Appendix 5C: Métis Nation Land and Resource Rights*

Métis Nation land and resource rights involve a complicated mixture of history, geography, politics and law. Because the historical facts differ sharply from one area to another, the following analysis is divided into three broad geographic categories: the part of Manitoba that includes the Red River Valley and that constituted the original province created by the Manitoba Act, 1870; the remaining (chiefly prairie) areas to which the Dominion Lands Act of 1872 was applied; and the rest of the Métis Nation homeland. A final section deals with resource use rights.

In all three areas, the legal starting point is the same: the Aboriginal title that Métis shared with all Aboriginal peoples. The reason for examining each area separately is that, until very recently, only two attempts to extinguish Métis Aboriginal title on a Métis-specific basis were ever made. These were made, on somewhat different terms, under the Manitoba Act, and the Dominion Lands Act. Because of their differences, those attempts must be considered independently. Then we must look at the situation of Métis Nation groups whose Aboriginal rights have never been extinguished.

Although our analysis of Métis rights must begin with law, it cannot end there. The discussion of Métis land rights in each geographic area therefore concludes with observations, as important as the legal ones, about the moral and political entitlement of the Métis Nation to a land base upon which their future as a people can be founded.

1. Manitoba Act Territory

The first attempt by the government of Canada to deal formally with Métis rights occurred in the Manitoba Act, 1870.[1] This was a statute of the Parliament of Canada that was given retroactive constitutional status by the British Parliament in the Constitution Act, 1871. The implementation of the Manitoba Act, so far as Métis rights were concerned, was a national disgrace. Maladministration was rampant, ranging from negligence to outright fraud. While there are differences of opinion about the legal consequences of that maladministration, few detached observers would doubt that the descendants of the Red River Métis are owed a huge moral debt. To assess the legal and moral/political ramifications, we must carefully examine the historical record.

1.1 Maladministration of Manitoba Act Entitlements

Thomas Flanagan maintains in Metis Lands In Manitoba, a book based on research commissioned by the government of Canada, that “the federal government generally fulfilled, and in some ways overfulfilled, the land provisions of the Manitoba Act” and that Métis families profited from “a veritable cascade of benefits”.[2] In our opinion, much of the evidence marshalled in Flanagan’s book, far from supporting those conclusions,

lends strong support to the opposite view, advanced by D.N. Sprague, Paul Chartrand and others, that promises made to the Métis population of Manitoba were broken in many important respects.

General

Flanagan's book adopts a bottom-line approach. Acknowledging that many errors and other irregularities were committed in the course of implementing sections 31 and 32 of the Manitoba Act, he concludes that at the end of the day, the government of Canada acted with "generosity towards the Métis" (p. 228).

Because justice delayed is justice denied and because justice denied requires redress, an effective assessment of promise fulfilment must consider more than the bottom line of how much was done over a period of time. The assessment must also evaluate how procrastination and maladministration may have eroded or nullified the promises before they were kept. Flanagan's assessment pays little heed to such issues. Delay and its impact, as well as fraud and deception, are major elements of the story of western Métis rights and are discussed below. It will be seen that even from a bottom-line perspective, Thomas Flanagan's assessment of the thoroughness with which Canada kept its promises to Métis people is open to serious question.

Land for children

Flanagan states that the 1.4 million acres promised by section 31 for children of Métis heads of families were eventually all distributed, although it took from 1877 until 1900 to complete the process and more than 90 per cent of the land was diverted by sales of entitlement to persons other than Métis children (pp. 86, 121). Because the number of persons entitled to claim under section 31 was miscalculated, however, the size of each grant (240 acres) exhausted the 1.4 million acres before the claims of all Métis children could be accommodated. The result was that 993 claims were dealt with by issuing scrip worth $240 each instead of by direct land grants (pp. 92-93). For at least those 993 surplus claims, then, Flanagan was clearly wrong to conclude that "the government complied exactly with the wording of section 31 of the Manitoba Act" (p. 94).

Allotment of children's grants

The Red River and Canadian negotiators agreed verbally that a committee whose members would be persons nominated locally, working under the supervision of the Manitoba legislature, would select the land from which the Métis children's grants would be made, and that the local people would also be in charge of the allotment of those grants.[3] When this promise was not reflected in the Manitoba Act, Abbé Ritchot and his colleagues complained and were assured by John A. Macdonald and George-Étienne Cartier that it would be "the same thing" in practice. Cartier's letter of May 1870, while not referring explicitly to these matters, was obviously designed, with other verbal undertakings, to reassure Ritchot about them and to encourage him to convey his

satisfaction to the people of Red River. He did so, expecting the government's promises to be kept.

In actuality, however, the allocation of children's land grants under section 31 were determined, albeit with occasional local input, primarily by federal authorities. The constitutionally entrenched requirement of section 31 that the lieutenant governor play a personal role in the allocation was ignored. The distribution of allotments resulting from that broken promise created great dissatisfaction among the beneficiaries of the land grant. The most fundamental reason for dissatisfaction was that the grants were distributed in a way that resulted in a dispersal of Métis people throughout Manitoba. A homogenous Métis homeland would have been possible if the grants had been located closer to existing Métis river lots.

Instead of selecting the lands in places where the families might be expected to survive in community, the government sponsored a scheme of dispersal. Instead of securing the families in locations selected by them according to local custom, and according to the promises that accompanied acceptance of the federal union, the government confirmed the usurpation by immigrant settlers from the established portions of Canada, who brought with them the political power to suppress the province's original inhabitants.[4]

Because its stated purpose was to benefit the families of the Métis, section 31 contained implied promises that the land granted would be appropriate to the social and economic circumstances ("reasonably fit to benefit the Métis") and suitable for the establishment of a permanent community (since "families" included future generations). The distribution did not observe the promise of either appropriateness or permanence; the consequence was to destroy the possibility of preserving a vibrant and cohesive Métis people on a coherent land base.

Scrip for parents

The extent to which section 31 of the Manitoba Act was intended to benefit and extinguish the Indian title of Métis heads of family has been a matter of controversy over the years. The language of section 31, read literally, appears to call for land grants only to children. But the statement that the 1.4 million acre allotment was "for the benefit of the families of the half-breed residents", coupled with the fact that parents are both members of families and children of their own parents, has led some to contend that section 31 was a guarantee of land benefits for all Métis residents.[5] Such evidence as exists concerning discussions between Canadian and Red River negotiators in 1870 may support the narrower interpretation as far as the grants were concerned.[6] The language used was far from clear, but the long-term benefit of all Manitoba Métis was certainly agreed to be the object of the grants.

The significance of excluding Métis parents from the ambit of section 31 (assuming that to have been the intent) was double-edged. If it denied them land grant benefits, it also left their Aboriginal title unextinguished. It was perhaps for that reason that the government decided, after much vacillation, that although Métis parents should not share

in the 1.4 million acres, they should be issued scrip for 160 acres each toward extinguishment of their Indian title. A statute to that effect was enacted in 1874.[7] At the same time, however, an identical issue of scrip was authorized for long-time non-Métis settlers and their children in recognition of their contribution to the development of the area.[8] Explanations offered for the grants to non-Aboriginal settlers seldom claimed for them a unique contribution but rather that they were, in the words of John A. Macdonald, "as much pioneers of that country…as the half-breeds". That grant therefore appears either to have deprived the Métis parents of an equivalent reward for their equivalent role as "pioneers of that country" or, if the Métis parents' grant was intended to be such a reward, to have given them no compensation for extinguishment of their Indian title.

As far as grants to Manitoba Métis parents are concerned, then, the bottom line of promise fulfilment is that

• if they were entitled to share in section 31 benefits, the substitution of scrip for land and of 160 acres for 240 acres violated the Manitoba Act; and

• the fact that they received nothing more than other (non-Métis) long-time settlers either cheated them of an equivalent settlement award or meant that the extinguishment of their Indian title was without compensation.

Settled lands

Thomas Flanagan asserts that "the government did fulfil its obligations under section 32" (p. 157). D.N. Sprague strongly disagrees.[9] Regardless of whose interpretation one accepts, it is clear that the government of Canada did not altogether ignore its obligation under section 32 of the Manitoba Act to confirm the title of settlers (chiefly Métis because of their numerical predominance) who had "occupancy" or "peaceable possession" of Manitoba land before Manitoba was created. Nor, however, did it fulfil that promise completely.

Flanagan states (pp. 186-187) that within the inner parishes of the settlement belt at the junction of the Red and Assiniboine rivers, the areas closest to Upper Fort Garry and Winnipeg, 96.5 per cent of the river lots (1,562 out of 1,619) were eventually made the subject of patents issued under section 32 of the Manitoba Act. Flanagan admits (pp. 188-189) that in the outer parishes of the settlement belt — areas further from the fork of the Red and Assiniboine and more heavily populated by Métis — and in other parts of the province, the section 32 patent rate was considerably lower (41 per cent and 54.8 per cent respectively) and that it was dramatically lower in some of the remoter areas (St. Malo, 27 per cent; Rat River, 7 per cent). He contends, however, that even in those parts of the province, patents were issued for most of the lots that had been settled substantially and that the rejected claims related to lots that had only been staked and not otherwise occupied. Flanagan says: "The very fact that patents were issued under the Manitoba Act demonstrates that the Dominion government recognized the occupancy of those who lived on the land prior to 1870." Furthermore, he writes (pp. 187, 189): "In all parishes Manitoba Act patents were granted where people really lived".

From these statistics, Flanagan concludes that Sprague is wrong to attribute the large post-1870 Métis migration westward from Manitoba to Métis dispossession or their inability to obtain land patents (pp. 189-190). Flanagan's own figures show, however, that very few patents were issued until after the Métis migration was well under way. The first patents were not issued until 1874, and only two were granted that year (p. 167). Although the number increased sharply the following year, only 336 titles (12 per cent of the eventual total) were confirmed before 1877, by which time, according to Sprague, the flow of emigration had become "remarkable" (p. 139). Section 32 patents continued to be issued at a roughly constant annual rate until 1886, the final one being granted in 1929 (p. 167). Flanagan admits that "many, perhaps even most" of the patents he has documented "were not made to the original occupants" because the occupants' claims to title had been sold and they had moved away (p. 187). He does not speculate about the motivation of those who left.

Nor does Flanagan dispute Sprague's evidence that many individuals lost all or part of their claims to lands they occupied because of unjustifiably restrictive bureaucratic interpretations of peaceable possession, subsequently softened, but not before many claims had been denied or abandoned. Those definitions were especially damaging to staked claims made by Métis (and others) in outlying areas. Abbé Ritchot later reminded Macdonald that he had displayed a map of these areas and explained the staking process to Macdonald and Cartier during the 1870 negotiations. In July 1870, Ritchot, armed with the verbal assurances and the reinforcing letter of George-Étienne Cartier, personally led a Métis expedition to Rat River to stake claims before the land transfer to Canada took place. This action demonstrated that he firmly believed, on the basis of what he had been promised in Ottawa, that such claims would be recognized under section 32(4) of the Manitoba Act. By his words and example, others were encouraged to do likewise. A high proportion of those last-minute claims were rejected by federal officials, who took the position that substantial improvements had to be made to the land to satisfy the requirement of peaceable possession. Although Flanagan describes the staked claims problem as a "marginal issue" (p. 157), he affirms that it was surrounded by "great controversy", which was examined eventually by a royal commission (p. 177). Overall, while patents were ultimately issued for the great bulk of river lots that had been occupied before 1870, the promise of section 32 was never completely kept, even in the fullness of time.

