Metis Treaties in Canada: Past Realities and Present Promise[i]

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Introduction:

Jokingly, one might blurt out after first reading the topic of this chapter that it must be a "very short one!" In other words, when asked about the existence of Metis treaties many people might say "what treaties?" This retort is, of course, understandable, as the history of Metis treaty relations has been an obscured one. More knowledgeable people might argue that the *Manitoba Act, 1870* and the land provisions set out in it for Metis families is the outcome of a treaty between the Metis of Red River and Canada.[ii] Some may even recount the unique Metis adhesion to Treaty 3.[iii] Yet Metis treaty history is much richer than these two examples. Despite a long history of Metis treaty making with both Indigenous and colonizing groups, the dominant public view of Metis history is focused on Metis resistance to the imposition of colonial authority (notably surrounding the events at Red River in 1870 and Batoche in 1885). However, this skewed, narrow account of Metis history, dramatic as it may be, ignores the many lines of relationship built between the Metis and their neighbors, both Indigenous and non-Indigenous. There is a rich history of Metis external relations with other peoples and communities that is only beginning to be fully appreciated. Indeed, there are several instances of various treaties between Metis polities and others including Indigenous, British, Canadian and American polities over the course of Metis history in Canada to the present day. Yet, it is correct to conclude that the Metis have generally been excluded as potential treaty

parties in Canadian history according to federal policy, due, in large part, to racialized understandings of civilization and the Metis people's paradoxical place within it.

This chapter will begin with a brief discussion of treaty law in order to put into context what is meant by the term "Treaty" in Canadian law, recognizing, however, that Canadian law's understanding of treaties with Indigenous peoples is colonially tainted. I do offer a critical perspective of the domestication of Indigenous treaties generally, but I also recognize that the colonial nature of Canadian law on treaty is not likely to change any time soon. Thus, I do offer a brief doctrinal review of how the courts presently define treaty in Canada which is then applied briefly to the issue of whether the 1870 agreement creating the province of Manitoba between Canada and the Government of Red River qualifies as a treaty.

I will then offer an historically grounded account of colonial policy approaches concerning the presence of self-identifying Metis groups when colonial authorities were tasked with the responsibility of treating with Indigenous peoples in a given region.[iv] In doing so, I will offer some initial observations regarding certain historical treaties between Metis authorities and colonial authorities.[v] However, a significant focus of the chapter will be on modern treaty negotiations with Metis polities, particularly the comprehensive claims negotiations with Metis peoples in the North West Territories. The purpose of this focus on the North is specifically to highlight the illogical and unfair basis in denying Metis peoples in other parts of Canada access to the comprehensive claims process while at the same time allowing Metis peoples living north of 60° to have access.

I will then conclude with a critique of existing federal mechanisms and present reform proposals that largely remain discriminatory towards Metis claims. Instead, I argue for treaty reform that is fully inclusive and that treats Metis claims as equal in status to those presented by First Nations and thus equally deserving of full modern treaty negotiations.

As a matter of clarification, I intend to focus on the issue of Metis treaty participation as distinct polities or groups. I do not intend to focus on the acceptance of Metis individuals by First Nations in order for those individual Metis to become beneficiaries of a First Nation treaty.[vi] As discussed in the next section, federal authorities generally resisted dealing with Metis as separate and distinct peoples. Thus, individual identity transfer (from a distinct Metis collective to an Indian collective) was often the only choice if a Metis person wished to benefit from a negotiated treaty in his/her home territory.[vii] The general resistance by British and Canadian authorities to accepting Metis as independent groups for the purposes of treaty is arguably one of the key injustices of the past, the present implications of which we are only now beginning to fully appreciate.

Defining Treaty

Before examining Canadian government policy and the Metis experience with treaty-making in Canada, it is necessary to first provide a discussion of what constitutes a treaty for the purposes of legal recognition. The determination of whether an agreement constitutes a "treaty" is significant for political and legal reasons. Politically, the status of being a "treaty" party is an important marker of significant political capacity and

autonomy to engage at the level of political equals. In terms of legal status, one can approach the issue from both an international and Canadian Aboriginal law perspective.

From an international perspective, treaties are instruments of international diplomacy that require, in the Canadian context, political ratification through legislative adoption to be legally enforceable domestically. From a non-racist and decolonized perspective, the status of treaties between British (and subsequent Canadian) authorities and Indigenous authorities should be treated no differently than treaties made between Canada and Portugal.[viii] Yet this is not how Canadian courts have defined treaties with Indigenous peoples.

In any event, this debate may not be relevant in the sense that the normative nature of treaties between the British/Canadian governments and Indigenous peoples cannot be explained by relying either on international concepts, which are historically and still remain largely informed by Western European values and understandings, or on Canadian common law judicial understandings. Indigenous peoples' understandings of political diplomacy derive from worldviews and normative systems that are very different from European-derived diplomatic worldviews. Thus, determining their legal status is much more complicated, as it necessarily involves a bridging of conceptual understandings of political relations between peoples that are grounded in fundamentally distinct cultural epistemologies. Arguably, their legal status must be assessed through a cross-cultural, cross-national process that does not presume one legal tradition as determinative of their meaning.[ix] Nonetheless, it is my opinion that at a very base level,

the value of possessing the freedom to choose how to relate to "others" grounded in a principle of self-determination, however culturally articulated, is translatable across cultures.[x] In other words, a decolonized understanding of this relationship that challenges the assumed sovereignty and the assumed exclusive legal authority over the claimed territories needs to be pursued. As Promislow has observed, "Most fundamentally, a non-hegemonic view of treaty processes should allow for the contestation of sovereignty – how it was acquired, and its present form of legitimacy."[xi] Arguably, implementing the minimum human rights obligations of *United Nations Declaration on the Rights of Indigenous Peoples* would result in a treaty negotiation, implementation and interpretation approach that is consistent with a decolonized approach and more respectful of Indigenous self-determination and peoplehood equality.[xii] A decolonized approach would require a re-examination of all treaties, including Metis treaties, through this post-colonial lens.

Unfortunately the hard work needed to bridge the cultural divide and truly reach mutual understandings of the relationship brought about by an agreement in the form of the historical treaty process has been unjustly by-passed by colonial British dogma that continues to uphold the absurd notion of the Canadian capacity to unilaterally assert sovereignty regardless of the presence of self-determining independent peoples.[xiii] This colonial dogma informs the judicial approach to Indigenous - English treaties. Thus, when the legal status of treaties made between the British Crown and Indigenous political leaders was litigated within English common law domestic courts, it was British common law, as opposed to mutually determined legal principles, that was applied. Accordingly,

the legal status of such treaties as inter-national agreements was denied, rendering both the status of the peoples and their treaties as non-existent on the international level. Early international opinion reinforced this inferior position.[xiv]

Today, according to this colonially derived legal thought, the nature and character of Aboriginal-Crown agreements currently falls within its own distinct (*sui generis*) legal category under domestic constitutional and common law. The characterization of treaties as *sui generis* flows from language used by Justice Davey in *White and Bob*.[xv] In that case, Justice Davey characterized treaties between Aboriginal peoples and the Queen as not appropriately involving agreements as between independent states acting in sovereign capacities. Nor, however, are they simply private contracts dealing with personal affairs. The meaning of "treaty" lies between those extremes.

The domestication of treaties as matters to be determined exclusively by the common law is currently a matter of serious critique that raises fundamental questions of peoplehood rights and calls for a reconceptualization of the treaties based on principles of decolonization.[xvi] Yet, lawyers today continue to draft modern land claims agreements from the presumption that the British common law and Canadian sovereignty is already a *fait accompli* and determinative of their legal status and interpretation.

These domestically defined treaties acquired constitutional protection in 1982 under s. 35(1) of the Constitution. Because of this, they are no longer as vulnerable to unilateral adjustment and disregard by the colonizer as they once were.[xvii] Ironically in this sense,

the legal protection accorded "Aboriginal" treaties may be stronger than if they were regarded as standard international treaties since, unlike international treaties, they are not regarded as purely political until such time as Parliament decides to legally adopt the treaty through subsequent legislation. Instead, upon their recognition as a treaty, by definition such agreements obtain not only legal status, but constitutional legal status. Although "Aboriginal" treaties are protected by s. 35(1) of the Constitution, this provision does not define what constitutes a treaty, leaving it up to the domestic courts to define its meaning.[xviii]

Treaty Categories and the Metis Adhesion to Treaty Three

According to Sebastien Grammond, there are two possible approaches to identifying an Aboriginal – Crown "treaty" for the purposes of Canadian law.[xix] The first is a categorical analysis which involves an inquiry of whether the agreement in question fits by analogy within one of the historically recognized categories of treaties such as, for instance, the numbered treaties of the prairies, the peace and friendship treaties of the Maritimes or the Douglas treaties of Vancouver Island. In terms of Metis treaties, the Adhesion to Treaty 3 of the Metis of Fort Frances could not be seriously questioned as a valid treaty because Treaty 3 itself has already been uncontestably accepted in the jurisprudence as a treaty and is in character similar to the numbered treaties.[xx]

In 1875, the government of Canada entered into an adhesion to Treaty 3 with the Metis community of Fort Frances under the leadership of Nicolas Chatelaine.[xxi] The adhesion treaty adopts the terms of Treaty 3, including the provision of reserve lands, annuities and presents in a "manner similar to that set forth in the several respects for the Indians in the said treaty."[xxii]

The treaty history of the Fort Frances Metis is complex. Ultimately, the treaty was not fulfilled. Instead, the Metis of Fort Frances were largely forced to join the Little Eagle Band, whose reserve bordered the Metis reserves promised in the Metis adhesion agreement.[xxiii] This failure to completely fulfill the terms of the treaty has been attributed to the hardening but porous federal government policy at the time of not recognizing Metis as distinct groups separate from First Nations or Europeans. Federal policy regarding the Metis has historically been very uncertain and indeterminate, constantly changing, and often conflictual. Thus, it is not surprising that there are many instances of policy non-conformance, as there are instances in which federal policy regarding non-recognition of Metis polities was enforced.

