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## "The lands...belonged to them, once by the Indian title, twice for having defended them...and thrice for having built and lived on them": The Law and Politics of Métis Title

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## Abstract

To predict what is on the horizon of the Métis legal landscape, we can look to jurisprudence on First Nations' rights, given that Métis rights cases are typically ten to fifteen years behind those of First Nations. With the release of the Supreme Court of Canada's decision in *Tsilhqot'in*, the next big issue in Métis law may be Métis title. Scholars have doubted the ability of Métis to establish Aboriginal title in Canada for two reasons: first, Métis were too mobile, and second, Métis were too immobile. This paper critically analyzes these positions and argues that the case for Métis title in Canada is a strong one. As such, governments in Canada would do well to focus on resolving outstanding Métis title claims.

## Keywords

Métis--Land tenure; Métis--Legal status, laws, etc.; Indigenous peoples--Legal status, laws, etc.; Canada

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# “The lands...belonged to them, once by the Indian title, twice for having defended them...and thrice for having built and lived on them”<sup>1</sup>: The Law and Politics of Métis Title

KAREN DRAKE\* & ADAM GAUDRY\*\*

To predict what is on the horizon of the Métis legal landscape, we can look to jurisprudence on First Nations' rights, given that Métis rights cases are typically ten to fifteen years behind those of First Nations. With the release of the Supreme Court of Canada's decision in *Tsilhqot'in*, the next big issue in Métis law may be Métis title. Scholars have doubted the ability of Métis to establish Aboriginal title in Canada for two reasons: first, Métis were too mobile, and second, Métis were too immobile. This paper critically analyzes these positions and argues that the case for Métis title in Canada is a strong one. As such, governments in Canada would do well to focus on resolving outstanding Métis title claims.

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1. Louis Riel, “Last Memoir” in A-H de Trémaudan, ed, *Hold High Your Heads: History of the Métis Nation in Western Canada*, translated by Elizabeth Maguet (Winnipeg: Pemmican Publications, 1982) at 207-208; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 4, 23, 395 DLR (4th) 381 [*Daniels*]. It is important to note that historically, the term “Indian” was used differently than it is today. It was a general term that encompassed all Indigenous peoples, including Métis.

Pour savoir ce que réserve l'avenir aux Métis sur le plan juridique, nous pouvons nous tourner vers la jurisprudence qui se rapporte aux droits des Premières Nations, car les jugements touchant les Métis accusent généralement un retard de dix à quinze ans par rapport à ceux qui touchent les Premières Nations. Avec la sortie du jugement *Tsilhqot'in* de la Cour suprême du Canada, le prochain problème juridique important relatif aux Métis pourrait être de savoir qui sont les Métis. Les spécialistes doutent de la capacité des Métis de prouver au Canada leur statut d'Autochtones pour deux raisons contradictoires : ils sont à la fois trop nomades et trop sédentaires. Cet article fait une analyse critique de ces situations pour conclure que les Métis possèdent au Canada un solide statut juridique. De ce fait, les gouvernements canadiens auraient intérêt à résoudre les revendications des Métis quant à leur statut.

*“The lands that they owned...belonged to them once by the Indian title, twice for having defended them with their blood, and thrice for having built and lived on them.”*<sup>2</sup>

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MÉTIS RIGHTS CASES ARE TYPICALLY ten to fifteen years behind those of First Nations.<sup>3</sup> To predict what is on the horizon of the Métis legal landscape, therefore, we can look to jurisprudence on First Nations' rights. The release of *Tsilhqot'in Nation v British Columbia*<sup>4</sup> in June, 2014 marked the Supreme Court of Canada's first and only declaration of Aboriginal title. The next big issue in Métis law, then,

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2. Riel, *ibid* at 207-208.

3. For example, see *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 (sets out the test for Métis rights pursuant to section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Constitution Act, 1982*]; See *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*] (establishes the general framework for section 35 Aboriginal rights); *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 (establishes the test for assessing First Nations and Inuit rights).

4. 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].

may be Métis title.<sup>5</sup> Scholars have doubted Métis' ability to establish Aboriginal title in Canada for two reasons: first, they were too mobile, and second, they were too immobile.<sup>6</sup> This article critically analyzes both positions and argues that the case for Métis title in Canada is strong.

The argument that Métis were simultaneously both too mobile and too immobile to satisfy the test for Aboriginal title appeals to the variability of Métis land use.<sup>7</sup> At least some Métis communities combined land use patterns resembling those of First Nations, such as hunting, fishing and other cyclical activities, with those of European communities, such as dividing and holding lands on a permanent and individual basis by farming the land and building dwellings.<sup>8</sup> The depiction of Métis as too mobile depends on the former, while the depiction of Métis as too immobile depends on the latter. Part I of this article outlines each of these positions.

Part II argues that Métis' mobility is no impediment to satisfying the test for Aboriginal title, which requires the Aboriginal nation to prove three elements: (i) sufficient occupation of land prior to the assertion of Crown sovereignty, (ii) continuity of occupation (only where the claimant relies on present occupation as proof of pre-sovereignty occupation), and (iii) exclusive occupation at the time of the assertion of Crown sovereignty.<sup>9</sup> In regard to the first requirement, Part II acknowledges that if "assertion of Crown sovereignty" refers to the date when

5. Métis claimants are seeking or have sought declarations that Métis have Aboriginal title in *Morin v Canada & Saskatchewan*, QB File No 619-1994 and in *Paul v Canada*, 2002 FCT 615, 219 FTR 275. Jean Teillet, *Métis Law in Canada* (Toronto: Pape Salter Teillet LLP, 2010) (loose-leaf 2015 supplement), ch 3 at 8.3.
6. See John Borrows, *Freedom and Indigenous Constitutionalism*, (Toronto: University of Toronto Press, 2016) at 21 [Borrows, *Freedom*] (arguing that "[m]obility (or a perceived lack thereof) has often been used to undermine Indigenous peoples' freedom to pursue a good life because of stereotypical characterizations. Indigenous peoples are denied space in contemporary political life if they move too frequently. Conversely, freedom can also be diminished if they move too little. ... [I]t seems as though Indigenous peoples cannot win. In many systems of legal thought, Indigenous peoples are characterized as being either too nomadic or too static to protect their most significant relationships").
7. See Robert K Groves & Bradford W Morse, "Constituting Aboriginal Collectivities: Avoiding New Peoples 'In Between'" (2004) 67 Sask L Rev 257 at 288 (noting that the variability of Métis land use and occupancy was so pronounced that "it is not even useful to employ the term 'Métis title'").
8. See Catherine Bell, "Métis Constitutional Rights in Section 35(1)" (1997-1998) 36 Alta L Rev 180 at 216; Larry N Chartrand, "Métis Aboriginal Title in Canada" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich, 2004) 151 at 162 [Chartrand, "Métis Aboriginal Title"].
9. *Tsilhqot'in*, *supra* note 4 at paras 25-26, 50. See also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 143, 153 DLR (4th) 193 [Delgamuukw].

the Crown first purported to be sovereign over a given territory, Métis would have difficulty establishing Aboriginal title. Britain appeared to assert sovereignty over Rupert's Land as early as 1670 via the Charter it granted to the Hudson's Bay Company, before the Métis Nation existed.<sup>10</sup> However, as Part II argues, the Court's decision in *Tsilhqot'in* provides a compelling rationale for rejecting the date of the Crown's mere assertion of sovereignty as the relevant assessment date. Additionally, *Tsilhqot'in* establishes that the standard for assessing sufficiency of occupation is the common law standard of a general occupant, as opposed to an adverse possessor.<sup>11</sup> According to this standard, Métis must establish that, as of the assessment date, they acted so as to communicate to third parties that they held the land in question for their own purposes by using it as it was capable of being used, given the characteristics of the land and the Métis Nation's own laws.<sup>12</sup> An analysis of the Métis buffalo hunt, which we present below, illustrates that plains Métis can meet this standard. Next, the continuity requirement is not a problem for Métis, since it applies only when the Aboriginal claimant relies on present occupation to prove pre-sovereignty occupation. Métis may avoid having to satisfy this requirement by not relying on present occupation to establish Aboriginal title. Finally, Métis can satisfy the exclusivity requirement by asserting joint title along with the First Nations with whom they were traditionally allied. Part II concludes by detailing the historical alliances among Métis, Cree, Saulteaux, and Assiniboine peoples on the plains.

