriginal title eventually came to enjoy hegemony in legal discourse at the expense of the alternative doctrine based on the equality of nations. It will suffice, for the purposes of this thesis, to simply stress the fact that, historically, there has never really been a single let alone ‘true’ way of conceiving aboriginal title. Ironically, Flanagan suddenly realized this when it came to the recognition of Métis Aboriginal rights, as “it was not inevitable that these social realities would result in the emergence of the Métis as a distinct aboriginal people under Canadian law.”¹⁰⁵

In the first section of this chapter, I will summarize two previous publications on Métis claims of Indian title¹⁰⁶ in order to provide the reader with some historical background behind s. 31 and to demonstrate that both MacInnes J. and Scott C.J. made overriding and palpable errors in their finding of fact that the Métis never made any land claims during the Resistance.¹⁰⁷ I will then look at how the ‘Indian’ title of the Métis was treated in the *MMF* case. In the following section, I

¹⁰² *R. v. Blais*, [2003] 2 S.C.R. 236 at para. 33. [*Blais*]

¹⁰³ *MMF*, *supra* note 20 at para. 608. (Man. Q.B.)

¹⁰⁴ *Ibid.* at para. 615.

¹⁰⁵ Flanagan, “Case Against” *supra* note 82 at 316.

¹⁰⁶ Darren O’Toole, “Métis Claims to ‘Indian’ Title, 1860-1870” (2008) 28 *Canadian Journal of Native Studies* 241 [O’Toole, “Métis Claims to ‘Indian’ Title”]; “Thomas Flanagan on the Stand: Revisiting Métis Land Claims and the Lists of Rights in Manitoba” (2010) 41 *International Journal of Canadian Studies* 137. [O’Toole, “Revisiting Métis Land Claims”]

¹⁰⁷ *MMF*, *supra* note 20 at para. 238. (Man. Q.B.); *MMF*, *supra* note 47 at para. 504. (Man. C.A.)

will try to determine what the ‘precise quality’ of Indian title was at the material time by looking at the *St. Catharine’s Milling and Lumber* case. Finally, I will briefly consider whether the present hegemonic legal discourse that portrays s. 31 as nothing more than an Act of Parliament is justifiable when one considers Anishinabek interpretations of the *Royal Proclamation of 1763* as part of a treaty.

1.1. Métis Claims to ‘Indian’ Title

Métis claims to derivative Indian title began at the very latest with the Fur Trade War in the early nineteenth century. In the standard account, it was employees of the Nor-West Company (NWC) who convinced the Métis that they were, “through their Indian mothers, participants in the Indian title to the land.”¹⁰⁸ Following the merger of the Hudson’s Bay Company (HBC) and the NWC in 1821, the Métis “still preserved their claim to a share in the Indian title to the lands of the Northwest.”¹⁰⁹ Shortly after, when Governor Simpson tried to have some Métis squatters cleared from land in 1830, they claimed “this was their country and the soil was theirs.”¹¹⁰ In January 1835, the Governor remarked that the “Brulés are becoming clamorous about their rights and privileges as Natives of the Soil and it required all our most skilful management to maintain the peace of the Colony during the holidays while Rum was in circulation.”¹¹¹ A certain D. Finlayson wrote on 10 August 1842 to Governor Simpson that the Métis “fancy themselves ill-treated because the company do not pay them for their lands [...]. They do all in their power to stir up

¹⁰⁸ Margaret MacLeod and William Lewis Morton. *Cuthbert Grant of Grantown* (Toronto: McClelland and Stewart Ltd., 1974 [1963]) at 23.

¹⁰⁹ William Lewis Morton, *Manitoba: A History* (Toronto: University of Toronto Press, 1967 [1957]) at 63. [W.L. Morton, *Manitoba: A History*]

¹¹⁰ George Woodcock, *Gabriel Dumont. The Métis Chief and his Lost World* (Edmonton: Hurtig Publishers, 1976) at 31.

¹¹¹ Quoted in Marcel Giraud, *Le Métis canadien* (St-Boniface: Éditions du Blé, 1984) at 940. [Giraud, *Le Métis canadien*]

the Indians to put in the like claims.”¹¹²

On 18 February 1847, the General Quarterly Court of Assiniboia decided the *McDermott c. Fanyant et al.* case. The defendant, who was accused of cutting wood on another’s property, justified his action by arguing that the “Indians had only granted to Lord Selkirk the land and not the wood thereon or the animals moving on its surface. As a Half-breed, the defendant considered himself, in common with others of his race, as succeeding to the rights the Indians had retained.”¹¹³ While the defendant lost his case, Sealey believed that his argument “represented the Métis view that they had right of use of the land except for the agricultural use which had been treated for with the Indians.”¹¹⁴ The Half-Breed Alexander Isbister, who practiced law in London, clearly believed that his people had derivative Amerindian rights.¹¹⁵ In 1861, he wrote that “every married woman and mother of a family throughout the whole extent of the Hudson’s Bay territories [...] of this [mixed race] class, [is], with her children, the heir to all the wealth of the country.”¹¹⁶

The local newspaper, *The Nor’-Wester* reported on 14 March 1860 and on 15 June 1861 that meetings took place where the Métis asserted they had a share in Indian title. In the first meeting, the chairman Pascal Breland stated that, “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.”¹¹⁷ He continued, saying that, “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

¹¹² *Ibid.* at 915, note 2.

¹¹³ Sealey, *Statutory Land Rights*, *supra* note 89 at 43.

¹¹⁴ *Ibid.*

¹¹⁵ John M. Bumsted, *Thomas Scott’s Body and Other Essays on Early Manitoba History* (Winnipeg: University of Manitoba Press, 2000) at 97. [Bumsted, *Thomas Scott’s Body*]

¹¹⁶ W.L. Morton, *Manitoba: A History*, *supra* note 109 at 91.

¹¹⁷ *The Nor’-Wester*, “The Land Question” 14 March 1860 at 2.

have said) no satisfactory arrangement has been made.”¹¹⁸ The second article reported two ‘Indignation Meetings’ on 26 May 1861 on the White Horse Plains and 29 May 1861 in Headingly.¹¹⁹ At the latter meeting, a deputation of Métis from the previous one claimed “that the Half-Breeds have a very palpable right, being the descendants of the original lords of the soil.”¹²⁰

On 29 July 1869, some of these very same people were involved in a public meeting that was held in the Court House, which “was filled to overflowing.”¹²¹ During the meeting, which was called in reaction to the agreement between the HBC and Canada on the terms of transfer of Rupert’s Land to Canada, the Métis William Dease claimed 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.”¹²² When the Half-Breed William Hallet was asked to speak, he stated that the goal of the meeting was to determine whether the land belonged to the HBC or to the Métis and Indians.¹²³ According to Governor McTavish, there “was general agreement on the claim of Indians and Métis to the lands of the North-West and to compensation.”¹²⁴ Shortly thereafter, Louis Riel met privately with surveyor Colonel Dennis on 1 October 1869 and inquired as to the intentions of the Dominion government concerning the extinguishment of Indian title and the lands occupied by the settlers.¹²⁵

¹¹⁸ *Ibid.*

¹¹⁹ *The Nor’-Wester* “Indignation Meetings” 15 June 1861 at 2.

¹²⁰ *Ibid.*

¹²¹ Alexander Begg, *The Creation of Manitoba* (Toronto: A.H. Harvey, 1871) at 85. [Begg, *Creation of Manitoba*]

¹²² *Ibid.* at 87.

¹²³ *Ibid.*

¹²⁴ Willaim Lewis Morton, ed. *Alexander Begg’s Reg River Journal and Other Papers Relative to the Red River Resistance of 1869-1870* (New York: Greenwood Press & Publishers, 1969 [1956]) at 33, note 1. [W.L. Morton, *Papers Relative to the Resistance*]

¹²⁵ Canada, “Report of the Select Committee of the House of Commons on the Causes and Difficulties in the North-West Territories in 1869-1870.” *House of Commons Papers*, 37 Vic., Vol. VIII, App. 6 (Ottawa: I.B. Taylor, 1874) at 186. [Canada, “Causes and Difficulties”]

By 1870, the population of the District of Assiniboia¹²⁶ was about 11,960 individuals, including 4080 English and Scots Half-Breeds, 5700 Métis *canadiens*, 1600 ‘Whites’ and 570 ‘settled’ Indians.¹²⁷ In order to resist the unilateral annexation of Rupert’s Land and the North-West Territory to Canada in 1869, the Métis formed a National Committee on 16 October 1869, which later declared itself the provisional government of Assiniboia. In a letter, dated 18 November 1869, John Young Bown, a Conservative Member of Parliament, informed John A. Macdonald that the Métis were demanding that “the Indian title to the whole territory shall at once be paid for” and that “on account of their relationship with the Indians a certain portion of this money shall be paid over to them.”¹²⁸ His brother, Walter Robert Bown, who lived in the Settlement, later stated to the Select Committee in his deposition of 2 May 1874 that he believed the Métis “claimed the lands under an Indian title.”¹²⁹ The Métis Pierre Delorme wanted “Indian status [to] be extended to their wives, thus allowing the Métis to benefit from any Indian land settlement.”¹³⁰ The Half-Breed Thomas Bunn understood that the Métis “claimed that the country

¹²⁶ The Governor and Council of Assiniboia adopted regulations on 25 June 1841, which specified that the Laws of Assiniboia applied to an area that “extended in all directions fifty miles from the forks of the Red River and the Assiniboine.” See E. H. Oliver, *The Canadian North-West. It’s Early Development and Legislative Records* (Ottawa : Government Printing Bureau, 1914) at 296.

¹²⁷ Canada, “Return: Instructions to the Honourable A. Archibald.” *Sessional Papers*, 34 Vict., N° 20 (Ottawa: I.B. Taylor, 1871) at 95. The term ‘Half-Breed’ is considered by some as derogatory. Even in 1869, Alexander Begg fulminated that “whoever started the term Breed ought to have been choked before he had time to apply it to human beings.” See John M. Bumsted, ed., *Reporting the Resistance. Alexander Begg and Joseph Hargrave on the Red River Resistance* (Winnipeg: University of Manitoba Press, 2003) at 127. While some attempts have been made to replace it with terms such as ‘mixed-blood’ or ‘country born’ or simply ‘Métis’, these can lead to confusion. ‘Mixed-blood’ includes those who were genetically mixed, but nevertheless identified themselves as ‘Indians’. See respectively Irene M. Spry, “The Métis and Mixed-Bloods of Rupert’s Land before 1870” and John Foster, “Some Questions and Perspectives on the Problem of Métis Roots” in Jacqueline Peterson and Jennifer Brown, ed., *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) at 80. ‘Country born’, like the term ‘native’, can refer to white settlers born in the North-West whereas ‘Métis’ blurs the distinction that both the ‘Bois-Brûlés’ (from Anishnaabemowin *Wiisaakodewiniwag*, “men partly or half burnt”) and the Half-Breeds maintained between themselves. As ‘Half-Breed’ was often used as a self-identifier by those who were most concerned, I will use it here.

¹²⁸ Arthur S. Morton, *A History of the Canadian West* (Toronto: University of Toronto Press, 1973 [1939]) at 877. [A.S. Morton, *History of the Canadian West*]

¹²⁹ Canada, “Causes and Difficulties”, *supra* note 125 at 113.

¹³⁰ Frits Pannekoek, *A Snug Little Flock. The Social Origins of the Riel Resistance of 1869-1870* (Winnipeg: Watson & Dwyer Publishing, 1991) at 192. [Pannekoek, *Snug Little Flock*]

belonged to the half-breeds under the same kind of title by which the Indians claim.”¹³¹ During the Convention of Forty debates over the second *List of Rights*, Riel raised the issue of Métis land claims during discussion of the 15th clause, which demanded treaties with the Indians.¹³² Riel asked rhetorically whether Indians had a claim to the *whole* country. Riel’s suggestion that the Indians were not “the only parties in the country who have to be settled with for land claims” clearly insinuated that there was “*some section* [of the country] for which the Half-breeds would have to be dealt with.”¹³³

The ‘section of the country’ that the Métis had in mind was to be reserved exclusively for them. During the first Convention with delegates from the Protestant English-speaking parishes, a first *List of Rights* was adopted on 1 December 1870. It notably demanded that “all privileges, customs and usages existing at the time of the transfer be respected.”¹³⁴ Likewise, a second *List* also stipulated 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.”¹³⁵ One of the customs referred to was clarified in an official letter of 19 April 1870 that the president of the provisional government, Louis Riel, wrote to one of the delegates, Father Noël-Joseph Ritchot. In it, he instructed Ritchot to demand “that *the country be continued to be divided into two*, so that the *custom of the two populations living separately* may be maintained for the protection of our most endangered rights [and] be good enough also to demand that this division of the country be made solely under the authority of the local legislature.”¹³⁶

¹³¹ Canada, “Causes and Difficulties” *supra* note 125 at 115.

¹³² *New Nation*, “Convention at Fort Garry” Feb. 4 1870 at supplement.

¹³³ *Ibid.* Emphasis added.

¹³⁴ Begg, *Creation of Manitoba*, *supra* note 121 at 157

¹³⁵ *Ibid.*

¹³⁶ Flanagan, *Métis Lands*, *supra* note 19 at 31. Louis Riel, *The Complete Writings of Louis Riel*, Vol. 1, George Stanley and Raymond Huel, eds. (Edmonton: University of Alberta Press, 1985) at 86. [Riel, *Complete Writings*]

While these instructions arrived too late to influence the negotiation of s. 31, previous references clarify and confirm the custom to which Riel was referring. A letter addressed to Bishop Taché informed him that, when a “few newly-arrived English-speaking settlers” tried to establish themselves in the Métis parish of Pointe-Coupée on 5 July 1869, they “were ordered by the people of Rivière Sale (St. Norbert) to settle elsewhere.”¹³⁷ The Métis told them: “We do not make *the law* [...] *which gives us the Upper section of the [Red] River*, it was the English-speaking who made it so by obliging those of French speech to abandon the Lower part of it; that law we merely follow it.”¹³⁸ Similarly, shortly after the adoption of the first *List*, Reverend Louis Raymond Giroux¹³⁹ wrote a letter to the *Courrier de Saint-Hyacinthe* on 15 December 1870 in which he referred to the ‘custom of the two populations living separately’:

Il y a quelques années la paix était loin de régner dans notre pays, et cela, à cause du mélange des deux populations différentes par la langue, les mœurs et la religion. Alors dans l’intérêt de la paix et d’un commun accord, les Métis canadiens et les anglais firent une convention en vertu de laquelle ceux-ci occuperaient le bas de la Rivière-Rouge depuis Fort Garry, et, ceux-là, le haut de cette même rivière. Les métis anglais tenaient tant à cette convention qu’ils ne permirent jamais à aucun Métis canadien de s’établir parmi eux.¹⁴⁰

The Anglican Bishop of Rupert’s Land, Robert Machray, was also aware of such a custom. In a letter of 11 March 1870, he wrote that “the rights that have hitherto been put forward by the French and debated are not what they really care for, but that they wish for a Section of the country to be restricted to the French Population.”¹⁴¹ He later testified in court in 1874 that it was on 2 or 3 March 1870 that Riel had informed him that the Métis “wanted land set apart

“[...] exigez le pays se divise en deux pour que cette coutume des deux populations vivant séparément soit maintenue pour la sauvegarde de nos droits les plus menacés [et] ayez la bonté d’exiger encore que cette division du pays soit faite par l’autorité de la Législature seulement.”

¹³⁷ Qtd. in Lionel Dorge, “The Metis and Canadian Councillors of Assiniboia. Part III” (1974) 305 *The Beaver* 51 at 58.

¹³⁸ *Ibid.* Emphasis added.

¹³⁹ Giroux was “a college friend of Riel’s who came to Red River in 1868, and was priest at the Cathedral and Ste-Anne-des-Chênes, and chaplain to Riel’s forces in Fort Garry.” W.L. Morton, *Papers Relative to the Resistance*, *supra* note 124 at 411, notes 1 and 2.

¹⁴⁰ Qtd. in Gilles Martel, *Le messianisme de Louis Riel* (Waterloo: Wilfrid Laurier University Press, 1984) at 62.

¹⁴¹ W.L. Morton, *Papers Relative to the Resistance*, *supra* note 124 at 506.

exclusively” for them and discussed two points, that of the “desirability of a Province and of reserves.” Machray concluded that “the desire for reserves was the cause of all the trouble; the French did not wish to be mixed [up with the English], but to be all together.”¹⁴²

Moreover, the specific tract of land on the ‘upper Red River’ that Giroux mentioned is corroborated by other sources. Colonel John Stoughton Dennis, who was commissioned by the federal government to survey the District in advance of the transfer and the expected flood of settlers, reported that as early as 11 October 1869 the Métis were claiming, “the country *on the south side of the Assiniboine* [...] as the property of the French half-breeds.”¹⁴³ Two weeks later, in an interview on 29 December 1869 with John Ross Robertson of the *Daily Telegraph*, Lieutenant Governor designate William McDougall showed himself to be perfectly aware that the object of the Métis “seemed to be to secure from the Canadian government a large tract of land *between Pembina and Fort Garry* [...] exclusively for the French.”¹⁴⁴ It was surely no coincidence that Pierre Delorme “wanted the tract of land *lying south of the Assiniboine River* to be set aside as a self-governing colony free from all taxations.”¹⁴⁵ Even after the adoption of s. 31, the Métis were still claiming this specific area for the future settlement of their children.¹⁴⁶

Upon invitation from the federal government, the executive of the provisional government commissioned three delegates to negotiate the conditions of entry into Confederation based on a fourth *List of Rights* that notably demanded the status of a province and local jurisdiction over

¹⁴² George Eliott and Edwin Brokovski. *Preliminary Investigation and Trial of Ambroise Lépine* (Montréal: Burland-Desbarats, 1874) at 52. [Eliott and Brokovski, *Trial of Ambroise Lépine*] The term ‘French’ evidently refers to the ‘French Half-Breeds’ or Métis.

¹⁴³ Canada, “Causes and Difficulties” *supra* note 125 at 7. Emphasis added. As the Red River flows northward, Lower Fort Garry is 34 km North of Upper Fort Garry, which was located at the forks of the Red and Assiniboine Rivers. Upper Red River is therefore south of Upper Fort Garry.

¹⁴⁴ W.L. Morton, *Papers Relative to the Resistance*, *supra* note 124 at 480. Emphasis added.

¹⁴⁵ Pannekoek, *Snug Little Flock*, *supra* note 130 at 193. Emphasis added.

¹⁴⁶ *Le Métis*, “Réserve des Métis français situés sur la Rivière-Rouge et autres” 8 June 1871 at 3.

Crown lands.¹⁴⁷ During the negotiations, the representatives of the federal government insisted on having control over Crown lands and restricted the size of the province to the District of Assiniboia. Two of the three delegates of the Provisional Government, most notably Father Noël-Joseph Ritchot, would only compromise if the population received “conditions which [...] would be the equivalent of the control of the lands of their province.”¹⁴⁸ As a result, “a long debate ar[ose] on the rights of the *métis*” which evidently meant “the rights that the *métis* of the North West have as descendants of Indians.”¹⁴⁹

While this ultimately led to the inclusion of s. 31 in the *Manitoba Act, 1870*, Thomas Flanagan has claimed that “the case for Métis aboriginal rights is weak at the level of first principles”¹⁵⁰ and that “the establishment of the Métis in Canadian statutes as a distinct aboriginal people, separate from the Indians, was an act of political expediency not based on cogent reasoning.”¹⁵¹ While I wish to avoid mapping out Métis Indigenous rights ‘from the boundary of Indian rights’ as opposed to the positive core,¹⁵² it is necessary to explore the definitions of ‘Indian title’, as this way of proceeding is precisely what was at work when MacInnes J. decided it was necessary to consider whether or not the Métis were ‘Indians’.¹⁵³

1.2. ‘Indian Title’ in Manitoba Métis Federation

One of the difficulties with the findings of both the Manitoba Court of the Queen’s Bench and the Manitoba Court of Appeal is the failure to adequately distinguish the *inherent* and *contingent* rights of the Métis. According to Catherine Bell, a “contingent rights approach assumes that all

¹⁴⁷ W.L. Morton, *Papers Relative to the Resistance*, *supra* note 124 at 120-1.

¹⁴⁸ William Lewis Morton, ed. *Manitoba: The Birth of a Province* (Winnipeg: Manitoba Record Society Publications, 1965) at 140. [W.L. Morton, *Birth of a Province*]

¹⁴⁹ *Ibid.* at 141.

¹⁵⁰ Flanagan, “Case Against” *supra* note 82 at 322.

¹⁵¹ *Ibid.* at 315.

¹⁵² See Giokas and Chartrand ‘Who Are the Métis’ *supra* note 9 at 106.

¹⁵³ *MMF*, *supra* note 20 at paras. 597-616. (Man. Q.B.)

rights are derived from the Crown and are dependant on Crown recognition through legislation, constitutional instruments, or some other means. This can be contrasted to an inherent rights theory which presumes Aboriginal rights are not contingent on, or created by, legal instruments. Rather they are pre-existing common law rights which are recognized, implemented, modified or terminated by these instruments.”¹⁵⁴ To clarify the issue, I will follow Alfred and Corntassel’s distinction between Indigenous rights which are inherent and Aboriginal rights, which are contingent, that is, State sanctioned legal fictions.¹⁵⁵ In this regard, Flanagan recognised that Riel believed the Métis “had both a legal and moral right *to compensation* from the state *in return for extinguishment* of that title.”¹⁵⁶ In other words, if the ‘Indian’ title that the Métis surrendered was an *inherent Indigenous* title that was statutorily extinguished, the 1.4 million acre land grant is a *contingent* right. While Flanagan observed that the “practical question concerns *the form which compensation will take*,”¹⁵⁷ he nevertheless ended up conflating the inherent right surrendered and the contingent right granted when it came to Riel’s instructions of 19 April 1870. If Flanagan admitted Riel’s instructions implied “other aspects of the land question” than local control of public lands, he downplayed any reference to Indian title by suggesting that they “seem to involve French-English ethnicity rather than specific Métis rights.”¹⁵⁸ While it is true that the Métis insisted on linguistic enclaves, this involved the *contingent* title granted by the Crown as *compensation* for the extinguishment of their *inherent* Indigenous title. Historically, compensation could take the form of a fee simple grant rather than ‘Indian’ title in a reserve, as was the case in the *Enfranchisement Act*, or involve ‘Indian’ hunting rights, or may even simply

¹⁵⁴ Catherine Bell, “Towards an Understanding of Métis Aboriginal Rights. Reflections on the Reasoning in R. v. Powley” in Dwight A. Dorey and Joseph Eliot Magnet, eds. *Aboriginal Rights Litigation* (Markham: LexisNexis/Butterworths, 2003) at 394. [Bell, “Métis Aboriginal Rights”]

¹⁵⁵ Alfred and Corntassel, “Being Indigenous,” *supra* note 93.

¹⁵⁶ Flanagan, “Political Thought” *supra* note 31 at 148-9. Emphasis added.

¹⁵⁷ *Ibid.* at 149. Emphasis added.

¹⁵⁸ Flanagan, “Case Against” *supra* note 82 at 317; “Métis Aboriginal Rights” *supra* note 82 at 231.

involve consideration in the form of presents or money.¹⁵⁹

As we have seen, MacInnes J. thought it necessary to determine whether the Métis had any ‘existing’ common law Indian title to surrender at the time that s. 31 was drafted.¹⁶⁰ In doing so, he was addressing the issue of the *inherent* Indigenous title of the Métis. Again, when he applied the three *Delgamuukw* criteria for establishing Aboriginal title,¹⁶¹ he concluded that the Métis “did not hold at July 15, 1870, or at any time prior, aboriginal title to the lands which were to become Manitoba *and serve as the source of the section 31 grants.*”¹⁶² In other words, MacInnes J. believed that the *contingent* rights in the form of a 1.4 million acre land grant from the Crown had to its their source in an inherent Indigenous title in order to qualify as a contingent Aboriginal title.

Scott C.J. of the Manitoba Court of Appeal also failed to maintain a clear distinction between the surrender of an inherent Indigenous title and compensation in the form of a contingent ‘Indian’ title that is a colonial invention as consideration for the extinguishment of the former. He held that, although “there was no finding in *Guerin* that the plaintiff band had Aboriginal title, its analysis relies heavily on the general existence of Aboriginal title.”¹⁶³ He took note of Dickson C.J., as he then was, remarks in *Guerin* according to which it “does not matter [...] that the present case is concerned with the interest of an Indian Band *in a reserve* rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land *is the same* in both cases.”¹⁶⁴ This is reinforced by his reading of *Guerin* where Dickson C.J. stated that the Indians’ “interest in their lands is a pre-existing legal right not created by *Royal Proclamation*, by

¹⁵⁹ See for example Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), at 122-4.

¹⁶⁰ *Ibid.* at para. 561.

¹⁶¹ *MMF*, *supra* note 20 at para. 566. (Man. Q.B.) Citing *Delgamuukw* *ibid.* at para. 143.

¹⁶² *Ibid.* at para. 594. Emphasis added.

¹⁶³ *MMF*, *supra* note 47 at para. 499. (Man. C.A.)

¹⁶⁴ *Ibid.* at para. 477. Citing *Guerin v. The Queen* [1984] 2 S.C.R. 335 at 379.

s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.”¹⁶⁵ It would appear that Scott C.J. believed that the reason why the interest in the land is the same in both cases is because a reserve is what is called in Anishinaabemowin *ishkonigan*, which literally means ‘leftover’. In others words, it is a remainder of their traditional territory and original title.

However, he acknowledged that *Wewaykum* also involved reserve land, but emphasized that it did not involve claims of Aboriginal title.¹⁶⁶ He also underscored the Court’s remarks in *Wewaykum* that, unlike *Guerin*, the Crown’s “mandate was not the *disposition* of an existing Indian interest in the subject lands, but the creation of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.”¹⁶⁷ Here, Scott C.J. seems to be suggesting that if MacInnes J. was correct that the Crown cannot, by definition, create an inherent Indigenous title, the Crown could create ‘an altogether new interest in lands’, which seems to be synonymous with what he called a ‘cognizable Aboriginal interest’ in land.

What underlies Scott C.J.’s remarks is that he overlooked the legal interest in a reserve created by a Crown grant and carved out of lands where the people concerned have no *inherent* Indigenous title – such as the Haudenosaunee on Grand River in Ontario – and the legal interest in a reserve that is an *ishkonigan* – a leftover of one’s traditionally occupied territory – such as the Nawash reserve at Neyaashiinigiing (Cape Croker, Ontario) – can be essentially the same. In the case of Nawash, the State is not the source of Anishinabek title. As *unceded* territory, title there remains *inherent* to the particular legal traditions of Anishinabek society. In the case of Grand River, the State created *ex nihilo* a truly *sui generis* title in the sense that it was foreign to previously existing common law real property doctrines of estate or tenure. But nothing in theory prevents Parliament from creating a contingent *sui generis* title that has all the qualities of

¹⁶⁵ *Ibid.* Citing *Guerin*, *ibid.*

¹⁶⁶ *Ibid.* at paras. 488-9.

¹⁶⁷ *Ibid.* at para. 495. Citing *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at para. 91.

inherent Indigenous title.

It would seem, however, that the doctrine of parliamentary supremacy is sufficient to allow that Imperial Parliament could go about inventing just about any type of interest in real property that is humanly imaginable.¹⁶⁸ For example, in *Lunenburg*,¹⁶⁹ Ross J. observed that, in “this case we are primarily called on *to construe an Act of the Legislature* and not to discuss abstruse questions of real property law.” Similarly, it could be said that s. 31 calls on us to construe an Act of Parliament, not to discuss abstruse questions of pre-existing Indigenous title recognized at law. Ross J. went on to say, “*I think it is safe to say, that the Legislature never intended to inflict on the parties the Chinese puzzle* that would result from a declaration such as the plaintiff seeks in this action.” Again, it is doubtful that the federal Parliament ever intended to inflict a Chinese puzzle on the courts that both MacInnes J. and Scott C.J.’s tortuous reasoning lead us into. Finally, Ross J. stated, “I am not concerned about giving the defendant's interest any special technical name; all I am concerned with is that *the right was created by the statute* [...]. *Even if there is no such thing at common law as a lease in perpetuity I do not see why Parliament cannot create an estate equivalent to such lease.*”¹⁷⁰

The principle in *Lunenburg* was affirmed by the Supreme Court of Canada in the *Wotherspoon* affair, which also involved a perpetual lease, something that is repugnant to the common law.¹⁷¹ Estey J. however observed that the Supreme Court of Canada was “saved in these proceedings from the exploration of these complex and ancient concepts of property law by reason of the agreement of all parties to this appeal in the courts below and in this Court that the various

¹⁶⁸ See *Sevenoaks Maidstone & Turnbridge [sic] R. Co. v. London Chatham & Dover R. Co.* (1879), 11 Ch. D. 625, where Jessel, M.R. found that interests unknown to the common law may be created by statute. See also *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352, at p. 360.

¹⁶⁹ *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.).

¹⁷⁰ *Ibid.* at 390.

¹⁷¹ *Wotherspoon v. Canadian Pacific Ltd*, [1987] 1 S.C.R. 952.

statutes of Canada authorizing these transactions at the same time also approved the perpetual leases, *whatever their status might otherwise have been at common law.*¹⁷² Estey J. then spoke of “the interpretation of this *parliamentary approval*, which gives effect to an interest in property which otherwise would not be recognized by the common law,” and concluded that if “*the Legislature has declared* that the defendant is to get the ‘use forever’ of the premises *I do not see how the Court can say that it got something else.*” To paraphrase Estey J., if Parliament has declared that the Métis have Indian title and thereby given effect to an interest in property that has not been proven at law, I do not see how the Manitoba Court of the Queen’s Bench or the Manitoba Court of Appeal can say that they got something else.

On the one hand, Scott C.J. seemed to insist that the unique source of the ‘cognizable Aboriginal interest’ was the land grant of 1.4 million acres – in other words in the compensation rather than the pre-existing Indian title that was surrendered. When it came to the “second part of the test for determining if a fiduciary obligation existed,” Scott C.J. found “that the Crown did assume discretionary control *over the administration* of s. 31 of the *Act* and that this aspect of the test is therefore met.”¹⁷³ After asserting that “the words of s. 31 alone are insufficient to give rise to a fiduciary duty” and recalling that the “test is whether there is a cognizable Aboriginal interest combined with Crown discretion in the nature of a private law duty,”¹⁷⁴ the Chief Justice specified that it “is clear that the beneficiaries of s. 31 were subject to the Crown's discretion *in the process of selecting and distributing grants.*”¹⁷⁵

Similarly, when he acknowledged that “no legal interest *in a specific land at issue* is required in order to ground a fiduciary duty in the Crown-Aboriginal relationship,” it would seem that the

¹⁷² *Ibid.* at 998-9.

¹⁷³ *Ibid.* at para. 510. Emphasis added.

¹⁷⁴ *Ibid.* at para. 526.

¹⁷⁵ *Ibid.* at para. 527. Emphasis added.

land grant itself was enough to create a ‘cognitive Aboriginal interest’. Scott C.J. seemed to be suggesting the fact that s. 31 created a cognitive interest in land prior to the actual setting aside of a tract of land or granting of a *specific* lot. However, this part of his analysis of the existence of a ‘cognizable Aboriginal interest’ in the land reveals that Scott C.J. consistently limited it to the ‘interest’ the Métis surrendered rather than the 1.4 million acre land grant they received.

Moreover, when he repeated in the following paragraph his preceding statement of the law, which is “consistent with an understanding that there is a *general Aboriginal interest in land of a strength and nature* that is not dependent upon whether or not any particular group *ever had*, or can prove that it had, *title to a specific parcel of land*,”¹⁷⁶ he seem to revert back to discussion of a *pre-existing* interest. When Scott C.J. then repeated that “it is not necessary for a given Aboriginal group to have Aboriginal title in order to be owed a fiduciary obligation with respect to land,”¹⁷⁷ it becomes apparent that if MacInnes J. had erred, it was not so much by limiting fiduciary obligations to situations involving the *surrender* of land, but to the surrender of *title*, since all that is required is a ‘cognizable interest’ that falls short of title. In effect, Scott C.J. found as a matter of law “that Aboriginal peoples’ independent, *pre-existing interest in land* provides the basis for enforceable fiduciary duties even when the Aboriginal group has *no title* in the land (*Wewaykum*), or where title *may* be present but has not been proven (*Guerin*). This means that it is possible that the Métis could have *an interest in land sufficient* to meet this particular requirement towards establishing a fiduciary duty.”¹⁷⁸ Here, the source of the ‘cognizable interest’ is clearly one that pre-existed surrender, not one that is created as compensation for the extinguishment of that interest following surrender.

At other times, Scott C.J. seemed to be aware of the distinction between the two. In his view,

¹⁷⁶ *Ibid.* at para. 500-1. Emphasis added.

¹⁷⁷ *Ibid.* at para. 502.

¹⁷⁸ *Ibid.* at para. 507.

despite the “fact that there was an element of political expediency to s. 31, [...] there was enough of a sense that the Métis *arguably had rights* that [...] *lead to the phrase in s. 31 that the land grant was being made ‘towards the extinguishment of’ any such potential rights.*”¹⁷⁹ Further on, he repeated that “[s]ome *significance might be accorded* to the fact that [s. 31] *purports* to give the Métis children land grants *in return for* the extinguishment of Indian title. It is far from clear what interest the Métis of Red River actually had *prior to s. 31 being enacted, if any*, but [...] [t]he Métis of Red River *had an interest of some kind sufficient to be recognized*, at least for political purposes, as having been extinguished through the *Act.*”¹⁸⁰ Oddly enough, however, Scott C.J. left “for another day” the “question of exactly what does constitute a cognizable Métis interest, and *whether one exists* in this truly unique case [...], all the more so since *focused argument* on whether or not this critical component of a fiduciary obligation existed *has not taken place.*”¹⁸¹ In the end, whereas it is the term ‘Indian’ that most commentators find problematic when it comes to the ‘Indian title’ of the Métis in s. 31, Scott C.J. had little trouble acknowledging that recognized a ‘cognizable *Aboriginal* interest’ in the land. However, like his colleagues more than a century earlier in *St. Catharine’s* case, Scott C.J. almost seemed incapable of conceiving that interest as an outright *title*, despite the explicit use of the term in s. 31.

While MacInnes J. allowed for a modification of the test for the recognition of Indigenous title that of the *Delgamuukw* criterion of occupation prior to sovereignty¹⁸² to the *Powley* criterion of ‘effective control’,¹⁸³ he in fact failed to make any distinction between the two. In terms of effective control, it is a well known historical fact that it was only in 1774 that the HBC “built the

¹⁷⁹ *Ibid.* at para. 475. Emphasis added.

¹⁸⁰ *Ibid.* at para. 505. Emphasis added.

¹⁸¹ *Ibid.* at para. 509. Emphasis added.

¹⁸² *Ibid.* at para. 566.