However, the federal government's policy regarding the recognition of Metis bands or polities at the time was becoming more entrenched and was reflected in new Indian legislation enacted in 1876.[xxiv] The department of Indian Affairs was increasingly of the view that it was not prepared to recognize independent half-breed bands or groups. This thinking is reflected in a report issued by I.A.N. Provencher, Manitoba Indian Commissioner in 1876, in which he indicates his strong views against recognizing Metis

"bands" because the "result would be the springing up of a new class of inhabitants, placed between the Whites and the Indians – having in a political and legal point of view, special and separate rights …". The department "could not well recognize the Half-breed Bands".[xxv] Interestingly, the very direct act of non-recognition is itself strong evidence of the very existence of independent "Half-breed" bands; otherwise there would be no need for an official policy of non-recognition in the first place.

Although federal policy may explain why the treaty adhesion was not fulfilled, the federal government should still be legally liable for its breach, policy or no policy. Arguably, the failure to fulfill the treaty promises remains a breach of treaty actionable by the Fort Frances Metis community and their descendants. Legal scholar Wendy Moss concluded:

> Whatever the government's motives were for recognizing Metis claims within the treaty system, they do not affect the adhesion's straightforward provisions and intent. Beyond a doubt, the government was aware that it was negotiating and making solemn pledges to a group of Metis people who intended to retain their Metis or halfbreed identity after treaty.[xxvi]

Since 1982, legislative policy is inferior to the treaties protected under s. 35 of the Constitution and there is no evidence of a clear and plain intent to extinguish the treaty by the federal government prior to 1982. Non-fulfillment is not sufficient evidence of intent to extinguish.[xxvii] Moreover, the honour of Crown principle is always at stake and "is a

fundamental concept governing treaty interpretation and application."[xxviii] As Moss notes, "These promises were made in the name of the Queen and their administrative abrogation cannot affect the legal rights the Metis acquired."[xxix] What legal recourse can be made? Paradoxically, the Fort Frances Metis, although a signatory to treaty 3, may not be able to advance a specific claim under the Specific Claims policy because they are in fact Metis and not Indians and would at first glance seem not to qualify.[xxx]

The Legal Concept of Treaty in Canada and the Manitoba Act Treaty

A second approach to defining a treaty would be to conceptually identify the essential elements of what constitutes a treaty, with an emphasis on the intention of the parties to the agreement. In 1990, the Supreme Court of Canada reviewed the earlier jurisprudence and defined the legal elements to consider in deciding whether an agreement is a "treaty".[xxxi] A treaty, essentially, involves the intention to create mutually binding obligations with a measure of solemnity. The Court identified a number of factors to assist in determining the intent of the parties to enter into a treaty, as opposed to other agreements that might affect them. They are:

1. Continuous exercise of a right in the past and at present;
2. The reasons why the Crown made a commitment;
3. The situation prevailing at the time the document was signed;
4. Evidence of relations of mutual respect and esteem between the negotiators, and

5. The subsequent conduct of the parties.[xxxii]

As these five factors suggest, the analysis is a contextual one. Much will depend on the existence and interpretation given to historical documentation and oral evidence. The courts have recognized the validity of relying on extrinsic evidence to determine, first, whether it was the intention of the parties to enter into a treaty, and, secondly, to aid the court in determining the terms and content of treaty rights and obligations.

The treaty at issue in *Sioui* centered on a very short written statement signed by General James Murray promising the Huron of Lorette that the English would act peacefully and protect them. The document stated that the Hurons would be allowed the free exercise of their religion, customs and liberty of trading with the English.[xxxiii] It was written on September 5, 1760, three days before the French capitulation at Montreal, which signaled the end of the war and France's *de facto* control in North America. The Court held that even though the document did not refer to itself as a "treaty" and that there was no exchange of gifts, nor recording of the event by wampum belt, as was usually the case in this region, it was nonetheless a treaty. The exigencies of the situation prevented such ceremony. The need to secure peace in a very uncertain and tumultuous time and the fundamental nature of the promises made weighed in favor of the statement being characterized as a treaty.

Thus, it is not so much whether certain formalities or protocols have been followed in a negotiation that determines the legal status of an agreement as a "treaty", but rather the

focus is on the substantive nature and quality of the agreement. In a very comprehensive overview of treaty history and its relationship to treaty jurisprudence, Janna Promislow states that the treaty jurisprudence "does not establish any barriers to arguing that a treaty was made" in the sense of having to comply with a predetermined form.[xxxiv] Such formalities are not determinative.[xxxv]

The critical factor in support of an agreement qualifying as a treaty is the nation-to-nation quality of the agreement. Is the agreement being entered into being entered into on behalf of an Indigenous people *as a people* and does it determine rights and obligations *as between peoples*? Agreements of this nature are arguably "constitutional rather than ordinary political processes.... The politics of treaties constitute political communities: Indigenous – non-Indigenous, and the presumably federated communities formed through their interactions."[xxxvi] Importantly, Promislow notes that

> Mutuality is important only in regards to identifying an "intention to create obligations" and the presence of "mutually binding obligations," neither of which demands a finding of shared meaning with respect to the treaty itself or particular treaty promises"[xxxvii]

Understanding what elements are essential to a determination of whether an agreement is a treaty and applying the *Sioui* criteria is important when the agreement's treaty status is contested. In the case of the Metis, this contestation seems to be the case with regard to the 1870 agreement between the Provisional Government of Red River and the Dominion

of Canada. The Canadian Crown has resisted characterizing this agreement, which led to the subsequent inclusion of the Red River territory into Canada as the province of Manitoba, as a treaty. In applying the conceptual method relied on in *Sioui*, however, a compelling argument can be made that the agreement between Canada and Red River (Government of Assiniboia) is indeed a treaty, notwithstanding judicial *obiter* to the contrary.[xxxviii]

There has been much ink spilt on the events surrounding the Metis resistance to Canada's attempt to annex by an alleged purchase the lands "owned" by the Hudson's Bay Company based on its 1670 Charter comprising Rupert's land.[xxxix] The resistance focused on Red River, which was a major fur trade and provisioning centre in the territory at the time. The inhabitants of the region of Red River and surrounding territory formed an independent government, rejecting outright the Hudson's Bay Company's ostensible authority over the territory which was previously consensually tolerated by the dominant Metis, who were an independent self-determining people at the time and had allowed the HBC to govern the region to the extent Metis interests were not in conflict with HBC decisions. The new, more representative government of the diverse population sent representatives to Ottawa to negotiate a peaceful solution. The new provisional government was prepared to relinquish its authority to Canada if a mutual agreement could be reached. The delegates went to Ottawa with a list of rights. Negotiations ensued which resulted in an agreement to create a province to be part of Canada, called Manitoba. Some of the terms of the agreement were embodied in the proposed *Manitoba*

Act and other terms were stated and recorded elsewhere and form part of the record.[xl] Adam Gaudry, in his extensive review of the negotiations, concluded:

> Going beyond the Act, the Manitoba Treaty contains both written and oral agreements, with the oral component clarifying the language of the Act. These clarifications would allow the parties to determine how certain clauses of the Act would be interpreted when put into practice after ratification. Therefore the written *Manitoba Act* is an imperfect representation of the shared vision of the future of the North-West, and a more robust understanding can be found in the Manitoba Treaty, which includes both written and oral components. It is the latter form that, I argue, best embodies the original treaty relationship envisioned by the Red River and Canadian delegations and their respective governments in 1870.[xli]

These terms were carried back to the Assiniboia government and presented to the Assiniboia Legislative Assembly. The Assiniboia Legislative Assembly resolved to accept the *Manitoba Act* on the terms proposed. Adam Gaudry further observed that this was the moment that the Provisional Government of Assiniboia confederated with Canada.

> The people of Canada and the people of the North-West built a shared vision of Manitoba that was institutionalized in the Manitoba Treaty of 1870. The treaty was a bilateral agreement with Canada, and was ratified by the respective legislatures of both parties. The result was a formal political union of the Métis

> people with Canada through a confederal relationship that preserved significant local autonomy for the Red River peoples. The people of the North-West entered into this confederation as a politically independent people, and the negotiation and the ratification processes of the Manitoba Treaty recognized this independence. Rather than acquiescing to British or Canadian authority, Métis initiated a treaty-making process consistent with their worldview. The bilateralism of the treaty negotiation process was repeatedly referenced by the Red River delegation to Ottawa, as well as the Canadian politicians who negotiated and ratified the agreement.[xlii]

Legal scholar D'Arcy Vermette has also examined in depth the history surrounding the formation of Manitoba and has concluded, like Adam Gaudry, that the *Manitoba Act* is indeed the "embodiment" of a treaty.