Part III rejects the notion, implicit in the majority decision in *Manitoba Metis Federation Inc v Canada (Attorney General)*, that Métis were too immobile to establish Aboriginal title.<sup>13</sup> According to the majority, Métis in the Red River settlement could not satisfy the Aboriginal title test because they held discrete plots of land individually, not communally.<sup>14</sup> The problem with this rationale is that communal landholding is not a requirement of the test for establishing Aboriginal title. The error in the majority's analysis results from a conflation of collective rights and communal landholding. Regardless of whether Métis held land communally, they certainly exercised collective rights—in other words, jurisdiction—in the Red River region. The majority's conflation is especially troubling because it results in a vicious circle. To succeed in an Aboriginal title claim, an Aboriginal nation must establish that it held land in a way that

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10. See Chartrand, "Métis Aboriginal Title", *supra* note 8 at 156.

11. See *Tsilhqot'in*, *supra* note 4 at paras 38-39.

12. See *ibid* at paras 38, 41.

13. 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Metis Federation*].

14. *Ibid* at paras 56, 59.

would be sufficient to establish title at common law,<sup>15</sup> and yet, the majority in *Manitoba Metis Federation* concluded that Métis in the Red River did not have Aboriginal title precisely because they held land in a way that was too similar to the common law.<sup>16</sup> A legal test that produces such a Kafkaesque paradox deserves to be rejected.<sup>17</sup>

The Court's most recent Métis-focused decision is *Daniels v Canada (Indian Affairs and Northern Development)*. In this case the Court held that Métis are "Indians" for the purpose of section 91(24) of the *Constitution Act, 1867*, according to which the federal government has legislative jurisdiction over "Indians, and Lands reserved for the Indians."<sup>18</sup> In other words, *Daniels* stands for the proposition that Métis fall within federal, as opposed to provincial, jurisdiction. Although the federal government may not have a legal duty to exercise its legislative authority,<sup>19</sup> it does have "a legal duty to negotiate in good faith to resolve land claims."<sup>20</sup> Thus, the *Daniels* decision removes one potential impediment to a successful Métis title claim, namely, the "jurisdictional wasteland" that the federal and provincial governments created by denying legislative authority to negotiate a resolution to Métis' outstanding claims. This article removes a second potential impediment by countering the argument that Métis are unable to establish Aboriginal title on the merits. Accordingly, the federal government would do well to establish a land claims process for resolving outstanding Métis title claims.

## I. THE ARGUMENT AGAINST MÉTIS TITLE: MÉTIS WERE BOTH TOO MOBILE AND TOO IMMOBILE

Both Prime Minister Sir John A. Macdonald and Parliament recognized the "Indian title" of Métis in the Red River, the former through statements in the

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15. *Tsilhqot'in*, *supra* note 4 at paras 42, 50.

16. *Manitoba Metis Federation*, *supra* note 13 at paras 56, 59.

17. Franz Kafka, *The Trial (Penguin Modern Classics)*, translated by Idris Parry (Harmondsworth, UK: Penguin, 1983).

18. *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 2, 3, 57, 395 DLR (4th) 381 [*Daniels*].

19. *Ibid* at para 15.

20. *Tsilhqot'in*, *supra* note 4 at para 17.

House of Commons and the latter through the *Manitoba Act, 1870*.<sup>21</sup> Despite this official recognition, a few scholars remain skeptical of the existence of Métis title. Foremost among them is Thomas Flanagan, a political scientist who served as Canada's expert witness in *Manitoba Metis Federation*.<sup>22</sup> Flanagan is not a lawyer, but his arguments merit close examination for two reasons. First, he is the most outspoken academic critic of Métis title, and second, some of his arguments were adopted by the trial judge and subsequently endorsed by a majority of the Supreme Court of Canada in *Manitoba Metis Federation*.<sup>23</sup> We therefore outline Flanagan's arguments briefly in this Part before responding to them in Parts II and III.

#### A. MÉTIS WERE TOO MOBILE

The notion that Métis were too mobile to establish Aboriginal title rests on the conventional narrative of Métis as “a society perpetually in motion—hunting furs, transporting goods, chasing buffalo.”<sup>24</sup> Flanagan constructs Métis as nearly transient wanderers who are ultimately too nomadic to possess Aboriginal

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21. Macdonald argued “half-breeds had a strong claim to the lands, in consequence of their extraction” and that the reserve was necessary for “settling those claims.” Sir John A. Macdonald, speech to Parliament, May 4, 1870 in WL Morton, *Manitoba: The Birth of a Province* (Altona, MB: DW Friesen & Sons Ltd, 1965) at 204. The prime minister further elaborated that “this reservation...is for the purpose of extinguishing the Indian title and all claims upon the lands within the limits of the province.” Macdonald, speech to Parliament, May 2, 1870, in *ibid* at 168-69.
  22. See Thomas Flanagan, *Métis Lands in Manitoba* (Calgary: University of Calgary Press, 1991) [Flanagan, *Métis Lands*] for the arguments informing his expert testimony in their most robust form.
  23. *Manitoba Metis Federation*, *supra* note 13 at paras 56, 59. *Manitoba Metis Federation v Canada (Attorney General)*, 2007 MBQB 293, 165 ACWS (3d) 820 [*Manitoba Metis Federation Trial Decision*]. Darren O'Toole provides a careful discussion and critique of the trial decision's endorsement of Flanagan's arguments. See Darren O'Toole, “The Red River Jig Around the Convention of ‘Indian’ Title: The Métis and Half-Breed *Dos à Dos*” (2012) 69 *Man Hist* 17 [O'Toole, “The Red River Jig”]; See Darren O'Toole, “Thomas Flanagan on the Stand: Revisiting Métis Land Claims and the *Lists of Rights* in Manitoba,” (2010) 41:1 *Inr'l J Can Studies* 138 at 139-140 [O'Toole, “Flanagan on the Stand”]; Darren O'Toole, “Métis Claims to ‘Indian’ Title in Manitoba, 1860-1870” (2008) 28:2 *Can J Native Stud* 241 [O'Toole, “Métis Claims”].
  24. Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010) at 93.



title to their homeland.<sup>25</sup> As he does not purport to provide a legal analysis, his arguments understandably do not engage explicitly with the specific legal principles informing the test for Aboriginal title.<sup>26</sup> That being said, Flanagan's concerns can be read in light of the three requirements of the Aboriginal title test: sufficiency, continuity, and exclusivity of occupation. Regarding the first requirement, sufficiency of occupation, Flanagan argues that "Métis did not hunt and gather food in a specific territory marked perhaps by rivers or mountain ranges,"<sup>27</sup> and while they often fought with other peoples over access to buffalo herds, "they did not interdict specific areas to Indian tribes, as the Indians tried to do with respect to each other."<sup>28</sup> Although Flanagan does not explicitly address the second requirement, continuity of occupation, it is difficult to fathom how Métis could have occupied a specific territory continuously if they did not occupy specific territories at all. Regarding the third requirement, exclusivity of occupation, Flanagan suggests that Métis "claimed the right to go anywhere they chose," and concludes that "Métis had no exclusive territory over which they roamed."<sup>29</sup>

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25. Thomas Flanagan, "Metis Aboriginal Rights: Some Historical and Contemporary Problems" in Menno Boldt, J Anthony Long, & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 237 [Flanagan, "Metis Aboriginal Rights"].

26. *Ibid.* Flanagan does refer to the four elements of Aboriginal title articulated in *Hamlet of Baker Lake v Minister of Indian Affairs*, [1980] 1 FC 518, [1979] 3 CNLR 17, the second and third of which refer to sufficiency and exclusivity of occupation. However, he does not refer explicitly to the legal tests for sufficiency and exclusivity of occupation. Moreover, as he was writing before the release of the Supreme Court of Canada's decision in *Delgamuukw*, *supra* note 9 and *Tsilhqot'in*, he does not refer to the current legal tests for sufficiency and exclusivity of occupation.