¹⁸³ *Ibid.* at paras. 573-7.

first of a long line of posts inland,”¹⁸⁴ and in 1775 that the century old policy of insisting “on the Indians coming down to the Factory on the Bay was abandoned, and the policy of inland posts [...] wholeheartedly adopted,”¹⁸⁵ Yet, MacInnes J. held that as from the date of 2 May 1670, when “Britain made its extensive land grant” to the Hudson’s Bay Company (HBC),¹⁸⁶ “Britain exercised control through the HBC in those areas where the grant pertained and beyond that after [the Treaty of Paris in] 1763.”¹⁸⁷ According to the trial judge, “there is little evidence as to the status of the ancestors of the plaintiffs at the commencement of British control in the area which ultimately became Manitoba.”¹⁸⁸ Now, anyone familiar with the ethnogenesis of the Métis knows that they could have hardly existed in 1670 and did not yet occupy the Red River valley in significant numbers in 1763. Given such a cut-off date, it came as no surprise then that the judge should find that on “the evidence, the plaintiffs have not proved the existence of [...] aboriginal title, even allowing for modification consistent with *Powley*.”¹⁸⁹

1.3. Dos à Dos: Fiddling with ‘Indian Title’

In opposition to Riel’s view of ‘Aboriginal rights’, Flanagan mentions that “[t]he ‘official view’ of aboriginal rights was not articulated until the *St. Catherine’s Milling Case*, decided in 1889 [*sic*]. The theory of aboriginal rights developed in this case was implicit in the practice of previous decades.”¹⁹⁰ In effect, Lord Watson wrote that “the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.”¹⁹¹ Flanagan claimed that

¹⁸⁴ A.S. Morton, *A History of the Canadian West*, *supra* note 128 at 300-1. Fort Douglas was only built with the establishment of the Red River Settlement in 1812.

¹⁸⁵ *Ibid.* at 423.

¹⁸⁶ *MMF*, *supra* note 20 at para. 580. (Man. Q.B.)

¹⁸⁷ *Ibid.* Emphasis added.

¹⁸⁸ *Ibid.* at para. 583.

¹⁸⁹ *Ibid.* at para. 589.

¹⁹⁰ Flanagan, “Riel and Aboriginal Rights” *supra* note 82 at 248. The case was decided on 12 December 1888, although it was only reported in 1889.

¹⁹¹ *St. Catherine’s Lumber and Milling Co. v. The Queen* (1888), 14 A.C. 46 at 54. [*St. Catherine’s* (JCPC)]

the decision of the Judicial Committee of the Privy Council (JCPC) “provided legal certainty” insofar as it was “an authoritative definition of Indian property rights” and “gave a legal rationale for that process [of negotiated land-surrender treaties]: the Indians had never owned the land, but their usufructuary rights were a burden on the title [of the Crown].”¹⁹² However, no sooner had Lord Watson stated that Indian title was a ‘personal and usufructory right,’ than he added that there “was a great deal of learned discussion at the Bar with respect to *the precise quality of the Indian right*, but their Lordships *do not consider it necessary to express any opinion upon the point*. It appears to them to be sufficient *for the purposes of this case* that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.”¹⁹³

Besides, as Flanagan himself pointed out, there is “much that is unclear in the idea of usufruct.”¹⁹⁴ In addition, Flanagan appears to have doubts about Lord Watson’s rationale of Indian title, since he later admitted that the “Proclamation uses terms such as ‘Possession’ and ‘Lands of the Indians’” which “are connected with the traditional use of the land” and therefore presupposes that the “Indians have property rights of some sort.”¹⁹⁵ He nevertheless continued to assert that the JCPC decision “formalized the implicit theory of the Royal Proclamation of 1763.”¹⁹⁶ However, as Archer Martin reported almost a century before Flanagan, there were in fact several competing discourses in the lower courts concerning just what this implicit theory of the *Royal Proclamation* was,¹⁹⁷ not to mention whether the *Proclamation* had been repealed and, if not, to what geographic areas it applied. It is perhaps because Flanagan was so focused on the

¹⁹² Flanagan, *First Nations, Second Thoughts*, *supra* note 82 at 124.

¹⁹³ *Ibid.* at 55. Emphasis added.

¹⁹⁴ Flanagan, “Indian Title to Aboriginal Rights” *supra* note 82 at 83.

¹⁹⁵ Flanagan, *First Nations, Second Thoughts*, *supra* note 82 at 121.

¹⁹⁶ *Ibid.* at 122.

¹⁹⁷ Archer Martin, *The Hudson’s Bay Company’s Land Tenures* (London: William Gloves & Sons, 1898) at 94-99. [Martin, *Company’s Land Tenures*]

final outcome at the level of the JCPC, that he erred in claiming that the JCPC “found different words to express more or less the same perception” of Indian title as the trial judge.¹⁹⁸ To be sure, Martin also misinterpreted to what extent the various judges agreed or disagreed with each other.¹⁹⁹ As Bell and Asch have noted, “a significant change in legal thought [...] will only take place *if the court critically analyzes the relevance of Aboriginal title cases* as the main source of legal principles to guide contemporary judicial decision-making on Aboriginal rights matters.”²⁰⁰

1.3.1. *St. Catharine’s Case*: The Ontario Chancery

The trial judge, Chancellor Boyd of the Ontario Chancery, asserted that “the colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. [...] As heathens and barbarians it was not thought that they had any proprietary title to the soil” and “no legal ownership of the land was ever attributed to them.”²⁰¹ As proof of this, he notably cited the recommendations of a group of counsellors in 1675 concerning Indian title in New York. They were of the opinion that, though “it hath been and still is the usual practice of all proprietors to give their Indians some recompense for their land, and so seem to purchase them, yet that is not done for want of sufficient title from the King or Prince who hath right of discovery, but out of Christian prudence and charity least otherwise the Indians might have destroyed the first planters.”²⁰² While he mentioned both a “right of occupancy”²⁰³ and a “possessory interest,” Boyd’s view put Indian title on an even lower footing than a personal and usufructuary right, which is at least subject to legal enforcement. After referring to “the ‘Indian title’ so called,” he drew the conclusion that

¹⁹⁸ Flanagan, *First Nations, Second Thoughts*, *supra* note 82 at 123.

¹⁹⁹ Martin, *Company’s Land Tenures*, *supra* note 197 at 94-99.

²⁰⁰ Bell and Asch, “Challenging Assumptions,” *supra* note 64.

²⁰¹ *St. Catharine’s Lumber and Milling Co.* (1885), 10 O.R. 196 at 206. [*St. Catharine’s* (Ont. Ch.)]

²⁰² *Ibid.* at 207.

²⁰³ *Ibid.* at 209.

before “the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown.”²⁰⁴ Further on, he added that “the claim of the Indians by virtue of original occupation is not such as to give any title to the land itself, but only serves to command them to the consideration and liberality of the Government upon their displacement.”²⁰⁵

It is interesting that Flanagan admitted that Chancellor Boyd’s characterization of the Indians as nomads who had no concept of property “was not an adequate account of the fur-trade-era trapping rights of the Ojibwa, the horticultural land use of the Mohawk and Hurons, or the fishing practices of the West Coast Indians.”²⁰⁶ In this regard, Flanagan observed that “Indians were not involved in it and probably did not even know about it. Judicial interpretation might have been different if the aboriginal peoples had had a chance to state their own understanding of property before the courts.”²⁰⁷ As Flanagan mentioned, “the courts do not evolve pristine doctrines through abstract reflection.”²⁰⁸ It would seem that on this occasion, while the JCPC decision was necessarily ‘an authoritative definition of Indian property rights’ in colonial courts, it did little to help clarify the ‘precise quality’ of Indian title.

1.3.2. St. Catharine’s Case: The Ontario Court of Appeal

The confusion surrounding the substantive content of Indian title was even more apparent when the case came before the Ontario Court of Appeal, Chief Justice Hagarty began by noting that a “review of the authorities as to the true nature and extent of the alleged ‘Indian title’ may well

²⁰⁴ *Ibid.* at 231.

²⁰⁵ *Ibid.* at 234. We find here the same arguments that Flanagan has advanced in his ‘case against’ the Aboriginal title of the Métis. Despite the evidence put forward by the defendant that various legal instruments and judiciary decisions had explicitly recognized the ‘Indian title’ of the Aboriginals, Chancellor Boyd basically decided that ‘Indian title so-called’ was an ‘empty box’ that had come about for reasons of political expediency.

²⁰⁶ Flanagan, *First Nations, Second Thoughts*, *supra* note 82 at 125.

²⁰⁷ *Ibid.* at 122.

²⁰⁸ Flanagan, “Indian Title to Aboriginal Rights” *supra* note 82 at 100.

warrant our full acceptance of the conclusion at which the learned Chancellor has arrived”²⁰⁹ and used the expression “*alleged* ‘Indian title’” on two other occasions.²¹⁰ As we can see, contrary to what Martin claimed, Hagarty C.J. did not take “a broader view” of Indian title than Chancellor Boyd.²¹¹ Nor for that matter did Osler, J. A., who contented himself with simply stating that he was “satisfied to affirm the learned Chancellor’s judgement for the reasons stated therein, and in the judgement of the learned Chief Justice.”²¹²

Similarly, Burton J.A. held that “the nature of Indian title was a mere occupancy for the purpose of hunting. It is not like our tenure, they have no idea of a title to the soil itself. It is over-run by them rather than inhabited.”²¹³ Like Chancellor Boyd, he spoke of “so-called Indian title” and stated that “in truth the recognition of any right in the Indians has been on the part of the Government a matter of public policy determined by political considerations, and motives of prudence and humanity, and has not been a recognition of property in the soil capable of being transferred.”²¹⁴ Nor does one find a ‘broader view’ in Patterson J.A.’s judgement. He entirely endorsed the premise that “the title to all these Indian lands, even before what is called the surrender by the Indians, is in the Crown.”²¹⁵ However, he did not consider it necessary to determine the ‘precise quality’ of ‘Indian title’ since the “action of the Dominion Government in procuring the extinguishment of the Indian title does not, in my view, in any way affect the legal question which is before us.”²¹⁶

1.2.3. St. Catharine’s Case: The Supreme Court of Canada

²⁰⁹ *R. v. St. Catharine’s Lumber and Milling Co.* (1886), 13 O.A.R. 148 at 148. [*St. Catharine’s* (Ont. C.A.)]

²¹⁰ *Ibid.* at 153 and 155.

²¹¹ Martin, *Company’s Land Tenures*, *supra* note 197 at 97.

²¹² *Ibid.* at 173.

²¹³ *St. Catharine’s*, *supra* note 209 at 159. (Ont. C.A.)

²¹⁴ *Ibid.* at 161. Note the similarity with Flanagan’s arguments concerning the recognition of Métis ‘Indian’ title.

²¹⁵ *Ibid.* at 170.

²¹⁶ *Ibid.* at 173.

On appeal to the Supreme Court of Canada, Henry J. “entirely approve[d] of the judgement of the learned chancellor.” In his view, “after the conquest of this country all wild lands, including those held by nomadic tribes of Indians, were the property of the Crown [...]. It was never asserted that any title to them could be given to the Indians” and “the Indians were never regarded as having a title.”²¹⁷ If treaties were signed, it was as a sort of quitclaim for the “cession of all the Indian rights, titles and privileges, *whatever they were*.”²¹⁸ The treaties that were “signed by certain Indians is not evidence of a purchase” since the “consideration was [...] on the face of it, an act of bounty on the part of her Majesty. It is not an acknowledgement of any title in fee simple in the Indians.” If lands were reserved for Indians, it was merely “the right to use them for hunting purposes, but not as property the title of which was in them.”²¹⁹ Henry J. even went so far as to assert that “if a private individual entered upon any of the lands at any time the Indians could not legally object, as the law does not permit them by any legal means to recover possession of the land, or recover any damages for any trespass committed thereon.”²²⁰ Taschereau J. seems to have shared his opinion, since when he mentioned the “rights of the natives,” he immediately added in brackets, “I would say the claims [of the natives].”²²¹ He saw nothing in the *Royal Proclamation* of 1763 “that gives to the Indians forever the right in law to the possession of any lands as against the crown. Their occupancy under that document has been one by sufferance only” and held that it had not “created a legal Indian title.”²²² In response to the argument of the appellants that negotiation of land surrenders amounted to “a recognition of their title to a

²¹⁷ *St. Catharine's Milling and Lumber Company v. The Queen* (1887), 13 S.C.R. 577 at 639. [*St. Catharine's* (S.C.C.)]

²¹⁸ *Ibid.* at 640. Emphasis added. A quitclaim is “a formal release of one’s claim of right.” *Black’s Law Dictionary*, 7th ed., s.v. “quitclaim”. In other words, the suggestion is that the government never really believed that Indians had good title and merely paid consideration for their unfounded claims to avoid litigation, or in this case political troubles.

²¹⁹ *Ibid.* at 642.

²²⁰ *Ibid.* at 639.

²²¹ *Ibid.* at 644.

²²² *Ibid.* at 647-8.

beneficiary interest in the soil,” Taschereau held that this was simply for “obvious political reasons, and motives of humanity and benevolence” and did “not give them any title in law, any title that a court of justice can recognize against the crown.”²²³

Where one finds a different notion of Indian title is with Chief Justice Ritchie, who was “of the opinion that all ungranted waste lands in the province of Ontario belong to the crown as part of the public domain, subject to the right of the Indian right of occupancy.”²²⁴ His idea of “the Indians possessing only the right of occupancy” was on a somewhat higher footing than that of Chancellor Boyd, since Ritchie C.J. interpreted this as a right susceptible to legal sanction. That it continued to burden the title “in cases in which the same has not been lawfully extinguished,”²²⁵ is also evident in his statement that the “crown has the right to grant the soil while yet in the possession of the Indians, subject, however, to their right of occupancy.”²²⁶

His colleague, Strong J. wrote a dissenting decision that put Indian title on an even higher footing. Interestingly, he began by stating that the “word ‘trusts’ would not be an altogether appropriate expression to apply to the relation between the Crown and the Indians respecting the unceded lands of the latter,” since “such relationship is not in any sense that of trustee and *cestui que trust*, but rather one analogous to the feudal relationship of lord and tenant, or, *in some aspects*, to that one, so familiar in Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary.”²²⁷ In reference to U.S. case law concerning Indian title, which Strong J. considered relevant as it was derived from British policy in the period anterior to the revolution and was subsequently ‘faithfully carried out’ in Ontario, he stated that it consisted “in the recognition by the crown of a usufructuary title in the Indians to all

²²³ *Ibid.* at 648.

²²⁴ *St. Catharine’s*, *supra* note 217 at 599 (S.C.C.).

²²⁵ *Ibid.*

²²⁶ *Ibid.* at 600.

²²⁷ *Ibid.* at 604. Emphasis added.

unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands.”²²⁸

Strong J. concluded that, “with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown” and maintained “that if there had been an entire absence of any written legislative act originating this rule as an express positive law, we ought [...] to hold that it nevertheless existed as a rule of the unwritten common law, which the courts are bound to enforce as [...] strictly legal rights.”²²⁹ In summary, he found that “at the date of confederation, the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American colonies, or that such rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil.”²³⁰ Interestingly, he dealt directly with the appellants’ argument “derived from expediency, public policy, and conveniences,” but so far as they were “to have any weight in removing any ambiguity,” Strong J. queried whether it had been intended by the framers of the *Constitution Act, 1867*, “to abrogate entirely the well understood doctrine, according to which the Indians were recognized as having a title to the lands not surrendered by them, which had been acted on for at least one hundred years, and which received the express sanction of the crown in a royal proclamation.”²³¹

²²⁸ *Ibid.* at 608.

²²⁹ *Ibid.* at 613.

²³⁰ *Ibid.* at 615-16.

²³¹ *Ibid.* at 621.

Gwynne J. wrote a concurrent dissenting decision that began by directly dismissing Taschereau J.'s reasoning. In the latter's view, the King of France "was vested with the ownership of all the ungranted waste lands as part of the crown domain" and never was even an allusion or mention, much less a recognition, made to "their right to any legal title whatsoever."²³² Since the King of France ceded all his rights of sovereignty, property and possession over Canada to the King of England in the *Treaty of Paris* of 1763, the latter's title was unburdened by any such thing as 'Indian title'. If Gwynne J. "admitted that the Kings of France recognised no title in the Indians in any part of the territory in the[ir] possession," this "presented no obstacle to the Sovereign of Great Britain, upon acquiring French title, placing the Indians upon a more just and equitable footing, and recognizing their having a certain title estate and interest in the lands."²³³ The rest of his decision, while it illustrated that both British and Canadian administrators had scrupulously respected the *Royal Proclamation* of 1763 and consistently referred to territorial rights belonging the Indians in all kinds of legal instruments and parliamentary reports, did not in any way deal with the 'precise quality' of that title.

The upshot of all this is that the various judges involved at all levels of *St. Catharine's* case could not agree among themselves about just what exactly the 'precise quality' of Indian title was in the period from 1885-1888. To confuse matters even more, three decades later, the JCPC stated in the *Star Chrome* affair that Indian title is "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."²³⁴ Given the differing opinions of the learned judges in *St. Catharine's* on the "precise quality" of Indian title, it is hardly surprising, as Scott C.J. mentioned in *MMF* on appeal, that the "evidence indicates that during the events surrounding the enactment of s. 31, there was uncertainty on everyone's part regarding the nature

²³² *Ibid.* at 645.

²³³ *Ibid.* at 652.

²³⁴ *A.G. Québec v. A.G. Ontario*, [1921] A.C. 401 at 408.

and extent of the Métis interests that s. 31 purported to extinguish.”²³⁵ In an implicit application of Vitoria’s fiduciary doctrine, the Métis had been denied political rights prior to the *Manitoba Act* on the basis that they did not possess sufficient directive reasoning to govern themselves.²³⁶ It was therefore unnecessary for the federal government to take the trouble to consult the Métis at the material time as to what their thoughts might be concerning their title. As we have seen, the Métis had very definite ideas about the specific lands that they thought belonged to them and that they wanted set aside for their descendants.

1.3. The Royal Proclamation of 1763

It is not very clear, then, just what exactly the ‘official view’ of Indian title was in 1889. Nevertheless, as we have seen, Flanagan claims that the “*recognition* of Indians and Inuit as aboriginal peoples, with certain special rights adhering to that status, is thus a product of Western, particularly British, civilisation in its Enlightenment phase.”²³⁷ In the case of the British, it “most notably [did so] through the Royal Proclamation of 1763, [which] gave some formal recognition to Indian rights.”²³⁸ But *St. Catharine’s* case also reveals that judges did not agree on the effects of the *Royal Proclamation*. For example, in Lord Watson’s opinion, the territorial possessions of the Aboriginal peoples, “such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.”²³⁹ While this became the ‘official view’, Lord Watson was undoubtedly refuting Strong J.’s contention that the British policy of

²³⁵ *MMF*, *supra* note 47 at para. 475. (Man. C.A.), referring to the trial judgement in *MMF*, *supra* note 20 at para. 649. (Man. Q.B.)

²³⁶ See Darren O’Toole, *The Red River Resistance: The Machiavelian Moment of the Métis of Manitoba*, unpublished Ph.D. Dissertation (Ottawa: University of Ottawa, 2010) at 6-10, 98-104, 151-3.

²³⁷ *Ibid.*, at 25-6. Emphasis added

²³⁸ *Ibid.*, at 25. The Crown did arguably create a legal fiction called ‘Indian title’ that had little or nothing to do with how Indigenous people’s viewed their collective or individual rights in their territory.

²³⁹ *St. Catherine’s*, *supra* note 191 at 54. [JCPC]

recognizing Indian title had crystallised into a right at law when he asserted that the *only* official source of the legal recognition of actual possession was the *Proclamation*. Apart from being a source of Indian title, Kenneth Narvey has convincingly argued that the terms of the *Proclamation* were intended to apply to areas outside of the Indian territories,²⁴⁰ and so may be just as relevant to Métis Indigenous title in Rupert's Land as in the Indian Territory. However, what is particularly relevant to s. 31 is John Borrows' argument that the *Proclamation*, despite its status as royally enacted legislation, is in fact part of the *Niagara Treaty* of 1764.²⁴¹

During the House of Commons debates over the Manitoba Bill on 5 May 1870, MP James Young of Waterloo South claimed "the whole Bill, particularly as first brought in, bore traces of a bargain, a compromise, and of being largely dictated by the Red River delegates."²⁴² However, the idea that Confederation itself is a 'compact' or 'treaty', is an idea that goes back to the negotiations that led to the Québec Resolutions when some fathers of Confederation used the term 'treaty' to describe them²⁴³ and the ensuing 'compact theory' that was thought to underlie the *Constitution Act, 1867*. Given the popularity of this doctrine in Québec, it is not unusual that Riel called the *Manitoba Act* a 'treaty',²⁴⁴ and that Ritchot, who negotiated the terms of the *Act*, also considered it to be a 'treaty'.²⁴⁵ However, the Supreme Court of Canada, all the while recognizing federalism

²⁴⁰ Kenneth M. Narvey, "The *Royal Proclamation of 7 October 1763*, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1974) 38 *Sask. Law Rev.* 123. It may be more relevant insofar as the Provisional Governments of 1869-1870 are concerned as the Lords of Traded proposed on 8 June 1863 that "no particular form of Civil Government" be established in the Indian Territory or Indian Country. Cited in *ibid.* at 134.

²⁴¹ John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997). [Borrows, "Wampum at Niagara"]

²⁴² *House of Commons Debates*, (4 May 1870) at 1387 (James Young).

²⁴³ Paul Romney, *Getting It Wrong. How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999) at 158. [Romney, *Getting it Wrong*]

²⁴⁴ Riel, *Complete Writings*, *supra* note 136 at 313 and 315. Louis Riel, "L'ammistie: mémoire sur les causes des troubles du Nord-Ouest" in Gilles Boileau, ed. *Louis Riel et les troubles du Nord-Ouest* (Montréal: Éditions du Méridien, 2000) at 113 and 116.

²⁴⁵ *New Nation*, "Legislative Assembly of Assiniboia. Third Session" 1 July 1870 at 2.

is “a political and legal response to underlying social and political realities,”²⁴⁶ that is, a political compromise between unity and diversity,²⁴⁷ has nevertheless qualified federalism as one of the underlying *principles* of the Constitution.²⁴⁸ This was evident in *Re Aeronautics*,²⁴⁹ when Lord Sankey L.C. of the Judicial Committee of the Privy Council held that:

Inasmuch as the *Act embodies a compromise* under which the original Provinces agreed to federate, it is important to keep in mind that *the preservation of the rights of minorities was a condition on which such minorities entered into the federation*, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down *the provisions of the original contract* upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.²⁵⁰

It is true, as Paul Chartrand observed, that six years later, in *Re Adoption Act*, Duff C.J. referred to the “basic compact of Confederation.”²⁵¹ However, the Supreme Court of Canada definitively rejected any legal signification of what it called ‘a full compact theory’ of Confederation in *Re Resolution to amend the Constitution* and took the trouble to add that “even factually, [it] cannot be sustained, having regard to federal power to create new provinces out of federal territories, which was exercised in the creation of Alberta and Saskatchewan.”²⁵² While such theories may “operate in the political realm,” they “do not engage the law.”²⁵³ What the Court arguably meant here is that the compact theory is at most a constitutional convention, which “no court may enforce [...] by legal action. The sanction for non-observance of a

²⁴⁶ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 57. [*Re Québec Secession*] For the debates on federalism, see Janet Ajzenstat, Paul Romney, Ian Gentles and William D. Gairdner, ed. *Canada’s Founding Debates* (Toronto: University of Toronto Press, 2003), at 261-326. [Ajzenstat et al., *Canada’s Founding Debates*]

²⁴⁷ *Ibid.* at para. 43.

²⁴⁸ *Ibid.* at paras. 55-59.

²⁴⁹ *Re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at 70. rev.’g [1930] S.C.R. 663.

²⁵⁰ *Ibid.* at 70. Emphasis added.

²⁵¹ *Reference Re Adoption Act*, [1938] S.C.R. 398 at 402.

²⁵² *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 803. The significance of this statement is that it draws on centralist rhetoric against the Compact Theory that was first mobilized by Norman Rodgers in 1931. See Paul Romney, *Getting It Wrong*, *supra* note 243 at 157.

²⁵³ *Ibid.* The Court did accept, however, that “they might have some peripheral relevance to *actual provisions* of the *British North America Act* and *its interpretation* and *application*.” Emphasis added. In other words, it granted the theory may have some weight when it comes to a purposive interpretation, which necessarily turns on a historical inquiry.

convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences.”²⁵⁴ In the *Québec Secession Reference*, the Court reaffirmed this legal/political distinction when it observed: “*Legally*, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However, *politically*, it was thought that more was required.”²⁵⁵

Dale Gibson raised much the same arguments when he pointed to “legal difficulties with the ‘treaty’ interpretation of the *Manitoba Act*.”²⁵⁶ While he provided several obstacles to interpreting the *Manitoba Act* as a ‘treaty’, the principal one that concerns us here is that “the *Manitoba Act* derives its legal authority from the unilateral law-making powers of the parliaments of Canada and the United Kingdom and contains provisions that were never agreed to by the Red River representatives.”²⁵⁷ Flanagan had also previously argued “the *Manitoba Act* was a unilateral action of the Canadian Parliament, not a treaty between independent partners.”²⁵⁸ On appeal in *Blais*, Scott C.J. wrote for a unanimous court that the *Manitoba Act* is “not a treaty since it is simply an *Act* of the Parliament of Canada.”²⁵⁹ This was also argued by both Manitoba and Canada at trial in the *MMF* case²⁶⁰ and it subsequently found its way into MacInnes J.’s conclusion that there “was no treaty. There was no agreement. There was an Act of the Parliament of Canada which is recognized as a constitutional document.”²⁶¹ Early on in the *Dumont* case, however, O’Sullivan J. refused to apply such false dichotomies in his dissenting

²⁵⁴ *Ibid.* at 853.

²⁵⁵ *Re Québec Secession*, *supra* note 246 at para. 39. Emphasis added. The Court pointed out, “Resolution 70 provided that ‘The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference’.” Emphasis in original. Interestingly, while Justice Deschamps mentions the “pacte confédératif” in the French version of *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] 2 S.C.R. 669 at para. 9, it was simply given as ‘Confederation’ in the official English translation.

²⁵⁶ Gibson, “General Sources of Métis Rights” *supra* note 81 at 288.

²⁵⁷ *Ibid.*

²⁵⁸ Flanagan, “Riel and Aboriginal Rights” *supra* note 82 at 249.

²⁵⁹ *R. v. Blais* [2001] M.J. No. 168 at para. 8. [*Blais* (Man. C.A.)]

²⁶⁰ *MMF*, *supra* note 20 at paras. 510-534. (Man. Q.B.)

²⁶¹ *Ibid.* at para. 510.

decision when he held that the *Manitoba Act* “is *not only* a statute; it embodies a treaty which was entered into between the delegates of the Red River settlement and Imperial authority.”²⁶² Similarly, Burrows has asserted that “since the *Proclamation* is not a ‘unilateral declaration of the Crown,’ but *part of a treaty into which First Nations had considerable input*, it therefore must be interpreted as it would be ‘naturally understood’ by them. A ‘natural understanding’ of the *Proclamation* by First Nations prompts an interpretation that *includes the promises made at Niagara*.”²⁶³ In the fourth chapter I will build on Paul Chartrand’s argument that it is not the entire *Manitoba Act* that is a ‘treaty’, but s. 31 alone that “may be construed to be a ‘treaty’ provision within the meaning of the *Constitution Act, 1982*.”²⁶⁴

²⁶² *Dumont*, *supra* note 22 at 49. (Man. C.A.) Emphasis added.

²⁶³ Burrows, “Wampum at Niagara” *supra* note 196 at 170-1. Emphasis added

²⁶⁴ Chartrand, *Métis Settlement Scheme*, *supra* note 15 at 14 and 134-137.

2. The Legal Doctrines of Métis Aboriginal Rights

The brief historical overview provided in chapter one allows us to better understand the implications of the *MMF* case. In this chapter, I will examine some of the implications of MacInnes' judgement, most notably those aspects where he dealt with the Aboriginal title of the Métis of Manitoba, in light of the various doctrines concerning Métis rights. After considering the three existing doctrines concerning Métis Aboriginal title, I will put forward a fourth doctrine, that of Métis Autochthonous rights. As an initial step, I will show that it is necessary to develop such a doctrine in order to shore up the logical frailty of simply relying on the 'constitutional imperative' justification for the recognition of Métis rights. In the last section, the interpretive technique of 'reading in' allows us to interpret the expressions 'Indian' in s. 31 and 'Aboriginal' in s. 35 as Autochthonous or Indigenous. As will be shown in the third chapter, this in turn lends cogency to the constitutional imperative justification for recognizing such rights. It should be mentioned that the Supreme Court of Canada has stipulated that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."²⁶⁵ I will attempt, insofar as historical documentation allows, to take that perspective into account here.

²⁶⁵ *Sparrow*, *supra* note 2 at 1112; See also *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 49. [*Van der Peet*]

2.1. Métis Aboriginal Rights Doctrines

As mentioned above, Métis law professor Paul Chartrand pointed out that the recognition of Indian title in s. 31 “does not require a legal basis for asserting Indian title on the part of the ‘Half-Breed’ population in 1870.”²⁶⁶ In other words, since the Métis’ aboriginal title is established in s. 31, they do “not need to rely on the tests for proof of [common law] aboriginal title.”²⁶⁷ Chartrand’s reasoning relies on two rules of interpretation, that of the plain meaning rule and what the Supreme Court of Canada called the ‘constitutional imperative’ in *Powley* and the corresponding ‘distinct Aboriginal People doctrine’. I will come back to this latter argument further on in section 2.2. In terms of the former, Judge Swail notably applied the plain meaning rule of interpretation in the *Blais* affair. The trial judge refused to read down the reference to ‘Indian’ title in s. 31 when he was invited to do so by Flanagan, according to whom “the frame of reference was the ‘Law of Nations’ not aboriginal rights.”²⁶⁸ Swail J. replied that “section 31 of the *Manitoba Act* clearly acknowledges Aboriginal rights of the Métis when it says: “[...] towards the extinguishment of the Indian title to the lands in the province [...] for the benefit of the families of the half-breed residents [...]”²⁶⁹ The Manitoba Court of Appeal upheld Judge Swail’s decision on this point when it confirmed that, “Section 31, therefore, acknowledged that the Métis enjoyed what we now know as ‘aboriginal rights’.”²⁷⁰

One would think that this would be enough to give full legal effect to the recognition of the Indigenous title of the Métis in s. 31. However, in order to understand the resistance to giving full legal effect to Métis title in the *MMF* case, it is necessary to understand the underlying logic of existent legal doctrines that were arguably at work even if they were never explicitly mentioned.

²⁶⁶ Chartrand, *Settlement Scheme*, *supra* note 10 at 78-9.

²⁶⁷ *Ibid.* at 79 note 303.

²⁶⁸ *R. v. Blais*, [1996] M.J. N° 391 at para. 6 (Man. Prov. Ct.), Swail J.

²⁶⁹ *Ibid.* Emphasis in original

²⁷⁰ *Blais*, *supra* note 259 at para. 10 (Man. C.A.), Scott C.J.M., Twaddle and Helper J.A. concurring.

There are currently three Métis Aboriginal Rights doctrines: the derivative Amerindian rights doctrine, the empty box doctrine and the distinct Aboriginal people doctrine. Here, I will take a closer look at the doctrines and the role they have played in case law involving Métis rights.

2.1.1. The Derivative Amerindian Rights Doctrine

According to Dale Gibson, this particular doctrine “traces Métis rights to the ancient rights of the peoples from whom Métis peoples derive their Aboriginal ancestry. From that point of view, these rights are older than the Métis peoples themselves.”²⁷¹ In other words, Métis rights are conceived of as being derivative of Amerindian rights. In *R. v. Chevrier*, Judge Wright commented that the defendant “traces his descent to a member of a tribe.”²⁷² For this reason, Larry Chartrand uses the expression “trace theory.”²⁷³ As we have seen in section 1.1, the Métis used this doctrine themselves to ground their claims to Indian title. John A. Macdonald referred to it in the House of Commons as a justification for the recognition of Indian title of the Métis in s. 31 when he stated: “Those clauses referred to the land for the half-breeds. If those half-breeds were not pure-blooded Indians, *they were their descendants*. [...] Those half-breeds had a strong claim to the lands, *in consequence of their extraction*.”²⁷⁴ In justifying s. 31, Georges-Étienne Cartier asserted that the “descendants of white people had no pretensions to the land,”²⁷⁵ implying that the Métis, as descendants of Indians, did. Further on, he “contended that any inhabitant of the Red River country having Indian blood in his veins was considered to be an Indian” and although

²⁷¹ See Gibson, “General Sources of Métis Rights” *supra* note 81 at 280. Horton and Mohr speak of a “derivative rights approach.” See Andrea Horton and Christine Mohr, “*R. v. Powley*: Dodging *Van der Peet* to Recognize Métis Rights” (2005) 30 Queen’s L.J. 772. [Horton and Mohr, “Dodging *Van der Peet*”] Giokas and Chartrand use the expression “derivative rights theory.” See Giokas and Chartrand, “Who Are the Métis” *supra* note 9 at 107. Catherine Bell calls it the “Aboriginal ancestry theory.” See Bell, “Métis Constitutional Rights” *supra* note 88; Bell, “Métis Aboriginal Rights” *supra* note 154 at 390.

²⁷² *R. v. Chevrier*, [1989] 1 C.N.L.R. 128 at 130 (Ont. Dist. Ct.).

²⁷³ See L. Chartrand, “Métis Aboriginal Title” *supra* note 81 at 158.

²⁷⁴ *House of Commons Debates*, (4 mai 1870) at 1359 (John A. Macdonald). Emphasis added.

²⁷⁵ *Ibid.* at 1447. (Georges-Étienne Cartier)

“Indian claims had been extinguished” in the territory,²⁷⁶ they “now had to deal with their descendents – the half-breeds.”²⁷⁷ Following the adoption of s. 31, Louis Riel spoke of “our Indian rights to the lands of the country”²⁷⁸ and reminded the Métis of the North-West Territories of “the right that your Indian blood gives you to the lands of the country.”²⁷⁹ Thereafter, this doctrine became the official position of the federal State when dealing with Métis rights.²⁸⁰

Right up until the end of the 1970s, the Manitoba Métis Federation continued to express Métis rights in these terms.²⁸¹ In his research carried out for the MMF, Émile Pelletier noted that the *Natural Resource Transfer Agreements* “contain no definition of the term ‘Indians,’” and thought it “indisputable in law” that “the Métis, through their Indian ancestry come under this agreement.”²⁸² In *Van der Peet*, Lamer C.J. referred to the derivative rights doctrine in an *obiter dictum* where he let it be known that it “may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of *their aboriginal ancestors*.”²⁸³ Bell maintained that “judicial emphasis has been placed on the word ‘aboriginal’ in s. 35. As a corollary of this emphasis, emerging theories on Métis rights have drawn on genealogical tracing to pre-contact Indian and Inuit society.”²⁸⁴ Larry Chartrand agreed that there was “a strong trend in legal thought about the source of Métis Aboriginal rights,” that is, “the idea that Métis rights flow from our Indian ancestors,” and that it had “gained strength as

²⁷⁶ Cartier was referring here to the Selkirk Treaty, which allegedly extinguished Indian title within a two-mile wide strip along both sides of the Red and Assiniboine rivers. See Alexander Morris, *The Treaties of Canada with the Indians* (Calgary: Fifth House Publishers, 1991 [1880]) at 13-15. [Morris, *Treaties of Canada*]

²⁷⁷ *Ibid.* at 1450. (Georges-Étienne Cartier)

²⁷⁸ Riel, *Complete Writings*, *supra* note 136 at 290. “[...] notre droit d’indien aux terres du pays”; “[...] le droit que votre sang sauvage vous donne aux terres du pays.”

²⁷⁹ *Ibid.* at 292.

²⁸⁰ See generally Flanagan, “Politics, Principles and Policy” *supra* note 77.

²⁸¹ Manitoba Métis Federation, *Riverlots and Scrip: Elements of Métis Aboriginal Rights* (Winnipeg: MMF, 1978) at 1.

