

# Section 31 of the *Manitoba Act, 1870*: A Land Claim Agreement

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D A R R E N   O ' T O O L E \*

## I. INTRODUCTION

In the recent *Manitoba Métis Federation v. Canada and Manitoba* case,<sup>1</sup> the majority of the Supreme Court of Canada found in favour of the plaintiff and granted declaratory relief. The MMF case notably involved the Crown's implementation, in the period from 1870 to 1880, of the 1.4 million acres of land that were granted to the children of Métis and Half-Breed heads of families under the terms of s. 31 of the *Manitoba Act, 1870*,<sup>2</sup> which was one of the conditions of the entry of the District of Assiniboia<sup>3</sup> into Confederation as the Province of Manitoba.<sup>4</sup> What

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<sup>1</sup> *Manitoba Métis Federation Inc v Canada* (Attorney General), 2013 SCC 14 [MMF SCC].

<sup>2</sup> *An Act to amend and continue the Act 32-33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba*, 33 Vict, c 3 (Canada) [*Manitoba Act*].

<sup>3</sup> The District of Assiniboia included an eighty-kilometre circumference around Fort Garry, or downtown modern day Winnipeg. The original boundaries of Assiniboia were slightly extended to include Portage-la-Prairie.

<sup>4</sup> Section 31 reads: "And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor

decided the issue was that “the honour of the Crown is engaged by constitutional obligations to Aboriginal groups. Section 31 of the *Manitoba Act, 1870* is just such a constitutional obligation.”<sup>5</sup> However, while the 1.4 million acre land grant was ostensibly consideration for the extinction of the “Indian title” of the Métis, the Court decided that the honour of the Crown was not engaged due to any collective Aboriginal interest they had in the land, but because s. 31 contained “a *promise* made to the Métis people collectively, in recognition of their distinct community.”<sup>6</sup> In this regard, McLachlin C.J., for the majority, upheld “the trial judge’s findings of fact that the Métis had no communal Aboriginal interest in land”.<sup>7</sup> However, what I am concerned with here is not so much the question of the Indigenous title of the Métis, but to McLachlin C.J.’s finding that s. 31 of the *Manitoba Act, 1870* “is not a treaty.”<sup>8</sup>

The Court’s finding that s. 31 is not a treaty is based on the fact that the trial judge “described s. 31 as a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting the creation of the province of Manitoba.”<sup>9</sup> It is true that the reason that MacInnes J. refused to see the *Manitoba Act* as a “treaty” because, in his view, “it was an Act of Parliament recognized as a constitutional document.”<sup>10</sup> But the reason MacInnes J. addressed this issue in the first place is because counsel for the plaintiff put forward the argument that the entire *Manitoba Act*—not just s. 31—is a treaty between the Métis and the federal government.<sup>11</sup> Furthermore, the case was decided on the issue of the honour of the Crown and its corollary duty of acting with due diligence. At trial, the “plaintiffs assert that the honour of the Crown was engaged in this case *whatever legal characterization is placed on the product of the negotiations*.”<sup>12</sup> In other words, the question of whether s. 31 is a “treaty” or not is irrelevant to the issue of the engagement of the honour of the Crown. To paraphrase

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General in Council may from time to time determine.”

<sup>5</sup> MMF SCC, *supra* note 1 at para 91.

<sup>6</sup> *Ibid* [emphasis added].

<sup>7</sup> *Ibid* at para 59.

<sup>8</sup> *Ibid* at para 93.

<sup>9</sup> MMF SCC, *supra* note 1 at para 93.

<sup>10</sup> *Manitoba Métis Federation v Canada (Attorney General) and Manitoba (Attorney General)* (2007), 2007 MBQB 293, 223 Man R (2d) 42, at para 464. [MMF MBQB]

<sup>11</sup> *Ibid* at para 437 (Factum of the Plaintiff at 2, 4, 5, 22).

<sup>12</sup> *Ibid* at para 634 [emphasis added].

MacInnes J.: “nothing turns on this point.”<sup>13</sup> When one considers that the plaintiff never argued that s. 31 alone is a treaty—and not only did not pursue the argument that the *Manitoba Act* is a treaty before the Supreme Court of Canada, but even argued that the question is moot insofar as the honour of the Crown is concerned—one is left wondering why the Court bothered to comment on it at all.

More importantly, MacInnes J.’s characterization of the *Manitoba Act* as a unilateral Act of Parliament throws into doubt that he viewed s. 31 as resolving “Aboriginal concerns” at all. In fact, there seems to have been little effort to ensure the Aboriginal rights of the Métis “are taken seriously.”<sup>14</sup> First of all, when he concluded that the *Manitoba Act* was “neither a treaty nor an agreement,” he added that “it certainly was not a treaty or an agreement with aboriginals.”<sup>15</sup> This is certainly understandable, given that the terms of the Act were to apply to all citizens of the province, present and future. But when MacInnes J. first considered s. 31 and stated that it “is essential to remember that the Act must be looked at from the perspective of Parliament,” he immediately added “*not from the perspective of the Métis.*”<sup>16</sup> In other words, insofar s. 31 is a constitutional provision, it precludes *ipso facto* any necessity of taking the perspective of the Métis into account. Yet, the Supreme Court of Canada recalled in *MMF* that the “ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.”<sup>17</sup> By definition, reconciliation cannot be imposed unilaterally. As the Court recalled in *Delgamuukw v. British Columbia*, “a court must take into account the perspective of the aboriginal people claiming the right...while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each”.<sup>18</sup> The trial judge’s failure to take into

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<sup>13</sup> *Ibid* at para 464.

<sup>14</sup> *R v Sparrow*, [1990] 1 SCR 1075, 1 RCS 1075 at para 81.

<sup>15</sup> *MMF MBQB*, *supra* note 10 at para 464.

<sup>16</sup> *Ibid* at para 557 [emphasis added].

<sup>17</sup> *MMF SCC*, *supra* note 1 at 66.

<sup>18</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 at para 81 [*Delgamuukw*], citing *R v Van der Peet*, [1996] 2 SCR 507, [1996] 2 RCS 507 at paras 49 and 50.

account the Métis perspective of their rights under s. 31 arguably led to a truncated conclusion as to their substantive content.

Furthermore, in response to the plaintiff's contention that "Canada was dealing with aboriginals, the Métis, who enjoyed aboriginal [sic] title," MacInnes J. considered it necessary to answer the following questions: "Did the Métis have aboriginal title? Were the Métis Indians? Did a fiduciary relationship exist between the Crown and the Métis? Was the honour of the Crown implicated in Canada's dealings with the Métis leading to passage of the Act?"<sup>19</sup> He responded to all of them in the negative. In conclusion, MacInnes J. held that "what section 31 did was *nothing more* than to create a grant to *a certain class of people*, in this case, the Métis children."<sup>20</sup> The only reference to the Métis as one of Canada's Aboriginal peoples under s. 35(2) in the entire decision occurs when MacInnes J. considered "whether there was a fiduciary relationship between Canada and the Métis and a resulting fiduciary duty".<sup>21</sup> He immediately recalled Lamer C.J.'s words in *Delgamuukw* that "s. 35(1) *did not create* aboriginal rights; rather, it accorded constitutional status to *those rights which were 'existing'* in 1982."<sup>22</sup> He then recalled his finding that the Métis "did not at the material time (July 15, 1870 or prior thereto) enjoy aboriginal title to the land in question."<sup>23</sup>

Strictly speaking, it is true, as Scott C.J. noted, that "nothing in his judgment questions *their status* as an Aboriginal people."<sup>24</sup> But the implication is clear: the status of the Métis as an Aboriginal people is purely nominal in this case since s. 35(1) cannot create rights, including title, and the Métis never had title. On appeal, even Scott C.J. felt the need to recall that the Manitoba Court of Appeal had "implicitly recognized the Métis as Aboriginal peoples in *Blais*, an Aboriginal rights case *in which s. 35 was not at issue*",<sup>25</sup> before he stipulated that "the trial

<sup>19</sup> MMF MBQB, *supra* note 10 at paras 558, 561.

<sup>20</sup> *Ibid* at para 661 [emphasis added].

<sup>21</sup> *Ibid* at para 617.

<sup>22</sup> *Delgamuukw*, *supra* note 18 at para 133, cited in *Ibid* at para 618.

<sup>23</sup> MMF MBQB, *supra* note 10 at para 622.

<sup>24</sup> *Manitoba Métis Federation Inc v Canada (Attorney General) and Manitoba (Attorney General)*, 2010 MBCA 71, [2010] 3 CNLR 233 at para 382. [MMF MBCA] [emphasis added].

<sup>25</sup> *Ibid* at para 379 [emphasis added]. The implication is that the legal status of the Métis as an Aboriginal people is not limited to s. 35.

judge found that the Métis were not Indians, [but] the more relevant question is whether or not they are Aboriginal.”<sup>26</sup> Scott C.J. also reversed the trial judge’s finding that “that there was no fiduciary relationship between the Métis and Canada.”<sup>27</sup>

From the point of view of the doctrine of mootness, the question of whether s. 31 is a “treaty” or not is by no means purely academic. The Court’s decision to grant declaratory relief could lead to further litigation if the federal government or federal Parliament does not respond in some way to the Court’s declaration. If it is true that MacInnes J.’s findings of fact “stand largely unchallenged” by the plaintiffs,<sup>28</sup> the objective of this article is to do precisely that, and to thereby question the alleged “completeness of these findings”.<sup>29</sup> I will argue that MacInnes J. made palpable and overriding errors of both fact and law. In order to do so, I will first consider the plaintiff’s argument that the *Manitoba Act* in its entirety is a “treaty”. I will then look at the specific question of what the Court called the “treaty-like history and character” of s. 31.<sup>30</sup> From there, I will apply the *Sioui* criteria (from *R v. Sioui*<sup>31</sup>) to the negotiations surrounding s. 31 to demonstrate that it embodies a land claim agreement.