Hay and common lands

The controversy over hay lands, which usually lay contiguous to the rear of settled river lots, was rooted in long-standing patterns of land use that dominion authorities ignored, despite their recognition by section 32(5) of the Manitoba Act, until considerable harm had been done to the rights of Métis and other old settlers.

Flanagan's book devotes considerable attention to the question of hay lands and common lands. Because the problem was not Métis-specific (although more Métis than others were affected, because of their greater numbers), we will not dwell on it at length. We do, however, wish to make one observation about Flanagan's conclusion that "the

government's commutation of the rights of hay and common produced reasonable satisfaction among the old settlers" (p. 219). While acknowledging the absence of evidence for that statement, he suggests that it is plausible to draw such a conclusion from the fact that by 1886 the "melancholy chorus of earlier years" had been

reduced to "scattered complaints" (p. 220). In the face of Flanagan's own evidence about homestead claims pre-empting hay lands claims and about substitutions of scrip for land, it is difficult to credit his conclusion that the hay question had been settled satisfactorily by 1886 simply because the volume of complaints had subsided. The world was a very different place for the western Métis in 1886, after the Northwest rebellion, than it had been in 1870. The migration from Manitoba was largely over, and Métis dreams of a western homeland lay shattered in the ruins of Batoche.

Justice delayed

To look only at promise fulfilment, as Flanagan does, without regard to the effect of the passage of time, is to ignore an important aspect of Métis rights — the fact that many of the promises were spoiled by delay, like meat left out in the prairie sun. The accompanying time line, based on the dates provided in Flanagan's book, shows how long it took for the federal government to fulfil its Manitoba Act promises (Figure 5C.1).

Except for parental scrip, the bulk of which was issued in 1876, six years after the promises were first made, it took 11 years before even half the commitments made in 1870 were met. For the first six years, absolutely nothing of value was provided to the Métis except confirmation of a handful of the least controvertible river lot titles. For the first decade, there was also uncertainty about the likelihood of promise fulfilment because of bewildering shifts in government policy.

During that long period of inaction and confusion, the demographic composition of Manitoba changed radically. The tidal wave of non-Aboriginal immigration, against which the Manitoba Act guarantees had been intended to provide economic and cultural protection, arrived before the safeguards were in place and overwhelmed the Métis long before these safeguards were even half implemented. The Métis population of Manitoba, which constituted a majority of almost 80 per cent in 1870, became a minority within a few years. The loss of majority status was in part a result of Métis migration westward. According to Sprague, more than 4,000 Métis left Manitoba: migration took place slowly between 1871 and 1876, rapidly between 1877 and 1880, and in a rush between 1881 and 1884.[10]

The importance of the Métis exodus has possibly been exaggerated by some commentators. A majority of the Métis population had remained in Manitoba, after all, and even if no one had left, Métis people would soon have been outnumbered by newcomers. The migration was nonetheless a major demographic and cultural event. Sprague argues that it is compelling evidence of the harsh impact on the western Métis of delays and non-fulfilment of Manitoba Act promises.

Flanagan rejects any linkage between the exodus and broken promises: “The evidence is overwhelming that Sprague’s theory about Métis emigration — that they left Manitoba because they were dispossessed of their lands — is simply wrong” (p. 189). Instead, he suggests, “the departing Métis were drawn by a plains economy that had been moving westward since the 1850s” (p. 190). What he fails to consider is the possibility that Métis who left were drawn to the plains economy because more than a decade of governmental dithering and denials had destroyed their confidence in their own economic or cultural survival in Manitoba.

Flanagan’s bottom-line approach leads him to some curious conclusions. He claims, for example, that delay in implementation of children’s grants was “not wholly prejudicial”, in that it “amounted to a compulsory savings program for the Métis children” (p. 225). At another point, after acknowledging that “perfect justice was not done”, he writes that “in the end, almost everyone got something” (p. 179). The latter comment illuminates Flanagan’s other conclusions and demonstrates the gulf that separates his understanding of the purpose of the Manitoba Act guarantees from that of most Métis people. For the Métis, sections 31 and 32 of the Manitoba Act and the attendant verbal promises were not measures to ensure that almost everyone would eventually get something. They were designed to assure the economic and cultural survival of a unique people. They recognized that Métis people were about to experience severe economic disruption and that their homeland would soon be inundated by people of an alien culture. Even if the government of Canada had ultimately complied with every one of the guarantees, the inexcusable delay ensured that compliance was too late to serve the guarantees’ intended purpose.

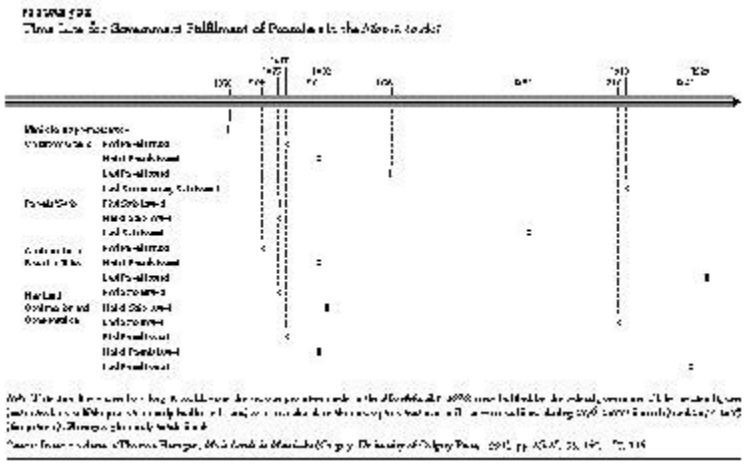
Justice debauched

Incomplete and delayed compliance with promises was only part of the Manitoba Act tragedy.[11] Métis land entitlements and scrip quickly became the subject of speculative trading by land agents, many of whom were woefully short of scruples. The lengthy delays, far from creating the compulsory savings program Flanagan imagines, provided a strong incentive to sell out early and cheap.[12] Instances of sharp dealing and fraud were common, although the full extent of such practices will never be known. Children of tender years were particularly vulnerable targets, and constitutionally questionable legislation dissolving or weakening normal legal protections for children aided and abetted their exploitation.

While most of the fraudulent and predatory practices by which individual Métis were cheated of their constitutional legacy were perpetrated by private operators, there are documented instances of bribery and fraud even on the part of government employees. One of the most notorious involved a key department of the interior official named Robert Lang, who extracted bribes from Manitoba Act claimants in return for expediting the claims process. Lang’s activities were known to government authorities, including Prime Minister Macdonald, as early as April 1883, but he was allowed to remain on the job until early 1885. His salary continued until April 1885, by which time he had fled,

with his ill-gotten assets, to the United States. He was not formally dismissed until 1887, and he was never prosecuted or sued for his activities.[13]

The government of Canada owed a fiduciary duty to the Manitoba Métis as an Aboriginal people. While the government itself may not have been involved directly in commercial exploitation of their Manitoba Act benefits, it was aware of much of the exploitation and, as a fiduciary, should have taken effective steps to stop it.



Conclusion

A 1991 study of the implementation of section 31 of the Manitoba Act found the government of Canada to have breached its constitutional obligations in fourteen respects.[14] Merely listing the subject headings of that analysis indicates the sweeping nature of the indictment:

1. Delay

2. Failure to Attach Settlement Conditions

3. Failure to Enact Laws to Protect Section 31 Interests

4. Failure to Exercise a Crown Discretion in Each Case

5. Failure to Maintain Crown Supervision Over the Intended Regulated Scheme

6. Failure to Provide Lands by Giving Scrip as a Substitute

7. Failure to Select the Lands Ahead of Incoming Settlement

8. Failure to Consider the Choice of the Beneficiaries in Respect of Land Selection

9. Failure to Distribute Lands Fit for the Purposes of Section 31

10.Failure to Give Lands to All the Children of Heads of Families

11.Failure to Provide a Benefit to Heads of Families

12.Failure to Grant the Lands for Purposes of Settlement Only

13.Setting a Time Limit for Section 31 Claims

14.Appropriating for the Purposes of the Dominion a Portion of the Lands Selected for Section 31 Purposes.

This long list of governmental transgressions does not even attempt to address the breaches that occurred in relation to section 32 of the Manitoba Act.

The promises made to the Métis population of Manitoba in return for their concurrence in the creation of the new province in 1870 were violated or ignored (or their implementation delayed) on a massive scale. If the unfair treatment of Métis rights in the Manitoba Act, the Dominion Lands Act, and the Constitution Act, 1930 were ever the subject of a play, it might appropriately be called a tragedy in three acts. It is certainly no exaggeration to describe it as a national disgrace.

1.2 Contemporary Consequences

The land allotments called for by section 31 of the Manitoba Act were made "towards the extinguishment of the Indian Title". The process by which that provision was implemented was so flawed, so drawn out, and so contaminated by sharp practice and fraud that its basic purpose — to give the Métis people of Manitoba a satisfactory land base upon which their community and culture could flourish — was frustrated. Although ultimately only the Supreme Court of Canada can determine the legal significance of that fact, a strong case can be made for the view that the process nullified the extinguishment of Indian title contemplated by section 31. If that view is correct, the remedy is obvious: the government of Canada has a legal obligation to begin land settlement negotiations as soon as possible with representatives of the descendants of the Métis people of that area.

It can also be argued persuasively that the government's informed tolerance of the widespread chicanery that accompanied implementation of section 31, along with its own incomplete and delayed compliance with section 31, constituted serious breaches of its fiduciary duty. Fiduciary breaches may also have occurred in the implementation of section 32, which, although designed to protect all old settlers, was expected to be of importance in preserving the Métis community in the Red River Valley. The government of Canada had a fiduciary duty in the administration of section 32 to the extent that it had an impact on the Métis population of Manitoba. That impact was considerable. If there were violations of fiduciary duty in the implementation of section 32, the remedial ramifications are again clear. Breaches of the Crown's fiduciary duty to protect Métis interests would create an entitlement to compensation, and if the breaches were as serious as they seem to have been, appropriate amount of the compensation would be high.

This assessment of legal issues is not authoritative. Only the Supreme Court of Canada can settle them conclusively. Important as they are to understanding the Métis Nation's historical situation, the answers to these legal questions are outside the scope of the Commission, which is to recommend measures by which the grave historical wrongs suffered by Aboriginal peoples, including Métis, can be put right. Whatever the ultimate judicial solutions to the legal puzzles we have examined, there is no room for reasonable doubt on the moral and political plane: the Métis residents of Manitoba did not receive anything resembling what they were promised in 1870 as compensation for the extinguishment of their Indian title, and the government of Canada fell inexcusably short of its moral obligation to treat Manitoba Métis equitably. Regardless of the legal case, the government of Canada is morally obliged to enter negotiations with Métis representatives to correct this injustice.

2. Dominion Lands Act Territory

The Manitoba Act did not purport to resolve the issue of Métis title completely. Although an agreement was reached between the Métis and the Canadian government regarding the territory of the original 'postage stamp' province of Manitoba, no such agreement was reached with Métis people from other parts of the Métis homeland.