> There might be a tendency to view the *Manitoba Act* as either a treaty *or* a legislative Act but few would consider examining it as being both. If you justify the administrative action by interpreting the *Manitoba Act* first as a legislative Act, then there might be a corresponding tendency to treat the treaty argument with disdain. For, if the Crown had intended to enter a treaty then they would have formally said so. However, if you look first to treaty law and recognize that an agreement was reached, it is much easier to recognize that treaty and to see the legitimacy of the *Manitoba Act* as being the Crown's attempt to honour that

> agreement. This latter approach, I would contend, is more in keeping with the historical record.[xliii]

Vermette goes on to explain how the historical record, as applied to an unbiased objective account of the criteria set out in *Sioui* stated above, would lead to the logical conclusion that there was a "treaty" between Canada and Red River and that the terms were largely parallel to the *Manitoba Act* legislation but not exclusively so. Moreover, legal scholar Darren O'Toole has also examined the negotiation record and has come to the same conclusion as Vermette and Gaudry.[xliv] However, O'Toole provides an alternative argument that focuses exclusively on s. 31 itself as reflective of a treaty agreement with the Metis. Moreover, he suggests that even if this agreement is not a treaty as defined by the jurisprudence, it nonetheless could be characterized as a land claim agreement for the purposes of s.35 (3).[xlv]

It is interesting to note that Vermette, in writing his dissertation on this issue in 2012, was skeptical that the courts would be true to treaty interpretation and recognition principles. He makes the poignant observation:

> So, even while this chapter has argued that the common law provides adequate space to recognize the existence of a Manitoba Métis Treaty (MMT), I do not necessarily feel that the courts are open to providing meaningful interpretive weight to the Negotiated Agreement as set out in the previous chapter. [xlvi]

The question of whether this agreement is a treaty has, of course, been subsequently discussed by the Supreme Court of Canada in the 2013 *Manitoba Metis Federation* case.[xlvii] It would seem that Vermette's skepticism was prophetic, as the court described the arrangement as "quasi-treaty" in nature but did not seem prepared to accord full treaty status to the agreement.[xlviii]

This is a puzzling conclusion by the court. There is no compelling explanation given for characterizing the agreement as a quasi-treaty. Moreover, this limited view of the agreement as some kind of "treaty like agreement" but not a treaty does not accord with the historical record analyzed in detail by Vermette, Gaudry, O'Toole and Chartrand. O'Toole states that the Supreme Court in *MMF* provided no *"ratio decidendi* on this point of law other than to imply that a treaty and an act of parliament are mutually exclusive."[xlix] This implication is simply unsupported based on constitutional law principles and from treaty history experience that shows that implementation legislation by federal and provincial governments is common practice, and indeed is necessary, to give legal effect to land and self -government agreements.[l]

Arguably, the Supreme Court decided to side-step the issue because it preferred to attach Crown responsibility on the constitutional nature of the Metis land allocation provisions of s.31 of the *Manitoba Act* as opposed to imposing an obligation based on its treaty nature. Consequently, as O'Toole points out, any conclusion that there is no treaty or treaty obligation is therefore essentially *obiter dicta*, as the case was decided on the issue concerning the existence and nature of a duty under the honour of the Crown principle.

The honour of the Crown principle flows directly from s. 35 of the Constitution and the court held that such duty was attached to s. 31 of the *Manitoba Act*, thus requiring the Crown to exercise due diligence in fulfilling the obligations contained in s. 31 of the *Manitoba Act*.[li] Although it may be technically correct to conclude that s.31 itself is not a treaty, as stated by the court, this does not preclude the fact that s.31 is, nonetheless, a product of treaty negotiations or land claim negotiations and reflects a specific term of a treaty or land claim, which s.31 simply mirrors in legislation.

Based on the above brief review of various scholarly works that have examined from a historical and legal perspective the formation of Manitoba as based on a treaty between the Provisional Government and Canada, it is problematic that there are "different narratives of treaties emerging from law and history".[lii] The Supreme Court of Canada's narrative does not match up with the scholarly narrative. This disconnect is problematic and erodes legitimacy. Janna Promislow 's comments on the relationship between law and history are particularly appropriate in this context. She remarks that

> [w]ith the coercive force of the state behind it and the role of the courts as public authorities, the narrative that emanates from courts has a controlling impact on the public history of treaties. When law, history and political theory collide through the law, the legitimacy and character of the national narrative is at stake.[liii]

This is particularly true of the collision between the court's view of the legal significance of the events leading up to the formation of Manitoba and the scholarly view of its legal

significance. Promislow concludes that the judicial approach to treaty has been decidedly based on a "one-dimensional empirical history" that arguably reinforces colonial power relations and for these reasons is incomplete, inappropriate and suspect.[liv] Fortunately, a treaty understanding of Manitoba formation is not judicially foreclosed; it remains an open issue and not simply an academic question as the Supreme Court of Canada's conclusions on the treaty issue were not relevant to the ultimate decision reached by the court. A rigorous review of the scholarly literature that examines in more detail the differences and similarities of the scholarly views of the formation of Manitoba along with a full and comprehensive comparison to the judicial accounts is necessary in the likelihood that the treaty issue may be pressed further by Metis political organizations such as the Manitoba Metis Federation. I have no doubt that the *MMF* case is not going to remain the last word on the question. If a more de-colonial approach to treaty jurisprudence outlined by Promislow and others is forthcoming, there is a good chance that a treaty relationship understanding of the Provisional Government of Assiniboia and Canada may still yet emerge.

I will now attempt to map out the evolution of federal policy concerning the non-negotiation of treaty with Metis groups that has persisted, notwithstanding the Adhesion to Treaty Three and the Manitoba Treaty.

Mixed-Ancestry Peoples and Canadian Colonial Treaty Policy

When treaty making began along the shores of Lake Huron and Lake Superior in the 1850s, the question of the inclusion of "half-breeds" in treaty was raised.[lv] With regards to the Fort William and Sault St. Marie areas, there were half-breed families distinctly identified as half-breeds.[lvi] It was stated then by William Robinson, agent for the British Colony of Canada West, that if these half-breed families are to be included in the Treaty it would be up to the Chiefs to decide to include them by sharing the benefits of the treaty with them, but that Canada would not deal with the half-breeds as a separate group or band.[lvii]

This policy was a departure from the Hudson`s Bay Company`s earlier willingness to enter into a treaty with the Metis as a distinct polity in 1815 in Red River, where a peace treaty was negotiated between the Metis of Red River and the Hudson`s Bay Company on behalf of Lord Selkirk for the purpose of ending the hostilities between them and the Selkirk settlers.[lviii]

The HBC/Selkirk Treaty

Perhaps the first agreement between the Metis as a separate people and the British was a peace and friendship treaty between the Metis community at Red River and the Hudson's Bay Company (HBC), acting on behalf of Lord Selkirk, that was concluded in June of 1815. This treaty took place in the larger context of the fur trade conflicts between the North West Company (NWC) and the HBC that occurred in the early half of the 19th century, often referred to as the "Pemmican wars".[lix]

In 1812, Thomas Douglas, Earl of Selkirk, tried to establish a colony of settlers in the Red River area as a result of a grant received by him from the HBC in 1811. The grant ostensibly covered a large part of Rupert's land surrounding and encompassing the Red and Assiniboine Rivers.[lx]

The establishment of a colony of settlers loyal to the HBC was seen as a threat to the NWC, which was in competition with the HBC in the fur trade industry. The Metis community in Red River at the time relied heavily on the provisioning trade with the NWC. Conflict erupted between the NWC and Metis against the HBC, who saw the formation of the colony and the control of it by its governor, Miles Macdonell, as a threat to its fur trade operations. The Metis of the territory also took issue with the colony and especially with the new governor's assumption of regulatory control over trade and the provisioning of the fur trade industry.

In August 1812, the first Selkirk settlers arrived. Together, the Metis community led by Cuthbert Grant and employees of the North West Company sought to actively discourage and stop settlement. Grant and his Metis followers decided that they needed to oust the new settlers from Red River. The Metis adopted systematic harassment activities against the settlers. They fired on the settlers, chased them from fields and farms and houses were stormed or set on fire. To end hostilities, an agreement was proposed. On June 15, 1815, Peter Fiddler, spokesperson for the HBC and the settlers, proposed a peace treaty.

However, the Metis did not accept the terms of the offer and proposed a counter-offer. The HBC accepted the counter-offer proposed by the Metis "chiefs".[lxi]

Kelly Saunders has remarked that this agreement was the first of its kind.[lxii] It was the first evidence of political independence marked by mutual recognition in a peace treaty between British authorities and Metis authorities.[lxiii] The implications of this agreement and the recognition it implies are significant. Taken at face value, the existence of a separate treaty with the HBC by the Metis is strong evidence of Metis political self-consciousness and independence at the time. This precedent for entering treaty with Metis as Metis was subsequently forgotten, as the experience of the Great Lakes Metis demonstrates.

Treaty and the Great Lakes Metis

In the 1850s, the colony of Canada West was not prepared to enter into a separate treaty with the Metis, but did allow them to join treaty by joining Anishinabek bands if allowed by their chiefs. The evidence of half-breeds listed on the subsequent treaty annuity pay lists of Lake Huron and Superior Anishinabek Bands indicates that the Chiefs had indeed included them within their bands for the purposes of treaty benefits.[lxiv] This was in keeping with Canadian colonial policy at the time. Half-breeds were not dealt with separately. In the eyes of Canadian policy you could only be White or Indian. There was no in-between. Metis were included in the treaty if the Indian Chiefs chose to do so as individual members of Indigenous bands. As discussed more fully below, however, this

does not mean that the half-breeds who took treaty under the authority of the Ojibway chiefs would have the result of extinguishing their distinct half-breed (now Metis) identity.[lxv] Yet the federal approach to denying a separate negotiation with the half-breeds of the region set a demeaning federal policy precedent going forward. According to historian Michel Hogue:

> In this regard, the Robinson Treaties provided a framework for the inclusion of people of mixed ancestry in subsequent treaties between Indigenous peoples and the Canadian government. Peoples of mixed Indigenous-white descent could join treaties as individual members of Indian bands, but the British and Canadian governments refused to [negotiate] treaty rights to groups of people of mixed ancestry.[lxvi]

As regards the Metis beneficiaries of the Robinson Treaties, in particular, their inclusion as treaty beneficiaries was relatively short-lived. As a result of provincial-federal arbitration over the financial obligations incurred under the Robinson Treaties, it was decided that families identified as half-breeds in the Robinson treaty areas and listed on treaty pay lists were eventually to be excluded as treaty beneficiaries through a policy of "non-transferrable titles". Thus, beginning in 1895, the children of half-breeds listed on the pay lists would not be allowed to inherit treaty.[lxvii] Thus, in the case of the Lake Superior and Huron half-breed communities, their communities became essentially legally erased and as individuals they became treaty Indian beneficiaries because the colonial government refused to recognize the existence of distinct half-breed

communities. Yet, ironically, 45 years later, because of the non-transferable title policy (a form of imposed non-voluntary enfranchisement) subsequent generations became excluded from treaty precisely because they were identifiable as half-breed children.