In order to determine whether or not s. 31 constitutes a land claim agreement, one might consider it necessary to first answer the preliminary question as to whether or not the Métis had any Indigenous title to surrender in the first place. It is sufficient for our purposes that the Métis *claimed* Indigenous title. On this point, MacInnes J. made a finding of fact that “there was no request for, expectation of or consideration by Canada to create a Métis homeland or land base”<sup>32</sup>; Scott C.J. also found that the Métis “made no formal claim.”<sup>33</sup> I have endeavoured to show elsewhere that the Métis did in fact make such claims and that findings of fact to the contrary are palpable and overriding errors.<sup>34</sup> In other words, one could

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<sup>26</sup> *Ibid* at para 382.

<sup>27</sup> *Ibid* at para 432.

<sup>28</sup> MMF SCC, *supra* note 1 at para 20.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* at para 92.

<sup>31</sup> *R v Sioui*, [1990] 1 SCR 1025. [Sioui]

<sup>32</sup> MMF MBCA, *supra* note 24 at para 238.

<sup>33</sup> MMF MBCA, *supra* note 24 at para 504.

<sup>34</sup> Darren O’Toole, “Metis Claims to Indian Title in Manitoba, 1860-1870” (2008) 28 Canadian Journal of Native Studies 241 [O’Toole, Métis Claims to ‘Indian Title’];

view the mention of the extinction of Indian title in s. 31 as a quitclaim, that is, “a formal release of one’s claim of right.”<sup>35</sup> This is hardly a novel approach in Canadian law. In the infamous *St. Catharine’s Milling and Lumber Company v. The Queen* case, which involved Treaty N° 3, Henry J. of the Supreme Court of Canada in his concurring decision held that “all wild lands, including those held by nomadic tribes of Indians, were the property of the crown [sic]...the Indians were never regarded as having a title.”<sup>36</sup> The treaties that were “signed by certain Indians is not evidence of a purchase [...]. It is not an acknowledgment of any title in fee simple in the Indians.” Treaties were nonetheless signed with First Nations for the “cession of all the Indian rights, titles, and privileges *whatever they were*.”<sup>37</sup> In other words, the suggestion in *St. Catharine’s* is that the government never really attributed to Indians any title and paid consideration merely for the release of Indian *claims*, “whatever they were”—in other words, regardless of how well founded they were. My point here is not whether this is still good law—which I doubt—but that *absolute* proof of a pre-existing title is not a necessary condition for the settlement of a land claim.

## II. CONSIDERATION OF THE *MANITOBA ACT* AS A “TREATY”

The argument that the *Manitoba Act* is a treaty can be traced back to the Union Bill of 1822, which sought to unite Upper and Lower Canada, and amounted to repealing the *Constitution Act*, 1791. Reformers argued at the time that the latter was a “solemn compact” between the sovereign and the people and could not be unilaterally repealed.<sup>38</sup> Later some of the fathers of Confederation used the term “treaty” to describe the

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“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”; “The Red River Jig Around the Convention of ‘Indian Title’. The Métis and Halfbreed *Dos à Dos*” (2012) 69 *Manitoba History* 7.

<sup>35</sup> [Editor of the Dictionary] *Black’s Law Dictionary*, 7<sup>th</sup> ed, *sub verbo* “quitclaim”.

<sup>36</sup> *St. Catharine’s Milling and Lumber Company v The Queen* (1887), 13 SCR 577 at paras 49, 51. [*St. Catharine’s*].

<sup>37</sup> *Ibid* at paras 54 [emphasis added].

<sup>38</sup> Paul Romney, *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999) at 48-55. [Romney, *Getting it Wrong*]

negotiations that led to the Québec Resolutions,<sup>39</sup> which led to the “compact theory” of the *Constitution Act, 1867*. Given the popularity of this doctrine in Québec, it is not surprising that Riel, who was educated at the Collège de Montréal and worked as a law clerk for Rodolphe Laflamme during the Confederation debates, would call the *Manitoba Act* a “treaty”.<sup>40</sup> MacInnes J. found that “even he”—that is, father Noël-Joseph Ritchot, who negotiated the terms of the Act—“did not speak of the conclusion of a treaty,”<sup>41</sup> and even specifically mentioned that when “Ritchot reported to the Legislative Assembly of Assiniboia on June 24, 1870, he referred neither to the creation of a treaty nor to an agreement.”<sup>42</sup> In fact, Ritchot explicitly referred to it as a “treaty” on this very occasion.<sup>43</sup>

Nevertheless, it was quite foreseeable that both the Queen’s Bench and Court of Appeal of Manitoba would reject this approach.<sup>44</sup> On the one hand, the Supreme Court of Canada recognized federalism is “a political and legal response to underlying social and political realities”,<sup>45</sup> that is, a political compromise between unity and diversity,<sup>46</sup> and has qualified federalism—along with the protection of minorities—as one of the underlying *principles* of the Constitution.<sup>47</sup> Both of these underlying principles can be traced back to *Re The Regulation and Control of Aeronautics in Canada*,<sup>48</sup> when Lord Sankey L.C. of the Judicial Committee of the Privy Council held that:

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<sup>39</sup> *Ibid* at 158.

<sup>40</sup> *The Collected Writings of Louis Riel, Vol. 1*, George Stanley and Raymond Huel, eds (Edmonton: University of Alberta Press, 1985) at 313 and 315 [Riel, *Collected Writings*]; Louis Riel, “L’amnistie: 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.

<sup>41</sup> MMF MBQB, *supra* note 10 at para 475.

<sup>42</sup> *Ibid* at para 508.

<sup>43</sup> New Nation, “Legislative Assembly of Assiniboia, Third Session” (1 July 1870) at 2.

<sup>44</sup> MMF MBQB, *supra* note 10 at para 510; MMF MBCA, *supra* note 24 at para 238.

<sup>45</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, [1998] SCJ No 61 at para 57 [*Re Québec Secession*]. For the debates on federalism, see Janet Ajzenstat et al, eds, *Canada’s Founding Debates* (Toronto: University of Toronto Press, 2003), at 261-326 [Ajzenstat et al, *Canada’s Founding Debates*].

<sup>46</sup> *Re Québec Secession*, *ibid* at para 43.

<sup>47</sup> *Ibid* at paras 55-59 and 79-82.

<sup>48</sup> *Re The Regulation and Control of Aeronautics in Canada*, [1932] AC 54 at 70, rev’g [1930]

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.<sup>49</sup>

Six years later, in *Re Adoption Act*, Duff C.J. also referred to the “basic compact of Confederation.”<sup>50</sup> On the other hand, in *Re Resolution to amend the Constitution*, the Supreme Court of Canada appears to have rejected any legal significance of what it called “a full compact theory” of Confederation.<sup>51</sup> The Court claimed 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.”<sup>52</sup> While such theories may “operate in the political realm,” they “do not engage the law.”<sup>53</sup> In the *Québec Secession Reference*, the Court seemed to reaffirm 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.”<sup>54</sup>

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SCR 663.

<sup>49</sup> *Ibid* at 70 [emphasis added].

<sup>50</sup> *Reference Re Adoption Act*, [1938] SCR 398 at 402.

<sup>51</sup> *Re Resolution to amend the Constitution*, [1981] 1 SCR 753.

<sup>52</sup> *Ibid* 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 Romney, *Getting it Wrong*, *supra* note 38 at 157.

<sup>53</sup> *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.” 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.

<sup>54</sup> *Re Québec Secession*, *supra* note 45 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 SCR 669 at para 9, it was simply given as “Confederation” in the official English translation. Of course, one may question the effectiveness of political sanctions to reinforce constitutional conventions when the



What the Court arguably meant here is that the compact theory is a constitutional convention, which “no court may enforce [...] by legal action. The sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences.”<sup>55</sup>

Whatever the *legal* status of the *Manitoba Act*, portraying it as *politically* “unilateral” does not sit well with the historical evidence. John A. Macdonald stated before the House that until the delegates of the Convention of 40 “came to Ottawa, and *until the government heard* in what way the Government of Canada was distasteful to them, *it was out of the question to prepare a Bill for the government of the Territory.*”<sup>56</sup> During the House of Commons debates over the *Manitoba Bill* on 5 May 1870, MP James Young of Waterloo South deplored that “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.*”<sup>57</sup> Historian W.L. Morton remarked that “Manitoba was not merely the creation of the Dominion and Imperial Parliaments. [...] The Dominion recognized rather than created.”<sup>58</sup> With few exceptions, the *Manitoba Act* did little more than provide the terms of the fourth *List of Rights* with legal form.<sup>59</sup> As we shall see, several

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rights of a numerical minority is involved.

<sup>55</sup> *Re Resolution to amend the Constitution*, *supra* note 51 at 853.

<sup>56</sup> *House of Common Debates*, (3 May 1870) at 1334 (Hon. John A. Macdonald) [emphasis added].

<sup>57</sup> *House of Commons Debates*, (4 May 1870) at 1387 (James Young) [emphasis added].

<sup>58</sup> William Lewis Morton, “The Red River Parish,” in *Manitoba Essays*, RC Lodge ed, (Toronto: The MacMillan Company of Canada Ltd, 1937) at 105 and 102.