27. Flanagan, "Metis Aboriginal Rights", *ibid* at 237.

28. *Ibid.*

29. *Ibid.*

## B. MÉTIS WERE TOO IMMOBILE

Flanagan's argument that the Métis were too immobile to establish Aboriginal title rests on a civilized-savage dichotomy. As he puts it, the "Indians have been endowed with Aboriginal rights under British law because of their [lower] level of social development."<sup>30</sup> According to this formulation, Métis are too civilized to possess Aboriginal title.<sup>31</sup> For Flanagan, "Aboriginal title evolved in British law to cover the situation where British sovereignty was imposed upon nomadic, hunting, food-gathering peoples."<sup>32</sup> In places where the British encountered agricultural populations, Flanagan argues, the colonial authorities "left the local structure of property rights intact."<sup>33</sup> In Flanagan's interpretation, Aboriginal title exists only for nomadic people when their "right to roam at will over the land" is curtailed by the Crown to advance "agricultural civilization" on their former territories.<sup>34</sup> The limitation of Aboriginal usage enabled "the introduction of European methods of agriculture, which would increase the productivity of the soil and enlarge the population." This project of modernization and growth in turn justified the sovereigns' requirement that "the natives ... surrender their right to live off the land and to settle down in a way compatible with European-style agriculture."<sup>35</sup> This interpretation leads Flanagan to conclude that if Aboriginal peoples "had been as advanced as the peoples of the Indian sub-continent, the British would not have invented the concept of Aboriginal title for them."<sup>36</sup> Instead, the new colonial regime that declared itself sovereign would have recognized the pre-existing Aboriginal property rights.<sup>37</sup>

While Flanagan is silent on why Aboriginal people who practiced intensive agriculture did not have their property rights acknowledged, he explicitly explains why Métis fail to possess Aboriginal title. Many Métis families, such as those occupying long river lots in the Red River valley, practiced some form of agriculture and used "the same methods of agriculture as white pioneers."<sup>38</sup> As such, Métis failed to gain Aboriginal rights when they adopted agricultural techniques and

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30. *Ibid* at 239.

31. Adam Gaudry, "Fantasies of Sovereignty: Deconstructing British and Canadian Claims to Ownership of the Historic North-West" (2016) 3 NAIS 46.

32. Flanagan, "Metis Aboriginal Rights", *supra* note 25 at 237.

33. *Ibid* at 238.

34. *Ibid*.

35. *Ibid* at 237.

36. Thomas Flanagan, "The Case against Métis Aboriginal Rights" (1983) 9:3 Can Pub Pol'y 314 at 322 [Flanagan, "The Case against Métis Aboriginal Rights"].

37. *Ibid*.

38. *Ibid* at 321.

crops made available through contact with European populations.<sup>39</sup> According to Flanagan, in short, Métis were simultaneously too nomadic and too sedentary to possess Aboriginal title.

## II. IN DEFENCE OF MÉTIS TITLE: REJECTING THE MOBILITY CRITIQUE

This Part considers the three elements of the test for Aboriginal title—sufficiency, continuity, and exclusivity of occupation—and demonstrates that the mobility of the Métis does not hinder their ability to satisfy each of these requirements.

### A. SUFFICIENT OCCUPATION

The sufficiency criterion comprises two main components: first, that the Aboriginal nation occupied the territory in question at a certain level of intensity and frequency,<sup>40</sup> and second, a date for assessing that occupation.<sup>41</sup> The mobility critique asserts that Métis were too mobile to occupy territory at a sufficient level of intensity and frequency. Skeptics of Métis title have also doubted whether any Métis occupation of territory occurred prior to the relevant date for assessing Aboriginal title.<sup>42</sup> This section allays each of these doubts in turn, beginning with the assessment date.

#### 1. WHAT IS THE APPROPRIATE ASSESSMENT DATE?

The Supreme Court of Canada has consistently identified the assertion of Crown sovereignty as the relevant date for assessing Aboriginal title claims.<sup>43</sup> Debate rages about what this phrase means or should mean.<sup>44</sup> Some argue that a mere claim to sovereignty made by the Crown establishes the relevant date.<sup>45</sup> Others defend “effective control” or “effective Crown sovereignty” as the most appropriate date

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39. See *e.g.* John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22 *Am Indian L Rev* 37 at 44.

40. *Tsilhqot’in*, *supra* note 4 at para 37.

41. *Ibid* at paras 25-26.

42. See *e.g.* Flanagan, “Métis Aboriginal Rights”, *supra* note 25 at 237; Dale Gibson, “Appendix 5A: General Sources of Métis Rights” in Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol 4 (Ottawa: Canada Communication Group Publishing, 1996) 271 at 281 [Gibson, “Appendix 5A”].

43. *Delgamuukw*, *supra* note 9 at para 144; *Tsilhqot’in*, *supra* note 4 at para 25.

44. Thomas Isaac offers a summary and critique of this debate. See Thomas Isaac, *Métis Rights* (Saskatchewan: Native Law Centre, 2008) at 28-30 [Isaac, *Métis Rights*].

45. See *e.g. ibid* at 29-30.

for assessing not only Métis title claims,<sup>46</sup> but also all Aboriginal rights and title claims regardless of whether the claimant is Métis, Indian, or Inuit.<sup>47</sup> While the labels for this latter date vary and include Slattery's "transition date,"<sup>48</sup> Paul Chartrand's "original date,"<sup>49</sup> and Catherine Bell's "date of colonization,"<sup>50</sup> each appears to be synonymous with effective control<sup>51</sup>—the date when Indigenous peoples were no longer able to exercise control over the use of their lands.<sup>52</sup> While their own customs persist in overt and covert ways, they are subject to intensified interference by European-derived institutions after this date. Effective control, according to these scholars, should be measured vis-à-vis the relevant Indigenous nation.

Thomas Isaac is chief among those who endorse a mere claim to sovereignty by the Crown as the relevant date for assessing Aboriginal title.<sup>53</sup> In defense of this position, Isaac points to the Court's consistent use of the word "asserted"

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46. See Bell, *supra* note 8 at 182. Similarly, the trial judge in *Manitoba Metis Federation* purported to use effective control instead of the assertion of Crown sovereignty as the relevant date, although he interpreted the grant of the Hudson Bay Company's Charter in 1670 as evidence of effective control. See *MMF Trial Decision*, *supra* note 23 at paras 573-80; See Darren O'Toole, "Case Commentary: *Manitoba Métis Federation v. Canada and Manitoba*" (2014) 3:1&2 *Aboriginal Policy Studies* 178 at 185 [O'Toole, "Case Commentary"] (for a critique of this interpretation of effective control); Darren O'Toole, "*Blais et Powley*: les doctrines des droits aborigènes des Métis sous la loupe" (2010) 41 *Ottawa L Rev* 59 at 95 [O'Toole, "Sous la loupe"]. But there are critiques of the Supreme Court of Canada's use of effective control as the relevant date for assessing Métis Aboriginal rights claims. See Andrea Horton & Christine Mohr, "*R v. Powley*: Dodging *Van der Peet* to Recognize Metis Rights" (2004-2005) 30 *Queen's LJ* 772 at 796, 798.
47. See Groves & Morse, *supra* note 7 at 272-73; Chartrand, "Métis Aboriginal Title" *supra* note 8 at 152-53, 177. One reason for rejecting differences in timing for Métis, Indian, or Inuit claims is the resulting unfairness. See Catherine Bell and Clayton Leonard, "A New Era in Métis Constitutional Rights: The Importance of *Powley* and *Blais*" (2003-2004) 41 *Alta L Rev* 1049 at 1069; Horton & Mohr, *supra* note 46 at 772. Such unfairness could potentially ground an equality claim under s 15 of the *Charter*. See Groves & Morse, *supra* note 7 at 287.
48. Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can Bar Rev* 196 at 218 [Slattery, "Making Sense"]. See Paul Chartrand, "The Hard Case of Defining 'The Métis People' and Their Rights: A Comment on *R. v. Powley*" (2001-2003) 12 *Const F* 84 at 92 [Chartrand, "The Hard Case"] (for an endorsement of this approach in the Métis context).
49. Paul Chartrand, "The Hard Case", *ibid* at 92.
50. Bell, *supra* note 8 at 190.
51. Chartrand, "Métis Aboriginal Title", *supra* note 8 at 166.
52. See Teillet, *Métis Law*, *supra* note 5, at 29. The mere presence of the Hudson's Bay Company personnel or its post did not constitute effective control. See *ibid* at 171-72.
53. Isaac, *Métis Rights*, *supra* note 44 at 29-30.

as opposed to “effective” when discussing the role of Crown sovereignty in its Aboriginal title decisions.<sup>54</sup> If Aboriginal title is to be assessed from the date of the Crown’s mere assertion of sovereignty, as Isaac contends, then the prospect of the Métis Nation establishing Aboriginal title is slim. King Charles II’s grant of a trading monopoly over Rupert’s Land to the Hudson’s Bay Company seems to constitute an assertion of sovereignty,<sup>55</sup> but this grant occurred in 1670, while the ethnogenesis of the Métis Nation in the northwest is widely agreed to have occurred in the late eighteenth century.<sup>56</sup> Métis could not have sufficiently occupied territory at a time when they did not yet exist.<sup>57</sup>