The half-breed treaty history pertaining to the Robinson treaties is complex and significant legal and constitutional questions remain unanswered. Was the exclusion of the half-breed beneficiaries a breach of the treaty? If so, what recourse do the descendants of these excluded members have? Can the exclusion from a band list extinguish their treaty rights? Some of the half-breed descendants of the original Lake Superior treaty half-breeds now identify as the Red Sky Metis Independent Nation and insist that it is still in a treaty relationship with Canada based on this history.[lxviii] Indeed, they argued this position as an intervenor in *Powely* before the Supreme Court of Canada.[lxix]

Regardless of whether the term Metis or Half-breed is an appropriate identifier for the Great lakes mixed-blood communities, the fact that they possessed a separate identity is sufficient. For the purposes of asserting claims against the Crown, it only matters that a self-identifying mixed-blood community existed prior to effective control by European authority in the region and that it was sufficiently distinct from the Indians in the region.[lxx] According to historian Arthur Ray, the "Metis who lived in the vicinity of Sault Ste Marie and elsewhere in Lake Superior country had developed a distinctive identity well before 1850."[lxxi] In a detailed review of the relevant Aboriginal law

concerning the degree of social organization necessary to assert an Aboriginal rights claim, it is apparent that there is a very low threshold required.

> Some degree of collective consciousness is all that is required of an Aboriginal group. Indeed, the very use and interchangeability of terms such as "people," "group," and "community" suggests that the courts are not very concerned about defining these criteria with any degree of precision.[lxxii]

Accordingly, it is likely that most Metis communities will have reached the required level of social organization, as a result of the ethnogenesis process, to be capable of asserting claims and thus negotiating them. Yet federal legal policy in the 1800s was not in accord with today's flexible judicial approach.

History has shown that ethnicity and identity cannot be dissolved by the single legal act of a state policy decision of inclusion or exclusion.[lxxiii] Metis specific communities and polities were not formally recognized and therefore the individual members were assumed to be citizens "and had the same rights that the other subjects of the Queen have".[lxxiv] Alternatively, in the case of the half-breeds of Lake Superior, members of the communities were assumed to be Indians if they took treaty. Arguably denying Metis collective existence as a political community is an imposed form of ethnic cleansing by colonial legal means. However, the power of law or federal policy itself cannot get rid of the factual existence of Metis collective ethnic and political consciousness. It is an organic and natural fact and will not disappear by legal non-recognition.[lxxv] The

collective identity will continue to exist regardless of whether the law chooses to ignore it or not. In this sense, the Metis were not so much a "forgotten" people as they were a legally "erased people". Only if we understand Metis history in this way do we really appreciate how extraordinarily significant it was for Harry Daniels to insist in 1982 on the inclusion of Metis as one of the "peoples" in s. 35(2) of the Constitution.[lxxvi] In that one moment, Metis peoples became legally un-erased as peoples and, more importantly, could not become erased ever again by constitutionally inferior Canadian government policy and legislation. We became a people again in *law* and not just in fact.

In appreciating the racialized nature of colonial policy during this period, one can understand the reasons for denying the ethnogenesis of a separate identity for mixed-blood communities that were distinguishable from First Nations and Europeans and possessed their own distinct cultural attributes, leadership and political cohesion. The policy was, and to some extent still is today, fueled by racial categorization as synonymous with conceptions of civilization. Consider the fact that if the policy of the colonial government was to transform Indians into Whites – to civilize them in other words – what account would the federal government make of a community that insisted on being halfway "civilized"? Conceptually, to acknowledge the Metis as a distinct group would arguably be akin to acknowledging the failure of colonial policy designed to assimilate and civilize the Indians. Such a definite middle ground of identity and belonging would be incomprehensible and inconsistent with colonial objectives of "progress". From Canada's perspective, there could be no middle ground between savage and civilized. "According to nineteenth-century racial thought, the dilution of

Indian blood through intermarriage was supposed to yield an ever-descending quantity of Indianness [savageness]…. Metis demands for inclusion in treaties … ran counter to that goal."[lxxvii]

If we accept that the denial of Metis political existence independent of Indian identity is morally wrong and inconsistent with the combined principles of Metis recognition and the reconciliation principles contained in s.35 of the Constitution, this has important implications for Metis today who were forced to join Indian bands in order to be a beneficiary of treaty to maintain their indigeneity. Arguably, the Red Sky Metis have a right to re-assert their distinct nature and identity and resist forced blending. They should be allowed to insist that they are now an independent Lake Superior treaty partner with the Crown as Metis and not as Anishinabek. "The honour of the Crown necessitates that such denial cannot be permitted to negatively influence the present judicial consideration of Metis treaty rights".[lxxviii]

The half-breed communities of the Great Lakes may not have been in a position of diplomatic or military strength to force the issue at the time. This was not the case in Red River in 1869. The colonial policy of denying Metis community independence was strongly resisted when the community of Red River (Assiniboia) (which was comprised by a dominant Metis population already well established as an independent polity with a distinct national consciousness of its own) decided to exert its political independence separate from the Hudson's Bay governance, which until then co-existed in a rather informal symbiotic relationship.[lxxix] The Metis of Red River and their leadership existed

as a distinct political collective and held no allegiance to the British Empire or any other European colonial power. Nor was their connection to Indian bands as proximate as was perhaps the case in the Great Lakes region.[lxxx] Moreover, it held military power that could not be lightly ignored by Canada at the time it tried to assert its own territorial government in the Northwest.[lxxxi] The ultimate response to this stalemate was the completion of an agreement between the British colony of Canada and the Red River Assiniboia nation.[lxxxii]

Unfortunately only the model for implementing the lands based on the Manitoba Treaty that was legislatively endorsed in s. 31 of the *Manitoba Act* became the basis of future federal policy and not the recognition of Metis polities for the purposes of treaty negotiations. From Canada's perspective, the agreement to form Manitoba and set aside lands was an exception and anomaly within Canada's dominant policy of denial of Metis political independence and identity. The administrative model of individual scrip allocations developed from s. 31 implementation directives subsequently and effectively became an excuse for the denial of Metis political recognition. No Metis separate identity need be recognized under this "administrative" individual scrip allocation model and thus there would be no need to negotiate future treaties to reconcile Metis collective interests with the interests of the Crown. Rather than recognize Metis bands and polities in the rest of the Northwest, only the method of allocating lands by way of individual scrip devised originally from the implementation of s. 31 lands in the *Manitoba Act* was to be adopted. Thus, the benefit of scrip was expanded beyond Red River, but at the

same time it was imposed unilaterally on Metis communities beyond the geographical reach of the Manitoba Metis Treaty.[lxxxiii]

Thus, Michel Hogue makes the insightful observation that the *Manitoba Act* set in motion a framework for dealing with Metis claims going forward.

> [T]he actions of Louis Riel and the Red River Metis forced at least a partial reconsideration of government practices. The events of the Red River Resistance secured Canadian government recognition of Metis corporate rights as a distinct people whose Indigenous ancestry gave them legal claim to land. … The *Manitoba Act*, with its recognition of Metis aboriginal title and its new mechanism for satisfying Metis claims, thus set a precedent and created a distinct method of addressing Metis claims.[lxxxiv]

In other words, Metis communities (with the possible exception of the Fort Francis Metis adhesion to Treaty 3 of 1875) would not be entitled to enter into treaty as distinct groups or bands, but their Indian title rights were not necessarily to be subsumed under First Nation band membership only for those who were recognized as band members, but could be independently recognized and extinguished simultaneously through the scrip process. Metis individuals could still opt for inclusion as band members of an Indian band and take treaty benefits if social and kinship connections allowed, but that was no longer the only choice to assert a right to benefit from Indian title. Now the mixed-blood as an "Individual" could be Indian, Metis or White. But if you chose Metis identity,

(whether you were part of a distinct Metis political community or not) you automatically became White (akin to enfranchisement) in the eyes of Canada by virtue of participating in the unilaterally imposed scrip process. Alison Gale stated in her historical report that the "Metis were given two options: either to take treaty and become part of a First Nation or to receive scrip and become citizens"[lxxxv].

From the federal government's colonial policy perspective, Metis individuals quite literally sat on the boundary between identities until such time as treaty or scrip decided their fate. However, resolving Metis claims was not high on the federal government's agenda and delay resulted in heightened frustration by the Metis. In the face of increased newcomer settlers to their homelands, this policy limbo and the delay in its resolution was eventually intolerable to the Metis of the Saskatchewan territory and ultimately lead to the explosion of "open war in 1885."[lxxxvi]

Present Outstanding Treaty Negotiation Obligations

This denial of historical fact – the existence of independent Metis bands or polities – has important legal consequences since this has resulted in a continuing delay in negotiations to reconcile the collective interests of Metis peoples with the Crown based on mutual consent. This obligation to reconcile claims is an obligation the Crown has had since at least 1763 under the Royal Proclamation and an obligation that applied equally to Rupert's land and the Northwest Territories when Canada agreed to the terms and

conditions imposed under section 146 of the *Constitution Act, 1867* by the Imperial Parliament in the United Kingdom.

The Order of Her Majesty in Council admitting Rupert's Land and the North-Western territory into union with Canada required that the "claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines".[lxxxvii] Arguably the "equitable principles" reference in the Order is in relation to the obligations that have existed on the Crown to negotiate claims as required by the Royal Proclamation since 1763.[lxxxviii] To unilaterally extinguish Metis claims would be contrary to these terms and conditions for union. Constitutional history scholar Bruce Clark has exhaustively reviewed the implications of the Rupert's Land and the North-Western Territory Order for the application of the duty to negotiate and has compellingly concluded that because of the constitutional status of the terms of union, Canada was "constitutionally bound to continue the previously established imperial law in relation to the aboriginal peoples and their lands…"[lxxxix]

In relation to the Metis, the Royal Commission on Aboriginal Peoples commented on this issue in its report. It stated:

> 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.[xc]

Moreover, the RCAP report concluded that:

> 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.[xci]

Thus, the question of Metis treaties remains outstanding in the regions outside the scope of the *Manitoba Act*. The federal government, however, refuses to negotiate with Metis under the claims process in the prairie west, (or elsewhere for that matter) thus forcing the issue to be resolved before the courts. Yet, it is interesting that this obligation to negotiate has not been resisted in regard to Metis claims North of 60°.