<sup>59</sup> Arguably, the only section in the *Manitoba Act* that did not come directly out of the negotiations with the delegates of the Provisional Government and does not correspond to the fourth *List of Rights* is that concerning the boundary, which was extended to include Portage-La-Prairie. This was a long-standing grievance of residents of Portage that even led to an attempt to establish a provisional government. James Joseph Hargrave, *Red River* (Altona: Friesen Printers, 1977) [1871], at 428-431. Even on this matter, Cartier sought the approval of the delegates of the Provisional Government. Noël-Joseph Ritchot, “Ritchot’s Journal” in *Birth of a Province*, William L. Morton, ed (Winnipeg: Manitoba Record Society Publications, 1965) at 144 [Ritchot “Journal”]. Ritchot left a detailed account of the differences between the original bill of 27 April and the Instructions of the delegates and the *List of Rights*. *Ibid* at 157-160. Ritchot’s concerns were mainly over the silence on the amnesty question and jurisdiction over public lands in s. 24. This would lead to the negotiation of s. 27, which became s. 31 in the final draft. For the original French version, see Noël-Joseph

amendments were made to the various draft bills following negotiations with the delegates and on other occasions the latter were consulted before amendments of other members of the House were accepted. On this point, Scott C.J. of the Manitoba Court of Appeal insisted that it should not “be forgotten that the Act [...] evolved from negotiations between Canada and the delegates.”<sup>60</sup>

Nevertheless, from a strictly legal point of view, political scientist Thomas Flanagan was perhaps the first to argue that “the Manitoba Act was a unilateral action of the Canadian Parliament, not a treaty between independent partners.”<sup>61</sup> For much the same reasons as Flanagan, Dale Gibson pointed to “legal difficulties with the ‘treaty’ interpretation of the *Manitoba Act*.”<sup>62</sup> 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.”<sup>63</sup> Flanagan subsequently appeared as an expert witness at trial in *Blais*, and on appeal Scott C.J. adopted his thinking, writing for a unanimous court that the *Manitoba Act* is “not a treaty since it is simply an Act of the Parliament of Canada.”<sup>64</sup> This was also argued by both Manitoba and Canada at trial in the *MMF* case,<sup>65</sup> in which Flanagan also appeared as an expert witness. It consequently found its way into MacInnes J.’s finding that there “was no treaty. There was no agreement.

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Ritchot, “Le journal de l’abbé N.J. Ritchot-1870”, ed by George FG Stanley, (1964) 17:4 *Revue d’histoire de l’Amérique française* 537. [Ritchot, “Le Journal”]

<sup>60</sup> *Ibid* at para 506.

<sup>61</sup> Thomas Flanagan, “Louis Riel and Aboriginal Rights” in Ian AL 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 249. [Flanagan, “Riel and Aboriginal Rights”]

<sup>62</sup> Dale Gibson, “Appendix 5A: General Sources of Métis Rights” in Canada, Report of the Royal Commission on Aboriginal Peoples (Ottawa: Department of Supply and Services of Canada, 1996) at 288. [Gibson, “General Sources of Métis Rights”]

<sup>63</sup> *Ibid*.

<sup>64</sup> *R v Blais*, 2001 MBCA 55, [2001] MJ No 168 at para 8.

<sup>65</sup> *MMF MBQB*, *supra* note 10 at paras 510-534.

There was an Act of the Parliament of Canada which is recognized as a constitutional document.”<sup>66</sup>

### III.S.31: “TREATY” OR LAND CLAIM AGREEMENT?

When the plaintiffs argued at trial that the *Manitoba Act* is a treaty, they asserted “that there was an agreement reached between the delegates and Cartier and Macdonald as evidenced by Ritchot’s diary record and Macdonald’s handwritten note of May 2, 1870.”<sup>67</sup> Both of these pieces of evidence refer exclusively to s. 31. To refute this argument, MacInnes J. not only focused his own analysis on the negotiations that led to the inclusion of s. 31,<sup>68</sup> but relied heavily on the lack of “consensus as to terms, certainty of terms, and finality”<sup>69</sup> as of this date concerning the specific number of acres to be allotted to Métis children.<sup>70</sup> As we have seen, not only did the trial judge find that there “was no treaty”<sup>71</sup> but emphatically stated the Act “certainly was not a treaty or an agreement with aboriginals.”<sup>72</sup> On appeal, 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.”<sup>73</sup> Furthermore, he was of the opinion that, insofar as s. 31 is concerned, the federal government certainly was dealing with an Aboriginal people.<sup>74</sup> But Scott C.J. nevertheless opined that s. 31 is “not a traditional historic land claim”.<sup>75</sup> When the Supreme Court of Canada found that s. 31 “is not a treaty,”<sup>76</sup> the gradual slide from the *Manitoba Act* as a whole to a specific focus on s. 31 was complete.

To be sure, even if it was not specifically pleaded that s. 31 is a treaty, one can deduct that, if the entire *Manitoba Act* is an Act of Parliament,

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<sup>66</sup> *Ibid* at para 510.

<sup>67</sup> *Ibid* at para 488.

<sup>68</sup> *Ibid* at paras 488-502.

<sup>69</sup> *Ibid* at para 507.

<sup>70</sup> *Ibid* at paras 497-501.

<sup>71</sup> *Ibid* at para 510.

<sup>72</sup> *Ibid* at para 464.

<sup>73</sup> MMF MBCA, *supra* note 24 at para 406.

<sup>74</sup> *Ibid* at para 382.

<sup>75</sup> *Ibid* at para 245.

<sup>76</sup> MMF SCC, *supra* note 1 at para 93.

and s. 31 is but one of many provisions in that Act, then s. 31 is a constitutional provision, not a treaty. What is implicit in this reasoning, however, is MacInnes J.'s characterization of the *Manitoba Act* as "a unilateral process which is the antithesis of a treaty or an agreement."<sup>77</sup> Is this conclusion inevitable? Early on in the MMF case, O'Sullivan JA., in his dissenting decision in *Dumont v Canada*, refused to apply such false dichotomies. 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 the Imperial authority."<sup>78</sup> While O'Sullivan J. mentions Imperial authority, it may be worthwhile recalling that s. 31 was initially a provision in an ordinary federal statute. It was only because it was believed that certain provisions of the *Manitoba Act* were *ultra vires* and required Imperial confirmation that it was constitutionally entrenched through the *Constitution Act, 1871*, along with ss. 22 and 23. Initially, then s. 31 could be seen as followed practice in the United States prior to 1870, when the "treaties" negotiated by the executive branch had to be ratified by Congress. Furthermore, as Chartrand wrote, s. 31 "was the first land claim agreement to be entrenched in the Constitution and it established a model that has now been formalized by section 35 of the *Constitution Act, 1982* as the mechanism of the future for the constitutional protection of the land rights of Canada's Aboriginal peoples."<sup>79</sup> As he notes, modern treaties "are carried into law by legislation."<sup>80</sup>

There is nothing particularly unusual about O'Sullivan J.'s position that a statute can embody a treaty when it comes to international treaties. Owing to the doctrine of the supremacy of Parliament, the common law belongs to a dualist system whereby international treaties, although negotiated and signed by the executive branch, can only be incorporated into municipal law through an act of Parliament. The logic of international treaties was effectively applied to a treaty with the Mi'kmaq

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<sup>77</sup> MMF MBQB, *supra* note 10 at para 486.

<sup>78</sup> *Dumont v Canada (Attorney-General)*, [1988] 3 CNLR 39, at 49, quoted in MMF, Plaintiffs' Written Argument at para 655 [emphasis added].

<sup>79</sup> Paul Chartrand, *Manitoba Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, 1991) at 5-6 [Chartrand, *Métis Settlement Scheme*]. Chartrand is referring here to the *Constitution Act, 1871*.

<sup>80</sup> *Ibid* at 130.

in *R v. Syliboy* to deny it was legally enforceable.<sup>81</sup> To be sure, it was precisely for this reason that the Court in *Simon v The Queen* stipulated that, while “it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”<sup>82</sup> Nevertheless, it seems somewhat strange that the fact that s. 31, unlike *sui generis* treaties, has been incorporated into constitutional municipal law through an Act of the Imperial Parliament and thereby actually meets the more demanding standards of international treaties or those that were required in *Syliboy*, should be used to deny its status as a treaty rather than bolstering it.

Of course, it all depends on what exactly McLachlin C.J. meant by “treaty” when she stated that s. 31 “is not a treaty”. When she discussed the engagement of the honour of the Crown, she was forced to resort to the “analogy [that] may be drawn between such a constitutional obligation and a treaty promise.”<sup>83</sup> Further on, she commented on the “treaty-like history and character” of s. 31, notably because it “sets out solemn promises—promises which are no less fundamental than treaty promises.”<sup>84</sup> In their minority decision, Rothstein and Moldaver JJ. chided the majority for holding that it was solely because s. 31 is a constitutional provision that it triggered the honour of the Crown. Rothstein J. pointed out, somewhat wryly, that the “majority nonetheless proceeds to consider how s. 31 of the *Manitoba Act* is similar to a treaty (para. 92). It thus appears that s. 31 engages the honour of the Crown, *not just because of its constitutional nature, but also because of its treaty-like character.*”<sup>85</sup>

As the sophist Gorgias put it in his infamous mockery of Parmenides’ *On Being*, “it is wholly absurd that a thing should both exist and not exist at one and the same time.”<sup>86</sup> If the promises in s. 31 are analogous to

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<sup>81</sup> *R v Syliboy*, [1929] 1 DLR 307 at 313-314, 4 CNLC 430 (NS Co Ct) Patterson J [Syliboy].

<sup>82</sup> *Simon v The Queen*, [1985] 2 SCR 387 at para 33.

<sup>83</sup> MMF SCC, *supra* note 1 at para 71.

<sup>84</sup> *Ibid* at para 92.

<sup>85</sup> *Ibid* at para 206 [emphasis added].