Isaac’s focus on the language used by the courts rather than the actual results of their decisions opens him to the charge that he is quibbling over semantics. The reasoning underlying the actual dates selected by courts is more nuanced than Isaac’s focus on the term “asserted” suggests. For example, Larry Chartrand’s analysis of British colonial law concludes that mere assertions of sovereignty, such as those contained within documentary claims like the 1670 Charter to the Hudson’s Bay Company, had to be perfected by establishing effective

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54. *Ibid* (quoting *Delgamuukw*, *supra* note 9 at para 145); *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 17, 26, [2004] 3 SCR 511 [*Haida Nation*]; *R v Marshall*; *R v Bernard*, 2005 SCC 43 at paras 48, 72, 129, 132-34, 136-38, [2005] 2 SCR 220 [*Marshall & Bernard*]. Although Isaac was writing before the release of the Supreme Court’s *Tsilhqot’in* decision, that decision continues to use the term “asserted”. *Tsilhqot’in*, *supra* note 4 at paras 14, 22, 25, 29, 50, 57, 58, 59, 69, 75, 81, 83.
55. Thomas Flanagan discusses the assumption that the Hudson Bay Company Charter of 1670 constitutes an assertion of Crown sovereignty. See Thomas Flanagan, “Metis Aboriginal Rights”, *supra* note 25 at 237; *MMF Trial Decision*, *supra* note 46 at para 580. But, several commentators offer a critique of this assumption. See Bell, *supra* note 8 at 212-13; Slattery, “Understanding Aboriginal Rights”, *infra* note 73 at 736 (“It is not enough to found the acquisition of the continent on some bit of puffery in an ancient Charter”).
56. Chartrand, “Métis Aboriginal Title”, *supra* note 8 at 156.
57. This may be the rationale underlying Gibson’s assumption that Métis collectives did not develop until after the assertion of European jurisdiction. Gibson, “Appendix 5A”, *supra* note 42 at 283. For a critique of this assumption, see Chartrand, “Métis Aboriginal Title”, *supra* note 8 at 156.

occupation.<sup>58</sup> This principle was not tested in *Delgamuukw v British Columbia*.<sup>59</sup> The trial judge in *Delgamuukw* adopted 1846—when Britain and the United States settled their disputed land claims to the west of the Rocky Mountains through the Oregon Treaty<sup>60</sup>—as the assessment date.<sup>61</sup> The reasoning in *R v Bernard* provides more explicit support for Chartrand’s analysis. The trial judge in that case rejected the assertion that Britain acquired sovereignty over the relevant area of New Brunswick through the *Treaty of Utrecht* in 1713, given Britain’s limited presence in the area at that time.<sup>62</sup> Instead, the trial judge adopted 1759 as the assessment date, when Britain established effective control in the area (although the trial judge measured Britain’s effective control vis-à-vis France, not vis-à-vis the Indigenous peoples of the area).<sup>63</sup>

Compared to *Bernard*, the reasoning on this issue in *R v Marshall*<sup>64</sup> is sparse. Again the trial judge focused on Britain’s ability to exercise effective control vis-à-vis France, holding that Britain acquired sovereignty over what is now Cape Breton either in 1758 when it captured Louisbourg from the French, or in 1763 when France surrendered the majority of its remaining territories in North America to the British via the *Treaty of Paris*.<sup>65</sup> In *Tsilhqot’in*, the plaintiffs and the province were content to accept 1846, the date of the Oregon Treaty, as the assessment date.<sup>66</sup> Canada argued, however, that Britain’s first assertion of sovereignty over the relevant territory occurred as early as 1579, when Sir Francis Drake claimed part of the west coast of what is now North America, or no later than 1792, when Captain George Vancouver asserted sovereignty on behalf of

58. Chartrand, “Métis Aboriginal Title”, *supra* note 8 at 165-73, especially at 171.

59. *Delgamuukw v British Columbia* (1991), 79 DLR (4th) 185 at para 235, [1991] 5 CNLR xiii (acknowledging that “[n]o specific argument was made by counsel on this question”) [*Delgamuukw SC*]. See Chartrand, “Métis Aboriginal Title”, *supra* note 8 at 165 (explaining that one reason why the assessment date is not often a contentious issue for First Nations is because “First Nations rarely have difficulty in proving they occupied territory prior to a European Crown’s assertion of sovereignty, regardless of the criteria used to establish sovereignty. There is usually ample anthropological and historical evidence available to prove occupation by First Nations well before the date of sovereignty”).

60. See Chartrand, “Métis Aboriginal Title”, *supra* note 8 at 173.

61. *Delgamuukw SC*, *supra* note 59 at para 235.

62. *R v Bernard*, [2000] 3 CNLR 184 at para 92, [2000] NBJ No 138 [*Bernard*].

63. *Ibid.*

64. *R v Marshall*, 2001 NSPC 2, 191 NSR (2d) 323 [*Marshall*].

65. *Ibid* at para 132. An analysis of the date of the assertion of sovereignty over mainland Nova Scotia was unnecessary as the parties agreed that 1713 was the relevant date. See *Marshall* at para 28.

66. *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 at para 587, [2008] 1 CNLR 112 [*Tsilhqot’in trial decision*].

Britain.<sup>67</sup> Canada's argument, like Isaac's, was that the Court's use of the word "asserted" in *Delgamuukw* is determinative. As such, sovereignty need not be effective or established as of the assessment date.<sup>68</sup> The trial judge rejected this argument, stating:

I am not persuaded that private adventurers or commissioned officers of His Majesty's Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. They are, in my view, just words blowing in the wind.<sup>69</sup>

The trial judge held instead that "assertion of sovereignty" refers to the date when the incoming nation exercises effective or de facto control.<sup>70</sup> He rejected a number of proffered assessment dates, including 1792 (when Captain Vancouver claimed sovereignty), 1818 (when Britain entered into a treaty with the United States), and 1821 (when Britain enacted legislation for the territory at issue), because Britain did not exercise actual effective control at any of those times. The trial judge ultimately selected 1846 as the applicable date,<sup>71</sup> but he seems to have felt bound by previous courts' acceptance of that date<sup>72</sup> and thus did not consider whether the Crown exercised effective control at that time.

The Supreme Court's use of the word "asserted" is not determinative. When courts have analyzed this issue, they have sought not the earliest mere assertion of Crown sovereignty but the date when the Crown was in a position to enforce its claims to sovereignty against other European states or when other European states acknowledged the Crown's sovereignty. The courts in these cases did not consider whether the Crown was in any position to enforce its claims

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67. *Ibid* at paras 590, 588.

68. *Ibid* at para 589.

69. *Ibid* at para 596.

70. *Ibid* at para 600.

71. *Ibid* at para 602. The trial judge held that "by 1846 there was a de facto British presence in the area" (*ibid*). However, a mere presence does not necessarily amount to effective control, which the trial judge affirmed as the applicable standard (*ibid* at para 600). In *Powley*, for example, the Supreme Court of Canada held that the Crown established effective control just prior to 1850 because that is when European laws and customs were imposed on the Métis, despite the fact that "Europeans were clearly present" in the area long before 1850. *Powley*, *supra* note 3 at para 39.

72. *Ibid* at para 601.

against Indigenous peoples in the territory at the relevant times.<sup>73</sup> The unstated assumption underpinning this practice seems to be that the effective control exercised by Indigenous peoples over a given territory is of no significance to the Crown's ability to acquire sovereignty over that same territory. In other words, territory effectively occupied by Indigenous peoples is *terra nullius*<sup>74</sup>—not yet possessed by a socially and politically organized community<sup>75</sup>—and thus available for acquisition.

If this is the rationale at play, then the practice of ignoring the presence of Indigenous peoples when determining the date of the Crown's acquisition of sovereignty rests on unstable ground. In *Tsilhqot'in*, a unanimous Court boldly proclaimed, "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada."<sup>76</sup> As Borrows puts it, "[i]f only this declaration were deeply true. Canadian law still has *terra nullius* written all over it."<sup>77</sup> If the Court wants to uphold its unequivocal pronouncement and truly reject the doctrine of *terra nullius*, the way forward is clear. It must abandon the notion that the Crown acquired underlying title to Indigenous land regardless of the presence of Indigenous peoples.<sup>78</sup> The notion that the Crown acquired sovereignty over Indigenous territory once it was able to exercise effective control over Indigenous peoples, though, is also

73. Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 735 ("the courts apparently feel bound to defer to official territorial claims advanced by the Crown, without inquiring into the facts supporting them or their validity in international law") [Slattery, "Understanding Aboriginal Rights"].