Metis Treaty Process North of 60°

By 1921 there was a well-entrenched Metis presence in the Northwest Territories, especially along the Mackenzie River, which was a major fur-trade route.[xcii] During the 1921 treaty 11 negotiations, as was generally the case in the south, Metis were offered scrip but, unlike in the south, Metis in the north were only offered money scrip in the amount of $240.00 (and not land scrip) in extinguishment of their "Indian title" or they could choose to enter treaty 11 and become a member of a treaty band.[xciii] Treaty 11 and the Metis scrip disbursement's legal validity were subsequently put into question, leading to a renewed treaty process beginning in the 1970s.[xciv]

The application to the Northwest Territories of the modern comprehensive land claims process came about as a result of the convergence of a number of key developments in the 1970s. The combination of the decision by the Supreme Court of Canada in *Calder* that Aboriginal title existed as an independent right to land and Justice Morrow's decision in *Re Paulette* that notwithstanding the language of the two treaties, [11 and 8] "there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward" by the Dene Chiefs.[xcv] Today a number of comprehensive claims have been settled in the Northwest Territories and others are in different stages of negotiation. The fact that the Metis have participated or are in the process of participating as distinct groups from their Dene relations in the comprehensive claims process may be based on the fact that if the historical treaties are sufficiently legally suspect in terms of the extinguishment of Aboriginal title to warrant

settling the issue anew through the comprehensive claims process, so too it logically follows that the parallel scrip process that attempted to extinguish the "Indian title" of the Metis was equally suspect. The following is a brief discussion of the nature and scope of Metis involvement in the modern treaty process in the NWT.

There are three completed comprehensive claims in the Northwest Territories where Metis are included as beneficiaries. These are *Gwich'in Comprehensive Land Claim Agreement, Tlicho Land Claims and Self Government Agreement* and the *Sahtu Dene and Métis Comprehensive Land Claim Agreement*. In describing Metis participation in respect of these land claims, Giokas and Morse stated that "[t]he Métis have subsequently been merged organizationally and in relation to both collective and individual identities for all essential purposes for those two [now three] joint Dene-Métis Nations outside of the fairly narrow continuing role of the *Indian Act*."[xcvi] Arguably, this conclusion may be true regarding the Metis involvement in the Gwitch'in and Tlicho claims, but, with due respect, is not completely accurate with regard to the Metis involvement in the Sahtu claim. Unlike the Metis in the Gwitch'in and Tlicho claims, the Metis in the Sahtu agreement have maintained their separate organizational structures and identities.[xcvii] Unlike most treaties in Canada that only have Indian and Britain/Canada as parties, there are 3 distinct parties to the Sahtu region treaty: the Metis communities (acting collectively), and the Dene communities (acting collectively), and Canada. Although the Sahtu Tribal Council represents both Dene and Metis Aboriginal communities for the purposes of implementing the land claims agreement, the Metis communities are politically organized separately with their own land management corporations.[xcviii]

Moreover, the Directors of the Sahtu Secretariat include leaders from the separate Metis land corporations and Dene land corporations.[xcix] Arguably, this is the only completed modern land claims agreement where the Metis and Canada are in a direct treaty partnership as separate political entities, notwithstanding that the agreement was entered into jointly with the Dene community.[c] Although most of the provisions of the agreement for the purposes of certain co-management boards do not create separate boards for the Metis and Dene, the Metis have maintained a distinct political and social status within the region which finds expression within the joint Sahtu Tribal Council.[ci]

The 1993 agreement provides that the Dene of the Sahtu region cede their rights to the territory in exchange for specific rights and special benefits such as financial compensation, land, rights to collect resources on the ceded territory, and the right to participate in decision making for the land; they also reserve the right to negotiate self-government agreements. In consideration of these benefits, the Dene agree to forego "all their claims, rights or causes of action whether collective or individual which they ever had, now have or may hereafter have under, arising out of or by reason of any obligations made in to them in Treaty 11".[cii] Likewise, the agreement also states in regard to the Metis in particular that they too must forego all their claims "by reason of … any Imperial or Canadian legislation or Order-in-Council or other action of the Governor in Council in relation to the Metis or half-breed scrip or money for scrip".[ciii] Arguably a waiver of any potential claims for outstanding scrip would be necessary only if there is a credible argument that could be made that the original scrip process was

equally ineffective in extinguishing the "Indian title" of the Metis in the Treaty 11 and Treaty 8 territory where scrip was issued.

In addition to the Sahtu Metis treaty, Canada and the North West Territories Metis Nation (NWTMN) have recently entered into an Agreement-in-Principle; an important preliminary step under the comprehensive claims policy.[civ] This agreement, if it follows through to conclusion, would be the first stand-alone modern treaty with a Metis group where the only parties to the treaty are a Metis representative political authority and Canada. This claim is, however, contentious as the Akaitcho Dene, which occupies overlapping territory claimed by the NWTMN, has filed a lawsuit against Canada which questions the legitimacy of the MWTMN claim.[cv] In addition, the North Slave Metis Alliance (NSMA), which represents Metis on the north shore, have also filed a law suit claiming that Canada was obligated to consult with them about their negotiations with the NWTMN.[cvi] Interestingly, Canada has refused to negotiate a comprehensive claim with the North Slave Metis Alliance, notwithstanding the fact that the NSMA has obtained judicial recognition that it has established a *prima facie* case that it is a "distinct Metis community which developed following contact with Europeans but also pre-dates the effective establishment of control by the Crown in the Great Slave Lake area."[cvii] It is not clear why Canada is prepared to accept the NWTMN claim and not negotiate with the NSMA. Indeed, in the Statement of Claim filed by the Akaitcho Dene against the validity of the NWTMN Agreement-in-Principle, they argue that it is not possible to reconcile the two positions. "Akaitcho Dene demand an explanation from Canada as to why it has taken diametrically opposed positions in the very similar circumstances of

those cases and in this matter."[cviii] Notwithstanding these ongoing contentious issues, the experience in the Northwest Territories demonstrates that the federal government is prepared to include Metis communities as eligible for the comprehensive claims process.

Implications for South of 60

The federal government has concluded one land claim agreement with Metis political collectives (Sahtu) and is currently in negotiations with another Metis political collective to settle a comprehensive land claim agreement. This willingness to engage with Metis communities in the north, however, does not exist in relation to Metis claims south of 60°.

Jean Teillet summarizes the current position of federal and provincial governments to claims by Metis as follows:

> The Metis situation has become a game of denial. The federal and provincial Crowns have made the following claims about the Metis: they are not within either federal or provincial jurisdiction; there is no definition of who they are; the Crowns do not know where Metis communities are; and Metis corporate organizations cannot defend Metis rights or be consulted.[cix]

Since the federal Crown is engaged in claims negotiations with Metis communities in the Northwest Territories, the only possible legitimate explanation for the denial of claims in the south is the question of jurisdiction, as it is the only factor that is different between claims in the north and claims in the south. The federal denial of legislative jurisdiction

or responsibility over the Metis has been a constant refrain resulting in Metis peoples falling through the cracks.[cx]

Yet, as noted in *Cote*, and more recently affirmed in *Grassy Narrows*, the rights of the Aboriginal peoples, including the Métis, under s. 35 of the Constitution are independent of questions of jurisdiction and are thus not a valid basis for distinguishing Metis claims in the south from the north.[cxi] Moreover, as the court noted in *Haida Nation v. British Columbia*, the "honour of the Crown requires that these rights be determined, recognized and respected".[cxii] In any event, the *Daniels* case recently decided by the Supreme Court of Canada has clarified that Metis fall within federal jurisdiction, so the excuse that the federal government is not responsible for dealing with Metis claims based on lack of jurisdiction is no longer available.[cxiii] There are Metis claims south of 60° to lands and resources that are arguably no different in kind than those in the north and should be equally acknowledged. Consequently, the existence of Metis specific modern treaties in the north offers a solid precedent for the promotion of Metis treaties in other parts of Canada.

Federal Reform Proposals

There is room for cautious optimism. For example, in 2015 Douglas Eyford was appointed as Special Representative on behalf of the federal government. He was mandated with the task to review and examine Canada's interim comprehensive land claims policy. Importantly, Eyford states:

> Despite succeeding more than 30 years ago in their quest for constitutional recognition, the Métis regard Canada as having failed to accept their status as an

> Aboriginal group with constitutionally protected rights. The 1986 Policy, like its predecessors, is silent on Métis rights, and the Interim Policy does not specifically address their interests either. Any rights recognition obtained by the Métis has been in the courts, and there have been several successes in recent years.[cxiv]

The Eyford report made two important recommendations concerning the Metis. The relevant recommendations state that "Canada should develop a reconciliation process to support the exercise of Metis section 35(1) rights and to reconcile their interests" and that "Canada should establish a framework for the negotiations with the Manitoba Metis Federation to respond to the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada*…."[cxv]

Problematic, however, is the placement of these recommendations within the report. The discussion of Metis options is addressed in the sub-section entitled "Reconciling Métis Rights Using Other Reconciliation Arrangements".[cxvi] This discussion of Metis arrangements falls within a larger discussion concerning other reconciliation arrangements which is explained as an alternative to modern treaties. This "alternative option" is explained as necessary because full modern treaties may not be a realistic option for many Aboriginal groups. This report and the explicit placement of the discussion of Metis options suggests that the federal government is hesitant to recognize the Metis right to participate in processes that would lead to constitutionally recognized modern treaties.