²⁸² Émile Pelletier, *A Social History of the Manitoba Métis*, 2nd ed. (Winnipeg: Manitoba Métis Federation Press, 1977 [1974]) at 9.

²⁸³ *Van der Peet*, *supra* note 265 at para. 67. Emphasis added.

²⁸⁴ *Ibid.* at 184. See also at 192.

a result of the recent *Van der Peet* decision and the test formulated by Chief Justice Lamer in proving the existence of an Aboriginal right.”²⁸⁵

Similarly, Gibson queried as to whether the courts would “eventually decide that Métis aboriginal rights are an exception to the general rule, or alternatively that they are protected because of the ancestral linkage of all Métis to pre-contact aboriginal peoples.”²⁸⁶ Gibson had previously asserted that the latter “approach is more consistent with the meaning of the word ‘Aboriginal’: from the beginning”²⁸⁷ and that it “seems unlikely that any Canadian courts would recognize [...] an entirely distinct second order of Aboriginal rights held by new social entities that did not exist when the European-based order first asserted jurisdiction.”²⁸⁸ For this reason, the derivative rights doctrine “seems more likely to apply” than the distinct aboriginal people doctrine.²⁸⁹ In effect, prior to the Supreme Court of Canada’s decision in *Powley*, the *Van der Peet* criterion revealed the principal advantage of the derivative rights doctrine: “the trace theory was attractive because it provided a way for Métis claims to Aboriginal lands and rights to avoid the seemingly insurmountable obstacle posed by the doctrine of Aboriginal rights” since a “strict application of the Aboriginal rights test would have meant that no Métis group could ever claim an Aboriginal right.”²⁹⁰ In *MacPherson*, for example, Gregoire J. found that it was obvious “that some of their antecedents, that being the Indian ancestors, in fact, had occupied some of the territories in question from time immemorial.”²⁹¹ For Catherine Bell, however, the derivative rights doctrine would severely restrict the number of Métis that could claim rights and for most

²⁸⁵ L. Chartrand, “Are We Métis” *supra* note 87 at 275.

²⁸⁶ Dale Gibson, “When is a Métis an Indian?” *supra* note 87 at 264.

²⁸⁷ Gibson, “General Sources of Métis Rights” *supra* note 81 at 280.

²⁸⁸ *Ibid.* at 281.

²⁸⁹ *Ibid.*

²⁹⁰ L. Chartrand, “Métis Aboriginal Title” *supra* note 81 at 153 and 155.

²⁹¹ *R. v. McPherson*, [1992] 4 C.N.L.R. 144 at 153. (Man. P.C.)

would basically amount to the empty box doctrine.²⁹²

What Flanagan found problematic about applying this doctrine to any mixed-blood, regardless of lifestyle, is that it makes rights dependant on racial inheritance. In his view, “Aboriginal title is not a racial characteristic,” but rather “a legal formula for reconciling nomadic peoples to the demands of European civilization.”²⁹³ However, if Flanagan claimed the “way of life of most [Métis] was much closer to that of their paternal white ancestors than that of their maternal Indian forebears,”²⁹⁴ when Governor Morris drew a distinction between three groups of mixed-bloods on the basis of lifestyle in 1880, he mentioned “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.”²⁹⁵ Morris emphasized the point by citing his report of 1876 where he wrote of “the *wandering* Half-breeds of the plains, who are chiefly of French descent *and live the life of the Indians*.”²⁹⁶ In 1936, the *Report* of the Ewing Commission defined the terms “Metis” or “half-breed” for its own purposes as “a person of mixed blood, white and Indian, who lives the life of the ordinary Indian, and includes a non-treaty Indian.” Similar to Morris’ distinction, the *Report* excluded mixed-blood individuals who had settled down as farmers from the ambit of the term ‘half-breed’.²⁹⁷ Although critical, Catherine Bell nevertheless agreed with Flanagan that, historically speaking, notions of aboriginal rights are rooted in a binary colonial logic that forces

²⁹² Bell, “Métis Constitutional Rights” *supra* note 88 at 205 and 208.

²⁹³ Flanagan, “Case Against” *supra* note 82 at 322; Flanagan, “Métis Aboriginal Rights” *supra* note 82 at 239-40.

²⁹⁴ *Ibid.* at 321.

²⁹⁵ Morris, *Treaties of Canada*, *supra* note 276 at 294.

²⁹⁶ *Ibid.* at 295. Emphasis added.

²⁹⁷ Alberta. *Report of the Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta* (Edmonton: Department of Lands and Mines, 1936) at 4. Cited in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 9. As noted by the Court at para. 8:

In 1934, the Alberta legislature established the Ewing Commission, a “Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta”. The mandate of the Commission was to inquire into “the problems of health, education, relief and general welfare of the half-breed population” and to make recommendations based on its investigation.

the Métis to choose between a Euro-Canadian identity and an Amerindian identity.²⁹⁸ Sally Weaver uses the expression “hydraulic Indian” to describe an ideology that “depicts an Indian or native person as a cylinder which, at some undefined point in history, was full to the top with ‘Indianness,’ that is, traditional Indian culture. As time passed, and as Indians adopted non-native ways, the level of ‘Indianness’ dropped to the point where the cylinder now is nearly empty.”²⁹⁹ This allows one to reject any claims to aboriginal status on the part of “culturally non-traditional native peoples [who] are cast as having a spurious ethnicity.”³⁰⁰ This leads to what Bell has termed “judicial assimilation.”³⁰¹

The problem with the doctrine of derivative Amerindian rights is not so much that it is rooted in a particular way of life, but that it reduces the latter to a stereotype, then uses such a ‘traditional’ Amerindian way of life as a measuring stick for recognizing Métis Aboriginal rights. Bell noted that “contemporary jurisprudence on the rights of Métis people has focused on [...] the continued survival and significance of cultural traits emphasized in judicial constructions of ‘traditional Indian life’.”³⁰² Groves and Morse agree that “the lower courts tend to look at social tests of ‘Indianness’ in order to determine entitlement.”³⁰³ For his part, Larry Chartrand underscores the risks of subjectivity of such an approach: “Different people, depending on their perception of what ‘being Indian’ looks like, could reach different conclusions as to whether a Métis activity is ‘Indian enough’ to warrant protection as an Aboriginal right.”³⁰⁴ This was apparent in *MMF* when MacInnes J. remarked that “the Métis did not live [...] in bands nor did

²⁹⁸ Bell, “Métis Constitutional Rights,” *supra* note 88 at 182-3.

²⁹⁹ Sally Weaver, “Federal Difficulties with Aboriginal Rights” in Boldt and Long, *Quest for Justice*, *supra* note 85 at 146. [Weaver, “Federal Difficulties”]

³⁰⁰ *Ibid.*

³⁰¹ Bell, “Métis Constitutional Rights,” *supra* note 88 at 183.

³⁰² *Ibid.* at 180-1.

³⁰³ Groves and Morse, “Section 91(24)” *supra* note 36 at 213.

³⁰⁴ L. Chartrand, “Métis Aboriginal Title” *supra* note 81 at 160.

they have one leader or a council of leaders”³⁰⁵ and that the “Indians were considered to be in a state of pupillage. Not so the Métis. Indians were not enfranchised, were not able to own property individually and were not treated as citizens of the community. Not so the Métis.”³⁰⁶ As a consequence, this doctrine “requires the interests of the Métis people [...] to be merged with the interests of Indian people”³⁰⁷ rather than being “rights sourced in essential attributes of ‘peoplehood’ or ‘nationhood’.”³⁰⁸ For this reason, there are “serious and arguably insurmountable difficulties with the trace theory.”³⁰⁹ In this regard, Paul Chartrand and John Giokas fully assume the fact that the definition of the Métis as a distinct aboriginal people “means abandoning [...] the idea that Métis rights are derived from Indian rights.”³¹⁰

In *Powley*, the Crown of Ontario continued to plead the derivative rights doctrine in the alternative at all three court levels.³¹¹ The Supreme Court of Canada, however, rejected this position. In an evident reference to the ‘trace theory’, the Court asserted that the “inclusion of the Métis in s. 35 is not traceable³¹² to their pre-contact occupation of Canadian territory.”³¹³ The court explicitly rejected “the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors” for the very reason that this “theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1).”³¹⁴ Although the Supreme Court of Canada recently concluded in the *Cunningham* case that “the preamble, wording, legislative history, and social context of the *MSA* [*Métis Settlement Act*] combine to

³⁰⁵ *MMF*, *supra* note 20 at para. 609. (Man. Q.B.)

³⁰⁶ *Ibid.* at 614.

³⁰⁷ Giokas and Chartrand, “Who Are the Métis” *supra* note 9 at 109.

³⁰⁸ Bell “Métis Constitutional Rights” *supra* note 88 at 184-5.

³⁰⁹ L. Chartrand, “Métis Aboriginal Title” *supra* note 81 at 152.

³¹⁰ Chartrand and Giokas, “Defining ‘The Métis People’” *supra* note 78 at 295.

³¹¹ Horton and Mohr, “Dodging *Van der Peet*” *supra* note 271 at 779 and 801.

³¹² *Powley*, *supra* note 4 at para. 17.

³¹³ *Ibid.* at para. 17.

³¹⁴ *Ibid.* at para. 38.

support the conclusion that the *MSA* is not a general benefit program, but a unique scheme that seeks to establish a Métis land base to preserve and enhance Métis identity, culture and self-government, *as distinct from* Indian identity, culture and modes of governance,”³¹⁵ it nevertheless seems to have buried once and for all the ‘lifestyle’ criterion of the settled farmer/nomadic hunter dichotomy as the basis of a distinction between the Métis and First Nations.

2.1.2. The Empty Box Doctrine

For its part, the term ‘empty box’ was coined in reference to the content of s. 35, which depends on whether the Aboriginal rights were still ‘existing’ at the time that Imperial Parliament enacted the *Canada Act, 1982*. To the extent that “there was no recognition of aboriginal and treaty rights in Canadian law before 1982, then section 35 had ‘recognized and confirmed’ nothing. [...] The federal government had an ‘empty box’ theory. A box of rights had been protected by section 35, but unfortunately the box was empty.”³¹⁶ If the term is of recent vintage, the idea itself can be traced back to at least 1675 when a group of counsellors in New York expressed the opinion that, though “it hath been and still is the usual practice of all proprietors to give their Indians some recompense for their land, and so seem to purchase them, yet *that is not done for want of sufficient title* from the King or Prince who hath right of discovery, *but out of Christian prudence and charity* least otherwise the Indians might have destroyed the first planters.”³¹⁷ In other words, the empty box doctrine allows one to take into account the *formal* recognition of ‘Indian title’ all the while emptying such recognition of any corresponding substantive legal content.

For this reason, as Flanagan has correctly pointed out, this “is not strictly speaking a theory of

³¹⁵ *Cunningham, supra* note 297 at para. 69.

³¹⁶ Douglas Sanders, “The Supreme Court of Canada and the ‘Legal and Political Struggle’ Over Indigenous Rights” (1990) 3 *Can. Ethnic Studies* 122 at 125. [Sanders, “Legal and Political Struggle”]

³¹⁷ “Councells Opinion Concerning Coll. Nicholls Pattent and Indian Purchases” in B. Fernow, ed. *Documents relative to the colonial history of the state of New York*, Vol. XIII (Albany: Weed, Parsons & Co., 1881) at 487. Cited in *St. Catharine’s, supra* note 201 at 207. (Ont. Ch.)

aboriginal ‘rights’; for the indigenous population will have no rights enforceable against the sovereign, even though sovereign policy may concede to the aborigines certain rights enforceable against other subjects.”³¹⁸ One of the main propositions of this doctrine concerning title is that the “nomadic use of land for hunting, fishing and food gathering does not constitute ownership in any sense recognizable in European systems of law; thus they have no property rights to be respected.”³¹⁹ Another proposition, however, is that “expediency or humanitarianism may dictate the acquisition of land through negotiated ‘treaties’, which may generate subsidiary rights once they are in force; but these ‘treaties’ are ultimately a matter of policy.”³²⁰

In the case of the Métis, the application of the empty box doctrine can be traced back to the policies of both British and Canadian authorities toward mixed-bloods in the nineteenth century. With few exceptions,³²¹ the tendency was to refuse any recognition of their Aboriginal rights. For example, on 29 August 1845, the Half-Breeds and Métis submitted a series of fourteen hypothetical questions to Governor Christie where they basically claimed that, as ‘natives of the country’ and as the offspring of Amerindians, the HBC’s fur trade monopoly did not apply to them.³²² This was evident in the very wording of Caldwell’s commission for an inquiry into the Métis and Half-Breed demands. He was instructed to report on the “interference which is reported to be exercised in preventing half-breed inhabitants from dealing in furs with each other, *on the ground that the privileges of the native Indians of the country do not extend to them.*” In the short term, however, Governor Christie responded that the letter was “grounded on the

³¹⁸ Flanagan, “Indian Title to Aboriginal Rights” *supra* note 82 at 90.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ In August 1847, Benjamin Hawkes, the parliamentary under-secretary of Earl Grey, the Secretary of Colonial Office, agreed in a memo “that the mixed-bloods did have some Aboriginal rights.” See J.M. Bumsted, “The Colonial Office, Aboriginal Policy, and Red River, 1847-1849” in *Thomas Scott’s Body*, *supra* note 115 at 109. [Bumsted, “Colonial Office”]

³²² D. Bruce Sealey and Antoine S. Lussier, *The Métis: Canada’s Forgotten People* (Winnipeg: Manitoba Métis Federation Press, 1975) at 62-3.

supposition that the half-breeds possess certain privileges over their fellow citizens, who have not been born in the country” and that they had the same rights and privileges as other British subjects.³²³

In other words, for Governor Christie, the legal status of ‘Indian’ and ‘British subject’ were necessarily mutually exclusive. It is interesting that a contemporary resident of Red River, Alexander Ross, believed that the Half-Breeds and Métis should have had the right to trade with the Amerindians, as both were “natives of the soil.”³²⁴ When Alexander Isbister, a Half-Breed lawyer associated with the Aborigine’s Protection Society, presented a petition to the Secretary of State of Colonial Affairs, Earl Grey, the Governor of the HBC, John H. Pelly, replied that the “circumstances of their being born in the country may entitle them to call themselves natives, but it neither conveys to them any of the privileges belonging or supposed to belong to the aboriginal inhabitants, nor does it divest them of the character of British subjects, all of whom are precluded by the Company’s charter from trafficking in furs within its limits without a licence from the Company.”³²⁵ In other words, colonial strategy basically involved a dubious application of the principle of the excluded middle.

This binary colonial strategy is equally evident during the debates over s. 31 of the *Manitoba Act*. The leader of the opposition, Alexander MacKenzie, clamoured that “these half-breeds were either Indians or not” before adding that the Métis “were not looked upon as Indians [...] and did not consider themselves Indians.”³²⁶ In the same vein, McDougall asserted that as “soon as the Indian mingles with the white he ceases to be an Indian and the half-breeds were just as

³²³ A. S. Morton, *History of the Canadian West*, *supra* note 128 at 808.

³²⁴ Alexander Ross *The Red River Settlement. Its Rise, Progress and Present State* (Minneapolis: Ross and Haines, Inc., 1957 [1857]) at 370. [Ross, *Red River Settlement*]

³²⁵ Bumsted, “Colonial Office” *supra* note 321 at 100.

³²⁶ *House of Commons Debates*, (2 mai 1870) at 1306 (William MacKenzie).

intelligent and well able to look after their own affairs as any white man.”³²⁷ Three years later, during the negotiation of Treaty 3 with the Anishinaabeg of the northwest corner of Lake of the Woods, *Ogimaa* (‘leader’) Mawedopenais wished that “those children that we call the Half-breed – those that are born of our women of Indian blood [...] that are living among us [and] are married to our women [...] should be counted with us.”³²⁸ While this was perfectly in keeping with the definition of ‘Indian’ in the *Act for the Better Protection of the Lands and Property of the Indians*,³²⁹ Alexander Morris replied: “I was sent here to treat with the Indians. In Red River, where I come 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.” One sees how this binary logic produced what Bell calls “legal assimilation,” in that it forced the Métis to abandon their specific identity and to choose between being either ‘White’ or ‘Indian’.

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On this subject, it can be said that the empty box doctrine and the derivative aboriginal rights doctrine are two sides of the same coin. It is situated on the other extremity of the ‘hydraulic Indian’ to the extent that it denies that the Métis have any aboriginal rights at all, under the pretext that they are not ‘Indian enough’. For example, Flanagan asserts that the ‘way of life’ of the Métis does not respect the historical origins of aboriginal rights, which are to be found in the distinction that the Imperial power made between the ‘civilized’ and the nomadic way of life of First Nations.³³¹ According to Flanagan, the Métis “were not nomads” and the “way of life of

³²⁷ *Ibid.* at 1447 (William McDougall). This was a somewhat hypocritical claim. In terms of lifestyle, McDougall immediately added that “agriculture was not the natural pursuit of those men. They were hunters and trappers.” Archibald had earlier rebuked McDougall for having described Manitoba “as a country of semi-savages.” *Ibid.* at 1427. McDougall specified later that the federal government erred “in proposing a measure calculated for people accustomed to Government” and that the population was “just emerging from a condition of serfdom.” *Ibid.* at 1452.

³²⁸ Morris, *Treaties of Canada*, *supra* note 276 at 69.

³²⁹ *Act for the Better Protection of the Lands and Property of the Indians* (1850) 13 & 14 Vict., c. 42, s. 5.

³³⁰ Bell, “Métis Constitutional Rights” *supra* note 88 at 183.

³³¹ Flanagan, “Métis Aboriginal Rights” *supra* note 82 at 238.

most was much closer to that of their paternal white ancestor than to that of their maternal Indian forebears.”³³² In other words, on the hydraulic Indian scale, Flanagan essentially situates the Métis at a “level of ‘Indianness’ [that has] dropped to the point where the cylinder now is nearly empty.”³³³ For this reason, any claims to be an Aboriginal people on the part of “culturally non-traditional native peoples are cast as having a spurious ethnicity.”³³⁴

On this basis, Flanagan bemoans the fact that “the language of the [*Manitoba*] *Act* established the *Métis* as an aboriginal people,”³³⁵ claiming that the “biggest error of all in drafting the act was to state that the grant was ‘towards the extinguishment of the Indian title to the lands in the Province’.”³³⁶ For much the same reason, he treats the inclusion of the Métis in s. 35 of the *Constitution Act, 1982*, as a “historical mistake.”³³⁷ For Flanagan, “the best strategy to minimize the damage caused by the thoughtless elevation of the Métis to the status of a distinct ‘aboriginal’ people is to emphasize the word ‘existing’ in section 35.”³³⁸ In other words, Flanagan suggests using the interpretative canon of ‘reading down’ in order to empty s. 35 of any legal substance insofar as the Métis are concerned. Even if the explicit mention of ‘Indian title’ in s. 31 forces judges to recognize the ‘Indian’ title of the Métis, the word ‘existing’, which means ‘unextinguished’,³³⁹ allows them to maintain that any such rights were extinguished well before the adoption of the ‘box’ of s. 35 and that the latter is therefore empty.³⁴⁰

As Chris Anderson has pointed out, the decisions of the courts of law continue to perpetuate

³³² Flanagan, “Case Against” *supra* note 82 at 321.

³³³ Weaver, “Federal Difficulties” *supra* note 299 at 146.

³³⁴ *Ibid.*

³³⁵ Flanagan, *Riel and the Rebellion*, *supra* note 82 at 61.

³³⁶ *Ibid.*

³³⁷ Flanagan, “Case Against” *supra* note 82 at 314.

³³⁸ *Ibid.*

³³⁹ *Sparrow*, *supra* note 2 at 1092.

³⁴⁰ To be fair, Flanagan was writing at a time when *R. v. Adams* [1996] 3 S.C.R. 101 and *R. v. Côté*, [1996] 3 S.C.R. 139 had not yet drawn a distinction between Aboriginal title and Aboriginal rights. Flanagan was working from the premise that the extinguishment of the Aboriginal title of the Métis under s. 31 automatically entailed the extinguishment of their Aboriginal rights.

this colonial binary opposition.³⁴¹ As expert witness in *Blais*, Flanagan invited Swail J. to apply the empty box doctrine by essentially reading down the reference to Indian title in s. 31.³⁴² In *Sawridge*,³⁴³ Judge Muldoon, after citing ss. 35(2), could not resist adding a personal commentary in parentheses, writing that this “sounds curious since the Métis can hardly be thought of as ‘Aboriginal’, having been a people only since the advent of the European people and then called ‘half-breeds’ because of their mixed ancestry. The constitution makers *indulged in history’s revision here.*”³⁴⁴ At an earlier stage of the *MMF* saga, when the Crown attempted to have the Manitoba Métis Federation’s claims thrown out of court on the basis that that the MMF did not have standing, Judge Twaddle of the Manitoba Court of Appeal hinted at the empty box doctrine when he mentioned that s. 35(1) “recognised the existing aboriginal rights of the Métis” and quickly added “whatever they are.”³⁴⁵ The Attorney General of Canada and that of certain provinces, notably Ontario, put forward this argument in the *Powley* case.³⁴⁶

Even the Supreme Court of Canada appeared to support the application of this doctrine to the Aboriginal title of the Métis in *Blais* in 2003. The central question in *Blais* was not the Indigenous title of the Métis, but rather that of whether the Métis were included in the expression ‘Indians’ for the purposes of s. 13 of the *Natural Resources Transfer Agreement*, which was ratified by the Canadian Parliament under the *Natural Resources of Manitoba Act*³⁴⁷ and confirmed by the Imperial Parliament under the terms of the *Constitution Act, 1930*.³⁴⁸ It is not so much the Court’s reply in the negative that concerns us here, but rather its reference to s. 31 of

³⁴¹ See Chris Anderson, “The Formalization of Métis Identities in Canadian Provincial Courts,” in Ron Laliberté et al. (ed.), *Expressions in Canadian Native Studies* (Saskatoon: University of Saskatchewan Press, 2000) at 95.

³⁴² *Blais*, *supra* note 268 at para. 6 (Man. Prov. Ct.), Swail J.

³⁴³ *Sawridge Band v. Canada*, [1996] 1 F.C. 3. [*Sawridge*]

³⁴⁴ *Ibid.* at 32. Emphasis added.

³⁴⁵ *Dumont*, *supra* note 23 at 45. (Man. C.A.)

³⁴⁶ Horton and Mohr, “Dodging *Van der Peet*” *supra* note 271 at 778-79.

³⁴⁷ *Manitoba Natural Resources Act*, (1930) 20-21 Geo. V, c. 29 (Can.)

³⁴⁸ *Natural Resources Transfer Agreement*, a schedule to the *Constitution Act, 1930*, 20-21 George V, c.26 (U.K.), R.S.C. 1985, Appendix II, No. 26 [s. 13 of the *Agreement*]

the *Manitoba Act, 1870*, as part of the ‘historical context’ in which s. 13 of the *Agreement* was adopted. The Court decided that, in order to ascertain “which group or groups the parties to the NRTA intended to designate by the term ‘Indians’,” it had to “look at the prevailing understandings of Crown obligations and the administrative regimes that applied to the different Aboriginal groups in Manitoba.”³⁴⁹ It was within the context of a *factual* historical analysis that the Court raised the question of the use of the term ‘Indian’ to designate the title of the Métis under s. 31 of the *Manitoba Act* and was in no way meant to be read as a *legal* analysis of s. 31. In order to distinguish the use of the expression ‘Indian’ in s. 31 from that of ‘Indian’ in para. 13 of the *Transfer Agreement*, the Court recognized that “[w]hile s. 31 states that this land is being set aside ‘towards the extinguishment of the Indian Title to the lands in the Province’, this was expressly recognized *at the time* as being an inaccurate description.”³⁵⁰ The Court seemed as though it was doing precisely what Flanagan had suggested in terms of s. 35 – it ‘read down’ s. 31 so as to render the reference to the ‘Indian title’ of the Métis virtually meaningless.

This is how MacInnes J. interpreted the Court’s reference to s. 31 in *Blais*. After having cited the relevant paragraphs in *Blais*,³⁵¹ he claimed further on that the “the Supreme Court [of Canada] in *Blais* decided that the Métis were not Indians under section 31 of the [*Manitoba Act*].”³⁵² That MacInnes took this to mean that the status of the Métis, not simply *as Indians*, but also *as an Aboriginal people* was ‘an inaccurate description’ is evident in his only reference in the entire *MMF* decision to s. 35. In the context of his analysis of the MMF’s claim that the Crown owed fiduciary duties to the Métis, MacInnes J. acknowledged that s. 35 recognises and affirms that the Métis are an aboriginal people. However, he immediately qualified this with a

³⁴⁹ *Blais*, *supra* note 102 at para. 19.

³⁵⁰ *Ibid.* au para. 22. Emphasis added. I will show how a positive spin can but put on this in section 3.3.1.

³⁵¹ *Ibid.* at para. 599.

³⁵² *Ibid.* at para. 616.

‘but’ and cited Lamer C.J. to the effect that “s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were ‘existing’ in 1982.”³⁵³ After remarking that all cases where fiduciary obligations were found to exist “have been cases *involving Indians* where either aboriginal title was found to exist or its existence was not in dispute,”³⁵⁴ MacInnes J. then implicitly referred to his interpretation of the Supreme Court’s finding in *Blais*, stating that the case at bar “involves Métis, *not Indians*, who as I have found did not at the material time [...] enjoy aboriginal title to the land in question.”³⁵⁵ The juxtaposition of his only reference to s. 35 and his insistence that *Blais* established that the Métis are not ‘Indians’, along with his conclusion that the Métis never held aboriginal title in the first place make it clear that, in his view, there was nothing for s. 35 to recognise and affirm.

On appeal, Scott C.J. explicitly rejected the empty box doctrine, at least insofar as s. 35 is concerned. He took the trouble to refer to the position “that Métis people should not be considered to be Aboriginal” before commenting that Flanagan’s “arguments to this effect do not reflect how the law has developed in Canada.”³⁵⁶ He made it clear that the “Métis are one of the ‘aboriginal peoples of Canada’ as defined in s. 35(2) of the *Constitution Act, 1982*”³⁵⁷ and that the Manitoba Court of Appeal “implicitly recognized the Métis as Aboriginal peoples in *Blais*.” However, when Scott C.J. commented that, if “the trial judge found that the Métis were not Indians, the more relevant question is whether or not they are Aboriginal,” he immediately added that “*nothing in his judgment questions their status as an Aboriginal people.*”³⁵⁸ In a sense, it is true, as Scott C.J. asserted that “neither s. 35(1) nor s. 35(2), which enshrines the rights held by

³⁵³ *Ibid.* at para. 618, citing *Delgamuukw*, *supra* note 33 at para. 114.

³⁵⁴ *MMF*, *supra* note 20 at para. 620. (Man. Q.B.) Emphasis added.

³⁵⁵ *Ibid.* at para. 622. Emphasis added.

³⁵⁶ *MMF*, *supra* note 47 at para. 383. (Man. C.A.)

³⁵⁷ *Ibid.* at para. 378.

³⁵⁸ *Ibid.* at para. 382. Emphasis added.

the Métis as one of Canada's Aboriginal peoples, applies in this case.”³⁵⁹ Yet, even Flanagan, who described the recognition of the Indian title of the Métis as the “biggest error of all” in s. 31 of the *Manitoba Act*, nevertheless believed that it legally “established the Métis as an aboriginal people.”³⁶⁰ The problem is that s. 31, not less than s. 35, enshrines the ‘Indian’ title of the Métis. MacInnes J.’s finding that the reference to the ‘Indian’ title of the Métis in s. 31 was a mere ‘political expedient’ and did not in effect ‘recognize and affirm the existing Aboriginal rights’ of the Métis implies that s. 31 is an ‘empty box’. In other words, his decision *does* indeed ‘question their status as an Aboriginal people’.

From a legal point of view, the problem with this doctrine is that it implies that the ‘recognition and affirmation’ of Aboriginal rights in s. 35 is “at worst a con job.”³⁶¹ Similarly, in his dissenting decision in *Dumont*, O’Sullivan J.A. remarked that “there is a school of thought that says the framers of the Constitution were of the view that the Métis people as such had no rights and that a cruel deception was practised on them and on the Queen whose duty it is to respect the treaties and understandings that she has entered into with her Métis people.”³⁶² As the Court stipulated in *Badger*, “the honour of the Crown is *always* at stake in its dealing 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.*”³⁶³ Surely, reading down s. 31 on the pretence that it was the result of political expediency so as to empty it of any legal substance is hardly in keeping with this lofty principle.

³⁵⁹ *Ibid.* at para. 379.

³⁶⁰ Flanagan, *Riel and the Rebellion*, *supra* note 82 at 61.

³⁶¹ Sanders, “Legal and Political Struggle” *supra* note 316 at 125.

³⁶² *Dumont*, *supra* note 22 at 48 (Man. C.A.).

³⁶³ *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41. Emphasis added.

2.1.3. The Distinct Aboriginal People Doctrine

On the very day that the Court seemed to be condoning the empty box doctrine in *Blais*, it explicitly rejected it in *Powley*. According to Dale Gibson, the distinct aboriginal people doctrine stems from the idea that the Aboriginal rights of the Métis Aboriginal “sprang into existence when the Métis themselves were born as a distinct people.”³⁶⁴ In effect, the Supreme Court of Canada asserted in *Powley* that the word ‘Métis’ in ss. 35(2) “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 and European forebears.”³⁶⁵ The court mentioned that the “inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as *distinctive communities*. The purpose and the promise of s. 35 is to protect practices that were historically important features of these *distinctive communities* and that persist in the present day as integral elements of their Métis culture.”³⁶⁶ A little further along, the Court repeated that the “inclusion of the Métis in s. 35 represents Canada’s commitment to recognize and value the *distinctive* Métis cultures.”³⁶⁷

The distinct Aboriginal people doctrine is not, however, without its aporias. As we have seen, Flanagan has questioned ‘the rightness of regarding the Métis as aboriginal’. Although MacInnes J. does not cite Flanagan explicitly in his analysis of s. 31, the underlying logic of his decision was undoubtedly influenced by the arguments of Flanagan against Métis Aboriginal rights.³⁶⁸ Following the inclusion of the Métis in s. 35 of the *Constitution Act, 1982*, Flanagan proposed

³⁶⁴ Gibson, “General Sources of Métis Rights” *supra* note 81 at 280.

³⁶⁵ *Powley*, *supra* note 4 at para. 10. Emphasis added.

³⁶⁶ *Ibid.* at para. 13. Emphasis added.

³⁶⁷ *Ibid.* at para. 17. Emphasis added.

³⁶⁸ As previously mentioned, Flanagan was the Federal Department of Justice’s primary expert witness in the *MMF* case. For a further demonstration of the similarity between MacInnes’ and Flanagan’s arguments, see O’Toole, “Métis Claims to ‘Indian’ Title” *supra* note 106; “Revisiting Métis Land Claims” *supra* note 106.

that it was “timely to take another look at the origin of the Métis claim to be an aboriginal people.”³⁶⁹ Flanagan has maintained, *inter alia*, that the land grant for the children of the Métis “emerged as a hastily contrived compromise”³⁷⁰ and was a “hasty and ill-considered decision.”³⁷¹ For this reason, he considers it “unfortunate” that the government of Canada “accepted the Métis as an aboriginal people in the Manitoba Act.”³⁷² In his view, the difficulties with “categorizing the Métis as an aboriginal people,” are “partly historical and logical questions about the rightness of regarding the Métis as aboriginal, and partly practical problems arising from any attempt to give legal substance to this concept.”³⁷³

In terms of the latter, while Flanagan acknowledged that he does “not have the competence to answer the constitutional question,”³⁷⁴ he nevertheless tried his hand at legal interpretation. In order to determine whether the Métis could have conceivably had ‘Indian’ title in 1870, Flanagan applied the four *Baker Lake* criteria to their claims.³⁷⁵ In *Baker Lake*,³⁷⁶ Judge Maloney established four criteria for establishing an Indian title cognisable at law, including: 1) “that they (the plaintiffs) 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; and 4) that the occupation was an established fact at the time sovereignty was asserted by England.”³⁷⁷

In terms of the last criterion, Maloney J. spoke of the “date of assertion of English

³⁶⁹ Flanagan, “Case Against” *supra* note 82 at 315.

³⁷⁰ Flanagan, *1885 Reconsidered*, *supra* note 82 at 65.

³⁷¹ Flanagan, “Riel and Aboriginal Rights” *supra* note 82 at 251.

³⁷² *Ibid.*

³⁷³ Flanagan, “Métis Aboriginal Rights” *supra* note 82 at 230.

³⁷⁴ Flanagan, *Métis Lands*, *supra* note 19 at 52.

³⁷⁵ Flanagan, “Case Against” *supra* note 82 at 320.

³⁷⁶ *Baker Lake v. Minister of Indian and Northern Department*, [1980] 1 F.C. 518. [*Baker Lake*].

³⁷⁷ *Ibid.* at 557-8.

sovereignty” as being “certainly no later than May 2, 1670.”³⁷⁸ The *Baker Lake* case seemed to be relevant to the Red River Métis since it applied to Rupert’s Land,³⁷⁹ and Flanagan understandably followed it when he assumed that the date of the assertion of sovereignty in Rupert’s Land “to be as late as 1670, when the Hudson’s Bay Company Charter was emitted.”³⁸⁰ Of course, Flanagan could not have known at that time that the Supreme Court of Canada would use the criterion of ‘effective control’ for the Métis in *Powley* instead of that of ‘assertion of sovereignty’ as was the case in *Baker Lake*.³⁸¹ In light of this, it is somewhat remarkable that in *MMF*, MacInnes J. should have set the date of ‘effective control’ at the very same date that Maloney J. gave for that of the ‘assertion of sovereignty – 2 May 1670, when “Britain made its extensive land grant” to the Hudson’s Bay Company.³⁸² In any case, Flanagan asserted that Métis claims to Indian title fails on all four counts: the Métis did not constitute an organized society, they neither occupied a specific territory nor occupied territory exclusively and could in no way establish occupation prior to 1670.³⁸³

The Achilles heel of this doctrine is arguably the cut-off date for the recognition of Aboriginal title at law. The problem is that the criterion of effective control seems to fly in the face of the very meaning of the word ‘aboriginal’. Flanagan cited Cumming and Mickenberg to the effect that “Aboriginal rights are those rights which native people retain as a result of their *original* possession of the soil. We have defined aboriginal rights as those property rights which inure to

³⁷⁸ *Ibid.* at 562.

³⁷⁹ It is not clear whether the Red River Settlement was within Rupert’s Land or the ‘Indian Territory’. See Kent McNeil, *Native Rights and the Boundaries of Rupert’s Land and the North-Western Territory* (Saskatoon: Native Law Centre, 1982).

³⁸⁰ *Ibid.*

³⁸¹ The ‘assertion of sovereignty’ cut-off date for the recognition of Aboriginal title was of course subsequently adopted by the Supreme Court of Canada in *Delgamuukw*, *supra* note 33 at paras. 114, 144-151.

³⁸² *MMF*, *supra* note 20 at para. 580. (Man. Q.B.)