<sup>86</sup> John Dillon & Tania Gergel, ed, *The Greek Sophists* (Toronto: Penguin Books, 2003) at 68.

treaty promises, if it has a “treaty-like history and character” why not simply call it a “treaty”? I suspect that the main reason is MacInnes J.’s finding relative to the plaintiffs, who “now seek collective entitlement to a land base,”<sup>87</sup> was that “the purpose of section 31 of the Act was not to create a Métis land base within Manitoba but to provide a benefit to the Métis by way of grant to the children.”<sup>88</sup> It is worth pointing out that Lieutenant Governor Archibald acknowledged that “the leaders of the French were demanding ‘one block’ because ‘they treat the question as one of race, and breed, and language, and because they are unwilling that their people should form part of a mixed community’.”<sup>89</sup> Even Flanagan recognized that Ritchot’s “behaviour during the negotiations makes most sense if it is interpreted as an attempt to secure a French and Catholic territorial enclave in southern Manitoba” and that Riel shared this outlook.<sup>90</sup> The Métis claims to s. 31 lands “were all very large and contiguous with each other. They would have converted the southern part of Manitoba into something like Ritchot’s Métis enclave.”<sup>91</sup> Again, we see here how MacInnes’ representation of s. 31 as a provision in a unilateral Act of Parliament was pivotal in his decision to exclude the Métis perspective of their rights. To be sure, the failure to respect the wishes of the Métis for a collective land base may have legal consequences to the extent that the honour of the Crown implies a duty to consult.

The answer to the “treaty-like character” of s. 31 may lie in the language of s. 35(3), which 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 acquired.”<sup>92</sup> It was Métis legal scholar Paul Chartrand who first proposed that s. 31 alone, and not that entire Act, “may be construed to be a ‘treaty’ provision within the meaning of the *Constitution Act, 1982*.”<sup>93</sup> Chartrand suggested more specifically that s. 31 can be construed as a *land claim agreement* that “was reached and was

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<sup>87</sup> *MMF MBQB*, *supra* note 10 at para 1201.

<sup>88</sup> *Ibid* at para 929.

<sup>89</sup> Thomas Flanagan, *Métis Lands in Manitoba* (Calgary: University of Calgary, 1991) at 66. [Flanagan, *Métis Lands*]

<sup>90</sup> *Ibid* at 31.

<sup>91</sup> *Ibid* at 68.

<sup>92</sup> Emphasis added.

<sup>93</sup> Chartrand, *Métis Settlement Scheme*, *supra* note 79 at 14.

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.”<sup>94</sup> Furthermore, Chartrand has argued that the breath of the term “treaty” should be construed more liberally than “Indian treaty”.<sup>95</sup> In effect, when the Court modified the *Van der Peet* criterion from a “pre-contact” to “pre-control” test for the recognition of a Métis Aboriginal right, it asserted that this “result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.”<sup>96</sup> Similarly, since s. 35 includes the Inuit and Métis peoples of Canada who do not have comparable “traditional” treaties such as those that exist between the Crown First and Nations, the definition of the term “treaty” and “land claims agreement” should be construed more liberally than, say, the term “treaties” in s. 88 of the *Indian Act*.

Perhaps it was precisely this latter narrower definition of “treaty” that McLachlin C.J. had in mind when she asserted that s. 31 “is not a treaty.” In this sense, Scott C.J. was not entirely wrong when he remarked that s. 31 is “not a traditional historic land claim.”<sup>97</sup> In effect, what we normally think of as “traditional historic land claims” that led to the numbered treaties were not limited to the surrender of Indigenous title in exchange for “reserves”,<sup>98</sup> but invariably contained substantive clauses concerning hunting rights, annuities, ammunition, nets or farming implements. In terms of procedure, the representatives of the Crown made every effort to at least appear to respect the terms of the *Royal Proclamation, 1763*, which reads: “if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our

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<sup>94</sup> *Ibid* at 5.

<sup>95</sup> Chartrand, *Métis Settlement Scheme*, *supra* note 79 at 129.

<sup>96</sup> *R v Van der Peet*, [1996] 2 SCR 507 cited in *R v Powley*, 2 SCR 207, [2003] 2 SCR 207 at para 38 [emphasis added].

<sup>97</sup> MMF MBCA, *supra* note 24 at para 245.

<sup>98</sup> Initially, land claims were settled with one-time cash payments. Later, treaties in Ontario were limited to reserves and annuities. Only in 1850 with the Robinson-Huron and Robinson-Superior treaties were the standards of the numbered treaties established. Robert J. Surtees, “Land Cessions, 1763-1830” in Edward S. Rodgers and Donald B. Smith, eds, *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994) at 112.

Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie.”<sup>99</sup> No public meeting between the Métis and a representative of the Crown was ever held in the “colony” within which the Métis claimed title specifically for the purpose of negotiating a surrender and purchase of the Indigenous title of the Métis. That being said, at the time there were “great Frauds and Abuses” that had “been committed in purchasing Lands of the Indians, to the great Prejudice of [the Crown’s] Interests and to the great Dissatisfaction of the said Indians.”<sup>100</sup> The purpose of the procedure outlined in the *Proclamation* was “to prevent such Irregularities for the future, and to the end that the Indians may be convinced of [the Crown’s] Justice and determined Resolution to remove all reasonable Cause of Discontent.”<sup>101</sup> What matters is not strict adherence to procedure, but that there were some sort of analogous mechanisms that were present in the negotiation of the surrender of the Indigenous title of the Métis that achieved this same lofty objective—which I shall argue is indeed the case.

In terms of s. 31, Chartrand admitted that it was only “[t]entatively” that “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*.”<sup>102</sup> What I first propose to do 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*. Secondly, when Chartrand had completed his book, the Supreme Court of Canada had not yet rendered its key decision concerning the criteria to determine the existence of a treaty in *Sioui*.<sup>103</sup> Following Chartrand’s intuition, we can now measure to what extent the factual background of the negotiations that led to the surrender of the “Indian” title of the Métis meets the criteria established in *Sioui* to determine whether it is a “land claim agreement” within the meaning of s. 35.

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<sup>99</sup> *Royal Proclamation, 1763*, RSC 1985, App II, No 1.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Chartrand, *Métis Settlement Scheme*, *supra* note 79 at 129. See also 134-137.

<sup>103</sup> *Sioui*, *supra* note 31.



#### IV. IDENTIFYING A LAND CLAIM AGREEMENT

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*, Chief Justice Lamer referred to *R. v. Taylor and Williams*,<sup>104</sup> because it provided “valuable assistance by listing a series of factors which are relevant to analysis of the historical background.”<sup>105</sup> 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*.”<sup>106</sup> Lamer C.J. then provided five factors to be taken into consideration:

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,
4. evidence of relations of mutual respect and esteem between the negotiators,  
and
5. the subsequent conduct of the parties.<sup>107</sup>

One of the difficulties of applying the *Sioui* criteria to s. 31 is that it involves a “treaty” within the meaning of s. 88 of the *Indian Act* as opposed to s. 35 of the *Constitution Act, 1982*. However, while it is “safe to assume that the word ‘treaty’ would bear the same meaning in both instruments,”<sup>108</sup> the latter is arguably larger in scope than the former. A more serious difficulty is that *Sioui* involves an Aboriginal *right* under a “peace and friendship treaty” rather than the surrender of Indian title and a land grant under the terms of a land claim agreement. In this context, the first criterion concerning the continuous exercise of the right is not relevant, all the more so in that what is contested is that the Métis were never properly granted the land in the first place and so could not have continuously exercised the rights that title would have given them.

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<sup>104</sup> *R v Taylor and Williams*, [1981] 3 CNLR 114, 62 CCC (2d) 227.

<sup>105</sup> *Sioui*, *supra* note 31 at para 46.

<sup>106</sup> *Ibid* [emphasis added].

<sup>107</sup> *Ibid*.

<sup>108</sup> Peter W Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 2002) at 607. [Hogg, *Constitutional Law*]

However, the Court did find in *Ross River* that the fourth *Sioui* factor was relevant to the creation of a reserve by an act of Parliament, a situation that parallels closely the implementation of s. 31.<sup>109</sup> On the other hand, since the issues at stake in *Ross River* were in a non-treaty context, the Court did not deal with the applicability of the other *Sioui* factors to a land claim agreement. For these reasons, I will use the more general criteria that Peter Hogg has extrapolated from the *Simon* and *Sioui* judgements. Hogg enumerated the following characteristics for establishing whether a document constitutes a “treaty”:

Parties: The Parties to the treaty must be the Crown, on the one side, and an aboriginal nation, on the other side.

Agency: The signatories to the treaty must have the authority to bind their principals, namely the Crown and the aboriginal nation.

Intention to create legal obligations: The parties must intend to create legally binding obligations.

Consideration: The obligations must be assumed by both sides, so that the agreement is a bargain.

Formality: there must be a ‘certain measure of solemnity’.<sup>110</sup>

## V. THE CRITERIA FOR THE RECOGNITION OF S. 31 AS A LAND CLAIM AGREEMENT

In what follows, I will treat the forth *Sioui* criterion concerning “mutual respect and esteem between the parties” as a subsection of Hogg’s first criterion. I will also treat the second and third *Sioui* criteria as a subsection of Hogg’s fourth criterion. Finally, I will not deal here with the fifth *Sioui* criterion concerning the subsequent conduct of the parties, which might be seen as a subsection of Hogg’s third criterion. The Court has recognized that the federal government did not implement s. 31 in a timely manner and thereby failed to live up to the standard of due diligence which was required under the circumstances to uphold the honour of the Crown. It should be pointed out, however, that, contrary to the Justice MacInnes portrayal in the trial judgment of the Métis as having “sat on their rights,”<sup>111</sup> there is ample evidence that Métis community

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<sup>109</sup> *Ross River Dena Council v Canada*, 2002 SCC 54 at paras 64-66.