Indeed, this contentious issue arose in the recent negotiations between Canada and the NWTMN. In order to get an Agreement-in-Principle finalized, the parties had to agree to defer the issue of whether the final agreement would be a constitutionally protected treaty.[cxvii] This hesitancy by the federal government is disconcerting and reminds me of an article by Jeremy Patzer concerning Metis rights doctrine, the title of which was appropriately called "Even When We're Winning, Are We Losing?".[cxviii]

However, it has been pointed out by legal counsel for a Metis organization that such a restriction may not necessarily result in a lack of constitutional status for such an agreement. One could argue that regardless of the label given to the agreement, the courts may still declare such an agreement as a treaty based on the language of s. 35 (3).[cxix] However, I am not so optimistic. If the parties mutually and expressly state, as has been the case with some other recent agreements, that the agreement is not to be construed as a treaty for the purposes of s.35, it would be difficult to argue that a court would decide to go against such express wishes of the parties and characterize it otherwise.[cxx]

It is significant that following the release of the Eyford report, Tom Isaac was appointed as the Ministerial Special Representative to lead engagement with Métis by the Honourable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development. His mandate to map out a process for dialogue on Section 35 Métis rights has been seen as a positive development for the Metis.[cxxi] Yet, again, I worry that, given the nature of the recommendations in the Eyford report, Isaac may follow its lead and

develop framework recommendations for a Metis process "outside the comprehensive land claims policy" which would continue to exclude Metis communities from processes that currently apply and are available to First Nations, thus resulting, arguably, in a separate process that would essentially be an inferior non-constitutionally protected treaty process simply because the Aboriginal party involved is Metis.[cxxii] This is discrimination hiding as accommodation and indirectly reinforces the historical injustice of denying the separate political existence of Metis polities.

The Liberal party in its 2015 pre-election campaign made certain promises in relation to Métis-specific issues that mirrored the Eyford recommendations. Campaign documents stated that a Liberal government would "Work with Métis people, as well as the provinces and territories, to establish a federal claims process that sets out a framework to address Métis rights protected by s. 35 of the Constitution Act, 1982, recognize Métis self-government, and resolve outstanding Métis claims against the Crown."[cxxiii] This language is very positive but, against the backdrop of the Eyford report, remains ambiguous. If anything, it seems to mirror the language of the Eyford report, which was commissioned under the previous Conservative government. Thus, the Liberal Party is not promising anything different than the Conservatives were already promising. However, there is a chance that Metis politicians may wish to highlight this concern and use it to leverage an actual commitment that the Metis should not be discriminated against and kept from full inclusion in the comprehensive claims process or be limited to the use of "other reconciliation processes" as Eyford describes it. Of course, other alternative arrangements should be made available to address circumstances where a

modern treaty is not practical or possible, but the Metis should not *ab initio* be limited to only "other reconciliation processes".

Conclusion

As colonized peoples who are indigenous to territories in North America, there is no logical or compelling reason to distinguish Metis rights from First Nation rights. Colonial imposed racial concepts used to manage the civilization of the peoples Indigenous to North America was contradictory to Metis political independence and fueled federal policy of not recognizing independent Metis communities nor engaging in treaty relations. However, the factual existence of Metis polities resulted in inconsistent application of this policy of denial. Exceptions are evident in the history of Métis-colonizer relations. There is an extensive history of treaty making beginning with the HBC/Selkirk treaty of 1815, the Métis-United States treaties in the 1840s/50s, the *Manitoba Act* Treaty of 1870, and the Fort Frances Metis Adhesion to Treaty Three of 1875. Moreover, there are modern treaties with Metis communities and ongoing negotiations with Metis communities in the North West Territories.

There is no logical basis to distinguish between Metis claims processes and First Nation claims processes. As the Supreme Court of Canada stated in *Powley*, the Metis peoples possess "full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1)."[cxxiv] Metis are entitled to recognition and reconciliation requires that the injustice of the past should not haunt the present.

Metis should have a right to participate in the comprehensive claims process throughout Canada. The Northwest Territories Metis claims, for reasons described above, cannot be seen as a legitimate exception to a policy that excludes the Metis as a general rule.

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[i] This chapter is also part of a research project on Metis Treaties in Canada funded, in part, by the Social Sciences and Humanities Research Council. See project website for more information: http://www.metistreatiesproject.ca.

[ii][ii] See *Manitoba Metis Federation v. Canada* [2013] 2 C.N.L.R. 281 (SCC) [hereinafter *MMF*]. The Supreme Court of Canada in *MMF* did not fully address the treaty issue. Although the court held that s. 31 of the *Manitoba Act* was not a treaty (para. 93), it did not directly address the question of the parallel existence of a treaty and the nature of its content. As discussed more fully below, the Supreme Court of Canada failed to appreciate that the terms of s. 31 of the *Manitoba Act* may nonetheless mirror the terms of a treaty promise even though s. 31 of the *Manitoba Act* itself is not part of the treaty and is rather akin to implementation legislation of a treaty in the same way that comprehensive land claims agreements today are given legal effect through implementation legislation.

[iii] This treaty adhesion by a Metis community is often regarded as an anomaly as it went against federal policy at the time. Regardless of whether this was an "anomaly" or not, the fact is that a treaty adhesion was entered into between the Metis of Fort Frances and Canada and as discussed remains to be honoured in full. See also the discussion of the adhesion by Justice Phelan of the Federal Court in *Daniels v. Canada* [2013] 2 C.N.L.R. 61 at 138 [hereinafter *Daniels*].

[iv] I use the term "Metis" throughout and for various historical periods even though other terms may have more historical precision such as "Bois-Brule", or "Half-breeds". I also use the term "Metis" to describe self-identifying mixed European – Indigenous ancestry communities including those that exist apart from the Red River Metis. For a useful overview of the identity debate regarding the usage of the term "Metis" see Christopher Adams, Gregg Dahl and Ian Peach, "Introduction" in *Metis in Canada: History Identity Law and Politics* (Edmonton: University of Alberta Press, 2013) at xiv-xv.

[v] There is an increasing literature on the history of Metis treaties in Canada, but to date the literature has generally focused on individual treaties and agreements as opposed to an overall synthesis of the Metis treaty experience. I offer a brief and preliminary

account of a select number of these treaties in the context of treaty and policy analysis. Comprehensive legal research of Metis treaties in Canada remains largely unaddressed in the scholarly literature.

[vi] For a recent judicial discussion of identity transfer from Metis communities to First Nation communities of Metis individuals see *Daniels*, supra, note 3 at para. 137. For an insightful historical account see Michel Hogue, *Metis and the Medicine Line* (Regina: University of Regina Press, 2015) at 116- 126. For a critical legal account see Larry Chartrand, "Metis Identity and Citizenship" (2001) 12 Windsor Review of Legal and Social Issues 5 and Paul Chartrand, ed, *Who Are Canada's Aboriginal Peoples* (Saskatoon: Purich Publishing, 2002).

[vii] For example, as discussed more fully below, this was the experience of the Metis of Lake Superior and Lake Huron in the 1850s during the Robinson treaty negotiation process.

[viii] According to Miguel Alphonso Martinez, Special Rapporteur to the United Nations, there is no logical basis to make a distinction in the legal status of treaties concluded between Indigenous peoples and European settlers and/or their continuators. The Special Rapporteur did not find "any sound legal argument to sustain the argument that they have lost their international juridical status as nations/peoples." See Special Rapporteur, Martinez, Miguel Alfonso, *Study on Treaties, Agreements and Other Constructive Arrangements* (Final Report, 1999) at para. 265, online: www.unhchr.ch/Huridocda/Huridoca.nsf/0/696c51cf6f20b8bc802567c4003793ec?Opendocument

[ix] For an insightful account of various Indigenous cultural and normative perspectives of "Treaty" see Aimee Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013)

[x] Michael Asch, in his review of Treaty 4, argues that the agreement entered into between the Crown and the Cree and Sauteaux tribes was one to share the lands and to treat each other as "brothers and sisters". He states that "we [British] treated our partners as independent political actors with their own leaders and with a right to make the final decision on our request, and there is nothing in the evidence to substantiate the proposition that, either in our minds or in theirs, the treaty terms were such that they would change the nature of our relationship." Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 97. This view is consistent with the idea of creating a shared form of co-existence under which the parties did not assume a political or legal power over the other that would interfere with the well-being or autonomy of the other without mutual consent.

[xi] Janna Promislow, "Treaties in History and Law" (2014) 47 UBC Law Review 1085 at 1102.

[xii] Chief Wilton Littlechild, "Consistent Advocacy: Treaty Rights and the UN Declaration" in Jennifer Hartley, Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing Ltd., 2010) 112 at 115.

[xiii] For an account of a contemporary process that has attempted to bridge this cultural divide see Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant* (Saskatoon: Office of the Treaty Commissioner, 2007).

[xiv] For example, when the Haudenosaunee sought international standing before the League of Nations in 1923, the "League categorized their claims as 'domestic,' and therefore outside its competency." James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples*: *Achieving UN Recognition* (Saskatoon: Purich Publishing, 2008) at 24.
[xv] *R. v. White and Bob*, (1964), 50 D.L.R. (2d) 613 (S.C.C.)
[xvi] Janna Promislow, supra, note 11 at 1091 – 1106 provides a useful and recent review of the some of the critical scholarship and the arguments advanced for reconceptualising treaties.
[xvii] Prior to 1982, treaties were subject to the principle of Parliamentary supremacy so if legislation conflicted with a treaty obligation of the Crown, the legislation would prevail (*R. v. Syliboy* [1929] 1 D.L.R. 307 (N.S. Co. Ct.)). Yet, such treaties are not absolutely protected under s. 35 of the Constitution from unilateral adjustment by the Crown, even though they are constitutionally protected, because they are subject to the doctrine of "justified infringement" in like manner as Aboriginal rights are subject according to the interests of the broader Canadian public (*R. v. Badger*, [1996] 1 S.C.R. 771). How this can be so defies the logic and nature of the meaning of "mutual agreement" and remains a mystery not yet satisfactorily explained by the courts.
[xviii] The definition of treaty in section 35 of the Constitution need not, however, be forever doomed as lacking international standing as the courts could re-interpret them as international in nature; section 35 recognition of Aboriginal treaties would then be a simple and efficient and automatic means of post-treaty adoption into Canadian law.
[xix] Sebastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at 287.
[xx] *Grassy Narrows Band v. Ontario,* [2014] 3 C.N.L.R. 174 (SCC).
[xxi] Victor Lytwyn, "In the Shadows of the Honorable Company: Nicolas Chatelain and the Metis of Fort Frances" in Nicole St-Onge, Carolyn Podrukchny and Brenda Macdougall, eds., *Contours of a People*: *Metis Family, Mobility and History* (Oklahoma: University of Oklahoma Press, 2013) at 194.
[xxii] Ibid at 209.
[xxiii] A map identifying the reserve lands to be set aside for the Fort Frances Metis was attached to the treaty adhesion agreement. Ibid at 210.
[xxiv] *Indian Act*, S.C. 1876, c. 18 (39 Vict.).
[xxv] Quoted in Wendy Moss, *Metis Adhesion to Treaty No. 3* (March 16, 1979) at 44. [unpublished, on file with author].
[xxvi] Ibid at 44-45.
[xxvii] *R. v. Sioui*, [1990] 1 S.C.R. 1025.
[xxviii] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388 at para. 51.
[xxix] Moss, supra note 25 at 45.
[xxx] The *Specific Claims Tribunal Act,* S.C. 2008, c.22 applies to a "First Nation" which is defined as an "Indian Act" band. By definition, this would exclude a Metis band because the Fort Frances Metis is not an *Indian Act* band. However, many of the descendants of the Fort Frances band joined the Couchiching band (formerly Little Eagle Band) which is a recognized *Indian Act* band and could potentially bring a claim. It is beyond the scope