³⁸³ Flanagan, “Case Against,” *supra* note 82 at 320-22.

native peoples by virtue of their occupation upon certain lands *from time immemorial*.”³⁸⁴ If “aboriginal rights arise from habitation from ‘time immemorial’,” Flanagan asked, “are the Métis an aboriginal people, since by definition they did not emerge until the coming of the white man?”³⁸⁵ Flanagan’s reply was that the distinct aboriginal people doctrine was “not based on cogent reasoning” since the presence of the Métis “was so obviously a result of white intrusion that it challenges credibility to call it original possession.”³⁸⁶ Likewise, Bryan Schwartz found that the “characterization of the Métis as [an] aboriginal people is etymologically dubious” since “they are not aboriginal in the same sense as the Indian and Inuit; they were not *here from the beginning*, but instead developed when a large number of Europeans came to Western Canada in connection with the fur trade.”³⁸⁷ Historian James Miller largely agreed with this analysis when he asserted:

It is clearly a logical impossibility that the Métis argument can be one based solely on aboriginal rights if aboriginal is equated, as is usually the case, with existence and occupancy ‘since time immemorial’. [...] So far as strict logic is concerned, the Métis cannot be an aboriginal people holding aboriginal title for the simple reason that they have not existed ‘since time immemorial’.³⁸⁸

Nor is this critique limited to scholarly commentary. For example, early on in the *MMF* saga, Twaddle J. referred to the derivative Aboriginal rights doctrine when he remarked that it was “only on one side of their families can they show descent from persons who inhabited the land from time immemorial.”³⁸⁹ In *Sawridge*, Judge Muldoon, after citing ss. 35(2), could not resist adding a personal commentary in parentheses, writing that this “sounds curious since the Métis can hardly be thought of as ‘Aboriginal’, having been a people only since the advent of the

³⁸⁴ Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing, 1972) at 3 note 3. [Cumming and Mickenberg, *Native Rights*]. Cited in Flanagan, “Case Against” *supra* note 82 at 319. Emphasis added.

³⁸⁵ Flanagan, “Métis Aboriginal Rights” *supra* note 82 at 251.

³⁸⁶ Flanagan, “Case Against” *supra* note 82 at 320; Flanagan, “Métis Aboriginal Rights” *supra* note 82 at 236.

³⁸⁷ Bryan Schwartz, *First Principles*, *supra* note 87 at 247.

³⁸⁸ James Miller, “Aboriginal Rights, Land Claims, and the Struggle to Survive” in James Miller, ed., *Sweet Promises. A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1992) at 414.

³⁸⁹ *Dumont*, *supra* note 22 at 46. (Man. C.A.)

European people and then called ‘half-breeds’ because of their mixed ancestry. The constitution makers *indulged in history’s revision here*.³⁹⁰ In *Willison*, Crown counsel relied on *Van der Peet* to argue that occupation had to be ‘for centuries’,³⁹¹ although he conceded that the *Van der Peet* test had been modified in this regard by *Powley*.³⁹²

This led to various attempts to justify a particular cut-off date specifically for the Métis. For example, prior to the Court’s decision in *Powley*, Paul Chartrand and John Giokas proposed following Brian Slattery’s suggestion to use the ‘transition date’ as the cut-off period – which basically amounts to the criterion of ‘effective control’.³⁹³ They call it “the ‘original date’ to emphasize the function of the word in defining the Métis as an Aboriginal people. The original date is set at the time that the Crown undertook to protect the interests of an Aboriginal people upon its assumption of constitutional authority. The Métis people is an ‘ab-original’ people because it descended from a people that existed at the ‘original date’.”³⁹⁴ Dale Gibson thought this doctrine “would not do violence to the dictionary meaning of Aboriginal either, since the word could be read to mean ‘from the beginning of significant European settlement’.”³⁹⁵ Prior to the Court’s decision in *Delgamuukw*, Larry Chartrand had also argued that the ‘pre-contact’ cut-off date in *Van der Peet* could be interpreted as “a point in history where the Métis Nation, as a nation, met the Europeans for the first time in such a nation to nation capacity.”³⁹⁶ The problem is that, if Paul Chartrand and John Giokas assert “there is no reason to twist the logic of Indian cases to suit a ‘later arrival’,”³⁹⁷ playing with the meaning of ‘origin’ to bring it in line with such a relatively late cut-off date and thereby tailor it to the specific needs of the Métis people gives

³⁹⁰ *Sawridge*, *supra* note 343 at 32. Emphasis added.

³⁹¹ *Willison*, *supra* note 7 at para. 20. 2006 BCSC 985 (CanLII)

³⁹² *Ibid.* at para. 21.

³⁹³ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can. Bar Rev. 196, esp. 215-20.

³⁹⁴ Chartrand and Giokas, “Defining ‘The Métis People’” *supra* note 78 at 286.

³⁹⁵ Gibson, “General Sources of Métis Rights” *supra* note 81 at 281.

³⁹⁶ L. Chartrand, “Are We Métis” *supra* note 87 at 280.

³⁹⁷ Chartrand and Giokas, “Defining ‘The Métis People’” *supra* note 78 at 287.

the impression that this is precisely what is being done. While it is important to emphasize that the Métis are a *people*, insofar as ‘aboriginal’ means ‘original occupation from time immemorial’, all these attempts to bypass this temporal criterion amount in the end to an admission that the Métis are not in fact an *aboriginal* people.

Despite the fact that “Métis cultures by definition post-date European contact,”³⁹⁸ the Court applied a “post-contact but pre-control test.”³⁹⁹ By doing so, the Court explicitly modified the criteria for the cut-off date established in *Van der Peet* in order to accommodate the fact that the Métis came into being as a people after the initial contact with Europeans. In effect, the Court confirmed “the basic elements of the *Van der Peet* test” but modified “certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims.”⁴⁰⁰ Again, in doing so, the only justification it provided was the “constitutional imperative that we recognize and affirm the aboriginal rights of the Métis.”⁴⁰¹ It thus asserted that such a “modification *is required* to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights”⁴⁰² and that s. 35 “*requires* that we recognize and protect those customs and traditions that were historically important features of Métis communities.”⁴⁰³

In *Powley*, the Court specified that the “overarching interpretive principle for our legal analysis is a *purposive reading* of s. 35.”⁴⁰⁴ From the point of view of such a purposive reading, “the inclusion of the Métis in s. 35 represents Canada’s *commitment to recognize and value* the distinctive Métis cultures [...] which the framers of the *Constitution Act, 1982* recognized can

³⁹⁸ *Powley*, *supra* note 4 at para. 16.

³⁹⁹ *Ibid.* at para. 37.

⁴⁰⁰ *Ibid.* at para. 14.

⁴⁰¹ *Ibid.* at para. 38.

⁴⁰² *Ibid.* at para 18. Emphasis added.

⁴⁰³ *Ibid.* Emphasis added.

⁴⁰⁴ *Ibid.* at para. 13. Emphasis added.

only survive if the Métis are protected along with other aboriginal communities.”⁴⁰⁵ The Court again emphasized that the “inclusion of the Métis in s. 35 is *based on a commitment* to recognizing the Métis and *enhancing their survival* as distinctive communities.”⁴⁰⁶ According to the Court, the “purpose and *the promise* of s. 35 is *to protect* practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.”⁴⁰⁷ One is left wondering why such a noble commitment that requires the courts to recognize and value distinctive Métis culture in order to enhance their survival as distinctive communities is any less true of s. 31 of the *Manitoba Act, 1870*, than it is of s. 35 of the *Constitution Act, 1982* – especially since it was also enshrined in the Constitution of Canada by the *Constitution Act, 1871*.

2.2. The ‘Constitutional Imperative’

In applying the ‘constitutional imperative’ justification, the Court was simply following its own *ratio decidendi* in *Sparrow*, where it implicitly applied the legal maxim *verba ita sunt intelligenda, ut res magis valeat quam pereat*⁴⁰⁸ when it asserted that ss. 35(1) is “a solemn commitment that must be given meaningful content”⁴⁰⁹ the objective of which is to ensure that Aboriginal rights “are taken seriously.”⁴¹⁰ However, as Horton and Mohr have pointed out, the ‘constitutional imperative’ justification raises more questions than it answers.⁴¹¹ On the one hand, the ‘constitutional imperative’ is based on the fact that we live in a democratic regime of parliamentary supremacy, where “important public policy choices should be made in the elected

⁴⁰⁵ *Ibid.* at para. 17. Emphasis added.

⁴⁰⁶ *Ibid.* at para. 13. Emphasis added.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ “Words are to be understood that the matter may have effect rather than fail.”

⁴⁰⁹ *Sparrow*, *supra* note 2 at 1108.

⁴¹⁰ *Ibid.* at 1119.

⁴¹¹ See Horton and Mohr, “Dodging *Van der Peet*” *supra* note 271 at 790.

legislative assemblies, and not by non-elected judges.”⁴¹² This implies that “where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be.”⁴¹³ As we have seen, this is the underlying rule of interpretation in both Paul Chartrand’s and Judge Swail’s reading of s. 31.

While of perfect legal validity, the ‘constitutional imperative’ argument alone is unsatisfactory in terms of a rational justification of Métis title. If a rule of law is to be at all convincing in a liberal democracy, it cannot merely depend on the tyranny of the majority. It must also provide some compelling reason to adhere to it rather than resort to blind appeals to the authority of the people’s representatives, which basically relies on circular arguments.⁴¹⁴ A lack of coherence runs the risk of having an effect on the willingness of judges to give full legal effect in terms of substance and scope to such rights: *debile fundamentum fallit opus*.⁴¹⁵ In this regard, Chartrand acknowledged that earlier on in the *MMF* case, Twaddle J. in effect disagreed with his position.⁴¹⁶ It is arguably, however, an overriding and palpable error to simply dismiss the Aboriginal rights out of hand, as Twaddle J. and MacInnes J. seemed only too willing to do. The constitutional imperative is an imperative precisely because it impels the courts to act in good faith by at least trying to provide compelling reasons for the inclusion of the Métis and their rights in s. 35 of the *Constitution Act, 1982*. In an effort to make some small contribution to a better understanding of the underlying logic of Métis title, I have tried to develop what I call the ‘Autochthonous’ people doctrine.

⁴¹² Hogg, *Constitutional Law*, *supra* note 15 at 288.

⁴¹³ *R. v. McIntosh* [1995], 1 S.C.R. 686, at 704, Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. [*McIntosh*]

⁴¹⁴ The circular reasoning (*circulus in probando*) goes like this: Why consider the Métis to be an Aboriginal people? – Because they are included in s. 35. Why are the Métis included in s. 35? – Because they are an Aboriginal people.

⁴¹⁵ “A weak foundation frustrates the work (built on it).”

⁴¹⁶ Chartrand, *Settlement Scheme* *supra* note 15 at 79 note 303. Citing *Dumont*, *supra* note 22 at 46. (Man. C.A.)

2.2.1. The ‘Autochthonous’ People Doctrine

Of course, the aporias of the Aboriginal rights doctrine put the Métis of Manitoba in no worse a position than their Anishinabek and Dakota cousins in Manitoba or the Haudenauonee in Ontario. As Flanagan observed, in “many cases, the patterns of habitation upon which the land-surrender agreements of the nineteenth century were based were only a few decades old.”⁴¹⁷ Flanagan cited in this regard the case of the Anishinabek who had only migrated from the Great Lakes region and settled in the lower Red River in the 1790s.⁴¹⁸ Consequently, for Flanagan, “aboriginal peoples cannot justifiably claim ‘property rights which inure to native peoples by virtue of their occupation upon certain lands from time immemorial’.”⁴¹⁹ As mentioned, the criterion in *Delgamuukw* was occupation prior to the assertion of sovereignty, not ‘time immemorial’. However, in *Baker Lake* Judge Maloney explicitly associated the notion of time immemorial with that of the assertion of sovereignty when he took it that “in this context, ‘time immemorial’ runs back from the date of assertion of English sovereignty over the territory.”⁴²⁰ In other words, it is the assertion of sovereignty that puts an end to time. immemorial and is the point at which ‘time memorial’ – or legal memory – begins.

While the English version of s. 35 of the *Constitution Act, 1982*, uses the term ‘Aboriginal people’ and ‘Aboriginal rights’, the French version does not use the etymological equivalent of *aborigène*, but rather that of *peuple autochtone* and *droits ancestraux*. The etymology of the term *ancêtre* comes from the Latin *antecessor*, which itself comes from the verb *antecedo*, simply meaning ‘come before’, both in a spatial sense (guide or scout) and a temporal one (predecessor). The specificity of the term ancestral caught Lamer C.J.’s eye in *Van der Peet*,

⁴¹⁷ Flanagan, *First Nations, Second Thoughts*, *supra* note 82.

⁴¹⁸ *Ibid.* at 18. This was already a subject of debate at the time the Selkirk Treaty was signed with the Saulteaux.

⁴¹⁹ *Ibid.* at 19. Quotation from Cumming and Mickenberg, *Native Rights*, *supra* note 384 at 13.

⁴²⁰ *Baker Lake*, *supra* note 376 at 562. Emphasis added.

where he took it into consideration. He referred to the dictionary definition in *Le Petit Robert*, which gave the following definition: “[q]ui a appartenu aux ancêtres, qu’on tient des ancêtres.”⁴²¹ The Chief Justice came to the conclusion this expression “suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence – the ancestry – of aboriginal peoples in North America.”⁴²² It would seem that the term *ancêtre* would refer to a ‘historical presence’ that can be measured in centuries. However, *Le Petit Robert* provides four definitions of the word *ancêtre*:

ANCÊTRE ♦ 1° Personne qui est à l’origine d’une famille, dont on descend. *Les ancêtres*, les ascendants au delà du grand-père. ♦ 2° Initiateur lointain, devancier. ♦ 3° (*Au plur.*) Ceux qui ont vécu avant nous, les hommes des siècles passés. ♦ 4° *Fam.* Vieillard.⁴²³

At first sight, the criterion of a ‘historical presence’ in North America that Lamer C.J. set in *Van der Peet* would seem to refer to the third definition. However, this does not necessarily suggest a direct lineage, such as when a Frenchman refers to his Gaul ancestors when he may in fact not have any Gaul ancestors in his family genealogy. In *Powley*, the Court held that in order to enjoy Aboriginal rights, a Métis “claimant must present evidence of an ancestral connection to a historic Métis community.”⁴²⁴ The only definition that implies direct descendants is the first, which refers to ascendants beyond the generation of grandparents. This definition also conforms to the legal definition of ‘ancestor’ in common law real property, which is simply a synonym for ‘ascendant’ and means: “One who precedes in lineage, such as a parent or grandparent.”⁴²⁵

Similarly, the French version of s. 31 uses the term *autochtone* rather than *aborigène*. The French term *aborigène* refers to a “[p]ersonne originaire du pays où elle vit (*seulement en parlant*

⁴²¹ *Van der Peet*, *supra* note 265 at para. 32.

⁴²² *Ibid.*

⁴²³ *Le Petit Robert*, 1991, s.v. “ancêtre”.

⁴²⁴ *Powley*, *supra* note 4 at 32. Emphasis in original.

⁴²⁵ *Black’s Law Dictionary*, 7th ed., s.v. “ancestor” and “ascendant”.

de populations dites 'primitives').⁴²⁶ The reference to 'primitive' here is evidently pejorative. Although the English equivalent 'autochthon' is used as a synonym for 'aboriginal' and 'indigenous',⁴²⁷ it stems etymologically from the ancient Greek ἀυτόχτων,⁴²⁸ which literally means 'sprung from the land itself'.⁴²⁹ As we have seen, this is precisely how the distinct Aboriginal people doctrine describes the source of the ancestral rights of the Métis: they "sprang into existence when the Métis themselves were born as a distinct people."⁴³⁰ It may therefore be more appropriate to speak of the Métis as an *Autochthonous* people with *ancestral* rights rather than an 'Aboriginal' people with 'Aboriginal' rights. In other words, if "there is no reason to twist the logic of Indian cases to suit a 'later arrival',"⁴³¹ it is because the logic of 'Indian' cases is that of *original* occupation, whereas the logic of Métis cases is that of *ancestral* occupation.

It may, however, be more convenient to use the term 'indigenous' rather than 'autochthonous'. In the first place, there is some truth that, historically speaking, the English "term 'aboriginal' has connotations of backwardness."⁴³² However, as Flanagan remarked, "the near-synonym 'indigenous' [...] does not bear such obvious connotations of being uncivilized, [and] has become the most common word in contemporary international law to refer to people like Indians, Inuit, Maori and Saami."⁴³³ In effect, this is notably the term used in the United Nations *Declaration on the Rights of Indigenous Peoples*.⁴³⁴ In this regard, if Bryan Schwartz thought "the characterization of the Métis as aboriginal people is etymologically dubious," he

⁴²⁶ *Le Petit Robert*, 1991, *Le Robert micro poche*, 1988, s.v. "aborigène". Emphasis added.

⁴²⁷ *Houghton Mifflin Canadian Dictionary of the English Language*, 1982, s.v. "autochthon".

⁴²⁸ *Pocket Oxford Classical Greek Dictionary*, 2002, s.v. "ἀυτόχτων".

⁴²⁹ *Houghton Mifflin Canadian Dictionary of the English Language*, 1982, s.v. "autochthon".

⁴³⁰ Gibson, "General Sources of Métis Rights" *supra* note 81 at 280.

⁴³¹ P. Chatrand and Giokas, "Defining 'The Métis People'" *supra* note 78 at 287.

⁴³² Flanagan, "Indian Title to Aboriginal Rights" *supra* note 82 at 82.

⁴³³ *Ibid.* at 83. In French, however, the term *indigène* presents the same problem as does 'aboriginal' in English. According to the *Le Robert Micro poche*, 1988, s.v., the term *indigène* is defined as: "Qui appartient à un groupe ethnique existant dans un pays d'outre-mer avant sa colonisation." Moreover, the word "est devenu péjoratif," which explains why the French equivalent of 'Indigenous' in International Law is neither *aboriègne* nor *indigène*, but *autochtone*.

⁴³⁴ General Assembly Resolution 61/295 on 13 September 2007.

nevertheless admitted that they “are certainly indigenous to North America – they came into being as a distinct people on this continent.”⁴³⁵ The term *indigenous* simply means “native or belonging naturally to a place”⁴³⁶ or “occurring or living naturally in an area; native.”⁴³⁷ This is close in meaning to ‘autochthonous’, and is also a rather apt description of the Métis people who, if they have not been here ‘from the beginning’, nevertheless ‘sprung from the land’ of Turtle Island itself. ‘Autochthonous’ is admittedly a somewhat awkward term in English and the word ‘indigenous’ has become the standard term in International law. With the exception of references to specific constitutional or statutory clauses that use the terms ‘Indian’ and ‘Aboriginal’, I will try to speak of the *Indigenous* rather than the ‘Aboriginal’ rights of the Métis, especially when speaking of their *inherent* rights of the Métis throughout the rest of this thesis,

2.2.2. Time Immemorial, De Facto Possession and Effective Control

If the notion of ancestral rights provides some justification for the ‘pre-control’ cut-off date in *Powley*, it nevertheless suggests that occupation for several generations would be necessary to establish title. In *Van der Peet*, Lamer C.J. held that “the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here.”⁴³⁸ In reaction to this, Flanagan objected that “emphasis is not a substitute for logic. [Lamer’s] statement offers no reason *why* ancestral priority requires creation of a special legal regime.”⁴³⁹ However, it is a well established rule of the common law that *de facto* occupation is *prima facie* proof of title, which can be rebutted

⁴³⁵ Schwartz, *First Principles*, *supra* note 87 at 247. The use of the term ‘indigenous’ in English can be traced to the 1640s. From L.L. *indigenus* "born in a country, native," from L. *indigena* "a native," lit. "in-born person," from Old L. *indu* "in, within" (earlier *endo*) + *gen-*, root of *gignere* (perf. *genui*) "beget," from PIE **gen-* "produce."

⁴³⁶ *Oxford Dictionary of Current English*, 1992, s.v. “indigenous”

⁴³⁷ *The Houghton Mifflin Canadian Dictionary of the English Language*, s.v. ‘Indigenous’: *adj.* **1.** Occurring or living naturally in an area; native. **2.** Intrinsic; innate. – See synonyms at **native**. [From Latin *indigena*, native.]

⁴³⁸ *Ibid.* at para. 30. Emphasis in original.

⁴³⁹ Flanagan, *First Nations, Second Thoughts*, *supra* note 82 at 20.

should someone be able to prove better title.

Previous to *Van der Peet*, Judge Hall had applied this basic rule of real property in *Calder* when he pointed out that *de facto* “possession is of itself [*prima facie*] proof of ownership.”⁴⁴⁰ Chief Justice Lamer was more explicit about this rule of law in *Delgamuukw*. In the latter case, he repeated that “aboriginal title [...] arises from the prior occupation of Canada by aboriginal peoples” and that “the physical fact of occupation” as proof of title “derives from the common law principle that occupation is proof of possession in law.”⁴⁴¹ More importantly, since “[u]nder common law, the act of occupation or possession is sufficient to ground aboriginal title and *it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans.*”⁴⁴² Lamer C.J. for the majority also stipulated that, since “Aboriginal title is a burden on the Crown’s underlying title [...] it does not make sense to speak of a burden on the underlying title *before that title existed*” and recalled that “the Crown did not gain this title until it asserted sovereignty over the land in question.”⁴⁴³ What the effect of the doctrine of *de facto* possession does in common law is to create a legal assumption that the current occupant holds title and thereby shifts the burden of proof to the opposing party to produce evidence of better title in order to overcome the presumption. As Donovan put it, “[p]ossession for hundreds or even thousands of years, *a fortiori*, constitutes the strongest possible evidence of seisin in fee.”⁴⁴⁴ This clarifies what Lamer C.J. meant in *Van der Peet* when he held that “the purpose of s. 35(1) lies in its recognition of *the prior occupation* of North America by aboriginal peoples.”⁴⁴⁵

However, in doing so, Lamer C.J. seemed to suggest that Aboriginals had to have already been

⁴⁴⁰ *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313 at para. 99. [*Calder*]

⁴⁴¹ *Delgamuukw*, *supra* note 33 at para. 114.

⁴⁴² *Ibid.* at para. 145. Emphasis added.

⁴⁴³ *Ibid.*

⁴⁴⁴ Brian Donovan, “Common Law Origins of Aboriginal Entitlement to Land” (2003) 3 Man. L.J. 289 at 338.

⁴⁴⁵ *Van der Peet*, *supra* note 265 at para. 32. Emphasis added.

here “for centuries.”⁴⁴⁶ This of course once again raises the spectre of Hall J.’s reference to “possession from time immemorial” in *Calder*.⁴⁴⁷ If this is the case, Métis Indigenous title is still open to Flanagan’s objection that the presence of the Métis “was so obviously a result of white intrusion that it challenges credibility to call it original possession.”⁴⁴⁸ However, in his dissenting decision in *Delgamuukw*, Lambert J.A. of the B.C. Court of Appeal asserted that the expression ‘from time immemorial’ only means ‘prior’ and does not necessarily mean “a long, long time, a very long time or even a long time.”⁴⁴⁹ Similarly, in her dissenting decision in *Van der Peet*, L’Heureux-Dubé believed “the substantial continuous period of time necessary to the recognition of aboriginal rights should be assessed based on (1) the type of aboriginal practices, traditions and customs, (2) the particular aboriginal culture and society, and (3) the reference period of 20 to 50 years.”⁴⁵⁰ The period of twenty to fifty years is certainly more in keeping with the *ancestral* rights approach I have put forward under the Autochthonous or Indigenous rights doctrine. However, whether the courts refer to ‘time immemorial’ or to a period of twenty to fifty years, the legal relevance is the same.

If Hall J. mentioned ‘time immemorial’, it was not so much as a legal criterion for establishing Indian title, but to underscore the fact that the Nishga’s *prima facie* title based on occupation, while theoretically a rebuttable presumption, nevertheless amounts to a conclusive or absolute one since it is obviously impossible for the Crown to claim better title. In other words, in “some cases, clarity with respect to the recognition of the right can only be reached by tracing the recognition of the right *for a considerable period. But that is a matter of proof, not a*

⁴⁴⁶ *Ibid.* at para. 30.

⁴⁴⁷ *Calder*, *supra* note 440 at para. 99.

⁴⁴⁸ Flanagan, “Case Against” *supra* note 82 at 320; Flanagan, “Métis Aboriginal Rights” *supra* note 82 at 236.

⁴⁴⁹ *Delgamuukw v. British Columbia* [1993] 5 C.N.L.R. 1 (B.C.C.A.) at para. 692, Lambert J.A. dissenting. [*Delgamuukw* (B.C.C.A.)]

⁴⁵⁰ *Van der Peet*, *supra* note 265 at para. 165.

characteristic of aboriginal title or aboriginal rights.”⁴⁵¹ From this point of view, when Judge Judson cited with approval the decision *Worcester v. State of Georgia* of the Supreme Court of the United States, he thereby indicated that occupation ‘from time immemorial’ was *proof* that occupation prior to the existence of Crown title was irrebuttable and not a *source* of Indian title. As Lambert J.A. correctly pointed out in *Delgammukw*, while “it was admitted that the Nishgas had been in possession since time immemorial, *it was not the rights since time immemorial that were claimed, but the rights as they existed in 1858*, the date taken by Mr. Justice Hall as the date of Sovereignty, and certainly the date of the reception of English law into British Columbia.”⁴⁵² In other words, the Métis do not have to prove ‘original’ occupation or occupation from ‘time immemorial’: they simply have to prove occupation *prior* to some legally relevant threshold. What Flanagan’s reference to ‘white intrusion’ implies is the pre-contact threshold in *Van der Peet*. In this regard, MacInnes J. in *MMF* correctly acknowledged that, in so far as the *prior* occupation of the Métis is concerned, *Powley* modified the legal threshold from that of the ‘assertion of sovereignty’ to that of ‘effective control’.⁴⁵³

In doing so, did the Court “twist the logic of Indian cases to suit a ‘later arrival’,”⁴⁵⁴ as Horton and Mohr seem to suggest? Larry Chartrand has shown that “the courts’ treatment under colonial law of claims to sovereignty based on royal charters replicates the requirement in international law that the Crown perfect its claim to sovereignty by demonstrating ‘effective control’ over the territory claimed in such a charter.”⁴⁵⁵ Nor is there anything even mildly anachronistic about applying the criterion of ‘effective control’ to the Métis in 1870, as illustrated by Chartrand’s

⁴⁵¹ *Calder*, *supra* note 440 at para. 701. *per* Hall J. Emphasis added.

⁴⁵² *Delgamuukw*, *supra* note 449 at para. 602 (B.C.C.A.), Lamber J.A. dissenting. Emphasis added.

⁴⁵³ *MMF*, *supra* note 20 at para. 577. (Man. Q.B.) Citing *Powley*, *supra* note 4 at para. 18.

⁴⁵⁴ P. Chartrand and Giokas, “Defining ‘The Métis People’” *supra* note 78 at 287.

⁴⁵⁵ L. Chartrand, “Métis Aboriginal Title” *supra* note 81 at 176-7.

references to contemporary sources such as the *Staples* case in 1899.⁴⁵⁶ One could add to this the comments of counsel for the appellants, McCarthy Q.C. and Creeman, in the *St. Catharine's* case. The latter pleaded before the Supreme Court of Canada that, upon discovery of North America, the Europeans “acquired a right of property in the soil provided that discovery was followed by possession.”⁴⁵⁷ They notably cited in support of their argument the chapter “Right of Acquisition” in Sir Travers Twiss’ *Law of Nations* concerning “the contest between England and the United States with reference to the mouth of the Columbia.”⁴⁵⁸ In his concurring decision, Taschereau J. cited with approval the Supreme Court of Louisiana in *Breaux v. Johns* to the effect “that on discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the soil to the Government by whose subjects, or by whose authority, it was made.”⁴⁵⁹ We can see that the underlying logic of the constitutional imperative that compelled the Court to recognize Métis indigenous rights was none other than the doctrine of *stare decisis et non quieta movere* (‘stand by decisions and disturb not settled matters’).

While MacInnes held this latter date to be in 1670 or 1763, Swail J. stipulated in *Blais* that, in “affirming that the Metis have aboriginal rights, section 35 of the *Constitution Act* must be interpreted purposively. This in turn would dictate that the application of the test in *Hamlet of Baker Lake* must be applied to the Metis in light of their unique circumstances, and in a manner that does not immediately pre-empt the possibility of their establishing an aboriginal title.”⁴⁶⁰ The Crown acknowledged “that requiring the accused to show occupation of the territory in question as early as 1670 would place ‘an onerous burden’ upon a modern Metis claim for aboriginal

⁴⁵⁶ *Staple v. R.*, 27 January 1899, Privy Council [unreported]. Cited in *ibid.* at 169.

⁴⁵⁷ *St. Catharine's*, *supra* note 217 at 580. (SCC)

⁴⁵⁸ *Ibid.* See Sir Travers Twiss, *The Law of Nations Considered as Independent Political Communities. On the Right and Duties of Nations in Time of Peace* (Oxford: Oxford University Press, 1861) at 156-192.

⁴⁵⁹ *Ibid.* at 643. Citing *Breaux v. Johns* (1) 4 La. An. 141.

⁴⁶⁰ *Blais*, *supra* note 268 at para. 101. (Man. Prov. Ct.)

rights” and relied on Judson J.’s decision in *Calder* to put forward the the *Convention of Commerce of 1818* as the date of the assertion of sovereignty,⁴⁶¹ which Swail J. accepted.⁴⁶² But if the *assertion of sovereignty* took place in 1818, this necessarily implies that *effective control* took place some time *after* 1818. In *Morin*, Meagher J. maintained that sovereignty was only asserted “with the Imperial Order of 1870 when Rupert’s Land and the Northwest Territories were admitted into confederation.”⁴⁶³ Similarly, in *Goodon*, Judge Combs of the Provincial Court of Manitoba held that “[e]ffective European control did not occur in the ‘postage stamp’ Province of Manitoba until it actually became a province in 1870 and the remainder of what is now southern Manitoba thereafter with effective control in place by around 1880”⁴⁶⁴

⁴⁶¹ *Ibid.* at para. 128.

⁴⁶² *Ibid.* at para. 129.

⁴⁶³ *Morin & Daigneault*, *supra* note 6 at 165.

⁴⁶⁴ *Goodon*, *supra* note 7 at para. 69.

3. The 'Indian' Title of the Métis: Expedient or Principle?

As we have seen, MacInnes J. justified the application of the empty box doctrine on the basis that the recognition of the 'Indian' title of the Métis in s. 31 was ostensibly nothing more than a 'political expedient'. There are serious legal implications to considering any right as a political expedient, notably in terms of the undue weight that must be attributed to extrinsic evidence to arrive at this conclusion and the false dichotomy that it sets up between principle and political compromise. If, as a matter of historical fact, colonial *recognition* of Indigenous rights – as opposed to their *existence* within Indigenous legal systems – came about as a 'political compromise', such recognition is nevertheless arguably rooted in the underlying constitutional principle of the protection of minorities. This has notably been illustrated in cases dealing with official language minority rights. While MacInnes J. rejected the application of this principle to the Métis in *MMF*, he arguably committed an overriding and palpable error in the interpretation of historical facts in doing so. Finally, insofar as we take Métis Indigenous rights seriously, s. 31 may be seen as a surrender of Indigenous title that involved the federal power over 'Lands Reserved for Indians' under ss. 91(24). This, however, implies that, from a strictly colonial legal perspective, the federal government essentially treated the Métis as enfranchised Indians.

3.1. *Interpreting s. 31 as a ‘Political Expedient’*

There is nothing particularly new about attempting to discredit the recognition of Métis Indian title in the *Manitoba Act* on the basis that it was the result of a ‘compromise’ or was adopted out of ‘political expedience’. Nor is there anything particularly original about treating the Indian title of the Métis as nothing more than a ‘boon’ and totally lacking in principle. Following the U.S. government’s promise to recognise the Indian title of the Métis, Red River historian Alexander Ross wrote in 1857:

The Pembina *squatters* are chiefly half-breeds from Red River; many of them without house, home or allegiance to any Government – wanderers at large, citizens of the wilderness. They have crossed the British line, as the gold-hunters of California cross the mountains, *in search of gain*. Ever since the road to St. Peter’s has been opened, it has been rung in their ears what large sums of money the Americans pay for Indian lands; and the half-breeds, being the offspring of Indians, come in for a good share of the loaves and fishes on all such occasions. *Their cupidity* being thus excited, is the real cause of the half-breeds having settled down on the American side; their movements being accelerated of late by the report that the Pembina lands were to be purchased forthwith by the American Government, and that all British subjects were in future to be debarred from hunting south of the line. As to any definite grievance under the government of the Hudson’s Bay Company, or their calling for American protection, it is all pure fiction; let the Americans but withdraw from them *the anticipated boon* they have in view – that is, *a share in the sale of the Pembina lands* – and they will soon return again to their cherished haunts in the north.⁴⁶⁵

Some quarter of a century later, Lieutenant Governor Archibald stated that it is difficult to understand what the phrase ‘toward the extinguishment of Indian title’ in section 31 meant. It is worth quoting at length his comments on the matter.

The half-breed population of this Province is largely from beyond the Province. White men who have lived in the most remote parts of this Continent, and have formed connexions with Indian women of the interior, as they advance in years remove to Red River, and there is not probably a tribe of natives between this and the Rocky Mountains, or between this and the North Pole, or between this and the coast of Hudson's Bay or Labrador, which is not to some extent represented in the halfbreeds of Red River.

The words therefore ‘towards the extinguishment of the Indian Title in these lands’ if they were really meant to apply to those who could have any claim, as descendants of the tribes who occupied the lands of Manitoba, would exclude all half-breeds whose Indian ancestors were not of certain tribes and families; but *I presume the intention was not so much to create the extinguishment of any hereditary claims* (as the language of the Act would seem to imply) *as to confer a boon* upon the mixed race inhabiting this Province, and generally known as Half-Breeds. If so, any person with a mixture of Indian blood in his veins, no matter how derived, if resident in the Province at the time of the transfer, would come within the class of persons for whom the boon was intended.⁴⁶⁶

What one immediately detects in these statements is the incapacity to take the legal

⁴⁶⁵ Ross, *Red River Settlement*, *supra* note 324 at 403. Emphasis added.

⁴⁶⁶ *MMF*, *supra* note 20 (Man. Q.B.) (Factum of the Plaintiff at para. 329). Emphasis added.

recognition of Indigenous rights of the Métis in s. 31 seriously. That nineteenth century historians and administrators should have trouble doing so is perhaps understandable. That twenty-first century historians and judges should have trouble taking the law seriously is another. Not unlike Ross, Flanagan asserted that the “Métis saw that the extinguishment of Indian title was an opportunity for them to reap a windfall benefit.”⁴⁶⁷ In other words, in Flanagan’s view, the Métis land grant “was less an extinguishment of Indian title than a political concession designed to buy them off.”⁴⁶⁸

Similarly, when it came to interpreting the expression, ‘towards the extinguishment of the Indian Title to the lands of the Province’, MacInnes J. held that it “was not intended by Parliament either to recognize the half-breeds as enjoying Indian title or to be entitled to share in Indian title,” but that it was nothing more than a “political expedient used successfully by Macdonald and his government to satisfy the delegates and make palatable to the Opposition in Parliament the grant of land to the children of the half-breeds and to thereby ensure passage of the *Act*.”⁴⁶⁹ To be sure, Flanagan differed with MacInnes on this latter point. Far from finding ‘palatable’ the idea that the Métis were entitled to a share in Indian title and thereby ensuring passage of the *Act*, “Liberal members repeatedly attacked the notion that the Métis had inherited a share of Indian title.”⁴⁷⁰ However, as we have seen, the Supreme Court of Canada appeared to give countenance to this view in *Blais* when it claimed that it was “expressly recognized at the time” that the expression ‘Indian title’ in s. 31 was “an incorrect description.”⁴⁷¹ MacInnes notably relied upon this statement to arrive at the conclusion that Parliament did not *really* mean to recognize the Indian title of the Métis.

⁴⁶⁷ Flanagan, *Métis Lands*, *supra* note 31 at 25.