74. Commentators have used other terms synonymously with '*terra nullius*'. See e.g. John H Currie, *Public International Law*, 2d ed (Toronto: Irwin Law, 2008) at 275 ("*res nullius*"); MF Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (New York: Negro Universities Press, 1969) at 12 ("*territorium nullius*"); Robert J Miller, "The Doctrine of Discovery" in Robert J Miller et al eds, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) 1 at 7 ("*vacuum domicilium*").

75. See Currie, *supra* note 74 at 275.

76. *Tsilhqot'in*, *supra* note 4 at para 69. A similar pronouncement is made in *Marshall & Bernard*, with LeBel and Fish JJ in concurring reasons holding that "[a]t the time of the assertion of British sovereignty, North America was not treated by the Crown as *res nullius*". *Marshall & Bernard*, *supra* note 54 at para 132. A similar pronouncement is made in the Australian context. *Mabo v Queensland (No 2)*, [1992] HCA 23 at paras 41-42, 175 CLR 1.

77. John Borrows, "The Durability of *Terra Nullius: Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 at 702 [Borrows, "Durability"].

78. *Ibid* at 703, 723-26; John Borrows, "Aboriginal Title in *Tsilhqot'in v. British Columbia* [2014] SCC 44" (Aug 2014) 1:7 Māori L Rev, online: <maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqot'in-v-british-columbia-2014-scc-44> [Borrows, "Aboriginal Title"].



problematic. To the extent that principles of international law allow European states to acquire sovereignty by establishing effective control over territory in the face of competing European occupation,<sup>79</sup> these principles are illegitimate when applied to Indigenous peoples.<sup>80</sup> The legitimacy of customary international law is arguably grounded in the principle of consent, insofar as these rules emerge from nations' consistent behaviour and practice, which can be understood as evincing consent to those practices and hence to the rules underlying them.<sup>81</sup> Indigenous nations neither participated in nor consented to international law principles. As Brian Slattery recognizes, “[a]t best, an exclusive appeal to European practice is capable of proving the existence of a customary rule binding European states among themselves, not one binding other nations and peoples.”<sup>82</sup>

On this view, whatever sovereignty the Crown currently has over Aboriginal title lands is *de facto* and not *de jure*.<sup>83</sup> As Brian Slattery explains, the definition of *de facto* is “illegal or illegitimate but accepted for practical purposes,” in contrast to *de jure*, which means “rightful, legitimate, just...and [in] full compliance with all legal requirements.”<sup>84</sup> This view is consistent with the Court’s description, in two of its decisions, of Crown sovereignty over Aboriginal title lands as *de facto*. First, in *Haida Nation*, the Court explains that the honour of the Crown arises from “the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”<sup>85</sup> Second, in *Taku River* the Court states that the purpose of section

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79. Currie explains that originally nations could acquire sovereignty by means of effective occupation only over territory that was *res nullius* or in other words, *terra nullius*, but some scholars argue that effective occupation can “ground current claims of sovereignty notwithstanding the status of the territory in question at the time such effective occupation commenced”. Currie, *supra* note 74 note at 275-76.

80. See Brian Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) 29:4 Osgoode Hall LJ 681 at 696 [Slattery, “Imperial Claims”].

81. See Currie, *supra* note 74 at 186.

82. Slattery, “Imperial Claims”, *supra* note 80 at 696.

83. See Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 Sup Ct L Rev (2d) 433 at 437-38 (the description of Crown sovereignty as “*de facto*” in *Haida Nation* and *Taku River* means that the assertion of Crown sovereignty “will continue to be legally deficient until there has been a just settlement of [Aboriginal] rights through negotiated treaties) [Slattery, “Honour of the Crown”]. See also Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012) at 34-35.

84. Slattery, “Honour of the Crown”, *ibid* at 437-38, citing *Black’s Law Dictionary*, 5th ed (St Paul: West Publishing Co, 1979) at 375, 382. See also Hoehn, *Reconciling Sovereignties*, *ibid* at 34.

85. *Haida Nation*, *supra* note 54 at para 32.

35(1) is “to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty.”<sup>86</sup>

If the Crown’s sovereignty is merely de facto, then any rationale for employing dates related to Crown sovereignty in the Aboriginal title test evaporates. As a sub-set of Aboriginal rights,<sup>87</sup> Aboriginal title shares its underlying rationale with Aboriginal rights,<sup>88</sup> namely, the common law recognition that the laws of Aboriginal peoples continue in the form of rights after the Crown gains sovereignty over a territory.<sup>89</sup> Both *Delgamuukw* and *Tsilhqot’in* confirm this interpretation. According to these cases, when the Crown asserted sovereignty, it acquired underlying title to the land and the pre-existing rights of Aboriginal peoples continued as a burden on the Crown’s underlying title.<sup>90</sup> The assessment date is the time of the Crown’s assertion of sovereignty, because this is when the Crown acquired underlying title and thus when Aboriginal title crystallized.<sup>91</sup> But if the Crown’s sovereignty is illegitimate and exists only in practice but not in law, then the Crown has no legitimate underlying title to Aboriginal title land.<sup>92</sup> Thus the common law right of Aboriginal title does not exist, because it never crystallized under the common law. On this approach, identifying the relevant assessment date is unnecessary because proving Aboriginal title is unnecessary. The only legitimate laws operating on the land are the relevant Aboriginal ones.<sup>93</sup> Therefore, the relevant Aboriginal nation should be entitled to exercise and

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86. *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42, [2004] 3 SCR 550.

87. *R v Adams*, [1996] 3 SCR 101 at para 25, 138 DLR (4th) 657; *Delgamuukw*, *supra* note 9 at para 137.

88. Slattery, “Understanding Aboriginal Rights”, *supra* note 73 at 737.

89. See Brian Slattery, “Understanding Aboriginal Rights”, *supra* note 73 at 732, 738, 739; Slattery, “Making Sense”, *supra* note 48 at 198; Horton & Mohr, “Dodging *Van der Peet*”, *supra* note 46 at 777-78, n 15.

90. *Tsilhqot’in*, *supra* note 4 at paras 12, 14, 18, 69; *Delgamuukw*, *supra* note 9 at para 145.

91. *Delgamuukw*, *supra* note 9 at 144-45.

92. See Borrows, “Aboriginal Title”, *supra* note 77.

93. See Hoehn, *supra* note 83 at 77 (explaining that “[a]n Aboriginal nation, especially one that has not yet entered into a treaty with the Crown, has a solid legal and constitutional foundation for asserting its continuing sovereignty, as well as concomitant rights to territory and jurisdiction. It can also claim that Crown sovereignty is not legitimate, and therefore remains only *de facto*, until a treaty reconciles the sovereignty of the Aboriginal nation with Canadian sovereignty”).

enforce its laws in the absence of court recognition.<sup>94</sup> The Crown, in contrast, should have the onus to take appropriate steps to legitimate the operation of its own laws.<sup>95</sup> Thus, in any contest between the operation of Crown laws and Aboriginal laws in territory subject to an Aboriginal title claim, the analysis should proceed directly to the issue of extinguishment, and the onus should be on the Crown to demonstrate that the rights of Aboriginal peoples to implement and enforce their own laws have been legitimately extinguished.<sup>96</sup>

Alternatively, if the Court refuses to shift the onus in Aboriginal title cases onto the Crown<sup>97</sup> and instead insists on assessing Aboriginal title claims with reference to Crown sovereignty, then the appropriate assessment date is the time when the Crown acquired de facto sovereignty, or effective control, vis-à-vis Indigenous nations, not the date of mere assertion of sovereignty or of effective control vis-à-vis other European nations. The reason for this is not that the Crown acquired underlying title through effective control. As discussed in Part 2 above, de facto sovereignty is illegitimate sovereignty. Rather, if courts are going to force Aboriginal peoples to prove the existence and operation of their laws, then that proof should at the very least be conducted in the light of an event that