of this paper to deal with the complex legal issues this case raises. Further research is recommended.

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

[xxxii] Ibid, at 1035.

[xxxiii] Ibid, at 1031.

[xxxiv] Promislow, supra note 11 at 1155.

[xxxv] Arguably the lack of a single signed document between the Red River Assiniboia government representatives and the Dominion of Canada representatives in 1870, for example, is not essential to a finding that a "treaty" was nonetheless entered into between the parties. See discussion of Manitoba Treaty below.

[xxxvi] Janna Promislow, supra note 11 at 1102.

[xxxvii] Ibid at 1155.

[xxxviii] The "judicial obiter" is in reference to the qualified characterization of the events leading to the formation of Manitoba as "treaty-like" by the Supreme Court of Canada in the recent *MMF* decision, supra note 2.

[xxxix] Kent McNeil has convincingly argued that the land that became the postage stamp province of Manitoba was not within "Rupert's Land" and thus did not fall under the jurisdiction granted to the Hudson's Bay Company in 1670. See in particular the discussion regarding Manitoba and the Red River Settlement at 35-42. Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982). In elaborating on Kent McNeil's arguments, I argue that Metis Aboriginal title exists where Metis communities occupied territory prior to the British perfecting its assertion of sovereignty by effective occupation in the relevant area. See Larry Chartrand, "Metis Aboriginal Title in Canada" in Kerry Wilkins, *Advancing Aboriginal Claims* (Edmonton: University of Alberta Press, 2004) at 165-173.

[xl] Adam Gaudry, *Kaa-tipeyimishoyaahk - 'We are those who own ourselves': A Political History of Métis Self-Determination in the North-West, 1830-1870,* (PH.D Dissertation, University of Victoria, 2014)

[xli] Ibid at 366.

[xlii] Ibid at 365-366.

[xliii] D'Arcy Vermette, *Beyond Doctrines of Dominance: Conceptualizing a Path to Legal Recognition and Affirmation of the Manitoba Métis Treaty,* (LL.D Dissertation, Faculty of Law, University of Ottawa, 2012) at 164.

[xliv] Darren O'Toole, "Section 31 of the Manitoba Act, 1870: A Land Claim Agreement" (2016) 38:1 Manitoba Law Journal 1 (forthcoming). O'Toole's argument reinforces the same conclusion previously reached by Paul Chartrand in his very thorough analysis of the legal significance of s. 31 of the Manitoba Act. See Paul Chartrand, *Manitoba's Metis Settlement Scheme of 1870* (Saskatoon: Native law Centre, 1991) at 127 – 137.

[xlv] The complete section reads as follows:

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

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

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.
[xlvi] Vermette, supra note 43 at 194.
[xlvii] *MMF*, supra, note 2.
[xlviii] Ibid at para. 92.
[xlix] O'Toole, supra note 44 at 25.
[l] See a discussion on this point in *Quebec v. Moses,* [2010] 1 S.C.R. 557 at para. 85 – 88.
[li] O'Toole, supra note 44 at 27.
[lii] Promislow, supra note 11 at 1087
[liii] Ibid.
[liv] Ibid at 1087. See also the discussion in Vermette, supra note 43 at 191 and 192.
[lv] The term "half-breed" is used in the historical reports. Other scholars and historians have subsequently used the term "Metis" to describe this community. For example historian Arthur Ray referred to the same group discussed here as Metis. Arthur Ray, *Telling It To The Judge: Taking Native History to Court* (Montreal: McGill-Queen's University Press, 2011) at 88 – 120. As mentioned above, there is a significant debate whether this change in terminology is appropriate or accurate. See Christopher Adams, Gregg Dahl and Ian Peach, supra note 4 at xiv-xv. Whether the communities of the Great lakes were Metis, Half-breeds, metis, mixed-bloods or any other term is irrelevant, in my opinion, to the fact that in the historical record there was a group that was nonetheless regarded as distinct from the Anishinabek communities and from the colonists of the area whose ancestral roots were comprised of both European and First Nation forbearers.
[lvi] See Gale, Robinson Treaty Metis Historical Report (Ottawa: Department of Indian and Northern Affairs) [unpublished] and Arthur Ray, ibid at 93-97.
[lvii] Alison Gale, ibid at 14 -15 quoting the official treaty report of William Robinson, September 24, 1850.
[lviii] Margaret MacLeod and W.L. Morton, *Cuthbert Grant of Grantown* (Toronto: McClelland and Stewart Ltd., 1974)
[lix] Ibid.
[lx] See map online: http://www.metistreatiesproject.ca/treaties-map/
[lxi] For a copy of the offer and counter-offer, see the discussion of the treaty contained in MacLeod and Morton, supra note 58 at 28 – 31.
[lxii] Kelly Saunders, "No Other Weapon: Metis Political Organization and Governance in Canada in Chistopher Adams, Gregg Dahl and Ian Peach, eds., *Metis in Canada: History, Identity, Law and Politics,* 1st ed., (Edmonton: University of Alberta Press,) 339 at 343.
[lxiii] There is, however, a debate in the literature as to the whether the Metis were truly acting as an independent political force or as servants of the NWC. Gerald Ens explains how this debate emerged from conflicting testimony from the NWC and HBC when colonial officials undertook an inquiry into the causes that gave rise to the conflict. Gerald Ens, "The Battle of Seven Oaks and the Articulation of a Metis National Tradition, 1811-1849" in Nicole St-Onge, Carolyn Podrukchny and Brenda Macdougall,

eds., *Contours of a People*: *Metis Family, Mobility and History* (Oklahoma: University of Oklahoma Press, 2013) 93 at 104. It is beyond the scope of this paper to resolve this historical debate. However, based on the application of existing legal doctrine, it is my tentative conclusion that if one applies the principles of treaty law as articulated in *Sioui*, it is likely that this treaty would be recognized as a valid treaty.

[lxiv] Alison Gale, supra note 56 at p. 21 – 39. See also RSMIN History online: http://rsmin.ca/about-us/rsmin-history

[lxv] On the contrary, according to the Court of Appeal in *R. v. Powley,* [2001] 2 C.N.L.R. 291 at para. 139, it is stated that "E.B. Borron, commissioned in 1891 by the province to report on annuity payments to the Métis, was of the view that Métis who had taken treaty benefits remained Métis and he recommended that they be removed from the treaty annuity lists."

[lxvi] Michel Hogue, supra note 6 at 116.

[lxvii] This exclusionary policy was largely due to budgetary concerns expressed by the province of Ontario when it was settling the issue with the federal government over which level of government was responsible for paying the annuities. Ontario was bound by arbitration to pay, but wished to reduce its debt under treaty significantly and argued forcefully that the "half-breeds" had no legal claim and should be taken off the list. See Gale, supra note 56 at p. 40-45.

[lxviii] The Red Sky Metis Nation website states that the community is in the process of asserting their treaty and/or Metis rights under the Constitution. Apart from the question of treaty, the Red Sky Metis Nation, which has been excluded from treaty, could possibly argue now that they have a valid claim to Metis Aboriginal title and claims to Aboriginal resource rights. Their documented history seems to support well the continuity of a distinct Metis/Half-breed community to the present day. See http://rsmin.ca/.

[lxix] Factum of the Intervenor, Metis Chief Roy E.J. DeLaRonde, *R. v. Powley* Supreme Court of Canada, Court File No. 28533, Feb. 3, 2003. (on file with author).

[lxx] *R. v. Powley*, supra note 65.

[lxxi] Arthur Ray, supra note 55 at 95-96.

[lxxii] Larry Chartrand, "The Definition of Metis Peoples in the *Constitution Act, 1982*" (2004) 67 Saskatchewan Law Review 219 at 231.

[lxxiii] Hannah Arendt, *The Origins of Totalitarianism* (Cleveland: The World Publishing Company, 1958). In this highly regarded analysis of human rights, Arendt recognizes the difference between State identity and citizenship and ethnic nationalism and how they are often simultaneously present in the modern state even when the modern state does not "officially" recognize the existence of minority ethnic nationalities.

[lxxiv] Alexander Morris to Augustin Braland et. al., September 16, 1874, f. 4041, vol. 3613, reel C-10106 RC 10 , LAC quoted in Hogue, supra note 6 at 115.

[lxxv] *Daniels v. Canada*, [2014] 3 C.N.L.R. 139 (FCA). The Court of Appeal affirmed that because you are not status Indian in the eyes of federal law does not mean that you are not Indian in fact or included in s. 91(24) of the *Constitution Act, 1982*.