⁴⁶⁸ Flanagan, *Riel and the Rebellion*, *supra* note 82 at 64; *1885 Reconsidered*, *supra* note 82 at 71.

⁴⁶⁹ *MMF*, *supra* note 20 at para. 656. (Man. Q.B.)

⁴⁷⁰ Flanagan, *Métis Lands*, *supra* note 31 at 42.

⁴⁷¹ *Blais*, *supra* note 50 at para. 22.

3.1.1. The ‘Minimal Relevance’ of Extrinsic Evidence

In MacInnes J.’s favour, it must be said that the Supreme Court of Canada perhaps misled him somewhat by giving undue weight to extrinsic evidence under the guise of applying a historical method of interpretation, notably that of a statement made by John A. Macdonald before the House of Commons.⁴⁷² In the first place, as MacInnes J. himself recognized, it is only in cases of ambiguity that one needs to have recourse to external evidence.⁴⁷³ However, one would think that this would have led MacInnes to the opposite conclusion. As noted above, the plain meaning rule implies that “where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be.”⁴⁷⁴ In *Blais*, the trial judge explicitly refused to read down the reference to ‘Indian’ title in s. 31 when expert witness Thomas Flanagan invited the court to do so. Flanagan’s position was that the “the frame of reference was the ‘Law of Nations’ not aboriginal rights.”⁴⁷⁵ Judge Swail simply applied the plain meaning rule of interpretation when he replied that “section 31 of the *Manitoba Act* clearly acknowledges Aboriginal rights of the Métis when it says: “[...] *towards the extinguishment of the Indian title to the lands in the province [...]* *for the benefit of the families of the half-breed residents [...]*” [italics in original; underscore added]⁴⁷⁶ The Manitoba Court of Appeal upheld Judge Swail’s decision on this point when it confirmed that, “Section 31, therefore, acknowledged that the Métis enjoyed what we now know as ‘aboriginal rights’.”⁴⁷⁷

However, given that MacInnes J. resorted to several elements of extrinsic aids to interpret s.

⁴⁷² *Blais*, *supra* note 102 au para. 18. The Court was relying on a statement made by John A. Macdonald before the House on 6 July 1885 to the effect the “phrase [toward the extinguishment of Indian title] was an incorrect one, the half-breeds did not allow themselves to be Indians.”

⁴⁷³ *MMF*, *supra* note 20 au para. 648. (Man. Q.B.)

⁴⁷⁴ *McIntosh*, *supra* note 413 at 704, Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.

⁴⁷⁵ *Blais*, *supra* note 268 at 118 (Man. Prov. Ct.), Swail J.

⁴⁷⁶ *Ibid.*.

⁴⁷⁷ *Blais*, *supra* note 259 at para. 10 (Man. C.A.), Scott C.J.M., Twaddle and Helper JJ.A. concurring.

31 and concluded that the reference to ‘Indian title’ in s. 31 was merely a political expedient, this would seem to suggest that he found the expression ‘Indian title’ in s. 31 to be ambiguous. Let us accept for the sake of argument, then, that this is the case and that recourse to elements of external evidence is therefore required in order to determine its meaning. What weight should be given to a statement made by a single parliamentarian in order to determine the will of Parliament? As Peter Hogg noted, it is not open to the courts to concern itself with the underlying policy of a statute, as this would imply an usurpation of the legislative powers of Parliament and the executive powers of the Crown.⁴⁷⁸

In *Re Residential Tenancies Act*, Justice Dickson wrote that, “generally speaking, speeches made in the Legislature *at the time of enactment of the measure* are *inadmissible* as having *little evidential weight*.”⁴⁷⁹ In *Re Upper Churchill Water Rights Reversion Act*, McIntyre J. was of the opinion that “the speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence.”⁴⁸⁰ While he agreed that they “represent, no doubt, the considered views *of the speakers* at the time they were made, [they] *cannot be said to be expressions of the intent of the Legislative Assembly*.”⁴⁸¹ In *Mahé*,⁴⁸² the respondent maintained “that s. 23 should be interpreted in light of the legislative debates leading up to its introduction.”⁴⁸³ Dickson C.J. rejected this argument on the basis that the Supreme Court of Canada “has stated that such debates may be admitted as evidence, but it has also *consistently taken the view that they are of minimal relevance*.”⁴⁸⁴ In the case at bar, the Chief Justice was of the opinion that “the *evidence from the legislative debates contributes little to the task of interpreting*

⁴⁷⁸ Hogg, *Constitutional Law*, *supra* note 15 at 288.

⁴⁷⁹ *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714 at 721. Emphasis added.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at 319. Emphasis added.

⁴⁸² *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

⁴⁸³ *Ibid.* at 369.

⁴⁸⁴ *Ibid.* Emphasis added.

s. 23 and, accordingly, I place *no weight upon it*.⁴⁸⁵ In *Re B.C. Motor Vehicle Act*, Lamer J. felt that “speeches and declarations by prominent figures are inherently unreliable.”⁴⁸⁶ In addition, as professor of Constitutional Law, Joseph Magnet, reminds us, “by allowing ambiguities in the statute to be resolved by statements in the legislature, *ministers would be given power in effect to legislate indirectly* by making such statements.”⁴⁸⁷

Worse still, Macdonald did not even make this statement “at the time” of the enactment of s. 31 of the *Manitoba Act*, as the Supreme Court of Canada implied, but on 6 July 1885 – in other words some *fifteen years after* the relevant time period.⁴⁸⁸ During the debates “at the time of enactment of the measure,” as Dickson J. put it in *Re Residential Tenancies Act*, Macdonald explicitly recognized when the bill was first introduced in the House on 2 May 1870 that s. 31 lands were to constitute “a reservation for the purpose of extinguishing the Indian title.”⁴⁸⁹ He repeated that this “reservation, as I have said, is for the purpose of the extinguishing the Indian title.”⁴⁹⁰ Two days later, he further stated that the Métis “had *a strong claim* to the lands, *in consequence of their* [Indian] *extraction*.”⁴⁹¹ In reference to the Métis, Macdonald even spoke of “tribes.”⁴⁹² On 9 May 1870, Georges-Étienne Cartier “contended that any inhabitant of the Red

⁴⁸⁵ *Ibid.* Emphasis added.

⁴⁸⁶ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 50.

⁴⁸⁷ Joseph E. Magnet, “The Presumption of Constitutionality” (1980) 18 *Osgoode Hall L.J.* 87 at 99 and 100. Quoted in *ibid.* at para. 49. Emphasis added.

⁴⁸⁸ One must keep in mind that the North-West Rebellion had just taken place in March of that year. Opposition Edward Blake brought a motion of blame against Macdonald’s government and charged it with “grave instances of neglect, delay and mismanagement, prior to the recent outbreak, in matters deeply affecting the peace, welfare and good government of this country.” *House of Commons Debates*, (8 July 1885) at 3075. He then delivered a thoroughly documented blistering indictment that takes up thirty-five pages of the Hansard (at 3075-3110). Blake argued, *inter alia*, that the government first mismanaged the implementation of s. 31, then neglected to respond to petitions from Métis claiming Indian title in the North-West before 1879 and finally having recognized such title, failed to act on it. Macdonald’s twofold response was predictable: 1) it was the Liberals were in power from 1873 to 1878 and whose friends had speculated in Métis lands; and 2) the recognition of Métis title in Manitoba was a political expedient: there was therefore no legal basis to Métis claims to Indian title in the North-West and no obligation on the government to act on such ‘spurious’ claims.

⁴⁸⁹ *House of Commons Debates*, (4 mai 1870) at 1302 (John A. Macdonald).

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.* at 1359. See Flanagan, “Case Against” *supra* note 82 at 318.

⁴⁹² *Ibid.*

River country having Indian blood in his veins was considered to be an Indian.”⁴⁹³

If the statements made by the ministers that sponsored s. 31 when it was debated in Parliament are anything to go by, it is somewhat difficult to claim that the phrase ‘toward the extinguishment of Indian title’ was recognized as an ‘inaccurate description’ *at the time*. Furthermore, the will of Parliament could not have been expressed more clearly when an amendment was proposed that would have suppressed any reference to ‘Indian title’ in s. 31. Parliament voted down the proposal by a vote of 80 against and 37 in favour.⁴⁹⁴ This brings to mind Lord Dunedin’s remarks in *Whiteman v. Sadler* when he stated that “it seems to me that express enactment shuts the door to further implication. ‘*Expressio unius est exclusio alterius*’.”⁴⁹⁵ As Lord Haldane stated long ago in *Attorney General for Ontario v. Attorney General for Canada*, “Parliament had spoken, and with the wisdom *or expediency* or policy of an Act, lawfully passed, *no Court had a word to say*.”⁴⁹⁶ Moreover, Parliament subsequently confirmed the Indian title of the Métis on two separate occasions. In lending undue weight to the extrinsic evidence of Macdonald’s statement in Parliament on 6 July 1885, the Court was not only granting him the power to legislate, *but to do so retroactively*.

In terms of expediency, the logic of the situation of the *Manitoba Act* is precisely that of the *Royal Proclamation*. The Old North-West was in the process of being transferred from French sovereignty to British sovereignty. Many Amerindians revolted under Pontiac’s leadership, partly due to the fear that their territorial rights would be interfered with. The Crown issued a *Royal Proclamation* that basically recognized Indian title in order to reassure the Aboriginal peoples and thereby facilitate the transfer of sovereignty. While the *Royal Proclamation* was, at least

⁴⁹³ *Ibid.* (9 mai 1870) at 1450 (George-Étienne Cartier).

⁴⁹⁴ *Ibid.* at 1449.

⁴⁹⁵ *Whiteman v. Sadler*, [1910] A.C. 514 at 527, [1910] K.B. 868 (H.L.). That is, “the expression of one thing is the exclusion of another.” *Black’s Law Dictionary*, 7th ed., s.v. “*Expressio unius est exclusio alterius*.”

⁴⁹⁶ *Attorney General for Ontario v. Attorney General for Canada*, [1912] AC at 583. Emphasis added.

from the colonizer's view,⁴⁹⁷ largely issued for reasons of political expediency, the courts have nevertheless consistently enforced the recognition of Indian title under its terms. One wonders why the recognition of the Indian title of the Métis under s. 31 should totally lack any force of law even if it were recognized out of political expedience.

When an ethic of conviction becomes inconvenient to achieving his ends, Flanagan does not hesitate to swap it for an ethic of consequence. He had no qualms about brandishing the alarmist rhetoric of the spectre of a tax increase, such as when he claimed that “an attempt to rehabilitate Riel will prove costly to taxpayers” or that, should the Métis be recognized as ‘Indians’ for the purposes of ss. 91(24), “it is bound to be expensive for taxpayers.”⁴⁹⁸ All the while accusing his adversaries of ‘paternalism’,⁴⁹⁹ he does not hesitate to claim to know better than the Métis themselves what is in their own best interests, going so far as to claim that “the establishment of the Métis in Canadian statutes as a distinct Aboriginal people [...] has had, and will continue to have, regrettable consequences for the Métis”⁵⁰⁰ and that recognizing their Aboriginal rights “will not serve their long-term interests.”⁵⁰¹ In essentially pleading for a ‘reading down’ of s. 35, Flanagan attempts to reduce a constitutional imperative to a simple directive on the pretence of avoiding such risks – in other words for reasons of political expedience.

The Supreme Court of Canada refused just such an interpretation when it came to interpreting, somewhat ironically, another clause of the *Manitoba Act*, that of s. 23 in *Re Manitoba Language Rights*.⁵⁰² In reference to the term ‘shall’, the Attorney General of Manitoba argued that, “though the words of s. 23 of the *Manitoba Act, 1870* [...] are mandatory in the common grammatical

⁴⁹⁷ This is not the Indigenous perspective on the *Proclamation*, for whom it formed part of a treaty. See Borrows, “Wampum at Niagara” *supra* note 241.

⁴⁹⁸ Flanagan, *1885 Reconsidered*, *supra* note 82 at 187-8.

⁴⁹⁹ Flanagan, *Métis Lands*, *supra* note 31 at 94 and 232.

⁵⁰⁰ Flanagan, “Case Against” *supra* note 82 at 315.

⁵⁰¹ Flanagan, “Métis Aboriginal Rights” *supra* note 82 at 245.

⁵⁰² *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

sense, they are only directory in the legal sense.”⁵⁰³ The Court pointed to “the harm that would be done to the supremacy of Canada's Constitution *if such a vague and expedient principle* were used to interpret it. It would do *great violence to our Constitution* to hold that a provision *on its face mandatory*, should be labelled directory *on the ground that to hold otherwise would lead to inconvenience or even chaos.*”⁵⁰⁴ In other words, *fiat justitia ruat caelum.*⁵⁰⁵

3.2. The Principle of the Protection of Minorities

Paul Chartrand and John Giokas have underscored the importance of the principle of the protection insofar as the Métis are concerned, but simply provided a rather cursory treatment of it and only applied it as a means of identifying the Métis people in s. 35.⁵⁰⁶ Counsel for the plaintiff pleaded, *inter alia*, that to properly interpret of s. 31, it is necessary to apply the underlying unwritten constitutional principle of the protection of minorities.⁵⁰⁷ The trial judge rejected this argument.⁵⁰⁸ Let us recall that in *Re Québec Secession Reference*, the Supreme Court of Canada began its analysis with the underlying unwritten constitutional principles. The Court specified that the “fourth underlying constitutional principle we address here concerns the protection of minorities” and further emphasised “that the protection of minority rights is itself an independent principle underlying our constitutional order.”⁵⁰⁹

In terms of the role of underlying constitutional principles, it can “assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles

⁵⁰³ *Ibid.* at para. 34.

⁵⁰⁴ *Ibid.* at para. 39. Emphasis added. The Court added: “Where there is no textual indication that a constitutional provision is directory and where the words clearly indicate that the provision is mandatory, there is no room for interpreting the provision as directory.”

⁵⁰⁵ “Let justice be done, though the heavens should fall.”

⁵⁰⁶ Chartrand and Giokas, “Defining ‘the Métis People’” *supra* note 78 at 273-4.

⁵⁰⁷ *MMF*, *supra* note 20 at para. 519. (Man. Q.B.)

⁵⁰⁸ *Ibid.* at paras. 534-550.

⁵⁰⁹ *Re Québec Secession*, *supra* note 246 at paras. 79 and 80.

is essential to the ongoing process of constitutional development and evolution of our Constitution as a ‘living tree’.”⁵¹⁰ While the Court stipulated that it is not “an invitation to dispense with the written text of the Constitution,”⁵¹¹ it nevertheless “invites the courts to turn those principles into the premises of a constitutional argument that culminates *in the filling of gaps in the express terms* of the constitutional text.”⁵¹² The Court further added that the underlying principle of the protection of minorities “may in certain circumstances give rise to substantive legal obligations” that is, “have ‘full legal force’ [...] which constitute *substantive limitations upon government action*.”⁵¹³ While these “principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature,” they are not in any case “*merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments*.”⁵¹⁴

3.2.1. Official Language Rights

The Court previously dealt with similar ‘political expedient’ arguments in official language rights cases. As noted above, Flanagan has labelled it a ‘compromise’ based on ‘political expediency’ rather than ‘first principles’, an interpretation that MacInnes J. made his own and that was upheld by the Manitoba Court of Appeal. This same reasoning was applied to reject a large and liberal interpretation of language rights in *Macdonald*.⁵¹⁵ Judge Beetz, for the majority, claimed that language rights “are based on a political compromise rather than on principle and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice.”⁵¹⁶ In

⁵¹⁰ *Re Québec Secession*, *supra* note 246 at para. 52.

⁵¹¹ *Ibid.* at para. 53.

⁵¹² *The Provincial Judges Reference*, [1997] 3 S.C.R. 3 at para. 104. Quoted in *ibid.* Emphasis added.

⁵¹³ *Re Québec Secession*, *supra* note 246 at para. 53.

⁵¹⁴ *Ibid.* at para. 54. Emphasis added.

⁵¹⁵ *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460.

⁵¹⁶ *Ibid.* at para. 117.

Société des Acadiens,⁵¹⁷ Beetz J. for the majority again repeated that language rights “are based on political compromise,” whereas “legal rights tend to be seminal in nature because they are rooted in principle.”⁵¹⁸ In what may seem to be particularly relevant to s. 31, he then suggested that the “legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.”⁵¹⁹ However, he seemed to ignore that the fundamental rights protected in the *Charter* were no less the result of the legislative process and the result of historical political compromises than language rights.

However, in the *Québec Secession Reference*, the Court highlighted that “even though those provisions were the product of negotiation and political compromise, *that does not render them unprincipled*. Rather, such a concern reflects a broader principle related to the protection of minority rights.”⁵²⁰ Nor would the application of this principle of constitutional interpretation to s. 31 be an anachronism. The Court pointed out that “it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation.”⁵²¹ This was quickly taken up insofar as language rights are concerned in *Beaulac*.⁵²² Judge Bastarache, for the majority of the Court, noted that, though “constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights.”⁵²³ For Bastarache, the “principle of

⁵¹⁷ *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.

⁵¹⁸ *Ibid.* at para. 63.

⁵¹⁹ *Ibid.* at para. 68.

⁵²⁰ *Ibid.* at para. 80.

⁵²¹ *Ibid.* at para. 81. See Chapter 10 “Minorities and Minority Rights” in Ajzenstat et al., *Canada’s Founding Debates*, *supra* note 246 at 327-353.

⁵²² *R. v. Beaulac*, [1999] 1 S.C.R. 768.

⁵²³ *Ibid.* at para. 24. Bastarache notably cited A. Riddell, in “À la recherche du temps perdu: la Cour suprême et l’interprétation des droits linguistiques constitutionnels dans les années 80” (1988), 29 *C. de D.* 829. He noted that at p. 846, Riddell “underlines that a political compromise also led to the adoption of ss. 7 and 15 of the *Charter* and argues, at p. 848, that there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political

substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State” and it “also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation.”⁵²⁴ In *Arsenault*,⁵²⁵ the Supreme Court of Canada unanimously confirmed *Beaulac* when it recalled that, as “this Court recently observed in *Beaulac*, [...] the fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope.”⁵²⁶

3.2.2. Aboriginal Rights

To come back to the *Québec Secession Reference*, the Court turned to the specific issue of Aboriginal rights. The Court held that it was “[c]onsistent with this long tradition of respect for minorities, which is at least as old as Canada itself, [that] the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples.”⁵²⁷ The Court then recalled the ‘promise’ of s. 35, which “recognized not only the ancient occupation of land by aboriginal peoples, but *their contribution to the building of Canada*, and the *special commitments made to them* by successive governments.”⁵²⁸ There is an exact analogy here with s. 31, which can be seen as not only a recognition of their occupation of the land, but a ‘special commitment’ made to the Métis people for their ‘contribution to the building of Canada’. Again, if MacInnes J. saw s. 31 as

compromise is without consequence with regard to the scope of language rights.”

⁵²⁴ *Ibid.*

⁵²⁵ *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3.

⁵²⁶ *Ibid.* at para. 27.

⁵²⁷ *Ibid.* at para. 82.

⁵²⁸ *Ibid.* at para. 82. Emphasis added.

a ‘political expediency’⁵²⁹ it was because it recognized “the contributions of the Métis to the settlement and development of the territory.”⁵³⁰ While they believed a political compromise necessarily excluded any principled recognition of Indian title, the doctrine established in *Arsenault* allows for the recognition of the Aboriginal title of the Métis in s. 31 to receive full force of law and denies that its origins, if they are indeed to be found in a political compromise, have any affect on its scope. In other words, the Court essentially drew a distinction between the origin of a policy, which may come about for reasons of political expediency, and the values or principles that are embodied in that policy.

The Court also specified that the protection of Aboriginal rights under s. 35, “so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.”⁵³¹ Just as the Court held in *Beaulac* that “[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada,”⁵³² the Court also held in *Powley* that the “overarching interpretive principle for our legal analysis is a *purposive reading* of s. 35. The inclusion of the Métis in s. 35 is *based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities*.”⁵³³ The Court further specified that the “inclusion of the Métis in s. 35 represents Canada’s *commitment to recognize and value the distinctive Métis cultures, [...] which the framers of the Constitution Act, 1982 recognized can only survive if the Métis are protected along with other aboriginal communities*.”⁵³⁴ To paraphrase *Beaulac*, the Aboriginal rights of the Métis ‘must in *all cases*’ – including s. 31 – ‘be interpreted purposively, in a manner consistent with the

⁵²⁹ *MMF*, *supra* note 20 at para. 656. (Man. Q.B.)

⁵³⁰ *Ibid.* at para. 651.

⁵³¹ *Re Québec Secession*, *supra* note 246 at para. 82.

⁵³² *Beaulac*, *supra* note 476 at para. 25. Emphasis in original.

⁵³³ *Powley*, *supra* note 4 at para. 13. Emphasis added.

⁵³⁴ *Ibid.* at para. 17.

preservation and development of Métis communities in Canada’.

3.2.3. The Minority Status of the Métis

Based on the Court’s statements concerning the general principle of the protection of minorities in both Aboriginal and official minority language rights cases, it could be argued that it is only to the extent that s. 31 involves Aboriginal or treaty rights that are still existing under s. 35 that they could be considered as falling within the ambit of the principle of the protection of minorities. However, it would be wrong to consider s. 35 as the only case where it is possible to consider Aboriginal rights as part of a larger concern with minorities. As mentioned, one of the arguments put forward by the plaintiff was that the interpretation of s. 31 involves the underlying unwritten constitutional principle of the protection of minorities.⁵³⁵ The trial judge rejected this argument, holding that “neither section 31 nor section 32 of the *Act*, considered on an historical, contextual or purposive basis, pertained to or was intended for the protection of minorities.”⁵³⁶

MacInnes J. reasons were threefold. In his view, the principle does not generally apply since neither the English Half-Breeds nor the French Métis “were minorities at the time” and there “is no evidence that the Métis considered themselves to be a minority in the Settlement at the time.”⁵³⁷ The second reason is that the “section provides for one time individual grants”⁵³⁸ rather than as “an ongoing and continuing obligation for future generations.”⁵³⁹ On this latter point, the trial judge found that it was not “plausible to consider this section as intended to protect the French Métis as a minority” since the “delegates were negotiating on behalf of all residents of the

⁵³⁵ *MMF*, *supra* note 20 at para. 519. (Man. Q.B.)

⁵³⁶ *Ibid.* at para. 534.

⁵³⁷ *Ibid.* at paras. 537 and 540.

⁵³⁸ *Ibid.* at para. 538.

⁵³⁹ *Ibid.* at para. 549.

Settlement” and because it included “the children of the English half-breeds as well.”⁵⁴⁰ Finally, MacInnes J. relied on his finding that “the evidence does not support the existence of any purpose or intent on the part of Parliament to create or establish by virtue of section 31 of the *Act*, a Métis enclave or land base, or to ensure the flourishing of a Métis community in Manitoba then, or for the future.”⁵⁴¹ While Scott C.J. did not specifically raise the issue, it can be presumed that the Manitoba Court of Appeal affirmed the lower court decision.

In terms of his first reason, MacInnes J. admitted himself that “it was expected that immigration could soon change that”⁵⁴² and repeated further on that the land grant “was intended simply to give the families of the Métis through their children a head start in the new country *in anticipation of the probable and expected* influx of immigrants.”⁵⁴³ In 1857, Captain William Kennedy (1813-1890) circulated a petition in the District of Assiniboia that called for the annexation of the Settlement to the United Canadas. The petition was subsequently sent to London and appeared in the Appendix of the Select Committee’s *Report on the Hudson’s Bay Company*.⁵⁴⁴ According to ethnologist Marcel Giraud, the clergy discouraged the Métis from signing the petition. What Bishop Taché apparently feared was a flood of Anglo-Protestant immigration.⁵⁴⁵ On 7 October 1869, he wrote to Georges-Étienne Cartier: “J’ai toujours redouté l’entrée du Nord-Ouest dans la Confédération parce que j’ai toujours cru que l’élément français catholique serait sacrifié.”⁵⁴⁶

While Riel insisted on provincial status for the North-West, it is also apparent that he feared

⁵⁴⁰ *Ibid.* at para. 547.

⁵⁴¹ *Ibid.* at para. 548.

⁵⁴² *Ibid.* at para. 541.

⁵⁴³ *Ibid.* at para. 655. Emphasis added.

⁵⁴⁴ House of Commons (U.K.), “Report from the Select Committee on the Hudson’s Bay Company” *Parliamentary Papers*, Session 2, Nos. 224, 260, 1857 at 437-439.

⁵⁴⁵ Giraud, *Le Métis canadien*, *supra* note 111 at 955.

⁵⁴⁶ George Stanley, *The Birth of Western Canada. A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961 [1936]) at 61.

that the Métis might *not* “be sufficiently protected in a province which was a Western replica of Québec.”⁵⁴⁷ At the beginning of the Resistance, Riel told the Council of Assiniboia on 25 October 1869 that the Métis “felt that if a large immigration were to take place they would probably be crowded out of a country which they claimed as their own.”⁵⁴⁸ Riel was clear about his objective: “we must seek to preserve the existence of our own people. We must not, *by our own act*, allow ourselves to be swamped. If the day comes when that is done, it must be *by no act of ours*.”⁵⁴⁹ Once again, Flanagan is correct in his assertion that, behind s. 31, “was the fear that aggressive newcomers might purchase all the good land in Manitoba, leaving the younger generation of Métis a landless *minority* in their own province,”⁵⁵⁰ and that Riel “wanted the Métis to conserve a separate identity as a people or nation.”⁵⁵¹

Nor was this lost on Members of Parliament at the time. Sir Francis Hincks found it “*perfectly clear* that when the difficulties were settled and the Queen’s authority established that *a vast migration would be pouring into the country*, from the four Provinces but *principally*, there was no doubt, *from Ontario*, and the original inhabitants would thus be placed *in a hopeless minority*, and of this, *they themselves had not doubt*. If this were correct, *it was perfectly obvious* that those who had been occupying the Territory all their lives would naturally take this view: *that they were to be entirely swamped* and their influence destroyed, that all their lands were to be taken.”⁵⁵² Hincks repeated further on that when the new Province “became thoroughly Canadian

⁵⁴⁷ Flanagan, “Political Thought” *supra* note 82 at 140.

⁵⁴⁸ Canada, “Causes and Difficulties” *supra* note 125 at 98.

⁵⁴⁹ *New Nation*, “Convention at Fort Garry” 11 February 1870 at 1.

⁵⁵⁰ Flanagan, “Métis Land Claims” *supra* note 82 at 113. Emphasis added.

⁵⁵¹ Flanagan, “Riel and Aboriginal Rights” *supra* note 82 at 260.

⁵⁵² *House of Commons Debates* (2 May 1870) at 1317 (Sir Francis Hincks). It should be mentioned that, in light of this, Hincks’ repeated claims that the delegates “did not come to ask any special legislation for any class,” that “on all points no particular party claimed any special interest” and that there “was not one point he could discover in which the delegates – *representing a minority* if you will – took a sectional view” seem a little disingenuous. *Ibid.* at 1316-15. Emphasis added.

*the people now there must necessarily be in the minority.*⁵⁵³ On 7 May, the honourable A.G. Archibald agreed that it was “true that the present population does not exceed fifteen to seventeen thousand, but they will not remain long at that figure. One of the first results which will follow the organization of the country, will be a large influx of immigration.”⁵⁵⁴

Indeed, this was precisely what the opposition and the government were pushing for. During the debates over s. 31, Mackenzie wanted “to lay out the whole land for settlement and pour in it a tide of settlers who would open up the country.”⁵⁵⁵ Population growth was notably incorporated into the terms concerning representation in the Senate. The *Manitoba Act* foresaw that the new Province would have the right to four seats when its population attained 75,000. Sir John A. Macdonald did not believe “in our day at any rate” that the population would surpass that of Prince Edward Island, which then stood at 85,000.⁵⁵⁶ This was nevertheless more than fifteen times the Métis population of 5,500 in 1870. In light of the anticipated immigration, even if one were to accept that the s. 31 land grant was made “for the purpose of giving the children of the Métis and their families on a one time basis *an advantage* in the life of the new province *over expected immigrants*,”⁵⁵⁷ the issue of delays, not only in making the children’s’ grants under s. 31 but the quieting of titles of adults under s. 32, becomes problematic in terms of the protection of minorities. The only way this could be an ‘advantage’ for the Métis would be if the grants were made and titles quieted *before* the expected immigration took place.

What is perhaps particularly worrisome in MacInnes’ reasoning is that it implies that, for example, even if the Acadians were ever to form the majority of the population of New Brunswick, the Anglophone population there could not take advantage of this principle and claim

⁵⁵³ *Ibid.* at 1318. Emphasis added.

⁵⁵⁴ *Ibid.* at 1430.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.* at 1300 (Hon. John A. Macdonald).

⁵⁵⁷ *MMF*, *supra* note 20 at para. 544. (Man. Q.B.) Emphasis added.

minority rights, since, unlike the Anglophones of Québec, they were not a minority at the time of the creation of the province. Yet, even at the time the Honourable M. Chauveau opined that it “was desirable to protect the minority in Manitoba from the great evils of religious dissensions on education. There could be no better model to follow in that case than the Union Act, which gave full protection to minorities. *It was impossible to say who would form the majority there, Protestants or Catholics. [...] He did not care which.*”⁵⁵⁸ In other words, sections such as 93 and 133 of the *Constitution Act, 1867*, are there to protect the minority, whichever that particular linguistic or religious group happens to be, and regardless of whether the group that constitutes the minority changes after the passing of the *Act*.

Furthermore, the question of “evidence that the Métis considered themselves to be a minority *in the Settlement* at the time” would only be pertinent if s. 31 lands were under the jurisdiction of the new province, in which case, as MacInnes J. recognised, it “would have been clear to the delegates and to the leaders of the Settlement that if the province controlled the undisposed public lands, as they were seeking, they would be able generally to do with it what they wished.”⁵⁵⁹ In addition, MacInnes J. insisted that “the Legislature of the new Province was controlled until probably 1876 or later by members who were Métis, or members sympathetic to them.”⁵⁶⁰ In principle then, had the land grant remained under provincial jurisdiction, as had initially been agreed to, the Métis would have been in a position to create a territorial enclave for themselves.

However, once s. 31 lands were placed under the jurisdiction of federal Parliament, which was clearly controlled by a white, Protestant and Anglophone majority, the question, at least insofar as s. 31 is concerned, is whether they were a minority *within Canada* and not simply within the new province. While Scott C.J. recognised that this fact alone triggered the fiduciary obligations

⁵⁵⁸ *House of Commons Debates*, (10 May 1870) at 1502 (Hon. M. Chauveau).

⁵⁵⁹ *Ibid.* at para. 542. Emphasis added.

⁵⁶⁰ *Ibid.* at para. 541.

of the Crown toward the Métis as an Aboriginal people, the questions of whether a right must be ‘ongoing and continual’ in order to fall under the principle of the protection of minorities and whether s. 31 was intended to ensure the flourishing of the Métis as a minority is more complex. Early on in the *MMF* case, in response to the defendants application to have the statement of claim struck out because it raised no justiciable issue, Barkman J. found that that there was a real issue at stake, notably that “the *Manitoba Act* promised a ‘Métis Reserve’, and whether the alleged measures were unconstitutional and undermined the rights of the descendants of the Half-Breeds.”⁵⁶¹ As Flanagan recognised, this meant if a Métis reserve “had become a reality, it would have provided continuing benefits for the Métis people.”⁵⁶²

A purposeful interpretation of s. 31 would take into account the objective of protecting minorities while a large and liberal interpretation would take into account the evolution of the power relations where the Métis were increasingly subject to the discretionary power of the Crown in the right of Canada. One can refer to the Judicial Committee of the Privy Council’s decision in *Edwards* as to whether the word ‘person’ in s. 24 of the *Constitution Act, 1867* extended to women.⁵⁶³ In *Blaikie*, the Supreme Court of Canada mentioned the “observations by Lord Sankey of the need to give the *British North America Act* a broad interpretation attuned to changing circumstances.”⁵⁶⁴ According to Lord Sankey, the “*British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits.”⁵⁶⁵ Even more relevant is the JCPC’s decision in *Attorney General of Ontario v. Attorney General of Canada*, where Viscount Jowitt stated “it is, as their Lordships think, *irrelevant that the question is one that might have seemed unreal at the date of the British North America Act*. To such an organic

⁵⁶¹ *Dumont*, *supra* note 21 at 92. (Man. Q.B.)

⁵⁶² Flanagan, “Métis Land Claims” *supra* note 82 at 126.

⁵⁶³ *Edwards v. Attorney General of Canada*, [1930] A.C. 124. [*Edwards*]

⁵⁶⁴ *Blaikie v. Québec (Attorney General)*, [1979] 2 S.C.R. 1016 at para. 22.

⁵⁶⁵ *Edwards*, *supra* note 563 at 136.

statute the flexible interpretation must be given which changing circumstances require.”⁵⁶⁶ In other words, it is irrelevant that the question of the Métis eventually becoming a minority in their own province is one that might have seemed unreal at the date of the *Manitoba Act, 1870*. A flexible interpretation should be given to the changing circumstances of the demographics of the province. The underlying constitutional principle of the protection of minorities was arguably ‘triggered’ when the Métis lost their majority status.

3.3. Métis Lands as ‘Lands Reserved for Indians’ under ss. 91(24)

Despite MacInnes J.’s claim in *MMF* that “in *Blais* the Supreme Court of Canada decided as had the Manitoba courts that the Manitoba Métis were not Indians,”⁵⁶⁷ the Court in fact emphasized that it was leaving “open for another day the question of whether the term ‘Indians’ in s. 91(24) of the *Constitution Act, 1867* includes the Métis – an issue not before us in this appeal.”⁵⁶⁸ On the one hand, I share Larry Chartrand’s hesitancy to qualify ourselves as ‘Indians’ under ss. 91(24).⁵⁶⁹ Chartrand raised two very good reasons for this: first, that being recognized as ‘Indians’ under ss. 91(24) would result in the trace theory – or derivative rights doctrine – being read into s. 35; and, second, that it would compromise the status of the Métis as a distinct Indigenous people. However, since the Supreme Court of Canada came down with its decision in *Powley* and more recently in *Cunningham*, there is perhaps less reason to worry about this. As we have seen in section 2.1.1, the Court clearly rejected the trace theory in *Powley*. In doing so, it decidedly affirmed the Métis as a distinct Aboriginal people. In *Cunningham*, the Court upheld the relevant clauses in the *Métis Settlement Act* and held “that the exclusion from membership in any Métis settlement, including the Peavine Settlement, of Métis who are also status Indians serves

⁵⁶⁶ *Attorney General of Ontario v. Attorney General of Canada*, [1947] A.C. 127 at 154. Emphasis added.

⁵⁶⁷ *MMF*, *supra* note 20 at para. 596. (Man. Q.B.)

⁵⁶⁸ *Blais*, *supra* note 102 at para. 36.

⁵⁶⁹ Chartrand, “Are We Métis” *supra* note 87.

and advances the object of the ameliorative program. It corresponds to the historic and social distinction between the Métis and Indians, furthers realization of the object of enhancing Métis identity, culture and governance, and respects the role of the Métis in defining themselves as a people.”⁵⁷⁰ There is, however, a third reason that makes me hesitate to argue in favour of the inclusion of the Métis in ss. 91(24) and that is the trusteeship doctrine that the Court has tended to read into it. As we shall see, the historical evidence presented here shows that it was precisely for this reason that the Métis and even more so the Half-Breeds were concerned in 1870 that the recognition of their ‘Indian’ title would entail being treated as wards of the Crown, which they interpreted as a denial of their political rights and their right to self-government.