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94. See *Saik'uz First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154, 370 BCAC 193, leave to appeal to SCC refused, [2015] SCCA No 235. The British Columbia Court of Appeal held that a First Nation can bring an action in nuisance against a private company, even though its Aboriginal rights and title claims had not been proven in court or admitted by the Crown. See also *Uashaunnuat (Innus de Uashat et de Mani-Utenam)c Compagnie minière IOC Inc (Iron Ore Company of Canada)*, 2014 QCCS 4403, 254 ACWS (3d) 751, leave to appeal to Que CA refused, 2015 QCCA 2.
95. Kent McNeil, Hoehn, and Borrows present similar arguments that question placing the onus on Aboriginal nations in Aboriginal title cases. See Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37:4 Osgoode Hall LJ at 777-82 [McNeil, "Onus of Proof"]; Hoehn, *Reconciling Sovereignties*, *supra* note 86 at 114; Borrows, "Durability", *supra* note 77 at 728-30.
96. A full analysis of the test for extinguishment of Aboriginal rights and title is beyond the scope of this article. Suffice it to note that if courts are truly to reject the doctrine of *terra nullius*, then extinguishment by unilateral Crown legislation would be impossible as long as the Crown lacks legitimate underlying title and hence legitimate jurisdiction to enact such legislation.
97. See McNeil, "Onus of Proof", *supra* note 95 at 782 (for an acknowledgement of the unlikelihood of the Supreme Court shifting the onus onto the Crown in Aboriginal title cases).

had some actual impact on the existence and operation of those laws.<sup>98</sup> Thus, if an assessment date must be established, then a better date for both Aboriginal title and Aboriginal rights is the time of effective control vis-à-vis the relevant Indigenous peoples.<sup>99</sup>

If effective control vis-à-vis the Métis Nation is the assessment date, then Métis in the prairies are not precluded from establishing Aboriginal title. When Britain granted the Charter to the Hudson's Bay Company in 1670, it did not have effective control over Rupert's Land. Indeed, at that time few British subjects had even travelled that far inland. Nor did Britain have effective control of the prairies in 1763 when it purported to accept a surrender of territory, including a southern portion of the prairies, from France in the *Treaty of Paris*.<sup>100</sup> While the Crown may have claimed sovereignty over the prairies in 1670 and again (partially) in 1763, Métis repeatedly and successfully challenged its effective control until the late nineteenth century. After 1670, the Métis undertook collective political action that undermined key British policies in the Métis homeland. At Red River, for example, Métis were successful in expelling Scottish settlers in 1816, dismantling the Hudson Bay Company's economic monopoly in 1849, and effectively replacing the Company's government in 1869 in order

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98. As Chartrand notes, using effective control as the assessment date would not completely eliminate the discrimination inherent in Aboriginal rights law, but it would ascribe "at least some limited legal significance to Indigenous peoples' actual presence in the relevant territory". Chartrand, "Métis Aboriginal Title", *supra* note 8 at 177. To be clear, we are not endorsing effective control as an appropriate assessment date, as it still embodies the notion that might is right. Our point is assessing effective control vis-à-vis the relevant nation is better than assessing effective control vis-à-vis European nations, and better than using the mere assertion of sovereignty as the assessment date, but placing the onus on the Crown in Aboriginal title cases is the best option.

99. This is consistent with arguments that Aboriginal rights should be assessed as of the date of effective control, as opposed to the point of contact, because a close reading of the jurisprudence establishes that the courts understand "contact" not as a moment in time but as a period of time that begins with the initial meeting with Europeans and ends with effective control. Chartrand, "Métis Aboriginal Title", *supra* note 8 at 163-64; Horton & Mohr, *supra* note 46 at 799. It is also consistent with the argument that to be legitimate, the Crown's assertion of sovereignty must be confirmed with effective control. Chartrand, "Métis Aboriginal Title", *supra* note 8.

100. As discussed above, the trial judge in *Marshall* adopted either 1763 as the date of British sovereignty, on account of the *Treaty of Paris*, or 1758, on account of the fall of Louisbourg (see the text accompanying *supra* note 65). Similarly, the Privy Council regarded Treaty 3 territory, which is within the Hudson's Bay drainage basin and thus purportedly within the territory covered by the 1670 Charter, to have been ceded to Great Britain by France by means of the *Treaty of Paris* in 1763. *St Catherine's Milling and Lumber Co v The Queen (Ontario)*, [1888] UKPC 70, at para 52, 14 App Cas 46.

to negotiate entry into Canadian Confederation.<sup>101</sup> This history is hardly a convincing display of the Crown's effective control of the region.

Although the British Parliament purported to pass laws and exercise jurisdiction over the plains in the first half of the nineteenth century, *R v Goodon* held that it “is not clear that any of these laws and regulations had much impact on” the hunting activities of the Métis, who continued to engage in their pattern of buffalo hunting in the face of European laws.<sup>102</sup> According to the court, the evidence established that “although attempts were made to control the customs, practices, and economic life of the Metis prior to 1870, these attempts were largely ineffective.”<sup>103</sup> Thus, the court accepted 1870 as the date of effective control for the “postage stamp” province of Manitoba as it existed at that time, and 1880 as the date of effective control for the remainder of what is now southern Manitoba.<sup>104</sup> In *R v Belhumeur*, the court held that effective European control vis-à-vis the Métis developed in the Qu'Appelle Valley and environs “from 1882 to the early 1900s.”<sup>105</sup> All of these dates are well after the ethnogenesis of the Métis Nation and thus do not preclude the existence of Métis title.

To summarize, the notion that the Crown's mere assertion of sovereignty should serve as the assessment date is unpersuasive. An analysis of the case law shows that the phrase “assertion of sovereignty” has been understood in terms of the Crown's ability to exercise effective control, albeit vis-à-vis other European nations. *Tsilhqot'in* points toward the rejection of the *terra nullius* doctrine and hence the notion that the Crown acquired underlying title to Aboriginal title land regardless of the presence of Indigenous peoples. On this view, given that the Crown lacks legitimate underlying title to the land, Aboriginal nations—including the Métis Nation—that have Aboriginal title claims are entitled to exercise and enforce their laws over their land forthwith. Despite the logic of this position, courts may insist on subjecting Aboriginal claimants to the Aboriginal title test. If so, the more appropriate assessment date is the time when the Crown established de facto sovereignty, or in other words, effective control vis-à-vis the Aboriginal claimant nation. The date of effective control will differ across the country and depend on the history of the particular region at issue. Most

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101. See Gaudry, *supra* note 31. See also *R v Goodon*, 2008 MBPC 59 at para 69, 234 Man R (2d) 278 [*Goodon*].

102. *Goodon*, *supra* note 101 at para 69.

103. *Ibid.*

104. *Ibid.*

105. *R v Belhumeur*, 2007 SKPC 114 at paras 167, 190, 301 Sask R 292.

scholars agree, however, that at least some Métis communities emerged prior to the beginning of effective Crown control within their territory.<sup>106</sup>

## 2. WAS THE OCCUPATION SUFFICIENT?

Prior to the Supreme Court's *Tsilhqot'in* decision, jurisprudence seemed to indicate that occupation by nomadic and semi-nomadic Aboriginal communities was insufficient to establish Aboriginal title. If this and the myth of Métis transience were true, then critiques such as those espoused by Flanagan, discussed above, would be well founded. This section argues, in contrast, that neither of these assumptions is true. The Métis were not aimless nomads lacking any specific territory.<sup>107</sup> Moreover, *Tsilhqot'in* establishes that the standard for sufficiency of occupation is not as high as that articulated by the Court in *Marshall & Bernard* or by the British Columbia Court of Appeal in *Tsilhqot'in*. As Kent McNeil demonstrates, the latter court applied a standard for sufficiency of occupation that is even higher than the standard for adverse possession.<sup>108</sup> The Supreme Court rejected this approach, establishing that the standard for sufficiency of occupation for proving Aboriginal title is that of a general occupant,<sup>109</sup> not an adverse possessor.<sup>110</sup> To establish sufficiency of occupation, a general occupant must demonstrate an intention to hold the land for its own purposes and communicate this intention to third parties.<sup>111</sup> This is precisely what the Métis did when they asserted that title to Rupert's Land was shared between themselves and First Nations to the exclusion of the Hudson's Bay Company and the Crown, and then substantiated this assertion by following their own laws in Rupert's Land rather than those of the Hudson's Bay Company, prior to effective Crown control.

Before *Tsilhqot'in*, when *Marshall & Bernard* was the Court's last word on Aboriginal title, the prospects of nomadic or even semi-nomadic Aboriginal communities meeting the sufficient occupation test seemed slim. The Court adopted what has come to be known as a site-specific approach.<sup>112</sup> In *Marshall*,

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106. See Larry Chartrand, "The Definition of Métis Peoples in Section 35(2) of the *Constitution Act, 1982*" (2004) 67 Sask L Rev 209 at 229-30 [Chartrand, "Definition"]; Groves & Morse, *supra* note 7 at 273-74; Chartrand, "The Hard Case", *supra* note 48 at 91.