[lxxvi] For an insightful account of how Harry Daniels, on behalf of the Metis, was able to secure a last minute amendment to the constitutional proposal that eventually became s. 35 (2) of the Constitution, which expressly identifies the Metis as one of the Aboriginal

peoples of Canada, see John Weinstein, *Quiet Revolution West: The Rebirth of Metis Nationalism* (Calgary: Fifth House Ltd., 2007) at 44-45.

[lxxvii] Hogue, supra note 6 at 113.

[lxxviii] Factum of the Intervenor, Metis chief Roy DeLaRonde, supra note 69 at para. 71.

[lxxix] The assertion I am making here is that the Hudson's Bay Company did not have a perfected assertion of sovereignty in the Red River area. There was no exclusive effective control to perfect the HBC assertion of sovereignty. Since the battle of Seven Oakes, the Metis dominated Red River. Although an HBC governance regime was eventually installed in Red River, this regime had to mutually co-exist with the Metis community and was welcomed so long as it did not act contrary to Metis collective interests. The Metis have always possessed the underlying authority in Red River. See Adam Gaudry, supra note 40 at 167 - 207. For a detailed account of the colonial law that is applicable to such questions see Larry Chartrand, supra note 39. See also Hogue, supra note 6 at 45 – 47.

[lxxx] In other words, there is no ambiguity in regard to a separate Metis identity and community from that of their First Nation kin, as some scholars in the literature suggests might be the case in regard to the half-breed communities of the Great Lakes. For a useful review of the scholarly debate regarding the issue of Metis identity in the Great Lakes see Darren O'Toole, "From Entity to Identity to Nation: The Ethnogenisis of the Wiisakodewininiwag (Bois-Brule) Reconsidered" in Chistopher Adams, Gregg Dahl and Ian Peach, eds., *Metis in Canada: History, Identity, Law and Politics,* 1st ed., (Edmonton: University of Alberta Press,), supra note 4.

[lxxxi] Resistance to Canadian authority became notoriously evident when Red River community representatives denied access into the region to the appointed Lieutenant – Governor designate, William McDougall, forcing Ottawa to negotiate with representatives of the newly formed provisional government of the "People of Rupert's Land and the North west". See Dale Gibson, *Law, Life and Government at Red River Volume 1* (Montreal and Kingston:McGill-Queen's University Press, 2015) at 240-241. For a more lively account of these events see Garrett Wilson, *Frontier Farewell: The 1870s and the End of the Old West* (Regina: University of Regina Press, 2014) at 39 – 76.

[lxxxii] The conclusion that the agreement between Canada and Red River (which included the right to provincial status within Canada and other terms exterior to the *Manitoba Act*) was a treaty is strongly supported in the historical and legal literature, contrary to the *obiter dicta* comments of the Supreme Court of Canada in the MMF case. See discussion above.

[lxxxiii] See *Dominion Lands Act*, 1879 c. 31 s. 125(e).

[lxxxiv] Hogue, supra note 6 at 116.

[lxxxv] Gale, supra note 56 at 117 and 133.

[lxxxvi] Hogue, supra note 6 at 140.

[lxxxvii] Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union, 23 June 1870, RSC 1970, app. II, no. 9 at 264.

[lxxxviii] The Canadian government acknowledged this obligation in its own legislation in 1872. See *Dominion Lands Act*, S.C. 1872, c. 23, s. 42.

[lxxxix] Bruce Clark, *Native Liberty: Crown Sovereignty* (Montreal: McGill-Queen's University Press, 1990) at 112.
[xc] Royal Commission on Aboriginal Peoples, *Perspectives and Realities, Vol. 4* (Ottawa: Minister of Supply and Services Canada, 1996) at 345.
[xci] Ibid at 345-346.
[xcii] Richard Slobodin, *Metis of the Mackenzie District* (Ottawa: Saint-Paul University, 1966) at 12-25. According to Slobodin, who had undertaken a major research project in the late 1930s about the Metis of the Mackenzie District, the Metis community was comprised of both descendants of "Red River" Metis who traveled to the region during the fur-trade era and of homegrown "Northern" Metis that emerged as mixed-blood people from unions in the north between Europeans (of much variety) and Dene and Inuit.
[xciii] Kenneth Coates and William Morrison, "Treaty Research Report Treaty 11 (1921)", (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986) at 29.
[xciv] Bill Erasmus, James Paci and Stephanie Irlbacher Fox, "A Study in Institution Building for Dene Governance in the Canadian North: A History of the Development of the Dene National Office" (2003) 4:2 Indigenous Nations Studies Journal 25 at 31.
[xcv] *Calder v British Columbia (AG),* [1973] S.C.R. 313. *Paulette v. Canada,* [1973] 6 W.W.W. 97 at para. 116 (NWTSC) per Justice Morrow.
[xcvi] Robert K. Groves and Bradford W. Morse, "Constituting Aboriginal Collectivities: Avoiding New Peoples 'In Between'", (2004) 67 *Sask. L. Rev.* 257
[xcvii] Even the titles of the relevant land claims exemplify an important distinction between the claims as the Sahtu agreement explicitly names and describe the Metis as a separate entity from the Sahtu Dene, whereas in the case of the Gwitch'in and Tlicho claims, there is no separate reference for the Metis in the Agreement title. However, this does not mean that the Metis and Dene live in separate communities geographically. Dene live side by side in the communities of Fort Good Hope, Norman Wells and Tulita along the Mackenzie River.
[xcviii] See, for example, the Norman Wells Land Corporation that manages funds and lands on behalf of the Norman Wells Metis beneficiaries under the agreement, online: https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwjT9smXsOrIAhWTuB4KHa5ICeg&url=http%3A%2F%2Fnwlc.ca%2Ffiles%2FNWLC%2FH%2520%2520structure%2520NWLC.doc&usg=AFQjCNFhpBhJofkYsy0mnC_XySGXRa5h3A&sig2=NpSHO9NJBHATM6uC7FtMRA
[xcix] See Sahtu Secretariat, online: http://www.sahtu.ca/#!board-of-directors/c1v0z
[c] Arguably, this situation is akin to a modern version of the Metis adhesion to Treaty 3 with the result that the Metis, as a distinct political community, became treaty partners with the Crown under the same treaty with their Anishinaabe relations.
[ci] The author is familiar with the Sahtu region due to having been appointed as a member of the Arbitration panel (1995 – 2012) established pursuant to chapter 6 of the Agreement and has attended the region on numerous occasions and have reported on Panel affairs to the Sahtu Secretariat in general assembly.
[cii] *Sahtu Dene and Metis Comprehensive Land Claim Agreement, Volume 1,* (Ottawa: Public Works, 1993), s.3.1.12.

[ciii] Ibid.
[civ] *Northwest Territory Metis Nation Land and Resources Agreement-in-Principle*, July 31, 2015, online: http://www.daair.gov.nt.ca/_live/documents/content/Final%20NWTMN%20AIP%20signed%20on%20July%2031,%202015.pdf
[cv] *Akaitcho Dene v. Canada*, Statement of Claim, Federal Court (Court File No. T-339-12) on file with the author. The Akaitcho Dene are in their own comprehensive claims negotiations with Canada which is intended to "reconcile any divergence in their views regarding the nature and scope of Akaitcho Dene aboriginal and treaty rights" (at para. 26).
[cvi] James McFadden, "North Slave Metis Alliance files lawsuit" (Northern News Services ONLINE, Sept. 14, 2015), online: http://www.nnsl.com/frames/newspapers/2015-09/sep14_15met.html
[cvii] *Enge v. Mandeville*, [2013] 4 C.N.L.R. 50 (NWT Supreme Court) at para. 218.
[cviii] *Akaitcho Dene v. Canada,* Statement of Claim, supra note 105 at para. 48.
[cix] Jean Teillet, "Federal and Provincial Crown Obligations to the Metis" in Wilson and Mallet, *Metis – Crown Relations* (Toronto: Irwin Law, 2008) at 88.
[cx] See further Larry Chartrand, *Maskikiwenow: The Métis Right to Health Under the Constitution of Canada and Under Selected International Human Rights Obligations* (2011) National Aboriginal Health Organization, at 3, online: http://www.naho.ca/documents/metiscentre/english/2011_right_to_health.pdf
[cxi] *R. v. Cote*, [1996] S.C.R. 139 at para. 74. This view was affirmed recently in *Grassy Narrows First Nation v. Ontario (Natural Resources),* [2014] 2 S.C.R. 447.
[cxii] *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 at para. 25.
[cxiii] *Daniels v. Canada (Indian Affairs and Northern Development* 2016 SCC 12. The Supreme Court concluded that Metis are Indians for the purposes of s. 91(24). See Larry Chartrand, "The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy" (2013) 50 Alberta Law Review 1 for a critique on the court's failure to question the plenary nature of s. 91(24).
[cxiv] Douglas Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Government of Canada, 2015) at 44.
[cxv] Ibid.
[cxvi] Ibid.
[cxvii] NWTMN Agreement-in-Principle, *supra*, note 16 at s. 2.2.5.
[cxviii] Jeremy Patzer, "Even When We're Winning, Are We Losing" in Chirstopher Adams, Adam Dahl and Peach, eds., *Metis in Canada: History Identity Law and Politics* (Edmonton: University of Alberta Press, 2013), supra note 4 at 307.
[cxix] Supra, note 45.
[cxx] Grammond, supra note 19 at 289.
[cxxi] Metis National Council Statement, June 7th, 2015, Online: http://www.metisnation.ca/index.php/news/mnc-general-assembly-endorses-engagement-with-ministerial-special-representative-on-metis-reconciliation
[cxxii] Douglas Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Government of Canada, 2015) at 44.

[cxxiii] Liberal Party of Canada, *Real Change: Advancing and Achieving Reconciliation for the Metis Nation* (2015) Online: https://www.liberal.ca/files/2015/09/Advancing-and-achieving-reconciliation-for-the-Metis-people.pdf

[cxxiv] *Powley*, supra note 64 at para. 38.