On the other hand, if the land the Métis surrendered under s. 31 does not fall under ss. 91(24), then this raises the question concerning which head of power the federal government was acting under when it extinguished it. The difficulty with determining this question is that the federal Parliament could not be said to exercising “plenary powers” in a federal territory. The *Manitoba Act, 1870* was enacted at a time when the Dominion of Canada was still a colony of the British Empire. Imperial Parliament therefore retained jurisdiction in Rupert’s Land and the North-West Territory at the time the Manitoba bill was negotiated with the representatives of Assiniboia. Imperial Parliament confirmed the Royal Charter’s grant of a trade monopoly for a period of seven years in 1690,⁵⁷¹ since the Crown’s prerogative to make unilateral grants had been challenged. In 1803, Imperial Parliament enacted the *Canadian Jurisdiction Act* for the North-West Territory and in 1821 it passed the *Act for Regulating the Fur Trade*, which extended the

⁵⁷⁰ *Cunningham, supra* note 297 at para. 83. If one replaces ‘status Indian’ with non-Métis, this is exactly what the Métis leaders sought to accomplish in 1869-1870, whether by controlling public lands or through a land grant.

⁵⁷¹ *An Act for confirming to the Governor and Company trading to Hudson’s Bay their Privileges and Trade*, (U.K.) 2. W. & M. c. 23.

Canadian Jurisdiction Act to Rupert's Land.⁵⁷² Canadian constitutionalist Peter Hogg has expressed the common view is that "the federal Parliament by statute created the province of Manitoba out of part of Rupert's Land."⁵⁷³ However, it could also be argued that the District of Assiniboia was effectively recognized as the equivalent of a Crown colony and admitted as a province. This raises the question as to whether the extinguishment of 'Indian' title in s. 31 is considered to take effect *before* or *after* the creation of the province of Manitoba. In the former case, federal Parliament would not have had plenary power, but would have jurisdiction in all the powers, both federal and provincial, allowed for in the *Constitution Act, 1867* and the *Constitution Act, 1871*. In so far as federal Parliament can exercise provincial heads of power in a territory, there are no provincial heads of power that allow provinces to extinguish Indian title. Insofar as the province of Manitoba can be seen as being created before Métis title was extinguished, in this case federal Parliament would have only been able to exercise federal heads of power under s. 91.

One possibility is that it falls under the Crown prerogative to negotiate treaties with foreign powers. Again, this is problematic, since the federal government had not yet been granted this power in 1870. Furthermore, s. 31, along with the rest of the *Manitoba Act*, was adopted by the federal Parliament, which seems to suggest both that the Crown could not act unilaterally and that authority to pass the *Act* necessarily flowed from one of the heads of power under the *Constitution Act, 1867*, as confirmed by the *Constitution Act, 1871*. Another possibility is the 'peace, order and good government' or pogg clause in the preamble of s. 91. According to Hogg,

⁵⁷² *An Act for Extending the Jurisdiction of the Courts of Justice in the Provinces of Upper and Lower Canada*, (U.K.), 42 Geo. III c. 138. *An Act for Regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction within certain Parts of North America* (U.K.), 1 and 2 Geo. IV c. 66.

⁵⁷³ Hogg, *Constitutional Law*, *supra* note 15 at 40.

there are three branches of pogg: emergency powers, a national concern and the ‘gap branch’.⁵⁷⁴ While it could be argued that the Resistance of 1869-1870 created a situation where the *recognition* of Métis title became both an emergency and a matter of national concern, this does not necessarily imply that the authority to accept the surrender of such title falls under these heads of power. Aside from that, I would certainly hope that no one would argue that every time the federal government deals with the Métis people, it does so under the pretext of a national emergency. One could argue that negotiating land surrenders with the Métis is a ‘national concern’ since it involves dealing with them as a people. There is, however, no legal precedent to support this argument. This leaves the ‘gap’ branch. The argument here would be that negotiating with the Métis, as opposed to ‘Indians’ *stricto sensu*, was not contemplated in 1867 and pogg fills in this gap. However, this in no way implies that the federal government was dealing with the Métis as an Indigenous people. It could arguably have been dealing with them as former French subjects who were outside the protection of the Crown prior to 1870,⁵⁷⁵ or merely as a disadvantaged minority. This in turn risks lending support to the argument that the mention of ‘Indian’ title in s. 31 was simply a ‘political expedient’ and is essentially superfluous.⁵⁷⁶

Let us begin with the presumption that the term ‘Indian’ in ss. 91(24) should be read restrictively, so as to only extend to the ‘Indians’ and ‘Inuit’ as defined in ss. 35(2). Insofar as Indian lands are concerned, Gwynne J. in *Church v. Fenton* found that the expression ‘lands reserved for Indians’ in ss. 91(24) “is an expression appropriate to *the unsurrendered lands* reserved for the use of the Indians described in different Acts of Parliament as ‘Indian reserves’,”

⁵⁷⁴ Hogg, *Constitution of Canada*, *supra* note 36 at 421-452.

⁵⁷⁵ See Peeling and Chartrand, “Legal Order of the Otipahemsu’uk” *supra* note 27.

⁵⁷⁶ In this case, it could be argued that the s. 31 land grant was simply a grant from the Crown in the right of Canada and was made under ss. 91(1) ‘Public Debt and Property’.

and not to lands, in which, as here, the Indian title has been wholly extinguished.”⁵⁷⁷ Chancellor Boyd held in *St. Catharine’s* that, before “the appropriation of reserves, the Indians have no claim except upon the bounty and benevolence of the Crown.”⁵⁷⁸ He nevertheless recognized that the federal Parliament was acting under the head of power of ss. 91(24) when it extinguished Indian title.⁵⁷⁹

When the *St. Catharine’s* case came before the Supreme Court of Canada, Strong J. held that ss. 91(24) “must include the right to control the exercise by the Indians of *the power of making treaties of surrender*” and that the expression ‘lands reserved for the Indians’ embraces “all territorial rights of Indians, as well as those in lands actually appropriated for reserves as *those lands which had never been the subject of surrender at all.*”⁵⁸⁰ After reviewing the legislative and administrative history of Indian title prior to 1867, Justice Strong’s colleague, Gwynne J., concluded that it “is the lands *not ceded to or purchased by* the crown which are spoken of in the Proclamation of 1763 as *the lands reserved to* Indians for their hunting grounds – and the unceded lands have ever since been known by the designation ‘lands reserved for the Indians’ or ‘Indian reserves’.”⁵⁸¹ Further on, he stipulated that “lands which had not been ceded by the Indians to the Crown [...] come within item 24 of section 91, which placed ‘Indians’ and ‘lands reserved for the Indians’ under the legislative control of the Dominion Parliament.”⁵⁸² It was in the context of federal powers under ss. 91(24) that Gwynne J. added that the “power to entering into treaty between her Majesty and the Indians for the cession to her Majesty their acknowledged title [...] not yet ceded to the Crown can, since the passing of the [*Constitution*

⁵⁷⁷ *Church v. Fenton*, (1878) 28 C.P. 384 at 399. Emphasis added.

⁵⁷⁸ *Ibid.* at 231.

⁵⁷⁹ *St. Catharine’s*, *supra* note 201 at 224-5. (Ont. Ch.), Gwynne J. citing with approval *Church v. Fenton*, (1878) 28 C.P. 384.

⁵⁸⁰ *St. Catharine’s*, *supra* note 217 at 615. (S.C.C.), Strong J. dissenting. Emphasis added.

⁵⁸¹ *Ibid.* at 664, Gwynne J. dissenting.

⁵⁸² *Ibid.* at 666.

Act, 1867,] be exercised only [...] under the authority of an act of the Dominion Parliament.”⁵⁸³

Although both Justices Strong and Gwynne wrote dissenting decisions concerning which level of government the beneficial interest in Crown land accrued once Indian title had been extinguished. While Lord Watson of the J.C.P.C. confirmed the opinion of the majority of the Supreme Court of Canada insofar as this latter issue is concerned, he nevertheless reversed Chancellor Boyd’s opinion that the *Royal Proclamation* had been repealed. Furthermore, Lord Watson stated in reference to ss. 91(24) that the “words actually used are, according to their natural meaning, sufficient to include *all lands reserved, upon any terms or conditions, for Indian occupation*. It appears to be the plain policy of the [*Constitution Act, 1867,*] 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.”⁵⁸⁴

Should the exclusive authority of Parliament to negotiate treaties and extinguish Indian title exclude the Métis? When the Supreme Court of Canada confirmed Lord Watson’s opinion in *Delgamuukw*, it notably held that the phrase ‘lands reserved for Indians’ in ss. 91(24) is not limited to reserve land, but extends to all “lands held pursuant to *aboriginal* title.”⁵⁸⁵ Lamer C.J. for the majority further found in *Delgamuukw* that “the exclusive power to legislate in relation to ‘Indians, and Lands reserved for the Indians’ has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in [his] opinion, encompasses within it the *exclusive power to extinguish* aboriginal rights, including *aboriginal title*.”⁵⁸⁶ It would seem that the Court expressly used the term *aboriginal* title rather than *Indian* title. If so, the Court may be suggesting that the phrase ‘lands reserved for Indians’ should be

⁵⁸³ *Ibid.* At 667.

⁵⁸⁴ *St. Catherine’s*, *supra* note 191 at 59, Lord Watson. Emphasis added.

⁵⁸⁵ *Delgamuukw*, *supra* note 33 at para. 74, Lamer C.J. for the majority. Emphasis added.

⁵⁸⁶ *Ibid.* at para. 173. Emphasis added.

understood as ‘lands reserved for *Aboriginals*’. If the Métis are an *Aboriginal* people under s. 35 and their ‘Indian’ title was recognized in s. 31, but the Court rejected the idea that they are ‘Indians’ for the purposes of para. 13 of the *NRTA*, should the expression ‘*Aboriginal* title’ be read into the phrase ‘toward the extinguishment of *Indian* title’?

3.3.1. Reconciling ss. 91(24), s. 31 and s. 35

As Paul Chartrand and John Giokas have argued, “[c]onstitutional provisions must be interpreted, not in isolation, but read together with the entire text of the Constitution. Accordingly, the meaning of ‘the Métis people’ in section 35 is informed by the meaning in section 31 of the *Manitoba Act 1870*, which is part of the Constitution of Canada and which expressly recognized the Métis people.”⁵⁸⁷ In effect, the Supreme Court of Canada has held that the Constitution of Canada “has an internal architecture, or what the majority of this Court in *OPSEU*,⁵⁸⁸ called a ‘basic constitutional structure’. The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.”⁵⁸⁹ In *Dubois*, the Court held that the *Charter* “must be construed as a system”⁵⁹⁰ and that “the courts must interpret each section of the *Charter* in relation to the others.” As with the *Charter*, one could argue that in the Constitution in general, “[e]very component contributes to the meaning as a whole, and the whole gives meaning to its parts.”⁵⁹¹ This involves a systemic interpretation where one “aims at clarifying a fragment of a text by another, indeed by other texts,”⁵⁹² or, to put it otherwise, a ‘systematic’ interpretation is where one “postulates that the law-maker is coherent and desires that a law first be interpreted with regard to all of its clauses and then with regard to

⁵⁸⁷ Chartrand and Giokas, “Defining ‘The Métis People’” *supra* note 78 at 279.

⁵⁸⁸ *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at 57.

⁵⁸⁹ *Re Québec Secession*, *supra* note 246 at para. 50.

⁵⁹⁰ *Dubois v. The Queen*, [1985] 2 S.C.R. 350 at para. 43.

⁵⁹¹ Pierre-André Côté, *The Interpretation of Legislation in Canada* (Cowansville, Ed. Yvon Blais Inc., 1984) at 236. Quoted in *ibid.*

⁵⁹² Troper, *Philosophie du droit*, *supra* note 95 at 104.

connected laws.”⁵⁹³

Since ss. 91(24) of the *Constitution Act, 1867*, s. 31 of the *Manitoba Act*, s. 35 of the *Constitution Act, 1982*, and para. 13 of the *Natural Resource Transfer Agreement* are all constitutional laws, they must be interpreted in a manner so as to give effect to each of them.⁵⁹⁴ In *Blais*, the Court concluded that the “continuity requirement would lead us to conclude that ‘Indians’ and ‘Métis’ are different, since they are separately enumerated in s. 35(2) of the *Constitution Act, 1982*.”⁵⁹⁵ What the Court meant here was simply that the term ‘Indian’ in para. 13 of the *NRTA* is synonymous with the more restrictive use of the term ‘Indian’ in ss. 35(2) of the *Constitution Act, 1982*. Since this latter use of the term ‘Indian’ expressly excludes the Métis, the latter are necessarily excluded from the ambit of para. 13.

As Chartrand and Giokas have pointed out, “the meaning of ‘the Métis people’ in section 35 is informed by the meaning of section 31 of the *Manitoba Act 1870*.”⁵⁹⁶ In effect, the reference to the Métis in s. 35(2) must at the very least include within its ambit the reference to the ‘Half-Breeds’ in the English version of s. 31 and *Métis* in the French version. Logically speaking, then, the ‘Indian’ title of the Half-Breeds/*Métis* in s. 31 must be conciliated with the expression ‘aboriginal title’ which, in accordance with the decisions *Côté* and *Adams*,⁵⁹⁷ is subsumed under the term ‘aboriginal rights’ in s. 35(1). In order to conciliate the terms ‘Indian’ and ‘aboriginal’, it is necessary to apply a technique akin to that of ‘reading in’ in *Charter* cases. In *Schachter Lamer* C.J. for the majority of the Supreme Court of Canada stated that it was “entirely inappropriate” to “create a situation *where the style of drafting* would be the single critical factor in the determination

⁵⁹³ Brun and Tremblay, *supra* note 79 at 762. Our translation.

⁵⁹⁴ *Ibid.* at 763.

⁵⁹⁵ *Blais*, *supra* note 102 at para. 36.

⁵⁹⁶ Chartrand and Giokas, “Defining ‘The Métis People’” *supra* note 78 at 277-9.

⁵⁹⁷ *Adams*, *supra* note 340; *Côté*, *supra* note 340.

of a remedy.”⁵⁹⁸ Further on, Lamer C.J. specified that “the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature.”⁵⁹⁹ At the very least, Parliament recognized that the Métis had some sort of *title*, and not simply a ‘cognizable Indian *interest*’ in the land. But what did it mean by ‘Indian’?

In terms of s. 31, we have seen that the Court quoted with approval Macdonald’s claim that the expression ‘Indian title’ was an *inaccurate* description.⁶⁰⁰ However, this could be attributed to what the Court called an unfortunate ‘style of drafting’ and should therefore not be the ‘single critical factor in the determination of a remedy’ – or in this case, the total absence of a remedy – by denying the legal recognition of any sort of title whatsoever, as MacInnes J. did. While ‘reading in’ usually means adding words to a statute to render it conform to the *Charter*, in *Miron v. Trudel* the Court simply gave a liberal interpretation of the existing term ‘spouse’, which the framers had meant to restrict to a person legally married, so as to include common law spouses, without adding any words to the text.⁶⁰¹

Similarly, the term ‘Indian’ in s. 31 can be given a large and liberal interpretation so as to ‘read in’ the word ‘aboriginal’ in s. 35. Judge MacInnes in effect did this when he applied the *Delgamuukw* test for establishing common law Aboriginal title in order to determine whether the Métis had any ‘Indian’ title that s. 31 could have effectively extinguished.⁶⁰² In addition, there is some historical support for this. Flanagan has asserted that the “adjective ‘aboriginal’ was first substituted for ‘Indian’ by authors claiming land rights for the Métis,” and advanced that “this was done as early as 1898 by the historian Archer Martin.”⁶⁰³ While this is not entirely true – one will find numerous references where the term ‘aboriginal’ was applied to the First Nations of

⁵⁹⁸ *Schachter v. Canada*, [1992] 2 S.C.R. 679. Emphasis added.

⁵⁹⁹ *Ibid.* at ?

⁶⁰⁰ *Blais*, *supra* note 102 at para. 22.

⁶⁰¹ *Miron v. Trudel*, [1995] 2 S.C.R. 418.

⁶⁰² *MMF*, *supra* note 20 at paras. 562-594. (Man. Q.B.)

⁶⁰³ Flanagan, “Indian Title to Aboriginal Rights” *supra* note 82 at 83.

North America in the nineteenth century⁶⁰⁴ – the term was in fact applied to the Métis prior to 1898.

For example, in an 1856 address of the *Aborigines' Protection Society* to Henry Labouchere, Principal Secretary of State for the Colonies, the petitioners use the expression 'aboriginal inhabitants of British North America' and the 'aboriginal population' in obvious reference to First Nations.⁶⁰⁵ However, the Committee evidently considered that the Métis were also 'aboriginals' when it claimed that, because five-sixths of "the population of the settlement [...] is composed of half-breeds and others of Indian blood," it "may therefore be considered as within the scope of the operations of our Society, and as claiming its advocacy."⁶⁰⁶ In 1856, local Red River historian Alexander Ross referred to the "native or aboriginal party, called hunters or half-breeds,"⁶⁰⁷ before calling them the "aboriginal inhabitants of the soil."⁶⁰⁸ In Captain Roderick Kennedy's 1857 petition to the Province of Canada, he mentions "those of aboriginal descent" in an obvious reference to Half-Breeds like himself who were engaged in free trade with the U.S.⁶⁰⁹

To come back to the Court's remark in *Blais*, if the characterization of the title of the Métis as being 'Indian' is an 'inaccurate description', the Court did not imply that that it was for so much a *false* description. Whereas it was in effect a *false* description to claim the Métis are 'Indians' for

⁶⁰⁴ Marshall C.J. spoke of "aboriginal occupants" in *Worcester v. Georgia*, (1832) 31 U.S. 515 at 544. In *St. Catharine's*, Chancellor Boyd referred to "aboriginal populations." *St. Catharine's*, *supra* note 201 at 206 (Ont. Ch.). On appeal, Patterson cited a passage from section six of the 1833 abridged edition of *Story's Commentaries on the Constitution of the United States* where the term "aboriginal inhabitants" is used. *St. Catharine's*, *supra* note 166 at 169 (Ont C.A.). On appeal to the Supreme Court of Canada, counsel for the Crown twice used the expressions "aboriginal inhabitants". *St. Catharine's*, *supra* note 217 at 596-7 (S.C.C.). To be fair, Flanagan acknowledged that he had not done a systematic survey. *Ibid.* at 83.

⁶⁰⁵ Aborigines' Protection Society, *Canada West and the Hudson's Bay Company: A Political and Humane Question of Vital Importance to the Honour of Great Britain, to the Prosperity of Canada, and to the Existence of the Native Tribes; Being an Address to the Right Honourable Henry Labouchere, Her Majesty's Principal Secretary of State for the Colonies; With an Appendix* (London: Published for the Society by William Tweedle, 1856) at 1-2.

⁶⁰⁶ *Ibid.*, at 3.

⁶⁰⁷ Ross, *Red River Settlement*, *supra* note 324 at 335.

⁶⁰⁸ *Ibid.*, at 336.

⁶⁰⁹ Edmund Henry Oliver, *The Canadian North-West. Its Early Development and Legislative Records* (Ottawa: Government Printing Press, 1915) at 1306.

the purposes of para. 13 of the *NRTA* or of ss. 35(2), it was merely an *inaccurate* description to call their title ‘Indian’ – rather than Aboriginal – in s. 31. It is arguably then an ‘accurate description’ to qualify Indian title in s. 31 as ‘aboriginal’ – that is, *autochtone* or *ancestral* – within the meaning of s. 35 of the *Constitution Act, 1982* or ‘indigenous’ within the meaning of ‘Indigenous’ in ss. 26(1) of the U.N. *Declaration*, which stipulates that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” The Court seemed to suggest this when it shut the door to para. 13 of the *NRTA* in *Blais*, since it repeatedly pointed to the open door of s. 35 and thereby indicated that the expression ‘Indian title’ in s. 31 is better conciliated with the term ‘aboriginal title’ which is subsumed under the term ‘aboriginal rights’ in ss. 35(2).

Finally, the technique of conciliation of para. 13 of the *NRTA* with s. 35(2) in *Blais* did not only exclude the Métis from the ambit of the term ‘Indian’ in the *NRTA*, it also has the effect of excluding the Inuit. However, much like the Court said of s. 31, the term ‘Indian’ in ss. 91(24) is also arguably an ‘inaccurate’ description since it equally includes the Inuit.⁶¹⁰ In other words, the term ‘Indian’ in para. 13 of the *NRTA* is more restrictive than that of ss. 91(24), or to put it otherwise, the term ‘Indian’ in ss. 91(24) is more comprehensive than the term ‘Indian’ in ss. 35(2). Just as with s. 31, I would argue that the term ‘aboriginal’ in s. 35 should be ‘read into’ the term ‘Indian’ in ss. 91(24).

3.3.2. The Métis as ‘Enfranchised Indians’

If the ‘Indian’ title of the Métis was indeed extinguished under ss. 91(24), does this necessarily mean that the Métis are ‘Indians’ for the purposes of ss. 91(24)? On the one hand, Hogg has asserted that there is no constitutional distinction between the terms ‘Indians’ and ‘lands reserved for

⁶¹⁰ *Reference re: British North America Act, 1867 (U.K.), s. 91*, [1939] S.C.R. 104.

Indians’.⁶¹¹ On the other hand, he also expressed the opinion “that s. 91(24) contains two heads of power: a power over ‘Indians’ and a power over ‘land reserved for Indians’.”⁶¹² According to Hogg, the “first power may be exercised in respect of Indians (and only Indians) whether or not they reside on, or have any connection with, lands reserved for Indians. The second power may be exercised in respect of Indians and non Indians so long as the law is related to lands reserved for Indians.”⁶¹³ Insofar as it is necessary to conciliate ss. 91(24) and s. 35, it is possible to argue that the term ‘Indians’ in the second head of power could be read as the equivalent of the more inclusive term ‘aboriginal’ in s. 35, but to read ‘Indians’ in the first head of power according to the more exclusive use of the term ‘Indian’ and ‘Inuit’ in ss. 35(2). This would allow for Métis title to be considered Aboriginal title for the purposes of the second head of power, all the while excluding them from the term ‘Indians’ for the purposes of the first head of power. In effect, the Court in *Blais* did not consider the Métis to be ‘Indians’ for the purposes of para. 13 of the *Transfer Agreement* and they may not be for the first head of power under ss. 91(24). Another way to resolve this anomaly is to hold that the word ‘aboriginal’ should also be read into the first head of power, but to recognize that the federal government essentially considered the Métis to be ‘enfranchised Indians’ as soon as their title was extinguished.

Although it was not expressed in this way, the question of the Métis having ‘Indian’ title and at the same time having full political rights was raised in the Settlement from the very moment s. 31 was adopted. When Ritchot returned to Assiniboia and presented his report to the Legislative Assembly of the Provisional Government, O’Donoghue brought to his attention that “some gentlemen present do not, I find, understand clearly Article 31 of the *Manitoba Act*, that having

⁶¹¹ Hogg, *Constitutional Law*, *supra* note 15 at p. 586.

⁶¹² *Ibid.* at 578.

⁶¹³ *Ibid.*

reference to the extinguishing of the Indian title by a land grant.”⁶¹⁴ The Half-Breeds had previously argued against any claims to Indian title and were concerned about the implication of the mention of ‘Indian title’ in s. 31 on their political rights and freedoms, since Indian ‘rights’ carried with it at that time the social stigma of legal status as wards of the Crown. Ritchot was quick to assert that the s. 31 “reservation does not in the least conflict with [ss. 91(24) of the *Constitution Act, 1867*], where it is provided that certain tracts of land are to be reserved for, and owned by, Indians.”⁶¹⁵ To clarify this latter point, O’Donoghue then shared with the Assembly that a “honourable member near me” wondered “whether Half-breeds taking these lands are to be held as minors” under ss. 91(24).⁶¹⁶ In other words, Half-Breeds were concerned that s. 31 lands implied that they and their children would be treated like ‘Indians’, that is as wards of the federal Crown with the consequent loss of their political and civil rights and liberties. Ritchot answered a simple “No.” He further tried to dispel these concerns by specifying that the grant was “to be reserved for minors, with Indian blood – but not for adults, for the latter are allowed every liberty of self-government and all the rights of white people.”⁶¹⁷ Of course, from a legal point of view, the children were considered to be ‘minors’ regardless of whether they were ‘Indian’ or not. Ritchot further explained that, because they already had land as well as “the rights and liberties of white people, adults, even with Indian blood, were allowed no special privileges.”⁶¹⁸ Before the House of Commons, Macdonald had stated that s. 31 “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

⁶¹⁴ *New Nation*, “Legislative Assembly of Assiniboia. Third Session” 1 July 1870 at 2.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.* Note that on both occasions, O’Donoghue raises the concerns of other members and not his own.

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.*

Dominion Government.”⁶¹⁹ If the Métis claimed Indian title, they had no desire to be classified as ‘Indians’ insofar as it entailed the inferior legal status of wards.

It was precisely with regard to ‘*their* titles’ that Riel intervened at this point, stating that, apart from s. 31, “the *general* Indian title has to be extinguished by being dealt with separately.”⁶²⁰ That he was not, however, simply referring to treaties with the First Nations is apparent when he specified that “[a]ll those having Indian blood have a title which must be extinguished as well as the general Indian claim.”⁶²¹ Confronted with what was Riel’s boldest public statement of his position on the Indian title of the Métis, Ritchot was forced to express some doubt about derivative Indian title as grounds for the land grant, stating that the “Half-breed title, on the score of Indian blood, is not quite certain. But in order to make a final and satisfactory arrangement, it was deemed best to regard it as certain, and to extinguish the right of the minority as Indians.”⁶²² Later in his report, Ritchot nevertheless agreed with Riel that adult Métis also had a claim to Indian title when he stated that although “by their energy in hunting and cultivation the Half-breeds have raised themselves to a higher position than the Indians,” their “claims are none the less good.”⁶²³ Finally, Ritchot confidently asserted that “England is fully prepared to pay all the respect due to the Indian title; and, in doing so, it will not overlook the claims of Half-breeds to their rights derived in this way.”⁶²⁴ As we have seen, Riel’s position was ultimately vindicated when Parliament adopted legislation to extinguish the derivative Indian title of Métis adults in 1874.⁶²⁵

The confusion stems from a belief that, in order to have Aboriginal title, which is a question of

⁶¹⁹ *House of Commons Debates* (May 2, 1870) at 1330 (Hon. John A. Macdonald). Emphasis added.

⁶²⁰ *New Nation*, “Legislative Assembly of Assiniboia. Third Session” 1 July 1870 at 2.

⁶²¹ *Ibid.*

⁶²² *Ibid.*

⁶²³ *Ibid.* Logically, the only Métis that could have “raised themselves to a higher position than the Indians [...] by their energy in hunting and cultivation” are *adults*.

⁶²⁴ *Ibid.*

⁶²⁵ *Act respecting the appropriation of certain Dominion Lands in Manitoba*, S.C. 1874 (37 Vict.), c. 20.

factual occupation, there must not only be an Aboriginal community, but its members must be *legally* defined as ‘Indians’. In other words, much like Peter Hogg, Ritchot seems to have believed there is no constitutional distinction between the term ‘Indians’ and ‘lands reserved for Indians’.⁶²⁶ This implies that if one has Indian title, one must necessarily have the legal status of an ‘Indian’. This is why Ritchot thought it less problematic to recognize the Indian title of Métis minors. The legal status of ‘Indians’ was that of wards of the Crown and the children of the Métis were already minors, so there was not the same social stigma attached to recognizing their Indian title. In effect, s. 16 of the *Gradual Enfranchisement Act*,⁶²⁷ which federal Parliament had adopted the previous year, once an individual was “held to be enfranchised,” from that date, “the provisions of any Act or law making any distinction between the legal rights and liabilities of Indians and those of Her Majesty’s other subjects shall cease to apply to any Indian, his wife or minor children as aforesaid, so declared to be enfranchised, who shall no longer be deemed Indians within the meaning of the laws relating to Indians.” The *Act* worked from the premise that once one enjoys full citizenship rights, one suddenly ceases to be ‘Indian’ in the sense of having a separate legal status that implies guardianship. What Ritchot and Riel’s statements seem to suggest is that, insofar as the Indian title of the Métis was recognized in s. 31, they were ‘Indians’. At the same time, insofar as Métis heads of family were concerned, it is as if their ‘titles by occupancy’ under ss. 32(3), their ‘peaceable possession’ of tracts of land under s. 32(4) and right of common under ss. 32(5) were deemed the equivalent of location tickets under the terms of *Enfranchisement Act*, and that upon commutation into fee simple and receiving political rights and freedoms under the terms of the *Manitoba Act*, they, their wives and children, were essentially enfranchised Indians. They were therefore no longer legally ‘Indians’ insofar as the first head of power is concerned.

⁶²⁶ Hogg, *Constitutional Law*, *supra* note 15 at p. 586.

⁶²⁷ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria*, Chapter 42, S.C. 1869, c. 6, s. 13.

However, the application of the underlying principle of the protection of minorities to the particular case of Aboriginal peoples did not begin with the adoption of s. 35 of the *Constitution Act, 1982*, but arguably underlies federal jurisdiction over ‘Indians and Indian Lands’ under ss. 91(24). In this regard, even if the powers under ss. 91(24) are strictly permissive, Parliament could not use them in such a way as to undermine this fundamental principle of the Constitution of Canada. What the application of the principle of the protection of minorities implies insofar as Aboriginal peoples are concerned is that the entire policy of enfranchising individuals and dividing reserve land into individual lots in order to assimilate the Amerindian population was unconstitutional. In sum, the “issue of alienable free grants to individuals could not be used as funnels to dissipate into the public market the block of lands specifically appropriated from the public lands for the benefit of a group. The groups interest had to be protected and preserved in the allocation of individual shares.”⁶²⁸ In other words, what is in question is not so much whether the Métis received just compensation for the extinguishment of their Aboriginal title, but whether the particular method of implementation of s. 31 in Manitoba, and notably the issue of scrip to Métis adults in Manitoba and to all Métis in the North-West, fulfilled the Crown’s obligation to protect the Métis as a minority. Interestingly, the Supreme Court of Canada admitted in the *Québec Secession Reference* that “Canada’s record of upholding the rights of minorities is not a spotless one.”⁶²⁹ It is respectfully submitted that the protection of the Indigenous rights of the Métis, both in Manitoba and in the North-West, is precisely one of those spots on Canada’s record.

⁶²⁸ Chartrand, *Métis Settlement Scheme*, *supra* note 15 at 77.

⁶²⁹ *Re Québec Secession*, *supra* note 246 at para. 81.

4. Section 31: A Land Claim Settlement

If we do take the surrender of the Indigenous title of the Métis seriously, this raises the question of the precise legal signification and status of s. 31. As mentioned above, Counsel for the plaintiff in *MMF* put forward the argument that the entire *Manitoba Act* is a treaty between the Métis and the federal government.⁶³⁰ As mentioned in section 1.3, it was quite foreseeable that both the Queen’s Bench and Court of Appeal of Manitoba would reject this argument.⁶³¹ However, Paul Chartrand has proposed that it is s. 31 alone, and not that entire *Act*, that “may be construed to be a ‘treaty’ provision within the meaning of the *Constitution Act, 1982*.”⁶³² In effect, s. 31 can be construed as a land claims agreement that “was reached and was entrenched in a Confederation pact, and the rights embodied in it are affirmed by section 35 of the *Constitution Act, 1982*, as one of the ‘treaties’ that formalized relations between the Crown and the habitants of the Crown lands when Canada assumed jurisdiction. It was the first land claim agreement to be entrenched in the Constitution.”⁶³³ Indeed, ss. 35(3), stipulates that “for greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist *by way of land claims agreements* or may be so

⁶³⁰ *MMF*, *supra* note 20 (Man. Q.B.) (Factum of the Plaintiff at 2, 4, 5, 22).

⁶³¹ *MMF*, *supra* note 20 at para. 510 (Man. Q.B.); *MMF*, *supra* note 47 at para. 238. (Man. C.A.)

⁶³² Chartrand, *Métis Settlement Scheme*, *supra* note 15 at 14 and 134-137.

⁶³³ *Ibid.* at 5. Chartrand is referring to the *Constitution Act, 1871*.

acquired.”⁶³⁴ However, Chartrand merely asserted that “[t]entatively, it appears that the background of the negotiations supports the view that section 31 embodies a treaty in the sense of a ‘land claims agreement’ as described in section 35(3) of the *Constitution Act, 1982*.” My first objective here is to build on Chartrand’s work by filling in the factual background of the negotiations that led to the inclusion of s. 31 in the *Manitoba Act*. In addition, the Supreme Court of Canada had not yet rendered its key decision concerning the criteria to determine the existence of a treaty in *Sioui*⁶³⁵ when Chartrand had completed his book. My second objective is to build on Chartrand’s intuition by considering the factual background negotiations that led to the surrender of the ‘Indian’ title of the Métis in light of the grid established in *Sioui* for the legal determination of the existence of a ‘treaty’.

It should be noted that, while the argument that s. 31 alone constitutes a treaty was not submitted by the plaintiffs, part of Judge MacInnes’ analysis of whether or not the entire *Manitoba Act, 1870*, is a ‘treaty’ partly dealt with the specific negotiations that led to s. 31.⁶³⁶ In addition, on appeal Scott C.J. held that s. 31 was “not a traditional historic land claim.”⁶³⁷ However, I will try to demonstrate in what follows that both MacInnes J. and Scott C.J. made palpable and overriding errors of both fact and law in their respective decisions in this regard. Before proceeding to this analysis, I would first like to recall that, in section 1.1 of this thesis, I sought to establish MacInnes J.’s finding of fact that “there was no request for, expectation of or consideration by Canada to create a Métis homeland or land base”⁶³⁸ and Scott C.J.’s finding that the Métis “made no formal claim”⁶³⁹ are both palpable and overriding errors of fact.

Furthermore, Scott C.J. also created some ambiguity relative to MacInnes’ findings in this

⁶³⁴ Emphasis added.

⁶³⁵ *R. v. Sioui*, [1990] 1 S.C.R. 1025. [*Sioui*]

⁶³⁶ *MMF*, *supra* note 20 at paras. 488-502. (Man. Q.B.)

⁶³⁷ *MMF*, *supra* note 47 at para. 245. (Man. C.A.)

⁶³⁸ *MMF*, *supra* note 20 at para. 238. (Man. Q.B.)

⁶³⁹ *MMF*, *supra* note 47 at para. 504. (Man. C.A.)

matter when he insisted that it should not “be forgotten that the *Act* [...] evolved from negotiations between Canada and the delegates.”⁶⁴⁰ In MacInnes’ view, “nothing turns on this point” of whether there were ‘negotiations’ or merely ‘discussions’ since “whichever descriptor one prefers, [the product] was neither a treaty nor an agreement. Moreover, *it certainly was not a treaty or an agreement with aboriginals.*”⁶⁴¹ For his part, Scott C.J. noted that, “[w]hile (as the trial judge noted in para. 643) the *Act* is not generally an instrument dealing with the Métis, s. 31 is clearly Métis-specific”⁶⁴² and was of the opinion that the federal government certainly was dealing with an Aboriginal people.⁶⁴³ In addition, whereas MacInnes J. asserted that because “the Métis did not hold aboriginal title, there was nothing to surrender or cede,”⁶⁴⁴ Scott C.J. acknowledged that the Métis “had occupied lands in Assiniboia for decades”⁶⁴⁵ and that they had a ‘cognizable Indian interest’ in the land that could be surrendered.⁶⁴⁶ Let us consider, then, the case law on the surrender of Indigenous title.