We now examine how the Dominion Lands Act 1879 affected Métis Aboriginal title in the rest of the area that now makes up most of the prairie provinces.[15] There is serious doubt about the capacity of the Dominion Lands Act to extinguish the Métis interest in land in the territory to which the act applied. If it did extinguish the Aboriginal title of the Métis, a second question concerns whether the Métis received fair and just compensation for such extinguishment. The evidence is conclusive that the Métis of the west were denied fair compensation.

2.1 Dubious Extinguishment

As noted earlier, section 31 of the Manitoba Act recognized the existence of the Indian title of the Métis. Section 125 of the Dominion Lands Act 1879 extended this recognition to the rest of the Northwest Territories:[16]

125. The following powers are hereby delegated to the Governor in Council:…

(e) To satisfy any claims existing in connection with extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and conditions, as may be deemed expedient.

Another provision, relating to the confirmation of title to settled lands outside Manitoba, was, like section 32 of the Manitoba Act, important for Métis settlers even though it did not apply exclusively to them:

f. To investigate and adjust claims preferred to Dominion land situate outside of the Province of Manitoba, alleged to have been taken up and settled on previous to the fifteenth day of July, eighteen hundred and seventy, and to grant to persons satisfactorily

establishing undisturbed occupation of any such lands, prior to, and, being by themselves or their servants, tenants or agents, or those through whom they claim, in actual peaceable possession thereof at the said date, so much land in connection with and in satisfaction of such claims, as may be considered fair and reasonable.

Although section 125 of the Dominion Lands Act was enacted in 1879, it was not until an order in council of 31 March 1885 that it was finally implemented.[17] The order allowed for the issuance of either land scrip or money scrip:

1. To each halfbreed head of family resident in NwT…the lot or portion of land of which he is at present time in bona fide and undisputed occupation…to the extent of 160 acres; if said land he is in bona fide occupation of is less than 160 acres, the difference to be made up by an issue of scrip redeemable in land at the rate of $1 per acre; those halfbreeds not in bona fide occupation of any land shall be issued scrip for $160 redeemable in land.

2. To each child of a halfbreed head of family…the lands he is at present in bona fide and undisputed occupation…to the extent of 240 acres; any [difference] to be made up by an issue of scrip redeemable in land…if not in bona fide occupation of any land, such child to be issued scrip redeemable in land for $240.[18]

If Métis residents satisfied the requirements of occupation of land, (which were ethnocentric and unduly restrictive given the traditional nature of Métis land use patterns), they were entitled to land scrip; if not, they were entitled to money scrip redeemable for land.[19]

The implications of the Dominion Lands Act have been the focus of a number of legal studies.[20] The concern has stemmed from the fact that despite the statute's express provision of land grants to all Métis heads of family and children, only a small percentage of Métis ever received and retained land.[21]

The Dominion Lands Act was not, as the Manitoba Act had been, the product of a negotiated settlement. Although the Dominion Lands Act recognized the existence of Métis Indian title, Métis people had no opportunity to negotiate the terms of surrender of that title. By enacting the Dominion Lands Act, Parliament attempted to extinguish Métis title unilaterally and to deny Métis peoples any say in how they would be compensated for their title. This failure to deal with Métis people in the northwest as Aboriginal collectivities capable of deciding their own best interests was not only an insensitive and immoral act of disregard, it was arguably unconstitutional.

The Crown had promised, in the Rupert's Land and North-Western Territory Order of 1870, that its actions regarding Aboriginal interests in land would conform with

"equitable principles which have uniformly governed the British Crown in its dealings with the aborigines". Similar protections were enunciated in the Royal Proclamation of 1763. Of particular importance was the requirement for Aboriginal consent to extinguish Aboriginal title, which was a necessary prerequisite for opening the Northwestern territory to general settlement because, according to Justice Morrow in Re Paulette, the Rupert's Land Order and attached schedules are part of the constitution of Canada.[22] The federal government was thus under a positive constitutional obligation to deal equitably with the Aboriginal peoples of Rupert's Land and the Northwest Territories. Thus, if one defines Métis as Indians or Aboriginal people under the Rupert's Land Order, then as a group they had a constitutional right to participate in negotiations concerning whether and on what terms their Aboriginal title should be extinguished.

The arguments applicable to the issue of whether Métis are Indians under section 91(24) of the Constitution Act, 1867 are equally applicable to the interpretation that should be given the Rupert's Land Order. The order and the Constitution Act, 1867 were drafted in the same period.

We have suggested elsewhere that the weight of the arguments strongly supports the conclusion that the term Indians in section 91(24) must be given a broad definition that includes Métis. It seems likely that if a court were asked the question directly, it would find that the Métis are Indians within the meaning of the Rupert's Land and North-Western Territory Order as well. In any event, the Supreme Court of Canada pointed out in Guerin that Aboriginal rights exist independently of royal ordinances.[23]

In unilaterally enacting section 125(e) of the Dominion Lands Act without acquiring the consent of the Métis, Parliament violated the equitable principles it was obligated to respect. As a result, the constitutional capacity of section 125 to extinguish Métis Aboriginal title may be in doubt. If the doubt is justified, Métis Aboriginal title persists in much of western Canada and has been constitutionally entrenched by section 35 of the Constitution Act, 1982.

Even if section 125 was within Parliament's constitutional jurisdiction, questions arise as to its effect. The phrase "in connection with the extinguishment" could be interpreted to mean that the grants are to be only a part of a larger extinguishment process and would not, in themselves, affect Aboriginal title until some more direct act of extinguishment occurred (which never happened). It is also possible that even if the grants were intended to bring about extinguishment directly, they had that effect only for Métis who actually became land owners under the scheme. Finally, the mere granting of scrip may not have constituted granting land under section 125.

2.2 Fiduciary Duty

Even if doubts about the constitutional validity and legal effect of section 125(e) are not justified, it is unquestionable that the equitable principles the government of Canada was obliged to respect in its relations with Indians included the fiduciary duty, described in Appendix 5A, to act in the best interests of Aboriginal people. One aspect of that duty

required the government to proceed, where possible, by negotiation rather than by unilateral legislation when dealing with Aboriginal title. There were other obligations too; the government of Canada was duty-bound in everything it did affecting the Métis to act in the best interests of Métis people.

In assessing whether the Crown fulfilled that fiduciary duty, the following questions must be addressed:

• Was it in the best interests of Métis people for Parliament to substitute individual grants for the collective entitlements of Métis communities?

• Was it in the best interests of Métis people to be given compensation with no guarantees of hunting, fishing or other rights that would enable them to make a living and ensure the survival of their way of life?

• Was it in the best interests of Métis people to be given compensation in a form that benefitted speculators, not the Métis?

• Was it in the best interests of Métis people to be allotted scrip for homesteads in lands hundreds of miles from their home communities?

• Was it in the best interests of Métis people to have to deal with land title offices hundreds of miles away to acquire the land promised?

• Was it in the best interests of Métis people that dominion land agents interpreted 'occupation' of the land to require cultivation rather than traditional Métis activities of hunting, fishing and trapping?

• Was it in the best interests of Métis people for the federal government, when the failure of the scrip program became clear, to ignore the problem?

• Was it in the best interests of Métis people for the federal government to ignore and facilitate abuses by speculators and government officials?

The foregoing are only some of the issues that arise from the administration and implementation of the Dominion Lands Act. To answer some of these questions, Frank Tough and Leah Dorion conducted research on the scrip process in northern Saskatchewan and northern Manitoba, which paralleled the Treaty 5 and Treaty 10 commissions that occurred from 1906 to 1910. The researchers reconstructed the paper trail associated with scrip certificates: application, assessment of claim and transactions. They concluded that the scrip scheme program was based on "one of the most convoluted policies ever created by the Canadian nation state". Their description reveals that Métis people were largely irrelevant to the process:

At a few points in the process, the Métis play a brief part. They stand before a Commissioner and provide some information. They assign their scrip to a scrip

middleman…Some Xs are attached to paper, a power of attorney, a scrip receipt, a quit claim deed. If the case is complicated by guardianship of a minor or the estate of a deceased claimant, more papers are signed. A few may have entered a Dominion Lands Office and played a part in locating land in their name, after which the land was assigned to a scrip middleman or small purchaser. If the scrip needed to be redbacked, then perhaps more signatures and Xs were attached to another set of documents. Some of these documents are executed in blank.[24]

Tough and Dorion report that the department of the interior was aware of the lack of benefit accruing to the Métis in exchange for their Aboriginal title, in particular, the problem of Métis being forced to locate their entitlements in surveyed homestead lands. In northern Saskatchewan and Manitoba, for example, no Métis were able to claim land unless they relocated to the homestead belt, far from their communities. This meant moving hundreds of miles from their homes, their families and their economic pursuits.

Exploiting the Métis dilemma were the scrip speculators. Métis people who were not willing to leave their homes, identity and families had only to go to the scrip commissioner's tent to find ready buyers. In most cases, they had no choice but to sell the land they were entitled to at a fraction of its value. An official of the department of interior named Semmens complained about the failure of the scrip policies for Métis people in the northern and unsurveyed lands:

The claim of half-breeds of Keewatin [northern Manitoba] is based upon adhesions made in that territory. Why not give them land on their own soil instead of allowing them to claim valuable Alberta or Saskatchewan lands which they will not improve. They sell to white men as soon as they receive a settlement and these white men pay but little and gain much and grow wealthy quick on advantages intended for the half-breed only if it were determined that only Keewatin Lands would be given it would dampen the ardour of Buyers and lands good enough for the Halfbreed might be given for their use in their own territory. My experience goes to show that nine-tenths of these people will not settle on the land given to them.[25]

Despite these concerns, nothing was done to change the scrip program.

The government of Canada apparently did not want the Métis occupying large contiguous areas, analogous to Indian reserves, perhaps fearing that such occupation would discourage immigration to the west. In Manitoba, an order in council recommended "'in view of the great dissatisfaction which has been caused in Manitoba by the locking up of large and valuable tracts of land for distribution among Half-breeds' that only scrip be issued to satisfy the claims".[26]

The Crown's underlying policy of preventing the Manitoba Métis from getting land in large tracts was revealed by Adams George Archibald, lieutenant governor of Manitoba, in a memo to the secretary of state, Joseph Howe. After quoting the memo, a report prepared for the Metis Association of Alberta concludes:

The government wanted to establish a situation where potential settlers and developers would have as much freedom as possible in choosing sites for development. It was felt that if the Métis lands were made inalienable, as the Indian reserves were, that this would completely block an orderly settlement of land. (p. 110)

Archibald's original plans were for a good faith implementation of section 31 of the Manitoba Act, which would have been much more direct, taking only two years. However, that policy was rejected by the secretary of state.

Howe said that they could not condone 'giving countenance to the wholesale appropriation of large tracts of country by half-breeds.' Archibald was told to back away from his…recommendations, 'to leave the land department and the Dominion Government to carry out their policy without volunteering any interference'.

The policy appears to have been applied to the Northwest Territories as well as to Manitoba.

To further this policy, the lands promised to Métis people were to be administered under a system that would facilitate both non-Aboriginal settlement and the appropriation of Métis land. If this was the objective of the Crown, it conflicted with its fiduciary obligation to ensure that the best interests of the Métis were served. Métis provisions in the Dominion Lands Act were certainly contrary to the best interests of Métis people.