107. See Flanagan, "Métis Aboriginal Rights", *supra* note 25 at 237.

108. Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" 91 (2012) Can Bar Rev 745 at 755 [McNeil, "Site-Specific or Territorial?"].

109. *Tsilhqot'in*, *supra* note 4 at para 39.

110. *Ibid* at para 38.

111. *Ibid* at paras 38, 39, 41.

112. See Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69:2 Sask L Rev 281 at 304; McNeil, "Site-Specific or Territorial?", *supra* note 107 at 752.

for example, the Court rejected the Aboriginal title claim because of the lack of evidence demonstrating the Mi'kmaq Nation's regular use of the exact sites where Mr. Marshall had cut timber.<sup>113</sup> The majority emphasized the important role of the Aboriginal perspective when assessing the standard of occupation required to establish Aboriginal title.<sup>114</sup> In the end, however, Chief Justice McLachlin (writing for the majority) held that an Aboriginal nation must demonstrate that its members occupied their land in a way that would be sufficient to establish title under the common law.<sup>115</sup> Although the majority did not rule out the possibility of establishing title on the basis of hunting or fishing,<sup>116</sup> it made the likelihood of such an occurrence seem remote: "Typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right, but not to Aboriginal title."<sup>117</sup> According to the majority, even if an Aboriginal nation returned to the same hunting or fishing site year after year since time immemorial, the fact that they left the area for part of each year meant that "the land could be traversed and used by anyone."<sup>118</sup> In this scenario, the majority held, the nation has Aboriginal hunting or fishing rights but not Aboriginal title over the area in question.<sup>119</sup>

The British Columbia Court of Appeal endorsed the site-specific approach in *Tsilhqot'in*.<sup>120</sup> It held that Aboriginal title can exist only over specific tracts of land with defined boundaries.<sup>121</sup> Although the Tsilhqot'in Nation limited their Aboriginal title claim to five per cent of their traditional territory,<sup>122</sup> the Court of Appeal held that they had made a broad "territorial" claim instead of a claim to specific sites.<sup>123</sup> To succeed, the Tsilhqot'in Nation needed to identify specific

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113. *Marshall & Bernard*, *supra* note 54 at paras 79-80.

114. *Ibid* at paras 45-48, 50-52, 54, 60, 64, 68-69, 70, 78.

115. *Ibid* at paras 54, 60, 61, 66, 69, 70.

116. *Ibid* at para 56, 58.

117. *Ibid* at para 58.

118. *Ibid*.

119. *Ibid* at para 58. See also para 81. The majority quoted with approval the following statement by the trial judge in *Bernard*: "Occasional forays for hunting, fishing and gathering are not sufficient to establish Aboriginal title in the land." See also Borrows, *Freedom*, *supra* note 6 at 30 (explaining the Supreme Court of Canada's characterization of the Mi'kmaq people in *Marshall & Bernard* as being too mobile to establish sufficient occupation).

120. *Tsilhqot'in Nation v British Columbia*, 2012 BCCA 285 at para 224, 33 BCLR (5th) 260 [*Tsilhqot'in Court of Appeal*]. See also McNeil, "Site-Specific or Territorial?", *supra* note 108 at 759.

121. *Tsilhqot'in Court of Appeal*, *supra* note 120 at para 230. See also McNeil, "Site-Specific or Territorial?", *supra* note 108 at 753.

122. *Tsilhqot'in*, *supra* note 4 at para 6.

123. *Tsilhqot'in Court of Appeal*, *supra* note 120 at para 217.

sites within their territory and provide evidence that they occupied those sites intensively and regularly, for example by building and occupying permanent villages or by cultivating or enclosing fields.<sup>124</sup> Activities like hunting, fishing, and gathering could only ground title if they occurred intensively “over a definite tract of land the boundaries of which are reasonably capable of definition.”<sup>125</sup> The Tsilhqot’in Nation’s claim was not framed in terms of occupation of specific sites, so it failed.<sup>126</sup> If this is the standard of occupation required to prove Aboriginal title, and if the Métis were highly nomadic, then they will have great difficulty establishing Aboriginal title, and Flanagan’s argument would seem to be sound.

Both premises of this argument should be rejected, however. With respect to the first, the Supreme Court in *Tsilhqot’in* explicitly rejected the Court of Appeal’s site-specific approach and granted a declaration of Aboriginal title to the Tsilhqot’in Nation throughout a broad territory.<sup>127</sup> Even though the Tsilhqot’in Nation was semi-nomadic, meaning that some areas of their territory remained unoccupied for portions of each year, their occupation was still sufficient to establish Aboriginal title.<sup>128</sup> Living in specific village sites and working on farms are not the only activities that amount to sufficient occupation.<sup>129</sup> Rather, the Court emphasized that hunting, fishing, trapping, foraging, cutting grass or trees, and merely waking around the land<sup>130</sup> can also establish sufficient occupation.<sup>131</sup>

In rejecting the site-specific approach, the Court explained that the standard of occupation required to prove adverse possession is not the correct standard for establishing sufficiency of occupation in an Aboriginal title claim.<sup>132</sup> Instead, Aboriginal title claimants must meet the requirements for general occupancy at common law,<sup>133</sup> which is a lower standard than that for adverse possession.<sup>134</sup> Unlike an adverse possessor, a general occupant is not trying to oust the original

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124. *Ibid* at paras 215-16, 221, 230.

125. *Ibid* at para 230.

126. *Ibid* at paras 126, 240, 344. The Court of Appeal held that its decision did not preclude the Tsilhqot’in Nation from bringing a new claim in the future for Aboriginal title formulated in terms of specific sites (*ibid* at para 241).

127. *Tsilhqot’in*, *supra* note 4 at paras 9, 42-43, 153.

128. *Ibid* at paras 55-56.

129. *Ibid* at para 42.

130. *Ibid* at para 39.

131. *Ibid*.

132. *Ibid* at para 38.

133. *Ibid* at para 39.

134. *Tsilhqot’in*, *ibid* at para 40; *R v Marshall*, 2003 NSCA 105 at para 37, 218 NSR (2d) 78, Cromwell JA [*Marshall Court of Appeal*]. *Marshall Court of Appeal* adopts the analysis of Kent McNeil.



owner. Rather, a general occupant asserts “possession of land over which no one else has a present interest or with respect to which title is uncertain.”<sup>135</sup> As McNeil explains, the standard applied by the British Columbia Court of Appeal in *Tsilhqot’in* was incorrect because it was even higher than that applied in adverse possession cases, where a wrongdoer attempts to oust the rightful owner by trespassing on the land for a sufficient period of time.<sup>136</sup> But as McNeil recognizes, “Aboriginal peoples claiming Aboriginal title are obviously *not wrongdoers*—on the contrary, they are claiming title because they were in *rightful occupation* of their traditional lands at the time of Crown assertion of sovereignty.”<sup>137</sup> Although the Supreme Court does not explicitly articulate this rationale in *Tsilhqot’in*, it illustrates why the standard of a general occupant is preferable to that of an adverse possessor in Aboriginal title cases.<sup>138</sup>

Some may object that while this rationale might apply to Inuit and First Nations, the same cannot be said for the Métis Nation. Some have argued that Métis were not the original owners of the land because Métis did not even exist until after Europeans arrived.<sup>139</sup> The issue is sometimes framed as a response to the term “Aboriginal.”<sup>140</sup> Some have claimed that Métis are not “Aboriginal” because this term means having “original possession of the soil”<sup>141</sup> or “from the beginning,”<sup>142</sup> but Métis were not here from the beginning.<sup>143</sup> Thus, according to this argument, Métis should not benefit from the lower standard for assessing occupation because they were not original owners of the land.

This argument is unpersuasive because it rests on a mistaken assumption about the appropriate assessment date for Aboriginal title, namely, the time of initial European contact. As discussed above, either the test for Aboriginal title

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135. *Tsilhqot’in*, *supra* note 4 at para 39.

136. See McNeil, “Site-Specific or Territorial?,” *supra* note 108 at 758.

137. *Ibid* at 758 [emphasis added].

138. Note that the concept of general occupancy is a common law concept which does not reflect the understanding of at least some Indigenous peoples regarding their relationship to land.

139. See Flanagan, “Métis Aboriginal Rights,” *supra* note 25 at 236.

140. See Bell, “Métis Constitutional Rights,” *supra* note 8 at 192 (for a discussion of possible implications of the word “Aboriginal” in defining Métis rights).