4.1. The Surrender of Indigenous Title

In *Haida Nation*, the Supreme Court of Canada held that the “honour of the Crown is always at stake in its dealings with Aboriginal peoples,”⁶⁴⁷ most notably during the “resolution of claims.”⁶⁴⁸ It furthermore stipulated that “[w]here treaties remain to be concluded, the honour of the Crown *requires negotiations leading to a just settlement of Aboriginal claims* [...]. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to

⁶⁴⁰ *Ibid.* at para. 506.

⁶⁴¹ *MMF*, *supra* note 20 at para. 464. (Man. Q.B.) Emphasis added.

⁶⁴² *MMF*, *supra* note 47 at para. 405. (Man. C.A.)

⁶⁴³ *Ibid.* at para. 382.

⁶⁴⁴ *MMF*, *supra* note 20 at para. 631. (Man. Q.B.)

⁶⁴⁵ *MMF*, *supra* note 47 at para. 504. (Man. C.A.)

⁶⁴⁶ *Ibid.* at paras. 475 and 505. See section 1.2 for Scott C.J.’s analysis of a ‘cognizable Indian interest’.

⁶⁴⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 16.

⁶⁴⁸ *Ibid.* at par. 17.

define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.⁶⁴⁹ In *Wewaykum*, the Court clarified three instances of the existence of fiduciary obligations of the Crown relative to the creation of a reserve, the second of which is relevant to the surrender of the pre-existing Indigenous title of the Métis: “Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown’s duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.”⁶⁵⁰

If the *Indian Act* was invoked in *Wewaykum*, in *Guerin* Wilson J. for three of eight judges agreed that s. 18 of the *Indian Act* “does not *per se* create a fiduciary obligation in the Crown with respect to Indian reserves” and that it merely “recognizes the existence of such an obligation. *The obligation has its roots in the aboriginal title of Canada’s Indians.*”⁶⁵¹ Dickson J. noted that 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.”⁶⁵² In attempting to reconcile the precedents that qualified Indian title as ‘personal and usufructuary’ and a ‘beneficial interest’, Dickson J. then noted that Indian title was *sui generis* and that the “nature of the Indians’ interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an

⁶⁴⁹ *Ibid.* at para. 20. Emphasis added.

⁶⁵⁰ *Wewaykum*, *supra* note 167 at para. 86.

⁶⁵¹ *Guerin*, *supra* note 164 at para. 22, per Wilson J.

⁶⁵² *Ibid.* at para. 98.

obligation to deal with the land on the Indians' behalf when the interest is surrendered."⁶⁵³

Dickson J. traced both of these aspects of the *sui generis* nature of Indian title to the *Royal Proclamation, 1763*.

While the Court in *Guerin* held that the federal Crown owed a fiduciary duty to the Musqueam Indian Band, the source of this duty could not have been s. 35 of the *Constitution Act, 1982*, since it was not in force at the time of the surrender by the Band to the Crown for lease in 1957. If Indigenous title can only be surrendered to the Crown in the right of Canada, and ss. 91(24) is the head of power that allows the Crown to accept such a surrender, then it stands to reason that whenever the federal government exercises its powers under ss. 91(24), it is necessarily subject to the principle of the honour of the Crown, which can trigger a fiduciary duty. As Brad Morse has noted, "even if s. 91(24) provided a discretionary power to legislate prior to 1982, it still possessed within it a restraint not to violate aboriginal interests as part of mandatory fiduciary duties once those duties had become concrete in a given situation."⁶⁵⁴ If Aboriginal title can only be surrendered to the federal Crown under ss. 91(24), this implies that Indian lands are not merely a federal jurisdiction, but are a federal *responsibility*.⁶⁵⁵ This responsibility is arguably embodied in the procedure for surrendering Indian title that is laid out in the *Royal Proclamation*, which engages the honour of the Crown and creates fiduciary obligations. It stands to reason, then, that *prior to reserve creation*, the Crown exercises a public law function under ss. 91(24) that incorporates the procedure in the *Royal Proclamation* for surrendering Indigenous title and is therefore subject to supervision by the courts exercising public law remedies.

⁶⁵³ *Ibid.*

⁶⁵⁴ Brad Morse, "Government Obligations, Aboriginal Peoples and Section 91(24)" in David C. Hawkes, ed., *Aboriginal Peoples, Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 59-91 at 87.

⁶⁵⁵ See generally *ibid.*

4.1.1. Identifying a ‘Treaty’: The *Sioui* Criteria

Keeping in mind, then, the legal obligations that are imposed on the Crown while negotiating the surrender of Indigenous title, let us now turn to the criteria for determining whether a treaty or land claims agreement or settlement was negotiated between the Métis people and the Crown in the right of Canada. In *Sioui*, Justice Lamer referred to *R. v. Taylor and Williams*,⁶⁵⁶ because it provided “valuable assistance by listing a series of factors which are relevant to analysis of the historical background.”⁶⁵⁷ He noted that while in “that case the Court had to interpret a treaty, and not determine the legal nature of a document, [...] the factors mentioned may be just as useful *in determining the existence of a treaty* as in interpreting it. In particular, they assist in *determining the intent of the parties to enter into a treaty*.”⁶⁵⁸ Lamer J. then provided five factors to be taken into consideration:

- 1) Whether the right has been continuously exercised in the past and at present;
- 2) The reasons the Crown made a commitment;
- 3) The situation prevailing at the time the document was signed;
- 4) The evidence of relations of mutual respect and esteem at the time the document was signed; and
- 5) The subsequent conduct of the parties.⁶⁵⁹

One of the difficulties of applying the *Sioui* criteria to s. 31 is that *Sioui* involved a ‘treaty’ within the meaning of s. 88 of the *Indian Act* as opposed to s. 35 of the *Constitution Act, 1982*. While it is “safe to assume that the word ‘treaty’ would bear the same meaning in both instruments,”⁶⁶⁰ the latter is undoubtedly larger in scope than the former. A second difficulty is that *Sioui* involved an Aboriginal *right* rather than Aboriginal title. In this regard, the question of the continuous exercise of the right is less relevant in cases concerning the surrender of Indian

⁶⁵⁶ *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227. (Ontario Court of Appeal)

⁶⁵⁷ *Sioui*, *supra* note 586 at para. 46.

⁶⁵⁸ *Ibid.* Emphasis added.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Hogg, *Constitutional Law*, *supra* note 15 at 607.

title. Insofar as this involves the existence of Indigenous title, this is best left to the *Delgamuukw* test and, insofar as s. 31 extinguished Métis Indigenous title, they obviously could not have continuously exercised the right in the past and the present. Furthermore, the Court found on the one hand in *Ross River*⁶⁶¹ that the fourth *Sioui* factor was relevant to the *creation* of a reserve in a non-treaty context, but rather by an act of Parliament, a situation that parallels closely the implementation of s. 31. On the other hand, *Ross River* did not deal with the application of the other *Sioui* factors and did not deal with a land claims agreement involving the surrender of Indigenous title. For these reasons, I will use the more general criteria that Peter Hogg has extrapolated from the *Simon*⁶⁶² and *Sioui* judgements. Hogg enumerated the following characteristics for establishing whether a document constitutes a ‘treaty’:

- 1) Parties: The Parties to the treaty must be the Crown, on the one side, and an aboriginal nation, on the other side.
- 2) Agency: The signatories to the treaty must have the authority to bind their principals, namely the Crown and the aboriginal nation.
- 3) Intention to create legal obligations: The parties must intend to create legally binding obligations.
- 4) Consideration: The obligations must be assumed by both sides, so that the agreement is a bargain.
- 5) Formality: there must be a ‘certain measure of solemnity’.⁶⁶³

4.2. The Parties of the Treaty

Insofar as Canada is concerned, there is no doubt that John A. Macdonald, as prime minister, and Georges-Étienne Cartier, as vice-prime-minister, both appointed by the Governor General, had the capacity to represent and engage the Crown. It is all the more the case when one considers that Lord Granville of the Colonial Office became directly involved and put pressure on Macdonald to negotiate with the representatives of the North-West. This intervention also clarifies the recognition of the delegates of the North-West. Insofar as the population of the District of Assiniboia is concerned, there is little doubt here either. The Convention of Forty

⁶⁶¹ *Ross River Dene Council Band v. Canada*, [2002] 2 S.C.R. 816.

⁶⁶² *Simon v. The Queen*, [1985] 2 S.C.R. 387.

⁶⁶³ Hogg, *Constitutional Law*, *supra* note 15 at 607.

appointed Joseph-Noël Ritchot, Judge John Black and Scott as representatives of the Settlement. Where things become complicated is whether one or all of the delegates were mandated to specifically represent the Métis and negotiate their land claims.

One of the reasons that the courts have refused to recognise s. 31 as the result of an ‘agreement’ is that they have essentially adopted Flanagan’s attack – again, the expert witness for the Crown in *MMF* – of Ritchot’s role during the negotiations, the objective of which is to minimise the legitimacy of the recognition of the derivative Indian title of the Métis in s. 31. He does this by first claiming Ritchot had no mandate to negotiate a land claim s. 31, second by reducing Ritchot’s position on the question to that of a minority of one delegate out of three, and third by suggesting that Ritchot went beyond the limits of his mandate.

In Flanagan’s view, Ritchot “was not officially instructed to negotiate the extinguishment of Métis aboriginal title, to request a land grant or anything of that sort,”⁶⁶⁴ especially since the “insurgents at Red River had never demanded a land grant or anything like it.”⁶⁶⁵ In fact, a land grant was not “originally desired by anyone, either the Métis or the Canadian government”, but simply “emerged as a hastily contrived compromise.”⁶⁶⁶ According to Flanagan, it was only when the ministers refused to cede control over public lands that Ritchot brought up the idea of a land grant.⁶⁶⁷ The trial court and the court of appeal both subsequently endorsed this narrative. MacInnes claimed that neither “the Red River delegates nor their principals had contemplated a land grant for the children, Métis or others.”⁶⁶⁸ Again, it is claimed that it “was only when it became clear to the delegates that Canada would not agree to transfer ownership of the public

⁶⁶⁴ Flanagan, “Case Against” *supra* note 82 at 317; “Métis Aboriginal Rights” *supra* note 82 at 231.

⁶⁶⁵ Flanagan, *Riel and the Rebellion*, *supra* note 82 at 59; *1885 Reconsidered*, *supra* note 82 at 65.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ *Ibid.* 59-60; “Case Against” *supra* note 82 at 317; “Métis Aboriginal Rights” *supra* note 82 at 232; *Métis Lands*, *supra* note 19 at 33; *1885 Reconsidered*, *supra* note 82 at 65-66.

⁶⁶⁸ *MMF*, *supra* note 20 at para. 649. (Man. Q.B.)

land to the Province that the concept of a children's grant first arose."⁶⁶⁹

Flanagan has further suggested that Ritchot overstepped his mandate by insisting that "Ritchot was only one of the three delegates from Red River" and pointing out that "Ritchot's diary refers several times to differences of opinion between John Black and himself."⁶⁷⁰ To be sure, when Dale Gibson pointed out the obstacles to interpreting the *Manitoba Act* as a 'treaty', he mentioned that "it is doubtful that the Red River negotiators represented the Métis population exclusively."⁶⁷¹ However, Gibson was speaking of the *Manitoba Act* as a whole, not simply s. 31, and recognized that "Ritchot, the primary negotiator, gave constant voice to Métis concerns and the legislative assembly of the provisional government, which was predominantly Métis [and Half-Breed] in its composition, ratified the act."⁶⁷² MacInnes followed Flanagan closely when he asserted that the delegates did not "represent the Métis *per se*, but rather all residents of the Settlement."⁶⁷³ Scott C.J. upheld MacInnes J.'s conclusion that the delegates "were negotiating on behalf of all members of the Red River Settlement and were not empowered to enter into a binding agreement."⁶⁷⁴ In what follows, I will seek to demonstrate that these assertions lie for a good part on a truncated interpretation of Ritchot's diary.

For example, Flanagan mentions that "[I]and matters then came up on 26 April,"⁶⁷⁵ but reduces such claims to those that were incorporated into s. 32 of the *Manitoba Act*. He then passes immediately to the discussions of 27 April and claims that it was only 'then' that Ritchot brought up the idea of compensation for the extinguishment of the derivative Indian title of the Métis. In other words, the issue was only raised during the negotiations because Macdonald and

⁶⁶⁹ *Ibid.* at paras. 649 and 928.

⁶⁷⁰ Flanagan, *Métis Lands*, *supra* note 19 at 47.

⁶⁷¹ Gibson, "General Sources of Métis Rights" *supra* note 81 at 288.

⁶⁷² *ibid.*

⁶⁷³ *MMF*, *supra* note 20 at para. 468. (Man. Q.B.)

⁶⁷⁴ *MMF*, *supra* note 47 at para. 176. (Man. C.A.)

⁶⁷⁵ Flanagan, *Métis Lands*, *supra* note 19 at 32-3.

Cartier would not accept provincial control of public lands.⁶⁷⁶ In fact, Ritchot's diary does not proceed in a perfectly chronological manner. First of all, it was Macdonald and Cartier who first raised the question of the extinguishment of Indian title as one of the justifications for maintaining federal control over public lands at the very beginning of the entry of 27 April.⁶⁷⁷ When the ministers steadfastly refused any compromise on this issue, Ritchot insisted that they "could by no means let go control of lands at least unless [they] had compensation or conditions which for the population actually there would be equivalent of the control of the lands of their province."⁶⁷⁸ Here, Ritchot abruptly interrupts his narrative of 27 April, writing in the margin that it was "Tuesday the 26th that we dealt with this" — in other words with what 'conditions' Ritchot took to be an 'equivalent' of local control of Crown lands.⁶⁷⁹ It is here that the 'land matters' to which Flanagan refers are mentioned, but he curiously neglects to mention that Ritchot concluded his recapitulation of 26 April with the remark that "*a long debate arises on the rights of the Métis.*"⁶⁸⁰ That this issue was thoroughly discussed is confirmed by Cartier when he mentioned in Parliament during discussion of s. 31 that this "land question was the most difficult one to decide" of all questions related to the *Manitoba Act*.⁶⁸¹ Ritchot's narrative then returns to the negotiations of 27 April and immediately reveals what was understood by 'Métis rights': Macdonald and Cartier's replied that the Métis, "claiming and having obtained a form of government fitting for civilized men ought not to claim also the privileges granted to the

⁶⁷⁶ *Ibid.* at 33.

⁶⁷⁷ Noël-Joseph Ritchot, "Le journal de l'abbé N.J. Ritchot – 1870" ed. George F.G. Stanley (1964) 17 *Revue d'histoire de l'Amérique française* 537 at 546.

⁶⁷⁸ W.L. Morton, *Birth of a Province*, *supra* note 148 at 140. Ritchot, *ibid.*: "Nous ne pouvons nullement renoncer au contrôle des terres à moins que nous ayons une compensation ou des conditions qui pour la population actuelle équivaldraient au contrôle des terres de la province." Ritchot, *ibid.*

⁶⁷⁹ *Ibid.* "[...] le mardi 26 que nous avons traité cela." Ritchot, *ibid.* at 547.

⁶⁸⁰ *Ibid.* at 141. Ritchot, *ibid.*: "s'éleva un long débat sur les droits des Mitis [*sic*]." Emphasis added.

⁶⁸¹ *House of Commons Debates*, (9 May 1870) at 1446. (Hon. Georges-Étienne Cartier).

Indians.”⁶⁸² The issue was therefore not simply raised out of the blue on 27 April, as Flanagan and MacInnes would have us believe.⁶⁸³

Of course, one might respond to this that, regardless of when exactly the question was first raised, Ritchot had nevertheless pulled it out of the proverbial hat. However, as has been shown here, and in more detail elsewhere,⁶⁸⁴ it was not Ritchot who gave “birth to the idea that the Métis had inherited a share of Indian title”, as Flanagan claims.⁶⁸⁵ Even more importantly, Macdonald had been informed of such demands some five months before he met Ritchot. As we have seen, a letter dated 18 November 1869 informed him that the Métis were demanding *inter alia*: 1) That the Indian title to the whole territory shall at once be paid for; 2) That on account of their relationship with the Indians a certain portion of this money shall be paid over to them [the Métis]; 3) That all their claims to land shall be at once conceded; 4) That [2]00 acres shall be granted to each of their children.⁶⁸⁶ As Macdonald knew perfectly well that the Métis were claiming both compensation for their share of Indian title and 200 acre grants for each child, he would have neither accredited Ritchot with the paternity of such ideas nor perceived it as an improvisation on his part.⁶⁸⁷ In light of this, Ritchot’s demand for 200 acres for each Métis adult *and* child to extinguish their Indian title was hardly “hastily improvised” or even an innovation

⁶⁸² W.L. Morton, *Birth of a Province*, *supra* note 148 at 140. Ritchot, “Le journal” *supra* note 677 at 547: “ayant obtenu une forme de Gouvernement propre aux hommes civilisés ne devraient pas réclamer les privilèges accordés aux Sauvages.”

⁶⁸³ Flanagan, “Case Against” *supra* note 82 at 317; “Métis Rights” *supra* note 82 at 232; *Métis Lands*, *supra* note 19 at 33; *MMF*, *supra* note 20 at paras. 649 and 928. (Man. Q.B.)

⁶⁸⁴ O’Toole, “Métis Claims to ‘Indian’ Title” *supra* note 106.

⁶⁸⁵ Flanagan, *Métis Lands*, *supra* note 19 at 34.

⁶⁸⁶ A.S. Morton, *History of the Canadian West*, *supra* note 128 at 877. The amount in A.S. Morton’s list is actually 300 acres, while in Daniels, Bumsted and Flanagan it is 200. While Flanagan cites Daniels, he also refers to the original document in the archives. I therefore presume that the correct amount is 200 and not 300 acres. See Harry Daniels, *Native People and the Constitution of Canada* (Ottawa: Native Council of Canada, 1981) at 56; John Bumsted, *The Red River Rebellion* (Winnipeg: Watson & Dwyer Publishing Ltd., 1996) at 79 and Flanagan, “Case Against” *supra* note 82 at 324, note 3.

⁶⁸⁷ By this time, Macdonald had also undoubtedly read the *Sessional Papers* that contained the “Correspondence and Papers Connected with Recent Occurrences in the North-West Territories” and in which several references to Métis claims of Indian title can be found.

on Métis demands or on land grants to Métis at the time.⁶⁸⁸ Far from being ‘a hastily contrived compromise’, s. 31 was the question that ‘was the most difficult one to decide’ and the result of ‘a long debate’, not only between the delegates and ministers, but most certainly among the Métis themselves.⁶⁸⁹

Be that as it may, none of this proves that Ritchot alone had a specific mandate to negotiate the surrender of Métis title for a land grant. Indeed, Flanagan claims that Ritchot had no instructions to negotiate “a land grant or anything like it” and further insists, not only was he but one of three delegates, but that John Black was often in disagreement with him.⁶⁹⁰ If this latter statement is true, it is nevertheless misleading. Flanagan asserts that, when Ritchot demanded control of public lands, “not receiving support from John Black, he finally retreated.”⁶⁹¹ In fact, when Black accepted without hesitation to cede control over public lands to the federal Parliament, Ritchot replied, “if Mr. Black wanted and was able to have this accepted by the people, I would gladly accept them.”⁶⁹² At this point, it was Black who, receiving neither the support of Ritchot nor that of Scott, finally retreated. According to Ritchot, “Mr. Black naively said he could not get these arrangements accepted.”⁶⁹³ Furthermore, as Flanagan himself recognised,⁶⁹⁴ in the delegates’ instructions, the article in the *List of Rights* concerning provincial control of public land was peremptory.⁶⁹⁵ It was therefore Black who overstepped his mandate when he so casually accepted federal control of public land.

⁶⁸⁸ M.L. Morton, *Birth of a Province*, *supra* note 148 at 142.

⁶⁸⁹ See O’Toole, “Métis Claims to ‘Indian’ Title” *supra* note 106 and Gerhard Ens, “Prologue to the Red River Resistance: Pre-liminal Politics and the Triumph of Riel” (1994) 5 *Journal of the Canadian Historical Association* 111.

⁶⁹⁰ Flanagan, *Métis Lands*, *supra* note 19 at 47.

⁶⁹¹ *Ibid.* at 33.

⁶⁹² W.L. Morton, *Birth of a Province*, *supra* note 148 at 140. Ritchot, “Le Journal” *supra* note 677 at 546: “si ce monsieur [Black] voulait et pouvait les faire accepter par le peuple, je les accepterais volontiers.” Ritchot was referring to his instructions, which made the deal with Canada subject to the approval of the Legislative Assembly of Assiniboia.

⁶⁹³ *Ibid.* Ritchot, *ibid.*: “Monsieur Black dit naïvement qu’il ne pourrait pas faire accepter ces arrangements.”

⁶⁹⁴ Flanagan, *Riel and the Rebellion*, *supra* note 82 at 59; *1885 Reconsidered*, *supra* note 82 at 65.

⁶⁹⁵ Begg, *Creation of Manitoba*, *supra* note 121 at 323.

Black's overly conciliating position is hardly astonishing when one considers that James Ross recorded first on 3 December 1869 that, in regards to the first *List*, Black "disapproved the French programme entirely" and then on the following day that Black "was going to see Riel and Co. about the resolutions or articles of rights set forth in print yesterday. He seemed to think them absurd."⁶⁹⁶ Furthermore, James W. Taylor,⁶⁹⁷ a special secret agent of the United States sent to Red River who followed the delegates of the Provisional Government to Ottawa, reported to the Secretary of State, Hamilton Fish, on 19 April 1870 that he suspected that there "will be a great effort to separate Judge Black from the other members of the delegation" and that "there is a determined purpose to single out Judge Black in the party to be flattered and influenced — inducing him to stand firmly on the original *Bill of Rights*, in opposition to any new demands borne by Ritchot and Scott."⁶⁹⁸ For Taylor, then, it was Black's, not Ritchot's position, that was that of a minority of the delegates. In effect, in his deposition to the Select Committee, Macdonald stated that when Black told him that his instructions were from the Provisional Government and that he carried a new *List of Rights* prepared by the latter, Macdonald "told him they had better not be produced," but "that the claims asserted in the last mentioned [second] Bill of Rights could be pressed by the delegates."⁶⁹⁹ Subsequently, while Ritchot "was continually anxious to obtain some such recognition" of the Provisional Government, "Black desired to be spoken of as coming from the Convention [of Forty], and not from the Provisional

⁶⁹⁶ W.L. Morton, *Papers Relative to the Resistance*, *supra* note 124 at 440. Given that this is what he thought of the first *List of Rights*, one wonders what Black thought of the fourth *List* and how prepared he was to stand by it.

⁶⁹⁷ James Wickes Taylor (1820-1893): Born in Starkey, Yates County, New York. In 1856, he moved to St. Paul, Minnesota, where from 1859 to 1869 he served as a special agent to the Treasury Department. In December 1869 he was issued a secret commission appointing him special agent of the State Department to provide full details on the Red River Resistance. Taylor was in Ottawa in 1870 when the delegates from the provisional government were discussing the terms of the settlement's entry into confederation. (see *Manitoba Historical Society* and *Dictionary of Canadian Biography Online*).

⁶⁹⁸ W.L. Morton, *Birth of a Province*, *supra* note 148 at 49 and 50.

⁶⁹⁹ Canada, "Causes and Difficulties" *supra* note 125 at 103.

Government.”⁷⁰⁰

Furthermore, according to Sir Stafford Northcote, Governor of the HBC, Sir John Young, the Governor General of Canada, was of the opinion that Scott was “a mere creature of Riel’s.”⁷⁰¹ If Scott was nominally appointed to represent the United States’ element in the Settlement,⁷⁰² Begg wrote in his diary that “it is quite certain [Scott] will side with [Ritchot] in all matters of dispute.”⁷⁰³ Later, Begg wrote that “there were, in reality, two delegates from the French and one from the English, as Mr. Scott professed, openly, to be in the confidence and on the side of the former party.”⁷⁰⁴ Although Ritchot’s diary does not make it easy to know when Scott in fact took part in the negotiations, his deposition to the Select Committee states that Scott was present on the key dates of 26, 27, 28 and 30 April, on 2, 5 and 6 May as well as the 3 May meeting with the Governor General.⁷⁰⁵ He was therefore present when land matters came up, most notably on 26, 27 and 29 April, 2, 5 and 6 May, and undoubtedly supported Ritchot on these matters. Consequently, it can be safely concluded that “Ritchot was the principal negotiator, with Scott as his seconder.”⁷⁰⁶

Apart from confirming that Ritchot was not simply one delegate among three, Begg’s comment reveals that he was specifically appointed to represent the “French”. It is important to understand what exactly the signifier ‘French’ signified in the context of Assiniboia in 1870. According to one contemporary, Rev. MacBeth, “the French half-breeds” were “commonly called ‘the French’ in the Red River Colony.”⁷⁰⁷ Ten years later, Dr. Valéry Havard also

⁷⁰⁰ *Ibid.* This would explain why he seemed to constantly ignore the instructions from the Provisional Government.

⁷⁰¹ W.L. Morton, *Birth of a Province*, *supra* note 148 at 81.

⁷⁰² Ritchot testified in *R. v. Lépine* that Black was appointed to represent the Scotch and Scott the English. See Eliot and Brokovski, *Trial of Ambroise Lépine*, *supra* note 142 at 78.

⁷⁰³ W.L. Morton, *Papers Relative to the Resistance*, *supra* note 124 at 345.

⁷⁰⁴ *Ibid.* at 274.

⁷⁰⁵ Canada, “Causes and Difficulties” *supra* note 125 at 71-2.

⁷⁰⁶ W.L. Morton, *Papers Relative to the Resistance*, *supra* note 124 at 135.

⁷⁰⁷ Rev. R.B. MacBeth, *The Making of the Canadian West: Being the Reminiscences of an Eyewitness* (Toronto:

remarked that the “designation of French is often indifferently applied to [French] Canadians, métis of all grades [of French blood] and even pure Indians who associate with métis and speak their *patois*.”⁷⁰⁸ In his introduction to a translation of Ritchot’s diary, W.L. Morton states that Ritchot alone had “the burden of the negotiations of all that was of peculiar concern to the French,” including “the land grants to the Métis.”⁷⁰⁹

This is effectively confirmed in Ritchot’s diary. On 17 May 1870, when Ritchot saw Black off to Montréal after the negotiations, the latter, far from admonishing Ritchot for overstepping his mandate, apparently told him that the “amnesty, *the land question* were *none of his* [Black’s] *business*.”⁷¹⁰ When Black recognised that the “convention had charged him with the business of the English Half-Breeds and me with the French Canadian [Métis],”⁷¹¹ he made it perfectly clear that he was fully aware that Ritchot, and Ritchot alone, had indeed received particular instructions to negotiate the land question specifically on behalf of the Métis. Four years later, Ritchot swore under oath in his testimony in *R. v. Lépine* that he had been appointed to represent ‘the French’.⁷¹² This also explains why Northcote recorded that Ritchot initially requested 150,000 acres⁷¹³ *uniquely* for the Métis and that he allegedly replied to Cartier, when the latter offered 100,000 acres for *each* linguistic group, that he “didn’t care for” the Half-Breeds.⁷¹⁴ If

William Briggs, 1898) at 30.

⁷⁰⁸ Valéry Havard, “The French Half-breeds of the Northwest,” *Annual Report of the Smithsonian Institution*, (Washington: Government Printing Office, 1880) at 314.

⁷⁰⁹ W.L. Morton, *Birth of a Province*, *supra* note 148 at 131. This is probably why Paul Chartrand mentions that Ritchot was the special negotiator for the Métis. See Chartrand, *Métis Settlement Scheme*, *supra* note 15 at 4 and 28.

⁷¹⁰ W.L. Morton, *ibid.* at 153. Ritchot, “Le Journal” *supra* note 677 at 557: “l’amnistie, *les affaires des terres*, ne sont pas de ses [Black] affaires.” Emphasis added.

⁷¹¹ W.L. Morton, *ibid.* Ritchot, *ibid.*: “convention l’a surtout chargé des affaires des Métis Anglais et moi [Ritchot] des [Métis] Canadiens français”

⁷¹² Eliot and Brokovski, *Trial of Ambroise Lépine*, *supra* note 142 at 78.

⁷¹³ According to Ritchot, it was Macdonald and Cartier who made this offer. See W.L. Morton, *Birth of a Province*, *supra* note 148 at 142 and Ritchot, “Le Journal” *supra* note 677 at 548.

⁷¹⁴ W.L. Morton, *The Birth of a Province*, *supra* note 148 at 91. Flanagan mistakenly claims that this information came directly from Macdonald, but according to Sir Stafford Northcote’s diary, it was Donald Smith who told him this on 28 April. In any case, Smith’s source was probably Macdonald. This exchange, as inferred from Ritchot’s diary, seems to have taken place the day before, on 27 April. See Ritchot, “Le Journal” *supra* note 677 at 548.

Ritchot overstepped his mandate, it was by representing the Half-Breeds and including them in the land grant, not by negotiating it for the Métis.⁷¹⁵

4.2.1. Mutual Respect and Esteem Between the Parties

It was Macdonald who wrote to commissioner Donald Smith on 3 January 1870 that he was “authorized, to invite a delegation of at least two residents to visit Ottawa for the purpose of representing the claims and interests of Rupert’s Land. The representation of the Territory in Parliament will be *a matter for discussion and arrangement with such delegation.*”⁷¹⁶ While Macdonald went out of his way not to recognize the Provisional Government and even publicly denied any such recognition, there is some evidence that he had no real choice in the matter. The fact that s. 1 of the *Manitoba Act* essentially admitted the District of Assiniboia as a province and that separate schools were included in s. 22 is an indication that negotiations were based on the fourth *List of Rights*, a list that was written up on the sole authority of the executive of the Provisional Government. In any case, there is no doubt that the representatives of the Crown in the right of Canada recognised the delegates as representatives of the North-West. As a result of Ritchot’s insistence the he be recognised as a delegate of the Provisional Government, Joseph Howe, in a letter of 26 April 1870, granted in the name of the federal government an audience with Macdonald and Cartier “as delegates from the North-West to the Government of the Dominion of Canada.”⁷¹⁷

Moreover, when the British Government got wind of the arrest of the delegates Ritchot and Scott, it sent a telegram to the Canadian Government asking if it had “authorised the arrest of the

⁷¹⁵ That being said, when the English first refused to join the Provisional Government, Riel told them: “retournez-vous paisiblement sur vos fermes. Restez dans les bras de vos femmes, donnez cet exemple à vos enfants. Mais regardez-nous agir. Nous allons travailler et obtenir nos droits et les vôtres. Vous viendrez à la fin [les] partager.” See Riel, *Complete Writings*, *supra* note 136 at 31.

⁷¹⁶ Quoted in *MMF*, *supra* note 20 at para. 88. (Man. Q.B.) Smith stated this in public at the Convention. See *New Nation*. “Convention at Fort Garry.” 21 February 1870 at 1.

⁷¹⁷ Canada, “Causes and Difficulties” *supra* note 125 at 70.

delegates.”⁷¹⁸ Lord Granville refused to support a military expedition unless the Canadian government grant reasonable terms to the Catholic settlers. When Macdonald replied that he could promise no more than receiving the delegates, Granville in turn replied that he wanted to know how the negotiations were going. When the Imperial government finally accepted to send troops, it was uniquely with the objective of enforcing a mutually acceptable agreement and that the Canadian government accept the decision of Her Majesty’s government on questions in the settlers’ *List of Rights*.⁷¹⁹ Both the Canadian representatives of the Crown in the right of Canada and the representatives of the Imperial Crown recognized the status of the delegates.

4.3. Agency: The Authority to Bind their Principals

Now that we have determined that there were two parties who had the capacity to negotiate a treaty, we must now determine whether a treaty was effectively concluded between the parties. Again, there is no doubt that John A. Macdonald and Georges-Étienne Cartier had the authority to bind the Crown. In any event, as a section of an Act of Parliament that granted large discretionary powers to the Governor General, s. 31 was most definitely binding on the Crown. Again, things are a little more difficult on the Métis side of things. I have argued elsewhere that a land claim was part of the 5th article of the third and fourth *Lists of Rights*.⁷²⁰

According to the ‘Executive Instructions to the Delegates’, the latter were instructed that “with regard to the articles numbered 1, 2, 3, 4, 6, 7, 15, 17, 19 and 20, you are left at liberty, in concert with your fellow commissioners, to exercise your discretion.” Insofar as the other articles were concerned, including article 5, “they are peremptory.” The delegates were “not empowered to conclude finally any arrangements with the Canadian Government; but that any negotiations,

⁷¹⁸ *Ibid.* at 154.

⁷¹⁹ Sprague, *Canada and the Métis*, supra note 89 at 51-52.

⁷²⁰ O’Toole, “Revisiting Métis Land Claims” supra note 106.

entered into between you and the said Government, must first have the approval of, and be ratified by, the Provisional Government.”⁷²¹ However, insofar as one wishes to use these instructions to claim Ritchot had not binding authority, one necessarily considers the executive of the Provisional Government not only as a legitimate government, but specifically as the source of Ritchot’s authority. If Ritchot did not have the authority to bind his principal, the Legislative Assembly of Assiniboia did. The issue of s. 31 lands, and notably the reference to the extinguishment of Indian title, was one of the main subjects on which Ritchot was questioned when he presented his report to the Legislative Assembly of Assiniboia. It is noteworthy that it was only after having discussed s. 31 lands that the latter body unanimously endorsed the terms of the *Manitoba Act, 1870*, including s. 31.⁷²²

4.4. The Intention to Create Legal Obligations

There is little need to insist on this aspect, given that inclusion of a land claim settlement in an Act of Parliament is in itself sufficiently indicative of an intention to create obligations that would be legally binding on both parties. It is evident that s. 31 imposed legal obligations as much on both the governor general and the lieutenant governor. As Scott C.J. stated in *MMF*, s. 31 “imposes an obligation on the Lieutenant Governor to select the 1.4 million acres of land subject to the imprimatur of the Governor General in Council.”⁷²³ For their part, the Métis accepted the legal obligations that went along with their acceptance of becoming subjects of Crown in the right of Canada, of the jurisdiction of federal Parliament over their homeland and being subject to federal and provincial laws.

⁷²¹ Begg, *Creation of Manitoba*, *supra* note 121 at 323.

⁷²² *New Nation*, “Legislative Assembly of Assiniboia. Third Session.” 1 July 1870 at 3. In the treaty-making process in the United States, Congress did not even grant a representative of the President of the United States authority to bind it, so one should not make too much of the fact that Ritchot did not have the authority to bind his principal and that the terms of the negotiations had to subsequently be ratified by the Provisional Government.

⁷²³ *MMF*, *supra* note 47 at para. 523. (Man. C.A.) Emphasis added.

4.5. Consideration: A Bargain and Mutual Obligations

As we have seen, in *MMF Canada* “argued that what occurred were discussions, not negotiations, and both Canada and Manitoba say there was no treaty or agreement, but simply an Act of Parliament.”⁷²⁴ In other words, the position of the federal government is that the *List of Rights* was a mere petition and that the goal of such ‘discussions’ was simply to clarify the various clauses in the *List*. MacInnes J. found that “nothing turns on this point” since “the product of the discussions or negotiations [...] was neither a treaty nor an agreement” but rather “an Act of Parliament recognized as a constitutional document.”⁷²⁵ Furthermore, “it certainly was not a treaty or an agreement with aboriginals.”⁷²⁶ However, as noted above, what the plaintiffs had pleaded was that the entire *Manitoba Act* was a treaty or agreement.