<sup>110</sup> *Ibid.*

<sup>111</sup> *MMF MBQB*, *supra* note 10 at para 437.

leaders started complaining early on about the delays in implementing s. 31.<sup>112</sup>

### A. The Parties of the Land Claim Agreement

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 so 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 appointed Noël-Joseph 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, 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 to

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<sup>112</sup> Gerhard J. Ens, “Métis Lands in Manitoba,” (1983) 5 *Manitoba History* 2 at 2. 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. *Ibid* at 9. Louis Riel himself wrote as early as 1871 to Joseph Dubuc claiming the Order-in-Council of 26 May 1871, claiming it appeared “entirely contrary to the 31<sup>st</sup> clause of the Manitoba bill”: Riel, *Collected Writings*, *supra* note 40 at 140. The problem is that one has to consult French-language newspapers in Manitoba to find contemporaneous complaints about delays and urging the federal government to immediately implement s. 31.

do anything of that sort”,<sup>113</sup> especially since the “insurgents at Red River had never demanded a land grant or anything like it.”<sup>114</sup> 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.”<sup>115</sup> 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.<sup>116</sup> The trial court and the court of appeal both subsequently endorsed this narrative. Justice MacInnes claimed that neither “the Red River delegates nor their principals had contemplated a land grant for the children, Métis or others.”<sup>117</sup> 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 land to the Province that the concept of a children’s grant first arose.”<sup>118</sup>

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.”<sup>119</sup> 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.”<sup>120</sup> 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,

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<sup>113</sup> Thomas Flanagan, “The Case Against Métis Aboriginal Rights” (1983) 9 Policy Analyst 314 at 317 [Flanagan, “Case Against”]; “Métis Aboriginal Rights: Some Historical and Contemporary Problems” in Menno Boldt and J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 231. [Flanagan, “Métis Aboriginal Rights”]

<sup>114</sup> Thomas Flanagan, *Riel and the Rebellion: 1885 Reconsidered* (Saskatoon: Western Producer Prairie Books, 1983) at 59; *Riel and the Rebellion: 1885 Reconsidered*, 2<sup>nd</sup> ed (Toronto: University of Toronto Press, 2000) at 65. [Flanagan, *1885 Reconsidered*]

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid* at 59-60; Flanagan, “Case Against” *supra* note 113 at 317; “Métis Aboriginal Rights” *supra* note 113 at 232; Flanagan, *Métis Lands*, *supra* note 89 at 33; Flanagan, *1885 Reconsidered*, *supra* note 114 at 65-66.

<sup>117</sup> *MMF MBQB*, *supra* note 10 at para 649.

<sup>118</sup> *Ibid* at paras 649 and 928.

<sup>119</sup> Flanagan, *Métis Lands*, *supra* note 89 at 47.

<sup>120</sup> Gibson, “General Sources of Métis Rights”, *supra* note 62 at 288.

which was predominantly Métis [and Half-Breed] in its composition, ratified the act.”<sup>121</sup> Justice MacInnes followed Flanagan closely when he asserted that the delegates did not “represent the Métis *per se*, but rather all residents of the Settlement.”<sup>122</sup> 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.”<sup>123</sup> 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 “[l]and matters then came up on 26 April,”<sup>124</sup> 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 Cartier would not accept provincial control of public lands.<sup>125</sup> 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.<sup>126</sup> 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.”<sup>127</sup> Here, Ritchot abruptly interrupts his narrative of 27 April, writing in the margin that it was “Tuesday the 26<sup>th</sup> that we dealt with this”—in other words with what “conditions” Ritchot took to be an “equivalent” of local control of Crown lands.<sup>128</sup> It is here that the “land matters” to which Flanagan refers

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<sup>121</sup> *Ibid.*

<sup>122</sup> MMF MBQB, *supra* note 10 at para 468.

<sup>123</sup> MMF MBCA, *supra* note 24 at para 176.

<sup>124</sup> Flanagan, *Métis Lands*, *supra* note 89 at 32-3.

<sup>125</sup> *Ibid* at 33.

<sup>126</sup> Ritchot, “Journal” *supra* note 59 at 140.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

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.”<sup>129</sup> 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*.<sup>130</sup> Ritchot’s narrative then returns to the negotiations of 27 April and immediately reveals what was understood by “Métis rights”: Macdonald and Cartier 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 Indians.”<sup>131</sup> The issue was therefore not simply raised out of the blue on 27 April, as Flanagan and Justice MacInnes would have us believe.<sup>132</sup>

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,<sup>133</sup> it was not Ritchot who gave “birth to the idea that the Métis had inherited a share of Indian title”, as Flanagan claims.<sup>134</sup> Even more importantly, Macdonald had been informed of such demands some five months before he met Ritchot. 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.<sup>135</sup> As Macdonald knew perfectly well that the Métis were

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<sup>129</sup> *Ibid* at 141 [emphasis added].

<sup>130</sup> *House of Commons Debates*, (9 May 1870) at 1446 (Hon. Georges-Étienne Cartier).

<sup>131</sup> Ritchot, “Journal”, *supra* note 59 at 140.

<sup>132</sup> Flanagan, “Case Against”, *supra* note 113 at 317; Flanagan, “Métis Aboriginal Rights”, *supra* note 113 at 232; Flanagan, *Métis Lands*, *supra* note 89 at 33; MMF MBQB, *supra* note 10 at paras 649 and 928.

<sup>133</sup> O’Toole, “Métis Claims to ‘Indian’ Title”, *supra* note 34.

<sup>134</sup> Flanagan, *Métis Lands*, *supra* note 89 at 34.

<sup>135</sup> Arthur S Morton, *A History of the Canadian West* (Toronto: University of Toronto Press, 1973 [1939]) at 877. The amount in AS 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

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.<sup>136</sup> In light of this, Ritchot's demand for 200 acres for each Métis adult to extinguish their Indian title<sup>137</sup> was hardly "hastily improvised" or even an innovation on Métis demands or on land grants to Métis at the time. 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.<sup>138</sup>

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.<sup>139</sup> 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."<sup>140</sup> 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."<sup>141</sup> At this point, it was Black who, receiving neither the support of Ritchot nor that

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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 M Bumsted, *The Red River Rebellion* (Winnipeg: Watson & Dwyer Publishing Ltd, 1996) at 79; and Flanagan, "Case Against", *supra* note 113 at 324, note 3.

<sup>136</sup> 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.

<sup>137</sup> Ritchot, "Journal," *supra* note 59 at 142.

<sup>138</sup> See O'Toole, "Métis Claims to 'Indian' Title", *supra* note 34; 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.

<sup>139</sup> Flanagan, *Métis Lands*, *supra* note 89 at 47.

<sup>140</sup> *Ibid* at 33.

<sup>141</sup> Ritchot, "Journal," *supra* note 59 at 140. Ritchot was referring to his instructions, which made the deal with Canada subject to the approval of the Legislative Assembly of Assiniboia.

of Scott, finally retreated. According to Ritchot, “Mr. Black naively said he could not get these arrangements accepted.”<sup>142</sup> Furthermore, as Flanagan himself recognised,<sup>143</sup> in the delegates’ instructions, the article in the *List of Rights* concerning provincial control of public land was peremptory.<sup>144</sup> It was therefore Black who overstepped his mandate when he so casually accepted federal control of public land.

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.”<sup>145</sup> Furthermore, James W. Taylor,<sup>146</sup> 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.”<sup>147</sup> For Taylor, then, it was

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<sup>142</sup> *Ibid.*

<sup>143</sup> Flanagan, *Riel and the Rebellion*, *supra* note 114 at 59; Flanagan, *1885 Reconsidered*, *supra* note 114 at 65.

<sup>144</sup> Alexander Begg, *The Creation of Manitoba* (Toronto: A.H. Harvey, 1871) at 323. [Begg, *Creation of Manitoba*]

<sup>145</sup> William 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 440. [WL Morton, *Papers Relative to the Resistance*] Given that this is what he thought of the first *List of Rights*, one wonders what Black thought of the third and fourth *Lists* and how prepared he was to stand by them.

<sup>146</sup> James Wickes Taylor (1820-1893) was 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).

<sup>147</sup> WL Morton, ed, *Birth of a Province* (Winnipeg, Manitoba: Record Society Publications,



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."<sup>148</sup> 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 Government."<sup>149</sup>

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."<sup>150</sup> If Scott was nominally appointed to represent the United States' element in the Settlement,<sup>151</sup> Begg wrote in his diary that "it is quite certain [Scott] will side with [Ritchot] in all matters of dispute."<sup>152</sup> 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."<sup>153</sup> 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

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1965) at 49 and 50. This is somewhat ironic, given that he even thought the first *List* to be "absurd." It was, however, approved of by the delegates of the Anglo-Protestant parishes at the Convention of 24 held in November 1869.

<sup>148</sup> 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 Vict, Vol VIII, App 6 (Ottawa: I.B. Taylor, 1874) at 103. [Canada, "Causes and Difficulties"]

<sup>149</sup> *Ibid.* This would explain why he seemed to constantly ignore the instructions from the Provisional Government.

<sup>150</sup> W.L. Morton, *Birth of a Province*, *supra* note 147 at 81.

<sup>151</sup> Ritchot testified in *R v Lépine* that Black was appointed to represent the Scotch and Scott the English. See George Elliott & Edwin Brokovski, *Preliminary Investigation and Trial of Ambroise Lépine* (Montréal: Burland-Desbarats, 1874) at 78. [Elliott & Brokovski, *Trial of Ambroise Lépine*]

<sup>152</sup> W.L. Morton, *Papers Relative to the Resistance*, *supra* note 145 at 345, note 1.