If the Crown did have a fiduciary duty to act in good faith in regard to Métis Nation lands — which seems likely, even if the courts have not yet expressly decided the issue — there can be little doubt that the duty was breached. Research shows that the scrip program benefitted speculators at the expense of the Métis with the Crown's knowledge and sometimes its assistance.[27] One of the most flagrant acts was the 1921 amendment to the Criminal Code that imposed a very short time limitation of three years on anyone wanting to press criminal charges regarding Métis scrip entitlements. The scheme employed to implement section 125 of the Dominion Lands Act almost completely prevented Métis from patenting land. The research conducted by Frank Tough and Leah Dorion illustrates the nature and extent of Métis frustration.

In the Guerin decision, the Supreme Court of Canada described the fiduciary duty owed to Aboriginal peoples by the Crown as follows:

Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.

The government of Canada claimed to be protecting the Métis by enactment and implementation of legislation, but the measures were, for the most part, protective only in theory. The Crown, aware that most Métis were not benefitting from the scrip program, should have taken remedial steps in the best interests of the Métis. In our opinion, its failure to do so constitutes a grave breach of fiduciary duty. If that failure did not nullify

the extinguishment provisions of the Dominion Lands Act altogether, it at least entitled the victims of the breach to fair reparation.

2.3 Lack of Uniform Treatment

The Crown promised in the Rupert's Land Order, 1870 that its actions regarding Aboriginal interests in land would conform with equitable principles that uniformly governed its dealings with Aboriginal people. In a research study conducted for the Commission, Joseph Magnet observed that in the North-West Territories, the federal government acted unilaterally to extinguish Métis Aboriginal title, contrary to the practice of negotiating treaties which had been used with Indian tribes since [early contact]. In doing so, the federal government discriminated against the Métis. Indian tribes negotiated the surrender of their Aboriginal title through treaty. In return, they received reserve lands, perpetual annuities, farm implements, livestock, schools, instructors, etc. Indians retained their hunting and fishing rights on surrendered lands. Indians came under the protection of the federal government. Their reserve lands, which became collective homelands, were held in trust by the Crown until such time as they were voluntarily surrendered. In stark contrast, each Métis received at most a grant of 240 acres of land as a once-and-for-all settlement of his or her claim to Aboriginal title.[28]

Such discriminatory treatment does not comply with the policy of uniform treatment for the Aboriginal peoples of the west implied in the Rupert's Land Order.

Furthermore, the Métis did not have the same protection as First Nations had with the requirement that reserve land could be surrendered or sold only to the Crown. The Crown holds Indian lands in trust for their benefit and protects the lands from unscrupulous third-party purchasers. The Métis were not given equivalent protection. This discriminatory policy is hard to reconcile with the uniformity of treatment promised in the Rupert's Land Order and with the Crown's fiduciary duty to Métis people.

2.4 Conclusion

To a person unfamiliar with Métis rights and how they were dealt with under the Dominion Lands Act, the fact that huge tracts of prairie land were distributed in the name of Métis individuals outside Manitoba suggests that fair and just compensation was received for extinguishment of Métis Aboriginal title. The reality, however, was that the extinguishment process was fundamentally flawed:

• The Métis were neither consulted about nor given an opportunity to negotiate the terms under which their Aboriginal title was to be extinguished.

• Compensation to individuals was substituted for the collective right of Aboriginal title.

• The land allocated was usually located so far from their homes as to be useless to the Métis, except for the token sums offered by land speculators. In some cases, they received only cash grants.

• The compensation, far from reflecting equitable principles in dealings with Aboriginal people, was discriminatory. It did not treat Métis as well as Indian peoples, in that the land provided was unnegotiated, arbitrary, individualized, non-contiguous, far from the recipients' homes, without protection against non-Aboriginals, and without the other benefits accorded Indians. It did not treat the Métis affected as well as the Métis of Manitoba, since the latter had an opportunity to negotiate the terms of their compensation and were in some cases offered land grants in addition to the land on which they had already settled.

• Sharp dealing and fraud, to which the government of Canada usually turned a blind eye, robbed many Métis individuals of the compensation they were offered.

These flaws were so basic and so flagrant that they deprived the extinguishment process of all legitimacy. Even if that were not the case legally, it was most certainly the case morally. The attempted extinguishment of Métis Aboriginal rights under the Dominion Lands Act cannot be reconciled with the Crown's fiduciary obligations, the equitable principles referred to in the Rupert's Land Order, or the dictates of common decency.

3. Other Métis Nation Territory

This part of the appendix addresses some issues relating to the parts of the Métis Nation homeland not dealt with under the Manitoba Act or the Dominion Lands Act or by policies and orders in council under those acts.

3.1 British Columbia

The colony of British Columbia became a province of the Dominion of Canada on 20 July 1871. It was excluded from the purview of the Dominion Lands Act, which received assent on 14 April 1872. In the absence of separate legislation, orders in council, policy or treaties, the Métis in the province of British Columbia would not have been affected or involved in settling their Aboriginal title or other Aboriginal rights.

The only legislative provisions that might have bearing on Aboriginal rights are the terms and conditions embodied in the Order of Her Majesty in Council Admitting British Columbia into the Union, dated 16 May 1871. Term 13 provides:

The charge of Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.[29]

Acting under this provision in 1889, the federal government entered into Treaty 8 with the Indian people of the Northwest Territories and northeastern British Columbia. The Métis in the Northwest Territories were dealt with through half-breed scrip commissions. The Métis within that portion of Treaty 8 that fell within British Columbia were not. A good example of this is the Métis community of Kelly Lake, close to the Alberta border.

As well, a number of Métis are believed to have moved to other parts of British Columbia prior to 1871. In the hearings of the Select Committee on the Hudson's Bay Company of 1857, Alexander Isbister, a Métis, testified that some Métis crossed the Rocky Mountains to Vancouver:

There were a number of emigrants, amounting to about 200, who left Red River the very spring I left it myself to come to England; they went across the country from Red River with their cattle and carts, and went right down to Fort Vancouver with all their property.[30]

Although they are not referred to as Métis, it can be assumed that most of those persons were in fact Métis. There was certainly some migration by Métis people to B.C., but research is needed to determine how many of them did so prior to its becoming a province. The Aboriginal title of those Métis people, of course, could not be dealt with unless they returned to areas covered by the acts in question.

Some Métis people who were covered by the Manitoba Act and the Dominion Lands Act later moved to British Columbia. If those acts did not extinguish Métis Aboriginal title to land, then whether or not post-1870 Métis migrants to B.C. can claim title must be determined. If they do not have Aboriginal title to these lands, what accommodations are necessary to satisfy their moral and political rights to lands and resources?

3.2 The North and Ontario

Apart from the province of British Columbia, the traditional territories of the Métis Nation largely fell within the province of Manitoba and the Northwest Territories.[31] The Northwest Territories, which included the entire drainage basin of Hudson Bay, covered the majority of the land mass of Canada, including approximately three-quarters of what is now Ontario, two-thirds of what is now Quebec, and half of what is now Labrador. Although the provinces of Ontario and Quebec (like British Columbia) were excluded from coverage, much of the vast northern area that is now part of Ontario and Quebec at that time fell within the Northwest Territories, to which the Dominion Lands Act did apply.

In practice, however, the government of Canada made little effort to apply the Dominion Lands Act east of Manitoba. There appears to be no legal reason why the government limited the distribution of Métis scrip to what are now the three prairie provinces and the Mackenzie Valley of the Northwest Territories. The Métis of Rainy River, for example, who concluded the ill-fated adhesion to Treaty 3 in 1875, ought to have had their rights safeguarded by the 1870 order. Since the Rainy River area was still part of the Northwest Territories in 1883, they could have been dealt with by virtue of section 125. So could Métis people in Moose Factory and other portions of the Northwest Territories that became part of Ontario a few years later. Even after those parts of the Northwest Territories became part of Ontario, pre-existing Métis rights should have been dealt with by the federal and Ontario governments.

The same holds true for those parts of the Métis Nation homeland in Ontario that fell outside the purview of the Dominion Lands Act. In the absence of treaties by which their Aboriginal rights were surrendered, Métis people within the original boundaries of the province of Ontario, like their counterparts in British Columbia, possessed the same rights as Métis people covered by the Manitoba Act and the Dominion Lands Act. Those rights have never, however, been recognized, much less respected.

4. Resource Uses

The report of the Northern Fur Conservation Area Trappers Association describes the importance of resources to Métis people:

For over two hundred years now, the Métis of Northern Saskatchewan have lived in harmony with our land and its resources. We have made use of the land, the trees, the wild plants, the waters, the fish and the game, taking what we needed for our livelihood. During this time we built strong values, strong families, and strong communities.

These communities…were not just a small patch of land defined by some bureaucrat…it includes the trap lines of our families, it includes the lakes and the fish which support our people, it includes the wild game which feeds our people, it includes the wild fruits which we harvest, it includes the wild rice which we harvest both commercially and for our own use, it includes the trees which we use to build our homes and which we also harvest commercially, and most important, it included the people and that spirit of the Métis community that can't really be described in [the English] words we learn in school.

The spirit, the community soul that probably can only really be described in Cree…is not past. It is true that in recent years the soul of [communities]…has dimmed and the spirit of some of our people has been covered over, covered but not lost.

We are fortunate, you see, because we have not been removed from our traditions for several generations, as has happened to many of our people who have lived in the cities of the south for several generations. Many of us, who live in Northern Métis communities, still make our living in the traditional ways, and almost all of us remember the days when we used our resources for our needs and processed these resources in our own communities. Today most of us remember, today we understand.

But in two or three generations who will understand, if we don't regain control over our own lives? What will become of our people and our way of life, if governments are allowed to continue to take control of our traditional sources of livelihood, then give control of these resources to the big companies and the mining companies?[32]

This passage captures the essence of the need to affirm and recognize the rights of Métis people to use natural resources. The presentation describes the daily connection of the Métis of Northern Saskatchewan with the resources of the area. The fact that urban Métis may not have this same relationship does not diminish their right to preserve their traditional links to the land.

This analysis must look beyond rights and traditions, however, to recognize the economic and social implications of resource ownership and use. A main foundational attribute of Métis society, indeed all Aboriginal societies, is the harvesting of natural resources. Hunting and trapping remain an important part of life for many Métis. Beyond that, there is a valid claim to other resource ownership and use on a scale sufficient to provide spiritual and material support for Métis aspirations.

4.1 Harvesting and Other Traditional Use Rights

In terms of traditional harvesting rights, the primary area of importance to many Métis is wildlife. Included here are the right to hunt game and fowl, to trap furbearing animals, and to take fish. This is important because many Métis are actively involved, to varying degrees, in these activities today. In addition, Métis also gather berries and other edible plant life, use plants and roots for medicines, use wood for cooking and warmth, and collect materials for handicrafts.

Resource harvesting is undertaken for both individual consumption and commercial purposes. Many Métis harvest big game and fowl in the autumn. Those living a subsistence or traditional lifestyle hunt and trap throughout the year. A large number of Canadian wild fur trappers are Métis. This continuing practice is based on the traditional way of life of the Métis throughout the Métis homelands. Historically, the Métis were an integral part of the fur trade and were directly connected to the buffalo hunt. This way of life has been recognized by governments in legislation, orders in council and policies.