More to the point is the plaintiff’s claim that an agreement was reached between the delegates of the Provisional Government and Macdonald and Cartier on 2 May 1870 concerning s. 31 lands. MacInnes J. concluded that there was no agreement for two reasons: because the federal government never agreed to grant 1.5 million acres and because it did not end up placing the lands under provincial jurisdiction.⁷²⁷ In order to understand how this result was arrived at, one cannot simply take a single sentence out of context. As Flanagan and MacInnes have been so eager to point out, the demand in the third and fourth *Lists of Rights* was for provincial jurisdiction over Crown lands. It was on 26 April that the delegates of the Provisional Government and the representatives of the Crown began discussions on land matters. At this point, discussions seem to have involved what eventually became the various subsections of s. 32. But Ritchot added that “[a]fter the exposition of these conditions that we accept *a long debate*

⁷²⁴ *Ibid.* at para. 461.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.* at 491.

arises on *the rights of the Métis*.”⁷²⁸ The point is important in that Flanagan and MacInnes have asserted that discussion of the Indian title of the Métis only came about as a result to the ministers’ insistence on jurisdiction over Crown lands. However, as we have seen, Bown’s letter had made Macdonald well aware that the Métis were claiming Indian title. It would appear that Macdonald had taken note of these demands, since when he wrote to Donald Smith on 3 January 1870, he bothered to mention that “Indian claims, *including the claims of the Half-breeds* who live with and as Indians, will be equitably settled.”⁷²⁹

Discussions began on 27 April over a draft version of the bill and the question of jurisdiction over Crown lands was raised. One of the reasons Macdonald and Cartier insisted on federal jurisdiction over Crown lands was the “rights of the Indians.”⁷³⁰ When Ritchot demanded equal treatment with other provinces in this regard, Macdonald replied that “to reach a settlement it is necessary to make some concessions.”⁷³¹ It was at this point that the bargaining over what was to become s. 31 began. After the ministers of the Crown rejected once again the demand for local control over Crown lands in the *List of Rights*, Ritchot replied: “We 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.”⁷³² Again,

⁷²⁸ W.L. Morton, *Birth of a Province*, *supra* note 148 at 141. Ritchot, “Le Journal” *supra* note 677 at 547: “Après l’exposé de ces conditions que nous acceptions s’éleva un long débat sur les droits des Mitis [*sic*].” Emphasis added.

⁷²⁹ Quoted in *MMF*, *supra* note 20 at para. 88. (Man. Q.B.) This was of course in keeping with the terms of *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians* (1857) 20 Victoria, c. 26 (Province of Canada), which modified *An Act for the protection of the Indians in Upper Canada from imposition and the property occupied or enjoyed by them, from trespass and injury*, (1850) 13 & 14 Vict., c. 42. The first section of the former *Act* declared that the third section of the latter *Act* “shall apply only to Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown (or which having been so surrendered have been set apart or shall then be reserved for the use of any Tribe or Band of Indians in common).”

⁷³⁰ W.L. Morton, *Birth of a Province*, *supra* note 148 at 140. Ritchot, “Le Journal” *supra* note 677 at 546: “droits des Sauvages.”

⁷³¹ W.L. Morton, *ibid.* Ritchot, *ibid.* at 546: “pour faire des arrangements il fallait céder quelques choses.”

⁷³² W.L. Morton, *ibid.* Ritchot, *ibid.* “Nous ne pouvons nullement renoncer au contrôle des terres à moins que nous ayions une compensation ou des conditions qui pour la population actuelle équivaudraient au contrôle des terres de leur province.”

these ‘equivalent conditions’ included what became section 32 and ‘the rights of the Métis’.

That these ‘rights of the Métis’ meant their Indian title is apparent in Macdonald and Cartier’s reply: “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 the Indians.”⁷³³ But Ritchot insisted that the Métis had rights as descendants of Indians until the ministers finally offered 100,000 acres. This, Ritchot said, was impossible to accept, and made a counter-proposal of 200 acres for all Métis and Half-Breed settlers, both men and women and 200 acres for their children “born or to be born, and each of their descendants beginning from a fixed date.”⁷³⁴ The ministers then proposed 150,000, then 200,000 acres, which Ritchot rejected. The parties met again on 29 April to hash out the ‘rights of the Métis’. On the way to the meeting, Ritchot had told Black he would demand three million acres. When Cartier (Sir John being ‘indisposed’) replied that this was impossible, Ritchot countered that “in order to come to a settlement we tried to agree on one million five hundred thousand (1,500,000 acres).”⁷³⁵ There was then a “long discussion on the quantity *and on the manner of division.*”⁷³⁶ Cartier said he would propose to his colleagues one million acres. When negotiations began again on 2 May, Cartier and Macdonald again presented the delegates with another draft version of the bill. At this point, the “ministers offered 1,200,000 acres to be distributed among the children of the Métis. We discuss anew the form or manner of distributing the lands. We continued to claim

⁷³³ W.L. Morton, *ibid.* Ritchot, *ibid.* at 547: “Les honorables membres font remarquer que les habitants du Nord-Ouest réclamant et ayant obtenu une forme de Gouvernement propre aux hommes civilisés ne devraient pas réclamer les privilèges accordés aux Sauvages.”

⁷³⁴ W.L. Morton, *ibid.* at 142. Ritchot, *ibid.* at 548. The following day, Ritchot mentioned a period of not less than fifty to seventy-five years. Had this been done, all the descendants of the Métis born in the province before 1905 to 1930 could have claimed 200 acres.

⁷³⁵ W.L. Morton, *ibid.* at 143. Ritchot, *ibid.* at 549. “mais pour en venir à un arrangement nous tâcherons d’en venir à un million cinq cents mille (1.500.000 âcres).”

⁷³⁶ W.L. Morton, *ibid.* at 143. Ritchot, *ibid.*: “*Longue discussion* sur le quantité et *sur le mode de division.*” emphasis added.

1,500,000 acres and we agreed on the mode of distribution.”⁷³⁷

It is here that MacInnes J.’s found that the agreement on the mode of distribution was simply among the delegates, and not between the delegates and Crown representatives.⁷³⁸ Now, when Ritchot continued to claim 1.5 million acres, he was obviously addressing himself to the ministers, not to his fellow delegates. This demand was made in reaction to Cartier and Macdonald’s offer of 1.2 million acres. As we have seen, Ritchot initially put forward 1.5 million acres on 29 April. So when he “continued to claim” 1.5 million acres, he was obviously addressing himself to Macdonald and Cartier, not to the other delegates. If this is so, then MacInnes J.’s interpretation implies that Ritchot pressed Macdonald and Cartier for 1.5 million acres and then the delegates suddenly went into a huddle to discuss among themselves the mode of distribution. Again, a ‘long discussion on the mode of distribution’ had already taken place on 29 April between Ritchot and Cartier, not among the delegates themselves. So when Ritchot wrote that they “*again* discussed the form and manner of distributing the land,” he was obviously pursuing the negotiations of 29 April with the ministers.⁷³⁹

Furthermore, MacInnes J. claimed that “Canada never agreed to place any of the lands in the new province under the jurisdiction, authority or control of the local Legislature.”⁷⁴⁰ As proof of this, he asserted that this “was made clear on the evening of May 2, 1870 when Macdonald, speaking in Parliament, described the grant as being 1,200,000 acres and went on to say that the assistance of the Local legislature would be invoked but always with the express sanction of the Governor General.”⁷⁴¹ This interpretation was subsequently endorsed by the Manitoba Court of

⁷³⁷ W.L. Morton, *ibid.* Ritchot, *ibid.*: “Les honorables membres offrent 1.200.000 âcres de terre pour être distribuées aux enfants des Mitis. Nous discutons de nouveau la forme et la manière de distribuer ces terres. Nous continuons de réclamer 1.500.000 d’âcres et nous nous accordons sur le mode de distribution.”

⁷³⁸ *MMF*, *supra* note 20 at para. 500. (Man. Q.B.)

⁷³⁹ Ritchot, “Le journal” *supra* note 677 at 549. Emphasis added.

⁷⁴⁰ *Ibid.* at para. 491.

⁷⁴¹ *Ibid.* at para. 492.

Appeal when it asserted that on “the evening of May 2, 1870, Macdonald made it clear in Parliament that while it was ‘proposed to invoke the aid and intervention, the experience of the local legislature’ with respect to the s. 31 grants, such involvement was subject to ‘the sanctions of the Governor General’; nor did Macdonald or Cartier commit Canada to involving the local legislature.”⁷⁴²

It is true that when Macdonald first spoke with “respect to the lands,” he brought the attention of the House to a clause in the bill that provided “that such of them that belong to individuals, shall belong to the Dominion of Canada.”⁷⁴³ He then stated that there “shall, however, out of the lands there, be a reservation for the purpose of extinguishing the Indian title, of 1,200,000 acres.” He then twice invoked the assistance of the local legislature. But when Macdonald first mentioned that it was “proposed to invoke the assistance of the Local Legislature in that respect,” he was speaking about “the right of cutting hay for two miles immediately behind their lot” – in other words ss. 32(5). When he again mentioned that it was “proposed to invoke the aid and intervention, the experience of the Local Legislature,” he was referring to “confirming all titles of peaceable occupation to the people now actually resident upon the soil” or what became subsections 32(3) and (4). When it came to s. 31 lands, Cartier explicitly stated in the House that the “land, *except for the 1,200,000 acres*, was under the control of the [federal] Government.”⁷⁴⁴ The honourable member Mr. Wood asked “if the Minister of Justice had stated that 1,200,000 acres of land *were to be reserved and placed at the disposal of the Local Government of the Province*.”⁷⁴⁵ In his reply, Macdonald stated that “it was proposed to place *under the control of*

⁷⁴² *MMF*, *supra* note 47 at para. 238. (Man. C.A.)

⁷⁴³ *House of Common Debates*, (2 May 1870) at 1302 (Hon. John A. Macdonald).

⁷⁴⁴ *Ibid.* at 1309. (Hon. Georges-Étienne Cartier). Emphasis added.

⁷⁴⁵ *Ibid.* at 1329. (Hon. Wood). Emphasis added.

the Province [...] the reservation of 1,200,000 acres.”⁷⁴⁶ In other words, Macdonald and Cartier did not commit Canada to merely involving the local legislature because they agreed to place s. 31 lands entirely under its jurisdiction. This clearly amounts to a palpable error of interpretation of fact, but it remains to be seen if the total sum of errors constitutes an overriding one.

Again, this confirms Ritchot’s claim that an agreement was reached on 2 May. It is, however, true that the question of the amount of land remained unresolved as of 2 May. Ritchot was asking for 1.5 million acres and the federal government was offering 1.2 million acres. But one must put this in the context of the negotiations. Ritchot had put forward the land rights of the Métis on 26 April. The next day, Ritchot insisted on local control of public lands. The ministers refused, so he insisted on receiving compensation that would be an equivalent condition to provincial jurisdiction over Crown lands and again brought up the Indian title of the Métis. The ministers then offered 100,000 acres for Métis children, which suggests that at this point they recognised in principle that the Métis had Aboriginal title. Ritchot countered with a grant of 200 acres for every man, woman and child as well as children to be born for a period of fifty to seventy-five years.⁷⁴⁷ The ministers then increased their offer to 150,000 acres, then 200,000. Ritchot then demanded three million before lowering it to 1.5 million acres. He discussed with Cartier the mode of distribution, and the latter said he would propose to his colleagues one million acres. On 2 May, Macdonald and Cartier came back with an offer of 1.2 million acres and Ritchot persisted with his demand for 1.5 million, but agreed with the ministers on the mode of distribution. In other words, on 2 May the only point of contention was a difference of 300,000 acres. The principle of a land concession itself, the recognition of the Métis share of Indian title, the mode of distribution and the jurisdiction of the local legislature had all been agreed to.

⁷⁴⁶ *Ibid.* at 1329-30. (Hon. John A. Macdonald). Emphasis added.

⁷⁴⁷ W.L. Morton, *The Birth of a Province*, *supra* note 148 at 142-3. Ritchot, “Le Journal” *supra* note 677 at 548-9.

But things do not end there. It is of course true that the *Manitoba Act* is an Act of Parliament. But a draft version of the bill was first presented to the delegates on 27 April. Following further negotiations, an altered version was presented to them on 2 May. When the opposition insisted in the House that Portage-la-Prairie be included in the new Province that evening, Cartier consulted the delegates on 3 May on the matter before modifying the bill.⁷⁴⁸ In other words, the ministers were clearly giving the delegates direct input into the bill, something that clearly goes beyond mere ‘discussions’. In addition, when Ritchot replied that, while he had no objection to making the new province larger so as to include Portage-la-Prairie, he added that “it would be necessary to increase the grants and the amount of land.”⁷⁴⁹

Ritchot never again made it an issue of the quantity of land, from which it can be inferred that he was satisfied with this result and the issue was settled. After having consulted Ritchot, Macdonald publicly declared to the House of Commons on 4 May 1870 that s. 31 “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 descendents. [...] Those half-breeds *had a strong claim to the lands, in consequence of their extraction*, as well as being settlers. The Government therefore proposed for the purpose of settling those claims, this *reserve of 1,400,000 acres*.”⁷⁵⁰ In other words, Macdonald did two things here: 1) he confirmed that this was an Aboriginal land claims settlement; and 2) the land grant had been increased from 1.2 to 1.4 million acres *following his consultation with Ritchot*. This suggests that the parties had *reached an agreement on the specific amount of land*. If several clauses in the modified bill of 5 May ‘fundamentally displeased’ Ritchot, it was undoubtedly concerning the removal of the role of the local legislature

⁷⁴⁸ W.L. Morton, *ibid.* at 144. Ritchot, *ibid.* at 549.

⁷⁴⁹ W.L. Morton, *ibid.* Ritchot, *ibid.* at 550.

⁷⁵⁰ *House of Commons Debates*, (4 May 1870) at 1359. (John A. Macdonald)

in the implementation of s. 31.⁷⁵¹ In terms of consideration, then, the federal government offered, and the Métis accepted, 1.4 million acres as compensation for the extinguishment of their share of Indian title. What they gave Canada was clear title to the land and peaceable entry into the territory.

4.5.1. The Reasons for the Crown's Commitment: The Prevailing Situation

As the Chief Justice Scott recognised in *MMF*, the purpose of s. 31 was “to bring about Manitoba’s entry as a new Canadian Province.”⁷⁵² I will not dwell on the political circumstances regarding the Métis taking up arms to resist the unilateral annexation of the Northwest as it has been largely explained in section 1.1. It is worth mentioning, however, that this corresponds with the prevailing situation surrounding other treaties with Aboriginal peoples. As we have seen, in his dissenting decision in *St. Catharine’s*, Strong J. strongly criticized his colleague for ascribing the recognition of Indian title “to moral grounds, to motives of humane consideration for the aborigines.”⁷⁵³ To do so “would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise. Its true origin was [...] experience of the great impolicy of the opposite mode of dealing with the Indians which [...] had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies.”⁷⁵⁴ He specifically noted that the *Royal Proclamation* of 1763 was a reaction to ‘Pontiac’s War’, when “Detroit was besieged and all the Indian tribes were in revolt.”⁷⁵⁵

Similarly, Hogg observed that, in both *Simon* and *Sioui*, the consideration on the part of

⁷⁵¹ W.L. Morton, *Birth of a Province*, *supra* note 148 at 147. Richtot, “Le Journal” *supra* note 626 at 552.

⁷⁵² *MMF*, *supra* note 47 at para 238. (Man. C.A.) Emphasis added.

⁷⁵³ *St. Catharine’s*, *supra* note 217 at 609. (SCC)

⁷⁵⁴ *Ibid.*

⁷⁵⁵ *Ibid.*

Aboriginal peoples was “a promise to cease hostilities.”⁷⁵⁶ Brian Slattery wrote that the “sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a ‘weaker’ or ‘primitive’ people, as has sometimes been suggested, but rather 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.”⁷⁵⁷ In *Wewaykum*, the Supreme Court of Canada cited Slattery with approval⁷⁵⁸ and in *MMF*, Scott C.J. recognised that the Supreme Court of Canada’s endorsement of Slattery in *Wewaykum* “resonates on the facts of this case.”⁷⁵⁹ The Métis in effect accepted to put down their arms and end their Resistance to the transfer.

4.6. ‘A Certain Measure of Solemnity’

As we have seen, the fact that s. 31 is part of the *Manitoba Act*, a statute adopted by Parliament, has been interpreted as necessarily excluding any consideration of it as a settlement or an agreement. One could see this instead as a measure of solemnity. The *Manitoba Act*, including s. 31, was adopted by the federal Parliament of the Dominion of Canada and therefore signed by the Governor General. For its part, the Provisional Government of Assiniboia unanimously approved the terms of the *Manitoba Act* on 24 June 1870. In addition, it was enshrined in the Constitution of Canada under s. 5 of the *Constitution Act, 1871*. As Chartrand pointed out, perhaps the closest analogy is the *Natural Resource Transfer Agreement* between Manitoba and Canada, which was subsequently constitutionalised in the *Constitution Act, 1930*. From one point of view, this was simply an amendment to s. 30 of the *Manitoba Act*. In this way, negotiations that led to the settlement of land claims in Treaties 1, 2 and 3 were subsequently enshrined in both a federal law

⁷⁵⁶ Hogg, *Constitutional Law*, *supra* note 15 at 608.

⁷⁵⁷ Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 753.

⁷⁵⁸ *Wewaykum*, *supra* note 167 at para. 79. Citing *ibid.*

⁷⁵⁹ *MMF*, *supra* note 47 at para. 506. (Man. C.A.)

and an Imperial law.

It is worth mentioning in this regard that Flanagan portrayed the transfer of Rupert's Land as a nothing more than a real estate transaction when he claimed that, to "the rulers of Britain and Canada as well as the proprietors of the Hudson's Bay Company, the acquisition by Canada of Rupert's Land and the Northwestern Territory was a complicated real estate transaction."⁷⁶⁰ None other than John A. Macdonald begged to differ, however. He addressed this very issue at the time when he postponed the transfer on 26 November 1869. In the Report of the Honourable Privy Council of 16 December 1869, he wrote that it "was surely *never contemplated by any of the parties* engaged in the negotiations that the transfer was to be *a mere interchange of instruments*. It must, *from the nature of things*, have been understood *by all parties*, that the surrender by the Company to the Queen, and the transfer by Her Majesty to the Dominion, *was not to be one of title only*. The Company was to convey not only their rights under the charter, *but the Territory itself* of which it was in possession, and *the Territory so conveyed* was to be transferred by Her Majesty to Canada."⁷⁶¹

4.6.1. The Subsequent Conduct of the Parties

Once the Indian title of the Métis was given legal recognition in s. 31, as Flanagan himself admitted, "the clock could not be turned back"⁷⁶² and what "counted for the future evolution of political and administrative practice was the language of the statute, not the private views of the negotiators."⁷⁶³ The recognition of the 'Indian' title of the Métis subsequently received statutory

⁷⁶⁰ Flanagan, "Riel and Aboriginal Rights" *supra* note 82 at 248.

⁷⁶¹ Canada, "Correspondence and Papers Connected with Recent Occurrences in the North-West Territories" *Sessional Papers*, 33 Vict., Vol. V, No. 12 (Ottawa: I.B. Taylor, 1870) at 141-2. Emphasis added.

⁷⁶² Flanagan, "Case Against" *supra* note 82 at 319. Flanagan, "Métis Aboriginal Rights" *supra* note 82 at 234.

⁷⁶³ Flanagan, "Politics, Principles and Policy" *supra* note 77 at 74.

confirmation in 1874.⁷⁶⁴ The preamble of the *Act* began with a confirmation that s. 31 “was enacted as expedient towards the extinguishment of the Indian title to the lands in the Province of Manitoba to appropriate [1.4 million] acres of such lands for the benefit of the children of half-breed heads of families,” but that “no provision has been made for extinguishing the Indian title to such lands as respects the said half-breed heads of families.” In Ontario, the Métis of Fort Frances adhered to Treaty 3 in 1875 and succeeded in having themselves included as ‘Half-Breeds’.⁷⁶⁵ The Indian title of the Métis in the North-West Territories outside of Manitoba was also given statutory recognition in the *Dominion Lands Act*. The latter was amended in 1879 by adding ss. 125(e), which provided that the Governor-in-Council was empowered to “satisfy any claims existing in connection with the extinguishment of the Indian Title, preferred by half-breed residents in the North-West Territories outside the limits of Manitoba, on the fifteenth day of July [1870], by granting lands to such persons, to such an extent and on such terms and conditions, as may be deemed expedient.”⁷⁶⁶ Furthermore, in the late nineteenth and early twentieth centuries, the federal government consistently followed a policy of recognising, confirming and compensating the extinguishment of Métis title.⁷⁶⁷

By way of conclusion, even if we are to accept MacInnes J.’s conclusion that the *Manitoba Act* “certainly was not a treaty or an agreement with aboriginals. Rather, it was an Act of Parliament recognized as a constitutional document,”⁷⁶⁸ there is nothing particularly unusual about extinguishing Indian title through legislation. Constitutionalist Peter Hogg has written that, prior to the adoption of s. 35, one way of “extinguishing aboriginal rights [...] was by legislation,”

⁷⁶⁴ *Act respecting the appropriation of certain Dominion Lands in Manitoba*, S.C. 1874 (37 Vict.), c. 20.

⁷⁶⁵ Giokas and Chartrand, “Who Are the Métis” *supra* note 9 at 101.

⁷⁶⁶ *An Act Respecting the Public Lands of the Dominion*, S.C. 1872 (35 Vict.), c. 23; mod. by S.C. 1879 (42 Vict.), c. 31, para. 125(e). [“*Dominion Lands Act*”]

⁷⁶⁷ Flanagan, “Politics, Principles and Policy” *supra* note 77. This does not imply that the way they dealt with Métis title in the North-West was appropriate. Insofar as Métis Indigenous title can only be surrendered under ss. 91(24) and the latter is informed by the process outlined in the *Royal Proclamation*, then issuing scrip was illegal.

⁷⁶⁸ *MMF*, *supra* note 20 at para. 464. (Man. Q.B.)

although after confederation only the federal Parliament was competent to enact an extinguishing law.”⁷⁶⁹ In effect, in *St. Catharines* case,⁷⁷⁰ Hagarty C.J.O. of the Ontario Court of Appeal specifically mentioned s. 31 as part of the scheme of extinguishing Indian title by way of legislation. Again, this raises the question of which head of power the federal Parliament was acting under when it adopted s. 31, and insofar as the objective of s. 31 was to extinguish the *aboriginal* title of the Métis, this was arguably done under ss. 91(24). Modern land claims settlements such as the James Bay Convention and the Nishga’a treaty both notably involved enacting federal and provincial legislation to give them legal effect.

⁷⁶⁹ Hogg, *Constitutional Law*, *supra* note 15 at 604-5.

⁷⁷⁰ *St. Catharines*, *supra* note 166 at 153. (Ont. C.A.)

Conclusion

The recognition of the Indian title of the Métis in s. 31 of *the Manitoba Act, 1870* was the result of more than fifty years of struggle, during which the Métis consistently claimed a share of Indian title. Despite this, neither the Court of the Queen's Bench nor the Court of Appeal of Manitoba acknowledged their claims and consequently failed to take their Indigenous title seriously. In attempting to determine the 'precise quality' of 'Indian title', Scott C.J.'s analysis had an almost eerie resemblance to that of the treatment of Indian title in the *St. Catharine's Milling and Lumber* case. While scholars like Thomas Flanagan reproach the Métis for not having put forward a pristine doctrine of their Indigenous title, *St. Catharine's* reveals that, in the period shortly after the 'Indian' title of the Métis was recognized in s. 31, judges were not able to agree among themselves just what the 'precise quality' of Indian title was in general. Their analysis nevertheless involved the *Royal Proclamation of 1763*, which, much like s. 31, is often presented as a unilaterally legislated recognition of Indian title. However, it arguably provides a precedent for s. 31 in that it can be seen as forming part of a treaty.

Before proceeding to an analysis of s. 31 as a treaty or land claims settlement, it was necessary to attempt to understand why courts are reluctant to take Métis Indigenous title seriously. After

reviewing the three existing common law doctrines of Métis rights, including the derivative rights doctrine, the empty box doctrine and the distinct Aboriginal people doctrine, all three were revealed to be inadequate to the task. In the latter case in particular, while the ‘constitutional imperative’ forces the courts to recognize Métis Aboriginal rights, it does not alone provide cogent reasons for doing so. However, a fourth doctrine, the Métis *Autochthonous* rights doctrine, to use the French terminology of s. 35, or the Métis Indigenous rights doctrine, if the language of international law is preferable, arguably provides a solid foundation for the recognition of Métis rights on the basis of the *de facto* possession doctrine. This notably involves reading the s. 35 expression ‘Aboriginal’ or *autochtone* into the term ‘Indian’ in s. 31 of the *Manitoba Act, 1870*, and in ss. 91(24) of the *Constitution Act, 1867*.

Another stumbling block to taking Métis Indigenous title seriously is the argument that the recognition of the ‘Indian’ title in s. 31 was a mere ‘political expediency’ and therefore not based on cogent reasoning. However, such interpretations of s. 31 rely unduly on extrinsic evidence and result in part from a misapplication of the excluded middle to ‘compromises’ and ‘principles’. Far from having no grounding on principles, Métis rights are rooted in the underlying constitutional principle of the protection of minorities and are at least as worthy of protection as French language rights. In my view, the courts of Manitoba committed a palpable and overriding error of law in not applying this principle to the implementation of s. 31. If courts must take the recognition of the ‘Indian’ title of the Métis in s. 31 seriously, this raises the question of the head of power under which the federal Parliament extinguished it. I have argued here that this could only have been under the federal head of power that covers ‘lands reserved for Indians’ under ss. 91(24). Following the preceding analysis of ss. 91(24), the question is not so much whether the Métis are ‘Indians’ for the purposes of ss. 91(24), but rather whether the word ‘Indian’ means ‘Aboriginal’ for the purposes of the Métis. Following Paul Chartrand’s proposition that s. 31 was

basically a fast-track version of the *Enfranchisement Act*, the legal implication would be that the federal government basically considered the Métis to be enfranchised ‘Indians’ once their title was extinguished. This would explain why, as the Court noted in *Blais*, the federal government created a distinct administrative regime for Métis as compared to other Aboriginal peoples. The question as to whether it was legal for the federal government to make the loss of Aboriginal status and rights a necessary corollary to enfranchisement or to extinguish the Indigenous title of the Métis of the North-West Territories with scrip will unfortunately have to be left for another day.

With a solid basis for taking Métis Indigenous title seriously and the premise that the surrender of that title had to be done under the auspices of ss. 91(24) and the procedure outlined in the *Royal Proclamation*, the process of negotiation that led to s. 31 can be looked at under the light of a treaty or a land claims agreement. When one reviews the historical background that led to an agreement between the official representative of the Métis and the Crown in the right of Canada in the light of the *Sioui* criteria for establishing the existence of a treaty, it becomes clear that both the Court of the Queen’s Bench and the Court of Appeal of Manitoba committed an palpable and overriding error in not recognizing that s. 31 constitutes a land claims agreement.

Insofar as s. 31 can be considered a treaty, the appropriate forum to resolve the issue of s. 31 lands is arguably through an arbitration process rather than through the adversarial approach that is inherent in the present court system with its inappropriate application of limitation periods that go against the legal maxim *nome ex suo delicto meliorem suam conditionem facere postest* by essentially allowing the State to improve its condition by its own wrong. This could still be done as a specific claim under the Specific Claims Tribunal if the federal government were to simply open up the jurisdiction of the latter to allow it to consider Métis claims, including those involving the use of scrip to settle Métis land claims in the North-West Territories.

Finally, a few words should perhaps be said about the limits of this thesis. While this thesis is basically an attempt to ‘take seriously’ Métis title by giving it a meaningful content, it does so by remaining within the boundaries of Kent McNeil’s work on the common law as a source of Aboriginal rights.⁷⁷¹ It admittedly does not “adequately address the legacy of colonialism” or “question the legitimacy of the Canadian State’s unilateral claim of sovereignty over Aboriginal lands and peoples.”⁷⁷² All I do here is simply request that the colonizer at least have the decency to respect its own proclaimed principles, most notably that of the rule of law. However, as Larry Chartrand put it, “I will assume, for the purposes of this paper, that the current state of the law regarding Aboriginal rights and title in Canada is legitimate, *even though I know it not to be.*”⁷⁷³ Ultimately, I agree with Dale Turner that Indigenous rights must “flow out of indigenous nationhood” and that “a meaningful theory of Aboriginal rights in Canada is impossible without Aboriginal participation.”⁷⁷⁴ This basically involves applying the doctrine of continuity, a well-established principle in English common law that arguably goes back as far as the Normand Conquest.⁷⁷⁵ It was notably applied in the land of Flanagan’s forefathers, where the *lex loci* of Ireland, or Brehon laws, continued in force following the Anglo-Norman invasion that began in 1169.⁷⁷⁶

In closing, I would like to give some indication of how this doctrine would apply to the Métis. More recently, various jurists have reconsidered its application in the context of Canadian aboriginal law.⁷⁷⁷ They invariably draw on Judge Hall’s comments in *Calder*, in which he cited

⁷⁷¹ See Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

⁷⁷² Dale Turner, *This is Not a Peace Pipe* (Toronto: University of Toronto Press, 2006) at 7. [Turner, *Peace Pipe*]

⁷⁷³ L. Chartrand, “Métis Aboriginal Title” *supra* note 81 at 153. Emphasis added.

⁷⁷⁴ Turner, *Peace Pipe*, *supra* note 772 at 7.

⁷⁷⁵ On the doctrine of continuity in general, see: Blackstone, *Commentaries*, *supra* note 111 at 51; Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: Butterworths, 1820) at 119; and Sir William Searle Holdsworth, *A History of English Law* (1938), vol. 11, (London: Methuen, 1938).

⁷⁷⁶ See *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516.

⁷⁷⁷ Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 Sask. L. Rev. 281 at 50;

with approval Chief Justice Marshall's consideration of *Campbell v. Hall*⁷⁷⁸ in *Johnson v. McIntosh*.⁷⁷⁹ Hall J. then took *Campbell v. Hall* directly into consideration and, after reciting the six principles set out by Lord Mansfield, stated that, “[a] *fortiori* the same principles, particularly Nos. 5 and 6, must apply to lands which become subject to British sovereignty by discovery or by declaration.”⁷⁸⁰ It is the fifth principle that is most important here, as it maintains that “the laws of a conquered country continue in force until they are altered by the conqueror.”⁷⁸¹

It is from this latter principle that Hall J. traced the ‘true origin of aboriginal title’. He observed that “the Nishgas in fact are and were from time immemorial a distinctive cultural entity *with concepts of ownership indigenous to their culture* and capable of articulation under the common law.”⁷⁸² The common error that many jurists make is to identify the legal source of Aboriginal title with ‘original occupation’ by overemphasising Hall’s reference to ‘time immemorial’. Such an interpretation ignores Hall J.’s reference to ‘indigenous concepts of ownership’ and to the following development of his *ratio decidendi* that clearly identifies them with the ‘laws in force’ at the time of discovery or declaration of sovereignty. That *this* is the veritable source of Aboriginal rights, and not occupation from time immemorial, was subsequently confirmed by the Supreme Court of Canada in *Van der Peet*, where Lamer C.J., for

Russel Lawrence Barsh, “Indigenous Rights and the *Lex Loci* in British Imperial Law” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 91; André Émond, “Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale” (1996) 30 R.J.T. 1 at 96; Alain Lafontaine, “La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones” (1995) 36 C. de D. 669 at 719. Mark Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992), 17 Queen's L.J. 350, especially at 407-409; Kent McNeil, *Common Law*, *supra* note 771, especially at 171-79; and Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as affected by the Crown's Acquisition of Their Territories* (Saskatoon, University of Saskatchewan Native Law Centre, 1979).

⁷⁷⁸ *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045.

⁷⁷⁹ *Johnson v. McIntosh* (1823), 8 Wheaton 543, 21 U.S. 240.

⁷⁸⁰ *Calder*, *supra* note 440 at para. 113. *per* Hall J.

⁷⁸¹ *Ibid.* at para. 112.

⁷⁸² *Ibid.* at para. 100. Emphasis added.

the majority, cited with approbation the decision of Judge Brennan of the High Court of Australia in the *Mabo* affair.⁷⁸³ According to Brennan J., “Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”⁷⁸⁴ For Lamer C.J., to “*base aboriginal title in traditional laws and customs*, as was done in *Mabo*, is, therefore, to base that title in the pre-existing *societies* of aboriginal peoples. *This is the same basis as that asserted here for aboriginal rights.*”⁷⁸⁵

If the legal precedents mentioned in *Calder* are not clear enough, L’Heureux-Dubé repeated the reasons in her dissenting decision in *Van der Peet*. She asserted that “when new territory is acquired the *lex loci* of organized societies, here the aboriginal societies, continues at common law.”⁷⁸⁶ Furthermore, she explicitly grounded it in “the ‘doctrine of continuity’, founded in British imperial constitutional law.”⁷⁸⁷ As Viscount Haldane put it in *Amodu Tijani*,⁷⁸⁸ Indigenous title “may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference.”⁷⁸⁹ In other words, contrary to what Flanagan has asserted, the Courts *have* offered cogent reasons “*why* ancestral priority requires creation of a special legal regime”⁷⁹⁰ and have been doing so since at least the seventeenth century. Furthermore, if the Court established that “*ancestral* priority requires *creation* of a special legal regime,”⁷⁹¹ it is because the common law *recognizes* the legal system

⁷⁸³ *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1.

⁷⁸⁴ *Ibid.* à la p. 58. Aff’d in *Van der Peet*, *supra* note 265 at para. 40.

⁷⁸⁵ *Ibid.* Emphasis added.

⁷⁸⁶ *Van der Peet*, *supra* note 265 at para. 173. *per* L’Heureux-Dubé dissenting.

⁷⁸⁷ *Ibid.* at para. 174.

⁷⁸⁸ *Amodu Tijani v. Southern Nigeria*, [1921] 2 A.C. 399. (J.C.P.C.)

⁷⁸⁹ Cited in *Delgamuukw*, *supra* note 33 at 409-410.

⁷⁹⁰ Flanagan, *First Nations, Second Thoughts*, *supra* note 82 at 20.

⁷⁹¹ *Ibid.* Emphasis added.

of an organised society that occupied the territory prior to effective control. Certainly, this common law rule has not always been consistently applied in Canadian law. But one should not confuse the non-existence of a norm with the non-application of a norm to a particular case, but which nevertheless remains in force.

However, if the Court unanimously held in *Roberts v. Canada* that “aboriginal title *pre-dated* colonization by the British and survived British claims of sovereignty,”⁷⁹² in *Delgamuukw*, the Court held instead that “aboriginal title [is] *the relationship between* common law and pre-existing systems of aboriginal law.”⁷⁹³ The latter, however, is what the Court called *sui generis* title in *Guerin*. The reason is that the doctrine of continuity only operates to recognize previously existing legal rules insofar as they are not repugnant to the common law. This is what Judge Marshall in *Fletcher v. Peck* meant when he stated that the “the nature of the Indian title [...] is not such as to be absolutely repugnant to seizin in fee on the part of the State.”⁷⁹⁴ It is unfortunately beyond the scope of this thesis to further explore the implications of this doctrine for Indigenous Métis title. To properly do so would involve undertaking a study in legal anthropology of the Métis system of landholding.

⁷⁹² *Roberts v. Canada*, [1989] 1 S.C.R. 322, at 340. Emphasis added.

⁷⁹³ *Delgamuukw*, *supra* note 33 at para. 114. Emphasis added.

⁷⁹⁴ *Fletcher v. Peck*, 10 U.S. 87 (1810).

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