<sup>153</sup> *Ibid* at 274.

with the Governor General.<sup>154</sup> 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.”<sup>155</sup>

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 contemporary, Rev. MacBeth, “the French half-breeds” were “commonly called ‘the French’ in the Red River Colony.”<sup>156</sup> Ten years later, Dr. Valéry Havard also remarked that the “designation of French is often indifferently applied to [French] Canadians, métis [sic] of all grades [of French blood], and even pure Indians who associate with métis [sic] and speak their *patois*.”<sup>157</sup> 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.”<sup>158</sup>

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*.”<sup>159</sup> When Black recognised that the “convention had charged him with the business of the English Half-Breeds and me with the French Canadian [Half-Breeds],”<sup>160</sup> he made it perfectly clear that he was fully aware that Ritchot, and Ritchot alone, had indeed received particular

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<sup>154</sup> Canada, “Causes and Difficulties”, *supra* note 148 at 71-2.

<sup>155</sup> WL Morton, *Papers Relative to the Resistance*, *supra* note 145 at 135.

<sup>156</sup> Rev RB MacBeth, *The Making of the Canadian West: Being the Reminiscences of an Eyewitness* (Toronto: William Briggs, 1898) at 30.

<sup>157</sup> Valéry Havard, “The French Half-breeds of the Northwest,” in the Annual Report of the Smithsonian Institution: 1879, (Washington: Government Printing Office, 1880) at 314.

<sup>158</sup> WL Morton, *Birth of a Province*, *supra* note 147 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 79 at 4 and 28.

<sup>159</sup> Ritchot, “Journal”, *supra* note 59 at 153 [emphasis added].

<sup>160</sup> *Ibid.*

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”.<sup>161</sup> This also explains why Ritchot reportedly requested 150,000 acres<sup>162</sup> *uniquely* for the Métis and that he allegedly replied to Cartier, when the latter offered 100,000 acres *each* for both peoples, that he “didn’t care for” the Half-Breeds.<sup>163</sup> If 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.<sup>164</sup>

### 1. Mutual Respect and Esteem Between the Parties

It is true that Sir Clinton Murdoch wrote to Lord Granville on 28 April 1870 that “the condition which, though not contained in the terms, was conveyed to Judge Black and the other delegates in writing, that whatever was agreed to here must be subject to confirmation by ‘the Provisional Government’ *would have involved a recognition of the authority of Riel and his associates*”.<sup>165</sup> MacInnes J. took “this as a strong indication of the Imperial Government’s likely unwillingness to consider or accept the delegates who were representatives of the Provisional Government as a negotiating party to a treaty or agreement and thereby countenance in any way recognition of the authority of Riel and his associates.”<sup>166</sup> However,

<sup>161</sup> Elliott & Brokovski, *Trial of Ambroise Lépine*, *supra* note 151 at 78.

<sup>162</sup> According to Ritchot, it was Macdonald and Cartier who made this offer. See Ritchot, “Journal”, *supra* note 59 at 142.

<sup>163</sup> WL Morton, *Birth of a Province*, *supra* note 147 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.

<sup>164</sup> 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, *Collected Writings*, *supra* note 40 at 31.

<sup>165</sup> MMF MBQB, *supra* note 10 at para 484. It would appear Murdoch is referring to the third, and not the fourth, List of Rights.

<sup>166</sup> *Ibid* at para 485. As we have seen, in his deposition to the Select Committee, Macdonald stated that Black told him that his instructions were from the Provisional Government and that he carried a new *List of Rights* prepared by the latter. Canada, “Causes and Difficulties”, *supra* note 148 at 103. The moment Macdonald was made

MacInnes J. also recognized that the “Red River delegates, Ritchot, Black and Scott, were chosen and appointed by the Convention of 40 which at the material time was composed of the leaders of the Settlement” and that the “Convention of 40 became the Provisional Government, calling itself the Legislative Assembly of Assiniboia.”<sup>167</sup> When the Supreme Court of Canada simply stated “the Canadian government *entered into negotiations with representatives of the Métis-led provisional government of the territory*”,<sup>168</sup> it seemed to be saying that the advisors to the Crown, whether Canadian or Imperial, could not on the one hand negotiate the entry of the North-West with delegates of the Provisional Government and on the other hand refuse to officially recognize the Provisional Government.

To be sure, Cartier initially skirted the issue. When he first mentioned in the House on 28 April that Macdonald and he had met “the delegates from Red River” that morning, MacKenzie immediately asked, “Which delegates? Whom do you call delegates?” Cartier replied, “the gentlemen who had been named and discussed and spoken about in every way and in every kind of manner in the newspapers—they were the three delegates—Father Ritchot, Hon. Judge Black and Mr. Scott.”<sup>169</sup> Cartier was referring to the fact that the Ritchot and Scott had been arrested upon their arrival in Ontario. When the Imperial Government got wind of the arrest of the delegates Ritchot and Scott, it directly intervened by sending a telegram to the Canadian Government asking if it had “authorised the arrest of the delegates.”<sup>170</sup> Furthermore, when Macdonald requested troops from the Imperial government, Lord Granville refused to comply 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.<sup>171</sup>

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aware of Black’s papers, he could no longer pretend he didn’t know he was dealing with delegates of the Provisional Government.

<sup>167</sup> *Ibid* at para 467.

<sup>168</sup> MMF SCC, *supra* note 1 at para 4.

<sup>169</sup> *House of Common Debates*, (28 April 1870) at 1249 (Hon. George-Étienne Cartier).

<sup>170</sup> Canada, “Causes and Difficulties”, *supra* note 148 at 154.

<sup>171</sup> 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: Douglas N Sprague, *Canada and the Métis, 1869-1885*

The Court diminished somewhat the role of the delegates of the Provisional Government in determining the content of the *Manitoba Act* when it remarked that these “negotiations were *part of a larger set of negotiations* on the terms on which Manitoba would enter Canada as a province.”<sup>172</sup> To be sure, Mackenzie shot back at Cartier, “I know there are others” than Ritchot, Black and Scott. But when Cartier replied that he “knew there were more, too,” he ruefully stated that “all gentlemen who had come there from Red River had been welcomed, and *all information they could give to the Government had been welcomed*. Several of the members of the Government had met all those gentlemen, and surely those gentlemen could not complain they had not been *met with that courtesy which ought to be expected from civilized people*.”<sup>173</sup> In other words, such individuals were not received as official delegates but had merely been paid the common courtesy owed to any subject of the Crown by her appointed ministers. The representatives of the Crown did not engage in official negotiations with them, but merely welcomed the information they gave. McDougall fully understood this when he intervened and queried as to “whether the House was to understand” that Cartier “had had an *official* interview with certain gentlemen who had come here claiming to be delegates from the people of the North-West?”<sup>174</sup> At this point, Cartier replied that with “regard to the footing on which the delegates stood, that would be explained when the measure was brought down.”<sup>175</sup> It is true that Macdonald stated to the House that “every source of information had been availed by the Government,” but he added “including the delegates appointed by the people.” He left no doubt as to their official status when Mackenzie interrupted him with a “No!” and he retorted, “They were!” McDougall shot back, “They were appointed by Riel and his gang!” Macdonald merely “repeated that the delegates were representatives of the people, elected by a Council of the inhabitants.” He claimed that it was the Federal Government’s Commissioner Donald Smith who had “obtained the election of a convention, which chose Judge Black, Father

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(Waterloo: Wilfrid Laurier University Press, 1988) at 51-52.

<sup>172</sup> MMF SCC, *supra* note 1 at para 30 [emphasis added].

<sup>173</sup> *House of Common Debates*, (28 April 1870) at 1249-1250 (Hon. George-Étienne Cartier).

<sup>174</sup> *Ibid* (William McDougall).

<sup>175</sup> *Ibid* (Hon. George-Étienne Cartier).

Ritchot and A. Scott to act as delegates.” He not only recognized the legitimacy of the Council when he claimed it had been “conducted with regularity,” but more importantly admitted that “the Government had heard them as *representatives* of the people.”<sup>176</sup>

In effect, Macdonald wrote to 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*.”<sup>177</sup> 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.”<sup>178</sup> However, when the Court commented that the federal government “invited a delegation of ‘at least two residents’ to Ottawa to present the demands of the settlers and confer with Parliament,” it that the “*provisional government responded by delegating* a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott to go to Ottawa.”<sup>179</sup>

## B. Agency: The Authority to Bind Their Principals

Now that we have determined that there were two parties who had the capacity to negotiate a land claim agreement, we must now determine whether an agreement 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, 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 5<sup>th</sup> article of the third and fourth *Lists of Rights*.<sup>180</sup>

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<sup>176</sup> *Ibid* (3 May 1870) at 1334 (Hon. John A. Macdonald).

<sup>177</sup> Quoted in *MMF MBQB*, *supra* note 10 at para 88. Smith stated this in public at the Convention. See *New Nation*, “Convention at Fort Garry” (21 February 1870) at 1.

<sup>178</sup> Canada, “Causes and Difficulties”, *supra* note 148 at 70.

<sup>179</sup> *MMF SCC*, *supra* note 1 at para 28.

<sup>180</sup> O’Toole, “Revisiting Métis Land Claims”, *supra* note 34.

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, entered into between you and the said Government, must first have the approval of, and be ratified by, the Provisional Government.”<sup>181</sup> However, one cannot point to these instructions as proof that Ritchot had no binding authority without simultaneously recognizing that the source of Ritchot’s authority was indeed the executive of the Provisional Government and thereby affirming its legitimacy. 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.<sup>182</sup> This very public acceptance of a provision providing for the extinction of the Indigenous title of the Métis is important on another level. To paraphrase the *Royal Proclamation*, it ensured that no “great Frauds and Abuses” were “committed in purchasing Lands of the Métis, to the great Prejudice of the Crown’s Interests and to the great Dissatisfaction of the said Métis.”<sup>183</sup>

### C. The Intention to Create Legal Obligations

There is little need to insist on this aspect, given that the Canadian government included the land claim as a section in an Act of Parliament is

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<sup>181</sup> Begg, *Creation of Manitoba*, *supra* note 144 at 323.

<sup>182</sup> 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.

<sup>183</sup> *Supra* note 99. Unfortunately, the same cannot be said of the 1.4 million acre land grant in s. 31.