Archival and court documents

On 27 May 1927 Special Fisheries Regulations for the Provinces of Saskatchewan and Alberta and The Territories North Thereof were adopted by order in council. Under the authority of the federal department of marine and fisheries the regulations provided that

3. Any Indian or half-breed resident in either of these provinces shall be eligible for an annual fishing permit, which shall entitle him or a member of his family to fish with not more than sixty yards of gill-net for domestic use, but not for sale or barter….Such permit shall be issued free.[33]

In the Northwest Territories, there has been a long-standing tradition of recognizing the Métis people's harvesting practices and reliance upon wildlife. This tradition was recognized in an order in

council passed on 14 January 1931 concerning the permission granted to Indians and Métis to trap beaver during a three-year closed season:

That because of a serious epidemic of influenza which broke out among the natives in 1928, making it difficult to secure food, Treaty Indians and half-breeds were permitted under the authority of P.C. 2146, dated 28th November, 1928, to take a limited number of beaver;

That representations have now been made that because of the scarcity of fur-bearing animals in the Mackenzie District the natives have not been able to secure adequate returns from their trapping operations to enable them to purchase sufficient food for themselves and their families.

Therefore…the Royal Canadian Mounted Police as game officers…be empowered to issue a permit to one member of each Indian family or each half-breed family leading the life of Indians…where the needs of such family warrant such an exception being made.[34]

On 3 July 1947 an order in council was issued to deal with an unnecessary slaughter of caribou "upon which many of the native residents are dependent for food and clothing".[35] By this order in council, P.C. 786 of 10 May 1924 was revoked, and regulations for the protection of game in the Northwest Territories, established by P.C. 1925 of 22 July 1939, were amended. Section 14 of the regulations was revoked and replaced by the following:

14 (1) Subject to the provisions of these regulations, or of any ordinance of the Northwest Territories, the holder of a hunting and trapping licence may:
(a) hunt, kill, take or trap game during the open season;

(b) have in his possession at all times the pelts and skins of such game as he has legally trapped or killed;

(c) sell, trade, ship or remove such pelts and skins.

(2) The rights of a holder of a hunting and trapping licence, as specified in this section, may be exercised, without the issue of a licence, by the following: every native-born Indian or native-born half-breed leading the life of an Indian; every native-born Eskimo, or native-born half-breed leading the life of an Eskimo.[36]

More recently, the courts in the Northwest Territories were asked to decide whether the fisheries regulations violated the Canadian Bill of Rights on the basis of race since they exempted Indians, Inuit and persons of mixed blood from licensing that applied to the accused, who was not an Aboriginal person.[37] At trial, Justice Ayotte dismissed the preliminary objection on the basis that Parliament, by virtue of section 91(24) of the Constitution Act, 1867, had jurisdiction to pass the challenged regulatory scheme. On appeal, the Northwest Territories Supreme Court overturned the conviction. However, in the judgement, Justice de Weerdt stated that "persons of mixed blood" are "commonly called 'Métis' in the Mackenzie Valley area". He noted in regard to the regulations that the "federal objective presumably in mind when section 22 of the Regulations was enacted was the preservation of aboriginal rights and freedoms in relation to domestic fishing by 'Indians' in the widest sense of that term".

The Crown appealed, and the Court of Appeal reinstated the conviction on the basis that section 22 was a method by which "natives, or persons of native descent or native blood"

are accorded priority for food purposes, for a restricted resource and for the objective of conservation. According to Justice Stevenson, the

Governor in Council concluded that a limited priority was to be given to natives. The rationale for according native persons priority for food is clear. Their needs are a primary responsibility of Canada under the Constitution, a responsibility confirmed, in many cases, by treaty.[38]

In a 1936 presentation, "What Canada is Doing for the Hunting Indians", prepared for the North American Wildlife Conference in Washington, D.C., T.R.L. MacInnes of the department of Indian affairs outlined federal and provincial initiatives in setting aside Indian hunting areas in Ontario:

As far as possible it is the object to retain the Northern Section for the Indians living in that area and other residents living north of the Grand Trunk Pacific Railway line that would be eligible for the same privileges as granted to Treaty Indians and half-breeds, with the understanding, however, that as far as the white trappers are concerned their trapping grounds will be limited to a certain given area in close proximity to their respective homes.[39]

In the 1930s, the government of Alberta established a royal commission to investigate the conditions of the 'half-breed' population of Alberta. Their report was released in 1936 by the department of lands and mines. That commission recommended a colonization scheme providing lands to 'half-breeds' that were conducive to hunting and fishing. In this regard, the commission was of the opinion that the Métis would get food from hunting and fishing:

In the earlier stages the whole of their living would come from these sources. It is to be hoped that they would, in time, come to rely more and more on their farming and stock raising operations.[40]

The commissioners viewed the Métis as having a definite prior and valid claim to harvesting rights and as relying on traditional hunting and fishing practices to support themselves:

The Commission is of opinion that as the Métis were the original inhabitants of these great unsettled areas and are dependent on wildlife and fish for their livelihood, they should be given the preference over non-residents in respect of fur, game and fish….They should, however, be given free permits under proper regulations, both for fishing and hunting, and if any area was in danger of depletion, that particular area should be protected for the Métis who should be given preferred rights. We are firmly of opinion that non-resident commercial operators have no right to deplete the fish, the game and fur-bearing animals in any district and leave the native inhabitants to be a charge on the country.

The perspective of the Saskatchewan government at the time is shown in a letter from T.C. Davis, attorney general for Saskatchewan, to T.A. Crerar, federal minister of the interior, mines, immigration and superintendent general of Indian Affairs, dated 11 December 1935. The letter followed a conversation between the two about "the problem of the half-breed in Saskatchewan". The problem and solution, according to Davis, were as follows:

These non-treaty half-breeds constitute a considerable problem. The Indian strain predominates and they are to all intents and purposes Indians in their habits and their outlook upon life. They are unable to compete with the white man and therefore have to receive assistance from the state. They would be infinitely better off if they were under the direction of the Department of Indian Affairs and put on the Indian Reserves.

We would therefore suggest that they be given the opportunity of becoming Treaty Indians, moving onto the Indian Reserves and coming under the jurisdiction of the Indian Department.

In discussing the proposed fur conservation blocks in Saskatchewan, Field Officer W.G. Tunstead of Ile-a-la-Crosse proposed:

Since the treaty indian are already in bands, areas can be blocked off to accommodate the entire band. Believe that the halfbreed, or at least the great majority of them should likewise be handled in this way. They like the treaty indian have been nomads for so many generations that staying put in any one particular spot just can't be done. Having large areas where they would have ample room to move around within its boundaries should prove more to the point.[41]

Wildlife conservation and the welfare of the Métis remained important issues in Saskatchewan. In a 1961 letter to a lawyer dealing with the Métis people about compensation for the Primrose Air Weapons Range, Premier Tommy Douglas said: "My understanding has always been that the Métis had certain traditional rights in the matter of trapping and fishing".[42] Douglas's sentiments are in accord with the Métis view that they have an Aboriginal right under section 35 of the Constitution Act, 1982 to harvest wildlife. In this connection, the issue of extinguishment will have a bearing on whether or not the rights have survived.

The Natural Resources Transfer Agreements of 1930 provide protection for the continuing right of 'Indians' to hunt, trap and fish for food in the provinces of Manitoba, Saskatchewan and Alberta. This legal issue has not been settled; it has, however, received some judicial attention, which we consider below.

Judicial decisions

The continuing right of Métis people to hunt and fish has not been settled by the courts at this time. The leading case in this area was R. v. Laprise in which the Saskatchewan Court of Appeal ruled in 1978 that non-treaty Indians were not covered by paragraph 12

of the Natural Resources Transfer Agreement (Constitution Act, 1930).[43] The court ruled that persons not entitled to registration under the Indian Act were also not covered. George Laprise stated in his testimony that his mother was a treaty Indian and his father a non-treaty Indian. (Since the passage of Bill C-31 in 1985, Laprise has gained Indian status.) He wasn't sure whether his father or his grandfather had received scrip. Review of records indicate that his paternal grandfather and grandmother did receive it.

Two recent cases, which have not proceeded past the Court of Queen's Bench, have given hope to the Métis that their rights will be recognized and protected by the courts. In Manitoba two Métis men were charged with hunting out of season. As a defence, they argued that they had a common law Aboriginal right to do so by virtue of section 35 of the Constitution Act, 1982.[44] They did not rely on the Natural Resources Transfer Agreement. In Alberta a Métis man was charged with hunting without a licence and with possessing wildlife contrary to the Wildlife Act, that is, he did not have a licence to kill moose. As a defence, he argued that he had the right to hunt moose because he was an Indian within the meaning of the Natural Resources Transfer Agreement.[45] He did not rely on section 35 of the Constitution Act, 1982. We address the Manitoba case first.

McPherson case

This case raises several issues, including extinguishment — that is, whether the right is an existing one — and whether the right is limited only to Métis living a subsistence lifestyle. On the issue of extinguishment, the trial judge concluded that

some Metis historically may have given up their Aboriginal rights by the acceptance of [scrip] and their families and descendants may be bound by that decision of their ancestor. Other individuals, who consider themselves Metis people may have lost their Aboriginal right to hunt by reason of the fact that for an extended period of time, they have no longer participated actively in the traditional hunting, fishing and gathering way of life but rather have become molded into the mainstream lifestyle. The evidence was that hunting should be firstly reserved for those who truly require hunting as a means of subsistence…. The court agrees with that proposition.[46]

While the decision supports Métis hunting rights in some ways, its suggestion that those rights may have been extinguished for some Métis because their ancestors accepted scrip or they had abandoned a traditional lifestyle is questionable. As the Supreme Court of Canada said in Sparrow, "the test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right".[47]

In the case of the Métis, the legislation dealing with Métis land rights is set out earlier in this appendix. Even if the courts found that Métis Aboriginal title had been extinguished validly (which we believe is not the case), the extinguishment of Métis Aboriginal rights to hunt and fish is far from certain, since those rights were never mentioned in any document that claimed to extinguish Métis Aboriginal title.

Historically, when successive governments intended to effect extinguishment, clear and plain words to that effect were used. For example, in dealing with the surrender by the Hudson's Bay Company of its territory, the surrender was very explicit:

4. Upon the Acceptance by Her Majesty of such Surrender all Rights of Government and Proprietary Rights, and all other Privileges, Liberties, Franchises, Powers, and Authorities whatsoever, granted or purported to be granted by the said Letters Patent to the said Governor and Company within Rupert's Land, and which shall have been so surrendered, shall be absolutely extinguished.[48]

With respect to Indian peoples and treaties, there was specific language when extinguishment was being intended. Treaty No. 10, for example, states clearly:

Now therefore the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada for His Majesty the King and His successors for ever all their rights, titles and privileges whatsoever to the lands included within the following limits….[49]

The order in council authorizing Treaty 10 provided that the treaty would include the setting aside of reserves or land in severalty, the payment of monies to each Indian, educational provisions and assistance for farming or other work.[50] For Métis people, the order in council provided only for the issuing of money scrip in the amount of $240 for purchase of Crown land or land scrip for 240 acres of Crown land.

There was no mention in the order in council of hunting and fishing rights for either the Indian or Métis peoples. In fact, as a result of the negotiations, Treaty 10 provided for the continuation of the Indian right "to pursue their usual vocations of hunting, trapping and fishing throughout the territory surrendered". These rights were provided in other treaties, and there was no other way for most Indian people to survive.