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”.<sup>184</sup> 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.

#### D. Consideration: A Bargain and Mutual Obligations

In *MMF*, the plaintiffs claimed 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.<sup>185</sup> In order to understand how this result was arrived at, one cannot simply isolate single sentences and quote them out of context. As Flanagan and MacInnes J. 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 involve 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 arises on the rights of the Métis.”<sup>186</sup> The point is important in that Flanagan and Justice MacInnes have asserted that discussion of the Indian title of the Métis only came about as a result of 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

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<sup>184</sup> *MMF MBCA*, *supra* note 24 at para 523.

<sup>185</sup> *Ibid* at 491.

<sup>186</sup> Ritchot, “Journal,” *supra* note 59 at 141 [emphasis added].



*claims of the Halfbreeds* who live with and as Indians, will be equitably settled.”<sup>187</sup>

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.”<sup>188</sup> 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.”<sup>189</sup> 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.”<sup>190</sup> Again, these “equivalent conditions” included what became s. 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.”<sup>191</sup> But Ritchot insisted that the Métis had rights as

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<sup>187</sup> Quoted in *MMF MBQB*, *supra* note 10 at para 88. This was in keeping with contemporaneous legislation. 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 Vict, c 26 (Province of Canada) 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)”.

<sup>188</sup> Ritchot, “Journal,” *supra* note 59 at 140.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

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.”<sup>192</sup> The ministers then proposed 150,000, then 200,000 acres, which Ritchot rejected.

When the parties met again on 28 April, the delegates were presented with a draft of a printed bill.<sup>193</sup> It was undoubtedly on this version of the bill that Ritchot wrote his *Remarks on the Twenty-Six Clauses April 28 and 29, 1870*, for when the parties met again on 29 April, Ritchot “presented [his] list of replies to Sir Georges.”<sup>194</sup> Ritchot wrote in his *Remarks* that the 24<sup>th</sup> clause was “in contradiction to article 11 of our instructions.”<sup>195</sup> In effect, art. 11 of the third *List of Rights* demanded that the local legislature “shall have full control over all public lands.”<sup>196</sup> While Ritchot does not explicitly mention the “Indian title” of the Métis in his *Remarks*—which otherwise raise all of the familiar issues around land—, the following comment is of interest: “I have *already explained* that a great part of the soil of Manitoba is not of great value and that large areas *held in common are necessary to the exploitation of the territories of the North West as country of the hunt and fur trade*, a condition that will have to subsist for a great number of years to come for much the greater part of those vast regions.”<sup>197</sup> It provides a clue as to *why* the Métis wanted control over Crown lands and *what* they were surrendering as consideration for the 1.4 million acre land grant in s. 31. Again, Ritchot mentions that this issue had already been explained during the negotiations that took place on 26 and 27 April. It is apparent that at this point the representatives of the Crown had attempted to both maintain jurisdiction over public lands and to ignore Ritchot’s demand for a land grant for the Métis as the draft bill made no reference to them.

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<sup>192</sup> *Ibid* at 142. 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. It would have involved more than the allotted 1.4 million acres.

<sup>193</sup> *Ibid*. The examination of the draft bill was put off as John A. Macdonald was “indisposed”. He would not re-join the negotiations until 2 May.

<sup>194</sup> *Ibid*.

<sup>195</sup> *Ibid* at 159.

<sup>196</sup> O’Toole, “Revisiting Métis Land Claims”, *supra* note 34 at 165.

<sup>197</sup> Ritchot, “Journal,” *supra* note 59 at 159 [emphasis added].

After some discussion, then “came up the question of the lands.”<sup>198</sup> The parties once again hashed 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).”<sup>199</sup> There was then a “long discussion on the quantity *and on the manner of division*.”<sup>200</sup> 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 1,500,000 acres and we agreed on the mode of distribution.”<sup>201</sup>

It is here that MacInnes J. found that the agreement on the mode of distribution was simply among the delegates, and not between the delegates and Crown representatives.<sup>202</sup> 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. 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 “discussed *anew* the form and manner of distributing the lands,”<sup>203</sup> he was obviously pursuing the

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<sup>198</sup> *Ibid* at 142.

<sup>199</sup> *Ibid* at 143.

<sup>200</sup> *Ibid*.

<sup>201</sup> *Ibid*.

<sup>202</sup> MMF MBQB, *supra* note 10 at para 500.

<sup>203</sup> Ritchot, “Journal,” *supra* note 59 at 143 [emphasis added].

negotiations of 29 April with the representatives of the Crown, not discussing the point with his fellow delegates.

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.”<sup>204</sup> 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.”<sup>205</sup> This interpretation was subsequently endorsed by the Manitoba Court of 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”.<sup>206</sup>

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.”<sup>207</sup> 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 s. 32(5), not s. 31. 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 ss. 32(3) and (4), not s. 31. 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.”<sup>208</sup>

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<sup>204</sup> *Ibid* at para 491.

<sup>205</sup> *Ibid* at para 492.

<sup>206</sup> MMFMBCA, *supra* note 24 at para 238.

<sup>207</sup> *House of Common Debates*, (2 May 1870) at 1302 (Hon. John A. Macdonald).

<sup>208</sup> *Ibid* at 1309 (Hon. Georges-Étienne Cartier) [emphasis added].

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.*”<sup>209</sup> In his reply, Macdonald stated that “it was proposed to place *under the control of the Province [...]* the reservation of 1,200,000 acres.”<sup>210</sup> 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.<sup>211</sup> 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.

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<sup>209</sup> *Ibid* at 1329 (Hon. Wood) (emphasis added).

<sup>210</sup> *Ibid* at 1329-30 (Hon. John A. Macdonald) [emphasis added].

<sup>211</sup> Ritchot, “Journal,” *supra* note 59 at 142-3.

But things did not end there. It is of course true that the *Manitoba Act* is an Act of Parliament. But the draft version of the bill that was first presented to the delegates on 27 April contained no reference to a land grant. According to Ritchot's journal and his *Remarks* on this draft version, his main contention with the initial bill was the issue of land. *Following further negotiations*, another draft of the bill was presented to the delegates on 2 May that contained a land grant to the children of the Métis and Half-Breeds. On that day, the Liberal member for Cardwell, Major Thomas Roberts Ferguson asked "how 190 families had been left out at Portage-la-Prairie" of the new province.<sup>212</sup> Macdonald replied that "the Bill, of course, was open to amendment."<sup>213</sup> On the evening of 3 May, Cartier consulted the delegates on the matter *before* modifying the bill.<sup>214</sup> 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."<sup>215</sup> The following day, Macdonald stated to the House that since enlarging the boundaries would add "1,000 to the number of inhabitants of the proposed Province, a proportion of whom are half-breeds," this meant "increasing the area from 1,200,000 acres to 1,400,000 to provide for the families of half-breeds living in the country."<sup>216</sup> The majority of the Supreme Court of Canada would seem to agree that the "parties *settled on a grant* to Métis children of 1.4 million acres of land (s. 31) and recognition of existing landholdings (s. 32)."<sup>217</sup> Ritchot never again made 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. He would, however, take issue with its implementation.

Furthermore, 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-

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<sup>212</sup> Morton, *Birth of a Province*, *supra* note 147 at 186. See also 188-189.

<sup>213</sup> *Ibid* at 190.

<sup>214</sup> Ritchot, "Journal," *supra* note 59 at 144.

<sup>215</sup> *Ibid*

<sup>216</sup> Morton, *Birth of a Province*, *supra* note 147 at 202.

<sup>217</sup> MMF SCC, *supra* note 1 at para 30.

blooded Indians, they were their descendants. [...] 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*.”<sup>218</sup> In other words, Macdonald did two things here: 1) he confirmed that this was an Aboriginal land claim 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 in the implementation of s. 31.<sup>219</sup> 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.

### ***1. The “Prevailing Situation”: Reasons for the Crown’s Commitment***

As then-Chief Justice Scott recognised in MMF, the purpose of s. 31 was “to bring about Manitoba’s entry as a new Canadian Province.”<sup>220</sup> When McLachlin C.J. stated that s. 31 “is not a treaty,” she immediately noted that the:

trial judge correctly described s. 31 as a constitutional provision *crafted for the purpose of resolving Aboriginal concerns* and permitting the creation of the province of Manitoba. When the *Manitoba Act* was passed, *the Métis dominated the Red River provisional government, and controlled a significant military force*. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers.<sup>221</sup>

Here, even Rothstein J. agreed that at “the start of the relevant time period, the Métis were a political and military force to be reckoned with.”<sup>222</sup> McLachlin C.J. then cited with approval the trial judge’s finding that “the purpose of the discussions or negotiations between the Red River delegates and Macdonald and Cartier was to bring about in a peaceful way

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<sup>218</sup> *House of Commons Debates*, (4 May 1870) at 1359 (John A. Macdonald).

<sup>219</sup> Ritchot, “Journal,” *supra* note 59 at 147.

<sup>220</sup> MMF MBCA, *supra* note 24 at para 238 [emphasis added].

<sup>221</sup> MMF SCC, *supra* note 1 at para 93.

<sup>222</sup> *Ibid* at para 286.

the entry of the territory into Canada.”<sup>223</sup> The implication here seems to be that the military force of the Métis precludes any possibility that s. 31 embodies a “treaty”. Again, I would agree that, strictly speaking, it is not a “treaty” within the terms of s. 88 of the *Indian Act*, but what gives it a “treaty-like character” is that it is a land claim settlement.