There is evidence that the scrip commissioner, Mr. McKenna (who also happened to be the treaty commissioner) assured the Métis in the area covered by Treaty 10 that their way of life would not be affected by accepting scrip. Most Métis, like their Indian relations and neighbours, had no other way to survive, a point supported by the commissioner in his report:

The Indians dealt with are in character, habit and manner of dress and mode of living similar to the Chipewyans and Crees of the Athabaska country. It is difficult to draw a line of demarcation between those who classed themselves as Indians and those who elected to be treated with as half-breeds. Both dress alike and follow the same mode of life. It struck me that the one group was on, the whole, as well able to provide for self-support as the other.[51] [emphasis added]

Ross Cummings, a Métis from Buffalo Narrows who was present at Ile-a-la-Crosse when scrip was distributed in 1906, confirmed in a recorded interview at Batoche in 1976 that dialogue between the scrip commissioner, McKenna, and the Métis assembled to receive

him concerned the effect that accepting scrip would have on hunting, trapping and fishing rights. According to Cummings' recollection of the discussion, harvesting rights would not be affected:

CLEM CHARTIER: [English] Ask if the people knew that they were giving up their rights?

JACQUES CHARTIER: [interpreting in Cree] Did they know they were giving up their rights to hunt, fish and trap and the use of their land?

ROSS CUMMINGS: [Cree] The Big Boss [Scrip Commissioner] said I won't tell you guys what to do as long as the sun moves. I won't tell you guys what to do, I'll look after you. We'll look after you. That's what I heard him say. There was a lot of people outside that heard him say that too. You'll be given money and the money man [Indian Agent] will give you money to use. If you're given money, the money man will give you equipment to use. As long as the sun is moving they will always look after you. That's when they took the land and they took the money. The treaties first and then the halfbreeds. That's when I became a non-treaty and took the scrip.

CLEM CHARTIER: Were the halfbreeds told that too or just the treaty Indians?

JACQUES CHARTIER: Was everybody told that or just the halfbreeds?

ROSS CUMMINGS: Yes, yes he told everybody there gathered at the assembly.

CLEM CHARTIER: Even if you still took land scrip you'd still get hunting and fishing rights?

JACQUES CHARTIER: Even if you took land scrip you'd still get hunting and fishing rights?

ROSS CUMMINGS: Yes, yes. Nobody was told anything until maybe twenty years later and then they started telling us. Twenty years…[English] after that scrip. [Cree] Everybody hunted, we hunted everywhere and then all of a sudden they started to come after us. Then we had to pay for everything we did. [English] We pay everything. Pay everything. Worse every year. Even now worse everything.[52]

The following year, in 1977, Mr. Cummings and another scrip recipient were at a meeting at Palmbere Lake in northwestern Saskatchewan and informed participants through an interpreter, Louis Morin, as follows:

Charlie Janvier from LaLoche and Ross Cummings from Buffalo, they said they were 16 years old at the time they first gave the scrip and they were promised everything. They said they were promised everything as long as the sun moves you'll get what you want and this scrip, it's going to be just for a while, your kids or your children, they're going to have another scrip and they're going to get some more money and your hunting rights of

everybody will never be affected. Now they say everything is broken, there is nothing what we were promised, that is what these two old…chaps, said.[53]

At that same meeting, one of the guests, elder, spiritualist and healer William Joseph of the Whitefish Reserve (also known as the Big River Reserve) near Debden, Saskatchewan, addressed the audience. According to Mr. Joseph, the understanding of the signatories to Treaty 6 was as follows:

Regards about land scrip, the Government promised the Indians, Métis Society to have their land scrip every 25 years, free taxes; I learned that over 50 years ago, by the people that signed the treaties, 1876, I seen them in person; I am the interpreter in my days, back about 60 years ago. I studied, I compared with Métis Society, the same with our treaties. They are the same thing, you people have no reserve, but you have the free land every 25 years. But the promise is dying away; Why?!! You don't study enough, you don't inquire what happened.

You have the same right to kill meat, but you seems to be shivering, you're afraid to step over, don't be ashamed, God will help you….[54]

Another scrip recipient, in his testimony in the Laprise trial in 1976, related that

Robbie Fontaine, 79 years of age, testified that he was a half-breed and that he had some recollection of the time when the Treaty and Scrip Commissioner attended the area. His evidence was that it had only been for the last twenty to thirty years that the Non-Treaty Indians have required licences to hunt. He said that Treaty and non-Treaty Indians always lived the same lifestyle in the area.

Mr. Fontaine further gave evidence of an occasion many years before where he took a trip similar in duration to that taken by the accused to hunt caribou, although he was not a Treaty Indian, that hunting was considered lawful. He corroborated the evidence of the accused with respect to the tradition of sharing the fruits of hunting.[55]

Further support is given to this understanding that Métis people had continuing hunting rights by another scrip recipient, Marie Rose McCallum of Ile-a-la-Crosse, in a questionnaire filled out in 1976. Mrs. McCallum was born on 26 February 1890 and would have been 16 years old when commissioner McKenna distributed scrip in that community. According to her, she and her contemporaries understood that they would continue to have hunting and fishing rights. She declared that hunting and fishing were done openly all year 'round and that it was only later that they could not hunt and fish without a licence.[56]

While official government records or documents acknowledging that scrip commissioners guaranteed Métis people that their way of life would not be affected appear not to exist, corroboration for the statements made by the scrip recipients can be found in the 1911 final report of the Alberta and Saskatchewan fishery commission

(known as the Prince Commission), presented to J.D. Hazen, minister of marine and fisheries by commissioners Prince, McGuire and Sisley.

The report contains accounts of witness presentations. At Lac la Loche, Saskatchewan, the report lists the following witnesses: Lamuel Janvier, Michel Lamerge, Angus McLean at the Hudson's Bay Company post and Reverend Père Pinard, Joseph Janvier, Pierre Maurice and J. Pickering at Revillon Company Post. According to available scrip records, Michel Lamerge, Joseph Janvier and Pierre Maurice received scrip. It is assumed that Angus McLean, Reverend Pinard and J. Pickering were non-Aboriginal people. Lamuel Janvier was most likely Métis, as the records indicate his wife received scrip.

The following evidence was recorded:

Fish are hung in October….It would be hard on the natives to stop fishing in spawning time. Only lake near this is Whitefish Lake — great mortality of whitefish there two years ago. Worms there destroy nets in the fall — about 250 Indian residents around La Loche. Scrip Commissioners told the Indians they would not be interfered with in fishing or hunting.[57]

It is clear that the commissioners are referring to the Métis of La Loche as Indians in a generic sense. It is also clear from Scrip Commissioner McKenna's report that the Aboriginal people at La Loche were Métis. Of his trip to La Loche, McKenna wrote:

The people at this point were all half-breeds and were dealt with as such. On the 8th of the same month, I left for La Loche mission, across La Loche lake, a distance of nine miles, where more half-breeds had to be met and dealt with. There were at this point three aged Chipewyan women who desired to be attached to the Clear Lake band, and I entered them as members and paid them treaty.[58]

The following year, Scrip Commissioner Borthwick also travelled to La Loche and confirmed that the Aboriginal people living at La Loche Lake were Métis, although treaty Indians from Whitefish Lake (Garson Lake on the Saskatchewan-Alberta border) covered by Treaty 8 were also present:

In addition to the half-breeds assembled here, I found a number of families of Indians from Whitefish Lake, who asked very earnestly that I should pay them their annuities….[59]

These scrip commissioners' reports certainly indicate that the majority of occupants of the La Loche Lake area were Métis.

The Prince Commission report also provides evidence that Ile-a-la-Crosse was populated by Métis. Some of the witnesses listed in its records had received scrip. According to their evidence,

Indians cannot fish in winter — their trappings time. Mr. McKenna, Treaty Commissioner said they would not be interfered with….Thirty natives fish for the Commercial Company.[60]

Again, while this evidence is not crystal clear, Ile-a-la-Crosse was and remains a Métis community, and the 30 fishermen referred to must have been Métis. It should also be noted that the Prince Commission used the term Indian to encompass the Métis:

for the sake of brevity the term "Indian" is meant to include Halfbreed as well….The distinction is that the Halfbreed is a Canadian citizen while the Indian can be made so only with difficulty under our present Indian Act.[61]

That an Aboriginal right to hunt and fish or conduct other harvesting activities can exist independently of Aboriginal title to land is reflected in a letter written by Jean Chrétien as minister of justice and attorney general of Canada to the Native Council of Canada on 22 December 1981 (see annex to Appendix 5A):

I have, furthermore, stressed to you that land title does not exhaust the list of aboriginal rights which you may claim. It is therefore mistaken to say that to deny the validity of land claims is to deny you any and all rights.

Support for this proposition is given by the 1993 Federal Policy for the Settlement of Native Claims. Regarding the objectives of comprehensive claims settlements, the policy affirms:

The primary purpose…is to conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title.[62] [emphasis added]

The document goes on to address lands and resources, saying that Aboriginal groups are asked to relinquish undefined Aboriginal rights to lands or resources, in favour of rights in the settlement agreements (p. 5).

From this it is clear that even if extinguishment is a factor, some Aboriginal rights, including resource-use rights, can survive independently of title to land if not clearly referred to in the document that purported to extinguish title. Certainly, there is doubt about whether the government clearly and plainly intended to extinguish Métis people's Aboriginal right to hunt and fish, which was integral to their way of life and necessary for their survival. In this connection, one can take guidance from the words of Judge Goodson in the Ferguson case. After referring to the Sparrow decision, he stated:

The last quotation makes reference to holding the Crown to a "substantive promise." In the case of the "Métis" the question that comes to mind is, "what is that substantive promise?" Is it land? Is it scrip money? Is it the right to hunt for food? It is difficult to imagine a more basic Aboriginal right than the right to avoid starvation by feeding oneself by the traditional methods of the community.63

Such a fundamental and basic right can be determined by the principles of interpretation reaffirmed by the Supreme Court of Canada in Sparrow:

In Nowegijick v. The Queen…the following principle that should govern the interpretation of Indian treaties and statutes was set out: 'treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians'.[64]

Even if the term Indian is being used in its narrow meaning, it cannot be expected that the Supreme Court of Canada would fail to apply the same principle to all Aboriginal peoples, including the Métis.

The weight of evidence and developing case law would therefore support an interpretation that Métis Aboriginal rights to the harvesting of traditional resources are "existing" Aboriginal rights under section 35 of the Constitution Act, 1982. Whether the Manitoba trial judge deciding McPherson was correct in considering the rights to be restricted to Métis who have not abandoned a traditional hunter and gatherer lifestyle is very doubtful. Since that issue also arose in the Alberta case, we address it in that context.

Ferguson case

In the Ferguson case, noted earlier, a descendant of Métis scrip recipients based his defence on the Natural Resources Transfer Agreement between the federal government and the province of Alberta. The paragraph relied on is identical to paragraphs in the agreements with the provinces of Manitoba and Saskatchewan.

The main issue in this case was whether Métis are encompassed by the term Indian in those agreements. As seen earlier, the Saskatchewan Court of Appeal in Laprise ruled that non-treaty Indians and those not entitled to be registered under the Indian Act are not included. In Ferguson, however, the Alberta Court of Queen's Bench upheld the interpretation of provincial court Judge Goodson that non-treaty Indians are included. It should be noted that historical documentation aiding

the interpretation of the paragraph was available in Ferguson but not in Laprise.

In Ferguson the analysis revolved around the 1927 Indian Act definitions of Indian and non-treaty Indian. The receiving of scrip was not seen as a factor; what was considered relevant was whether the Métis person involved would be characterized as a non-treaty Indian:

2(h) "non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even if such person is only a temporary resident in Canada.

Judge Goodson found on the facts of the case that Ferguson was "following the Indian mode of life" and was therefore a non-treaty Indian. While this ruling would cover a large number of Métis, particularly in the northern parts of the prairie provinces, it leaves open the question of whether it includes persons who do not appear to be following the Indian way of life. Assuming that it does not, the court's reliance on this definition raises the question of what defines the Indian mode of life. Many First Nations people no longer hunt. Does that mean that they no longer live the life of "Indians"? What about those who hunt only occasionally? Are modern hunting methods permitted, or must bows and arrows be used? Since the Canadian constitution has long been considered a "living tree" by the courts, it is probable that all such questions would be resolved in favour of a contemporary definition of the "Indian mode of life", unrestricted by old folkways. Another factor, however, appears to make mode-of-life questions irrelevant.

Why is the Indian Act definition so important? How can an Indian Act definition properly be the sole determinant of the meaning of words used in a constitutional guarantee like that contained in the transfer agreements? It is doubtful that it can, and if it cannot the whole question of mode of life becomes irrelevant. While the Indian Act in place in 1930 can be used as an aid in determining the definition of Indian in the transfer agreements, it cannot be the sole determining factor. The transfer agreements have constitutional status, which places them above the Indian Act. There are, moreover, other aids to assist in interpreting the agreements, including archival documents surrounding their enactment and legislative provisions with respect to hunting and fishing that were in place in 1930. Those aids suggest a broader meaning of Indian than the Indian Act definitions.

Shortly after the transfer agreements came into force, the government of Alberta requested from its legal advisers an interpretation of the terms 'game' and 'unoccupied Crown lands', mentioned in the section of the transfer agreements dealing with Aboriginal rights. They were concerned that Indians would be able to hunt in game preserves unless such areas could be classified as occupied lands.[65] They suggested that game should take the same meaning as that found in the provincial Game Act. In response, the assistant deputy attorney general of Alberta agreed that in the absence of a definition of game in the agreements, the term should be defined with reference to the Alberta Game Act.

The federal government was also asked for a legal interpretation on the question in a letter from the Alberta agriculture minister to Duncan Campbell Scott, deputy superintendent general of Indian affairs. W. Stuart Edwards, deputy minister of justice for Canada, provided the opinion in a letter dated 12 February 1931; it differed from the provincial interpretation in both respects. With respect to game, he stated,

I apprehend that the intent of this proviso is to secure to the Indians a definite right or privilege and to except the Indians from the application of the Provincial Game Laws in respect of the exercise of that right. The Assistant Deputy Attorney General of Alberta has expressed the opinion that the signification of the term "game" in this proviso is governed by the definition of "game" in the Provincial Game Laws, but, in my opinion, the more consistent and probable construction sanctions the view that the Indians are

entitled to enjoy the right secured to them by the proviso without reference to any limitations upon the meaning of the term "game" which may exist under the Provincial Game Laws from time to time in force, and that the term "game" in the proviso is, therefore, to be understood in its ordinary sense, i.e., as meaning birds and beasts of a wild nature, fit for food, such as may be obtained by hunting and trapping. I am further of opinion that, while the Province may competently enact regulations to prevent and punish any abuse of the right, secured to the Indians by clause 12, the right to regulate the exercise of that right and to place any restrictions upon it resides exclusively in the Dominion Parliament by virtue of sec. 91, Head No. 24, of the British North America Act, 1867.

He then defined unoccupied lands:

Secondly, with regard to the term "unoccupied Crown lands" in the proviso of clause 12, I am of opinion that this term may be taken to comprise all lands from time to time owned by the Crown within the Province (1) the title to, or right to the use and enjoyment of, which is not from time to time disposed of to any person, and (2) which are not, from time to time, bona fide, appropriated or set aside, by competent provincial authority, for a specific public purpose, (including, e.g., a park, a game preserve or a wild bird sanctuary) and in fact used and enjoyed for such purpose.

After internal discussion, that legal opinion was forwarded to the governments of the three prairie provinces.

The issue of interpretation arose again by way of a letter dated 5 August 1933 from W.S. Gray, of the Alberta attorney general's department, to the department of Indian affairs. Mr. Gray referred to the justice department's legal opinion with respect to game and unoccupied Crown lands and requested another legal opinion dealing with interpretation of the term Indians, suggesting the following interpretation:

We take it that the proper interpretation is the definition of Indians in The Indian Act, as distinguished from the definition of Non-Treaty Indians, and therefore that the privileges given to the Indians under Section 12 of the Act are confined to Treaty Indians.

In his reply, dated 30 August 1933, Edwards referred to R. v. Wesley,[66] in which the interpretation of the term game was the same as that provided by Edwards in his earlier opinion. With respect to Gray's interpretation of the term Indians, he said, in a letter sent on 7 October 1933:

With this opinion I do not agree. The terms "Indian" and "non-treaty Indian" are defined in section 2(d) and (h) of the Indian Act, R.S.C., 1927, c. 98, in and for the purposes only of that Act….There is nothing in the object of the clause or the context or in any other part of the Agreement to justify such a restriction of the primary and natural meaning of the expression "the Indians of the Province" in that clause, and I am of opinion that it embraces and was intended to embrace all the Indians of the Province, whether treaty or non-treaty Indians. This larger interpretation of the expression (which I regard as, in

itself, the more proper and natural) also seems to be the most consistent with the object of this particular clause of the agreement.

Gray requested further views from the department of Indian affairs in a letter sent on 7 October 1933:

With regard to the interpretation of the word "Indians" in this Section I think difficulties are liable to arise if the broad meaning put upon it by Mr. Edwards is to be followed. I think there is no doubt that the Natural Resources Agreement was intended to continue to the Indians the rights they formerly had under the various Treaties, and that it is a reasonable interpretation of the word "Indians" to construe it as being confined to the persons entitled to the benefit of the Treaties….Further, if a very general interpretation is put upon the word, no doubt half-breeds and all persons having any Indian blood would claim the benefits of the Agreement.

In response to this letter, Edwards wrote again on 7 November 1933 and concluded:

If the connotation of these words be considered simpliciter its descriptive signification seems to require and to admit of no plainer exposition than the language itself affords: any person so resident who answers the description of Indian, whether a treaty or a non-treaty Indian, is within the scope of that phrase….what is there in the terms of cl. 12 to require a more restrictive signification to be given to the words used? Nothing in my opinion; on the contrary, if the phrase is to be understood in the sense which best harmonizes with the declared object of the clause, namely, "to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence", non-treaty, no less than treaty, Indians, must be held to be within the scope of the phrase used, and, therefore entitled to the benefit of the clause. The assurance of the right to hunt and kill game for food on unoccupied Crown lands in a province surely cannot be said to be of less consequence to non-treaty than treaty Indians. Apart from these considerations, I desire to add that each of the two Governments, parties to this Agreement, were well aware of the distinction between treaty and non-treaty Indians; and I am satisfied that if they had intended to limit the benefit of this provision to treaty Indians, they would have taken care to express that intention unambiguously, as they might very easily have done, e.g., by using the words 'treaty Indians of the Province'.

With respect to the last point, Judge Goodson allowed into evidence in the 1993 Ferguson case a 9 January 1926 draft of the agreement between Canada and Alberta because it formed part of the legislative history leading to the agreement endorsed by both governments. That draft provided:

9. To all Indians who may be entitled to the benefit of any treaty between the Crown and any band or bands of Indians, whereby such Indians surrendered to the Crown any lands now included within the boundaries of the Province, the Province hereby assures the right to hunt and fish on all unoccupied Crown lands administered by the Province hereunder as fully and freely as such Indians might have been permitted to so hunt and fish if the said lands had continued to be administered by the Government of Canada.

Since the draft was eventually discarded in favour of one that dropped the reference to treaty, Judge Goodson concluded that the drafters clearly intended "Indians" to mean more than Indians with treaty status.

Another draft contained in the archival file dealing with the transfer agreements but that was not introduced in Ferguson is from the fall of 1929. This draft is between the governments of Canada and Manitoba, and it contains the same wording as the January 1926 Alberta draft. Like the Alberta draft, wording that excluded "treaty" replaced other text. These two drafts certainly support Edwards's legal opinion that if the parties to the agreements had intended to restrict the right expressed there only to treaty Indians, they could have retained the original wording.

While Edwards, the deputy minister of justice, did not directly address whether Métis were included in the term Indians, it is clear that he had them in mind as he prepared his second opinion in response to Gray's letter. Clearly, he was including Métis and all persons of Indian ancestry under the designation of non-treaty Indians.

Support for the view that the federal government knew about Métis reliance on wildlife was provided earlier in this appendix. This is evident from the special federal fisheries regulations for Saskatchewan, Alberta and the Northwest Territories, which were in force in 1930, and from federal orders in council for the N.w.T. in force in 1930.

A further argument that can be made as evidence of the inclusion of Métis in the Constitution Act, 1930 is the fact that the term Indian or Indians has never been defined in any of Canada's constitutional documents. From the Royal Proclamation of 1763 to the Constitution Act, 1982, there is strong support for the view that the term Indians was used generically to refer to Indigenous or Aboriginal peoples. In 1982, Aboriginal peoples replaced the term.

There does not appear to be any reason to believe that the term Indians had a different meaning in different constitutional documents as Canada's constitution evolved. Unless it can be shown otherwise, the appropriate approach is to give the same word in the same constitution the same meaning. In this connection, the Supreme Court of Canada held in 1939 that Inuit were encompassed by section 91(24); the same court also held that Inuit were covered by the Royal Proclamation.[67] It is highly probable that the courts would rule that Inuit in northern Manitoba are covered by the term Indians in the transfer agreement. And it is equally probable that Métis (who are expressly included in the term Aboriginal peoples in section 35 of the Constitution Act, 1982) will also be held to be Indians under the transfer agreements and other constitutional provisions, whatever their mode of life might be.

4.2 Commercial Uses

Being Aboriginal is not inconsistent with being modern. While traditional forms of resource use — hunting, fishing and trapping — continue to be of primary economic importance to some Métis, and are central to the cultural values of all Métis, the

economic survival of the Métis Nation in the modern world depends on its ability to exploit natural resources commercially, as peoples do the world over.

Forestry, mining, oil and gas extraction, commercial fishing, game farming, wild rice farming, tourism and outfitting and hydro-electric generation, and the manufacturing enterprises that spring from such activities must be available to the people of the Métis Nation. A substantial land base and the authority to develop are prerequisites of commercial use of the land.

To ensure the permanent existence of a resource base upon which these activities can depend, it goes without saying that development has to be on a sustainable basis. The resource-use record of Aboriginal peoples in general and the Métis Nation in particular over the centuries offers assurance that the environment would be no less safe under Métis management than it has been in non-Aboriginal hands.