Nevertheless, this is a somewhat strange finding of law given that it corresponds almost exactly to the “prevailing situation” surrounding other treaties with Aboriginal peoples. It is well known that what triggered the negotiation of the Robinson-Huron and Robinson-Superior treaties is the Mica Bay incident when Chief Shingwaakoons along with thirty armed Ojibwa and Métis evacuated a mine and removed the miners and their families.<sup>224</sup> In his dissenting decision in *St. Catharine’s*, which revolved around Treaty N° 3, Strong J. strongly criticized his colleague for ascribing the recognition of Indian title in treaties “to moral grounds, to motives of humane consideration for the aborigines.”<sup>225</sup> 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.”<sup>226</sup> He specifically noted that the *Royal Proclamation of 1763* was issued in reaction to “Pontiac’s War”, when “Detroit was besieged and all the Indian tribes were in revolt”.<sup>227</sup>

Similarly, Hogg observed that, in both *Simon* and *Sioui*, the consideration on the part of Aboriginal peoples was “a promise to cease hostilities.”<sup>228</sup> Brian Slattery wrote that the “sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a

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<sup>223</sup> *Ibid* at para 93. Citing MMF MBQB, *supra* note 10 at para 649.

<sup>224</sup> Janet E Chute, *The Legacy of Shingwaukonse: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998) at 131-136.

<sup>225</sup> *St. Catharine’s*, *supra* note 36 at para 14.

<sup>226</sup> *Ibid*.

<sup>227</sup> *Ibid*. Similar to s. 31, Anishinaabe legal scholar John Borrows has argued that the *Royal Proclamation, 1763* is not simply a unilateral legislative act, but part of the Treaty of Niagara of 1764. John Borrows, “Wampum at Niagara. Canadian Legal History, Self-Government, and the Royal Proclamation,” in *Aboriginal and Treaty Rights in Canada*, Michael Asch ed (Vancouver: UBC Press, 1998).

<sup>228</sup> Hogg, *Constitutional Law*, *supra* note 108 at 608.



‘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.”<sup>229</sup> In *Wewaykum Indian Band v. Canada*, the Supreme Court of Canada cited Slattery with approval<sup>230</sup> 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.”<sup>231</sup> The Métis in effect accepted to put down their arms and end their Resistance to the transfer.

It is worth mentioning in this regard that Flanagan portrayed the transfer of Rupert’s Land as 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.”<sup>232</sup> 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.”<sup>233</sup> As the Court mentioned, “Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown’s claim to sovereignty.”<sup>234</sup>

<sup>229</sup> Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can Bar Rev 727 at 753.

<sup>230</sup> *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 79, citing *ibid*.

<sup>231</sup> *MMF MBCA*, *supra* note 24 at para 506.

<sup>232</sup> Flanagan, “Riel and Aboriginal Rights”, *supra* note 61 at 248.

<sup>233</sup> 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].

<sup>234</sup> *MMF SCC*, *supra* note 1 at para 92.

### E. “A Certain Measure of Solemnity”

There is perhaps little need to insist this criterion since it is the main reason for which the Court commented on the “treaty-like” character of s. 31. As we have seen, McLachlin C.J. for the majority wrote that:

Section 31 sets out solemn promises—promises which are no less fundamental than treaty promises. Section 31, like a treaty, was adopted with “the intention to create obligations ... and a certain measure of solemnity” [...]. It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived.<sup>235</sup>

Since s. 31 is in effect part of the *Manitoba Act*, and was not only adopted by the federal Parliament of the Dominion of Canada and therefore signed by the Governor General, but also entrenched in the Constitution of Canada under s. 5 of the *Constitution Act, 1871*, an Imperial Act that was signed by none other than Queen Victoria herself. The solemnity was not unilateral since the Provisional Government of Assiniboia unanimously approved the terms of the *Manitoba Act* on 24 June 1870.

## VI. CONCLUSION

While the Supreme Court of Canada decided in *MMF* that s. 31 is “not a treaty”, it provided no *ratio decidendi* on this point of law other than to imply that a treaty and an Act of Parliament are mutually exclusive. The problem with this line of reasoning is that it fails to take into account the legislative process that modern treaties involve. Similarly, Scott C.J. claimed that s. 31 is “not a traditional historical land claim,” without specifying what he understood this to be. Certainly, the negotiation of s. 31 does not strictly respect the terms of the *Royal Proclamation, 1763*. But then, the Collins purchase in 1785 and a surrender of 1787-88 constitute areas “surrendered without proper regard for the provisions of the *Royal Proclamation of 1763*,”<sup>236</sup> not to mention all the cases before the specific claims commission and tribunal. In addition, consideration in early treaties did not involve annuities, reserves, or hunting and fishing rights. Instead, the “Crown made a single, one-time payment in goods in return

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<sup>235</sup> *Ibid.*

<sup>236</sup> Surtees, “Land Cessions,” *supra* note 98 at 106.

for a specific portion of the territory.”<sup>237</sup> Furthermore, representatives of the Crown negotiated treaties that involved the surrender of Indian title despite the fact that they did not believe the particular First Nation they were dealing with actually had title in the specific area. Neither the fact that s. 31 is a provision in an act of parliament nor the fact that it does not follow the model of the numbered treaties are sufficient in themselves to justify a finding that s. 31 is not a “treaty”. Furthermore, as I have endeavoured to show here, the surrounding circumstances of the negotiation of s. 31 easily meet all of the *Sioui* criteria for determining whether or not a historical document constitutes a “treaty”. Nevertheless, it undoubtedly better to concede the point insofar as the specific term “treaty” is concerned and instead emphasize that its “treaty-like history and character” qualifies it as a “land claim agreement” under the terms of s. 35 rather than the arguably more restrictive term of a “treaty”. The point is not at all moot since a finding that s. 31 embodies a land claim agreement has implications in terms of whether promises that were made during the negotiations but were not included in the final draft are legally binding and of the specific fiduciary obligations that the Crown owed to the Métis during the implementation of s. 31.

In terms of the Indigenous title of the Métis, the Supreme Court of Canada decided that the trial judge’s finding that, since the “the Métis did not hold aboriginal title, there was nothing to surrender or cede”<sup>238</sup> is “fatal to this contention” that the fiduciary obligations of the Crown were triggered during the implementation of s. 31.<sup>239</sup> But as Scott C.J. remarked, “*focussed argument* on whether or not this critical component of a fiduciary obligation existed *has not taken place*” and—quite appropriately—refused to decide the issue.<sup>240</sup> Given that the plaintiffs never put forth at trial the argument that s. 31 in itself constitutes a “treaty”, any finding on this particular issue would fly in the face of the fundamental principles that underlie our adversarial legal system, at least insofar as it constitutes part of the *ratio decidendi*. As Dickson J. remarked in *Lewis v. Todd and McClure*, “it might be observed, *though this should hardly be necessary*, that a court, in our adversarial system, is largely confined to

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<sup>237</sup> *Ibid* at 98-112.

<sup>238</sup> MMF MBQB, *supra* note 10 at para 631

<sup>239</sup> MMF SCC, *supra* note 1 at para 59.

<sup>240</sup> MMF MBCA, *supra* note 24 at para 509 [emphasis added].

the evidence adduced at trial, *and to argument related thereto*.”<sup>241</sup> Similarly, while discussing the doctrine of mootness, Sopinka J. stated for the Court in *Borowski v. Canada*<sup>242</sup> that the “requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that *issues are well and fully argued* by parties who have a stake in the outcome.”<sup>243</sup> I respectfully submit that, insofar as “the judge could have reached the decision without making the statements” and that such statements “are not necessary elements of the reasons for decision,”<sup>244</sup> that they are *obiter dicta*.

This is precisely what Rothstein J. appeared to suggest when he asserted in his dissenting decision that “this case *was never argued* based on this specific duty of diligent fulfillment of solemn obligations arising from the honour of the Crown. The parties *made no submissions* on a duty of diligent implementation of solemn obligations.”<sup>245</sup> To be sure, on this particular issue, McLachlin C.J. astutely replied that the “honour of the Crown was at the heart of this litigation from the beginning. Before the courts below and in this Court, the Métis argued that the conduct of the government in implementing s. 31 of the *Manitoba Act* breached the duty that arose from the honour of the Crown.”<sup>246</sup> Indeed, MacInnes J. noted that the plaintiffs “assert that the honour of the Crown *must be observed in all of its dealings* with aboriginal peoples, that it precedes and is the foundation of the Crown’s fiduciary duty, and that it is *a source of independent obligation* which *continues throughout all dealings* between the Crown and aboriginal people whether or not a fiduciary duty arises.”<sup>247</sup> Further on, he also recognized that, in terms of the implementation of s. 31, the “plaintiffs say that their overarching complaint is that of delay.”<sup>248</sup> Nevertheless, Rothstein J.’s point of not

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<sup>241</sup> *Lewis v Todd and McClure*, [1980] 2 SCR 694, [1980] 2 SCR 694, at para 35 [emphasis added].

<sup>242</sup> *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] SCJ No 14.

<sup>243</sup> *Ibid* at para 31 [emphasis added].

<sup>244</sup> Canadian Online Legal Dictionary, *sub verbo* “Obiter dicta”. <[http://www.irwinlaw.com/cold/obiter dicta](http://www.irwinlaw.com/cold/obiter%20dicta)> (2 Sept 2014).

<sup>245</sup> MMFSCC, *supra* note 1 at para 209 [emphasis added].

<sup>246</sup> *Ibid* at para 86.

<sup>247</sup> MMFMBQB, *supra* note 10 at para 634.

<sup>248</sup> *Ibid* at para 1052.

deciding issues that have not been argued or for which no submissions have been made is entirely relevant to the majority of the Court's finding that s. 31 is not a "treaty". In conclusion, insofar as statements concerning the treaty-status of s. 31 "are not necessary elements of the reasons for decision," they are more appropriately considered *obiter dicta* and a proper *ratio decidendi* on that particular legal question is better left to a day when it is properly pleaded before a court and the parties have had the opportunity to present the appropriate evidence for a trial judge to make findings of both fact and law.