4.3 Urban Lands

Terms like Aboriginal land bases and resource uses conjure up images of wilderness or agricultural landscapes. These types of land bases are required by Canada's Métis, but as the statistics presented in Chapter 5 show, a high proportion of Métis are urban dwellers. Métis who live in cities retain a cultural need for connections with non-urban Métis land bases; but they also have need, as do all urban-dwelling Aboriginal persons, for easily accessible communal land bases, for cultural, social,
recreational, governmental and commercial purposes, in the cities where they live. Satisfactory settlement of Métis land claims must therefore include provision for adequate Métis-owned urban community facilities to serve the needs of Métis persons living in urban areas in numbers large enough to warrant such facilities.

4.4 Implementation

Implementing resource use policies that permit sustainable modern commercial development alongside traditional harvesting practices will require sophisticated management strategies. Among the co-operative approaches required are co-jurisdiction arrangements with other governments; inter-governmental agreements to share rents, royalties and other resource revenues; resource-use licences granted to Métis Nation enterprises; and joint venture agreements with other (private and public) enterprises. Fundamental to all such arrangements will be a land claims agreement or agreements establishing viable land bases for the Métis Nation.

Notes:

1 See Paul L.A.H. Chartrand, Manitoba's Métis Settlement Scheme of 1870 (Saskatoon: Native Law Centre, University of Saskatchewan, 1991); "Aboriginal Rights: The

Dispossession of the Métis" (1991), 29 Osgoode Hall L.J. 457; "The Obligation to Set Aside and Secure Lands for the "Half-breed" Population Pursuant to section 31 of the Manitoba Act, 1870", LL.M. thesis, University of Saskatchewan, 1988; D.N. Sprague, Canada and the Métis, 1869-1885 (Waterloo, Ontario: Wilfrid Laurier University Press, 1988); "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980), 10 Man. L.J. 415; Thomas Flanagan, Metis Lands in Manitoba (Calgary: University of Calgary Press, 1991); and Gerhard Ens, "Métis Lands in Manitoba", Manitoba History 5 (Spring 1983), p. 2.

2 Flanagan, Metis Lands, pp. 225 and 227.

3 Chartrand, Manitoba's Métis (cited in note 1), p. 22.

4 Chartrand, Manitoba's Metis, p. 76.

5 Chartrand says, for example, of 'benefit' with the technical meaning of 'grant' reveals the intention to provide a benefit to all members of the families by way of licence of occupation, whereas the children only obtain grants of estates in the land in accordance with the objects of a regulated land settlement scheme. (p. 32)

6 See Flanagan, Metis Lands (cited in note 1), pp. 34-35 and p. 78 and following.

7 An Act respecting the appropriation of certain Dominion Lands in Manitoba, S.C. 1874, c. 20.

8 In fact, the grant to non-Métis "old settlers" had been authorized the previous year (An Act to authorize Free Grants of land to certain Original Settlers and their descendants, in the territory now forming the Province of Manitoba, S.C. 1873, c. 37) in a statute displaced before its implementation by the 1874 legislation: Dale Gibson, "Was Section 31 Really Aimed at Extinguishing Métis Title?", discussion paper prepared for the Royal Commission on Aboriginal Peoples [RCAP] (1994).

9 Sprague, Canada and the Métis (cited in note 1).

10 Sprague, Canada and the Métis, p. 139.

11 See generally, Sprague, "Government Lawlessness" (cited in note 1).

12 Even Sir John A. Macdonald acknowledged to the House of Commons in 1885 that "despairing of ever receiving patents for their lands, the majority of the claimants had disposed of their rights for a mere song to speculative friends of the Government" (House of Commons, Debates, 6 July 1885, p. 3117).

13 Flanagan, Metis Lands (cited in note 1), pp. 168-171.

14 Chartrand, Manitoba's Métis (cited in note 1), p. 138-144.

15 The Dominion Lands Act was first enacted in 1872, but it did not refer directly to Métis until it was amended in 1879. The 1872 act did, however, acknowledge Indian title in section 42: "None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."

16 Douglas Sanders, "A Legal Analysis of the Ewing Commission and the Métis Colony System in Alberta" (Saskatoon: University of Saskatchewan Native Law Centre, 1978), p. 3. The Northwest Territories at the time included all the current prairie provinces, other than the 'postage stamp' province of Manitoba.

17 Metis Association of Alberta and Joe Sawchuck, Patricia Sawchuck and Theresa Ferguson, Metis Land Rights in Alberta: A Political History (Edmonton: Metis Association of Alberta, 1981), pp. 38, 118. The authors state that the order was made in response to the growing unrest that culminated in the North-West Rebellion in the spring of 1885.

18 Quoted in Richard I. Hardy, "Metis Rights in the Mackenzie River District of the Northwest Territories" (1980) 1 C. N. L. R. at 13.

19 See Hardy, "Metis Rights", for a discussion of the procedures that had to be followed in applying for land grants.

20 See, for example, Hardy, "Metis Rights"; Sanders, "A Legal Analysis" (cited in note 16); Metis Association et al., Metis Land Rights (cited in note 17); and Frank Tough and Leah Dorion, "'The claims of the Half-breeds---have been finally closed': A Study of Treaty Ten and Treaty Five Adhesion Scrip", research study prepared for RCAP (1993).

21 Tough and Dorion, "'The claims of the Half-breeds'", estimate that for the Treaty 10 and Treaty 5 areas, only 1 per cent of the Métis land scrip was ever patented by Métis grantees.

22 Re Paulette, [1973] 6 W.W.R. 97 at 136 (N.W.T.S.C.).

23 For discussion of Métis as 'Indians' under section 91(24) of the Constitution Act, 1867, see Chapter 5 and Appendix 5A. For discussion of whether Métis are within the Rupert's Land Order, 1870, see Appendix 5B. The Supreme Court's observations are found in Guerin v. R., [1984] 2 S.C.R. 335 at 376.

24 Redbacking allowed a scrip buyer/middleman to take possession of land without the Métis claimant being present. This was essential given that the Métis scrip claimant might live in York Factory, Manitoba, while the lands were located in Peace River territory in Alberta. See Tough and Dorion, "'The claims of the Half-breeds'" (cited in note 20).

25 National Archives of Canada [NAC], Record Group [RG] 10, Vol. 4009, File 249, p. 462, pt. 1A, 24 October 1910.

26 Quoted in Metis Association et al., Metis Land Rights (cited in note 17), p. 92, from which the following account is drawn.

27 See, for example, L. Heinemann, Association of Metis and Non-Status Indians of Saskatchewan, "A Research Report: An Investigation into the Origins and Development of the Metis Nation, the Rights of the Metis as an Aboriginal People, and their Relationship and Dealings with the Government of Canada", 31 March 1984, Métis Nation of Saskatchewan Archives. See also Metis Association et al., Metis Land Rights (cited in note 17), pp. 146-151, for other examples of scrip injustices.

28 Joseph E. Magnet, "Métis Land Rights in Canada", research study prepared for RCAP (1993).

29 M. Ollivier, British North America Acts and Selected Statutes, 1867-1962 (Ottawa: Queen's Printer, 1962), p. 178. This order is part of the constitution, being contained in a schedule to the Constitution Act, 1982 under the title British Columbia Terms of Union.

30 Report From the Select Committee on the Hudson's Bay Company, ordered by the House of Commons to be printed 31 July and 11 August 1857; Saskatchewan Archives Board [SAB], Government Publications Section, Shortt, F, 1060.43, G 78, C.1., p. 356. Isbister left for England in 1841 or 1842, as indicated in his response to question 2402, p. 121.

31 We are referring here only to that portion of the Métis Nation lying north of the boundary between Canada and the United States. The traditional Métis Nation homeland includes a considerable portion of the north-central United States.

32 Excerpt from a presentation made by a delegation of mayors from northwestern Saskatchewan to the General Assembly of the Métis National Council, September 1986.

33 Order in council P.C. 1927-1034, NAC RG2, Vol. 1404.

34 Order in council P.C. 1931-51.

35 Order in council P.C. 1947-2567.

36 Order in council P.C. 1939-1925.

37 R. v. Rocher, [1982] 3 C.N.L.R. 122 (N.W.T. Terr. Ct.); [1983] 3 C.N.L.R. 136 (N.W.T.S.C.); [1985] 2 C.N.L.R. 151 (N.W.T.C.A.).

38 R. v. Rocher, [1985] 2 C.N.L.R. 155.

39 NAC RG10, MR C-8535.

40 Alberta, Enquiry into and Concerning the Problems of Health, Education and General Welfare of the Half-Breed Population of the Province of Alberta: Report (Edmonton: 1936).

41 SAB, NR 1/2 120.

42 SAB R 33.1,372 (999-16).

43 R. v. Laprise, [1978] 1 C.N.L.B. (No. 4) 118; [1978] 6 W.W.R. 85 (Sask. C.A.).

44 R. v. McPherson, [1992] 4 C.N.L.R. 144 (Man. Prov. Ct.); R. v. Fiddler, [1994] 4 C.N.L.R. 137 (Man. Q.B.).

45 R. v. Ferguson, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.); [1994] 1 C.N.L.R. 117 (Alta. Q.B.).

46 R. v. McPherson, (cited in note 44), p. 156.

47 R. v. Sparrow (1990), 70 D.L.R. (4th) 385 at 401.

48 Rupert's Land Act, 1868 (U.K.), c. 105, reprinted in R.S.C. 1985, App. II, No. 6.

49 Treaty No. 10 and Reports of Commissioners [1907]. Reprint. (Ottawa: Queen's Printer, 1966).

50 Order in council P.C. 1906-1459, in Treaty No. 10.

51 Treaty No. 10.

52 Tape recording made at Batoche in September 1976. Mr. Ross was 18 years old when he witnessed the assembly with the scrip commissioner at Ile-a-la-Crosse.

53 Metis Family and Community Justice Services [Saskatchewan], "Governance Study: Metis Self-Government in Saskatchewan", research study prepared for RCAP (1993) [note omitted].

54 William Joseph lived in the area covered by Treaty 6. He was 82 years of age in 1977; he passed over to the spirit world in 1978. At the time Mr. Joseph was a senator of the Federation of Saskatchewan Indians and had been a founder and president of the Queen Victoria Treaty Protection Association, which later merged to form the FSI. The passage is quoted in Clem Chartier, "British North America Act, 1930: The Legal Right to Hunt, Trap and Fish", 13 March 1978, paper for Law 390B.

55 R. v. Laprise (cited in note 43).

56 Association of Métis and Non-Status Indians of Saskatchewan, Aboriginal Rights research questionnaire, 13 July 1976. Métis Nation of Saskatchewan Archives.

57 NAC RG23, vol. 366, file 3216, pt. 3.

58 Treaty No. 10 (cited in note 49), p. 5.

59 Treaty No. 10, p. 14.

60 NAC RG23 (cited in note 57), p. 17.

61 NAC RG23, p. 62.

62 Department of Indian Affairs and Northern Development [DIAND] Federal Policy for the Settlement of Native Claims (Ottawa: DIAND, 1993).

63 R. v. Ferguson (cited in note 45), p. 156.

64 R. v. Sparrow (cited in note 47), p. 407.

65 Memorandum from Benj. Lawton, Game Commissioner, to H.A. Craig, Deputy Minister of Agriculture, 1 October 1930, NAC RG10, vol. 6820, file 492-4-2. The rest of this account is drawn from documents in this archival file.

66 (1932), 2 W.W.R. 377 at 344-345.

67 Sigeareak E1-53 v. R., [1966] S.C.R. 645 at 650.