141. See Flanagan, “Métis Aboriginal Rights,” *supra* note 25 at 236.

142. See Gibson, “Appendix 5A,” *supra* note 42 at 275 (for use of the “from the beginning” phrase).

143. In response to this argument, Darren O’Toole argues in favour of employing the French translation of s 35, rather than the English, in the case of the Métis. According to O’Toole, the French term “autochtone” does not have the same connotation of “from time immemorial” as does the term “Aboriginal”. O’Toole, “Sous la loupe,” *supra* note 45 at 75, 84. Chartrand makes a similar argument extolling the virtues of the French term. See Paul Chartrand, “The Hard Case,” *supra* note 48 at 91.

should be reworked completely by placing the initial onus on the Crown instead of the Aboriginal nation, or if the Court declines to implement this option, then the more appropriate assessment date is the time of de facto Crown sovereignty, or in other words, effective control vis-à-vis the Aboriginal claimant nation. The historical evidence indicates that at least some Métis communities emerged before the Crown established effective control of Métis territory.<sup>144</sup> In at least some instances, therefore, the Métis are the original owners of their land insofar as they were exercising jurisdiction and enforcing Métis laws in their territory prior to the Crown doing so, or in other words, prior to de facto Crown sovereignty.<sup>145</sup>

This brings us to a discussion of the standard of occupation required for a general occupant to establish possession of land, and then to an analysis of whether the Métis Nation fulfilled that standard prior to effective British control.

A general occupant must demonstrate that “it has historically acted in a way that would communicate to third parties that it held the land for its own purposes.”<sup>146</sup> This standard is to be assessed contextually, which means at least two things. First, a court must consider both the common law perspective and the Aboriginal perspective when applying this standard.<sup>147</sup> The Aboriginal perspective includes, among other things, the laws and customs of the Aboriginal claimant nation.<sup>148</sup> Second, the types of acts that can satisfy the standard will vary, depending on the character of the land over which title is asserted and the character of the Aboriginal nation.<sup>149</sup> In other words, when determining whether the land was used at a sufficient level of intensity and frequency, a court will consider the ways in which the land was capable of being used in light of the Aboriginal group’s “size, manner of life, material resources... technological abilities,” and laws.<sup>150</sup> A contextual analysis recognizes that an Aboriginal nation might have a different conception of possession of land than that espoused by the common law,<sup>151</sup> so the standard of occupation must “reflect the way of life of

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144. See Chartrand, “Definition”, *supra* note 106 at 229-30; Groves & Morse, *supra* note 7 at 273-74; Chartrand, “The Hard Case”, *supra* note 48 at 91.

145. There is a discussion of various instances of Métis law implemented by the Métis Nation prior to effective Crown control. See John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 86-91; Karen Drake, “R. v. Hirsekorn: Are Métis Rights a Constitutional Myth?” (2013) 92:1 Can Bar Rev 149 at 167-69.

146. *Tsilhqot’in*, *supra* note 4 at para 38.

147. *Ibid* at para 34.

148. *Ibid* at paras 35, 41.

149. *Ibid* at paras 37, 38.

150. *Tsilhqot’in*, *ibid* at para 35. Slattery, “Understanding Aboriginal Rights”, *supra* note 73 at 758.

151. *Tsilhqot’in*, *ibid* at para 41.

the Aboriginal people, including those who were nomadic or semi-nomadic.”<sup>152</sup> According to this approach, activities like fishing, hunting, and gathering should be given more weight in the context of a large expanse of uncultivated territory than in the context of enclosed, cultivated land.<sup>153</sup> The question, then, is whether the Métis Nation communicated to third parties that it intended to hold land for itself by using the land in the way it was capable of being used, given the characteristics of the land and the Métis Nation’s own laws and customs.

To answer this question, it is first necessary to recognize that the myth of Métis transience is just that, a myth. Brenda Macdougall’s meticulous review of archival records<sup>154</sup> demonstrates that the Métis in northwestern Saskatchewan were not aimless nomads, untethered to any particular territory. The Métis of that region travelled within a “well-defined and regionally bounded geography” which they identified as their homeland.<sup>155</sup> In contrast to Flanagan’s suggestion that Métis lacked distinct territory, Macdougall and Nicole St-Onge demonstrate that Métis hunting brigades traversed significant territories and had common destinations and points of origin. Red River, Whitehorse Plains, the Cypress Hills, Wood Mountain, St Laurent, and Round Prairie are all common reference points for nineteenth century Métis families, serving as important wintering sites and staging points for Métis hunts.<sup>156</sup> Likewise, the court in *Goodon* held that Métis of southern Manitoba followed a seasonal pattern, returning to the same summering and wintering sites each year.<sup>157</sup> This particular Métis community’s territory was vast, but not undefined; it included “all of the area within the present boundaries of southern Manitoba from the present day City of Winnipeg and extending south to the United States and northwest to the Province of Saskatchewan including

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152. *Ibid* at para 38.

153. *Ibid* at para 40; *Marshall Court of Appeal*, *supra* note 134 at para 137.

154. See Macdougall, *One of the Family*, *supra* note 24 at xvi, 1 (providing an account of the author’s methodology).

155. Macdougall, *ibid* at 126.

156. Brenda Macdougall & Nicole St-Onge, “Rooted in Mobility: Métis Buffalo-Hunting Brigades” (2013) 71 *Manitoba History* 16 at 22, 25. See also Louis Goulet, as told to Guillaume Charette, *Vanishing Spaces: Memoirs of a Prairie Métis*, translated by Ray Ellenwood (Winnipeg: Editions Bois-Brûlés, 1976) 43, 60-62; George Woodcock, *Gabriel Dumont: The Métis Chief and his Lost World* (Edmonton: Hurtig Publishers, 1975) at 192-93; Borrows, *Freedom*, *supra* note 6 at 21 (explaining that “Indigenous peoples are not rootless. Our travels usually occur in relationship to territories with which we have long-standing associations.... Ancient homelands remain a pivotal axis around which most Indigenous peoples’ lives revolve”).

157. *Goodon*, *supra* note 101 at paras 35-36.

the area of present day Russell, Manitoba.<sup>158</sup> Characterizing Métis occupation of territory as cyclical is a more accurate representation of Métis life than Flanagan's description of Métis as wandering nomads without a clear sense of territory.<sup>159</sup> Métis who were engaged in this cyclical movement between wintering sites, gathering points for the hunt, trading posts, and Red River seem to understand their relationship to territory in this manner. Louis Goulet, a nineteenth century Métis hunter, describes this movement between regular sites of occupation:

As soon as the snow melted in spring, we would leave our winter camp as we always did and head for another location, either farther south or farther north, around Fort Layusse (Edmonton), or St. Albert and beyond [and then] we'd return to the Red River...<sup>160</sup>

The occupation of Métis territory may not have been permanent, but it was regularized and predictable by place and season, as evidenced by the Métis communities who still live in these places.

Much of this movement was for hunting buffalo. The Métis buffalo hunt satisfies a contextual application of the standard for sufficient occupation within the Aboriginal title test, insofar as Métis used the land in the way it was suitable for being used and in accordance with their own laws. It was also an effective use of the land, because it was a more assured occupation than farming throughout most of the nineteenth century.<sup>161</sup> The Red River Settlement experienced numerous agricultural failures. The Red often flooded<sup>162</sup> and as late as 1868, Red River experienced a grasshopper infestation that consumed most of the settlement's crops.<sup>163</sup> Even in an era of declining buffalo, the buffalo hunt was a more secure living than agricultural settlement, and to insist upon a completely sedentary existence would have meant the ill health or even death of many families. From the standpoint of Métis hunting families, this ongoing use of territory through movement perpetuated their title to the Northwest Territories.

The great buffalo hunts of the nineteenth century formed the basis of Métis governance. These were the means by which Métis vested their territorial control. The establishment of buffalo hunt governance utilized a long-standing

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158. *Ibid* at para 48.

159. Macdougall & St-Onge, *supra* note 156 at 26.

160. Charette, *supra* note 156 at 53.

161. See Gerhard J Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996) at 139.

162. Alexander Ross, *The Red River Settlement: its rise, progress, and present state, with some account of the native races and its general history to the present day* (Edmonton: Hurtig Publishers, 1972) at 107, 114.

163. Charette, *supra* note 156 at 53.

and agreed-upon system to assert political authority over Métis and others who hunted within a given territory. Goulet's memoirs describe large assemblies of Métis families and other Indigenous people gathering at predetermined times "to elect the first and second leader along with a council of at least twelve" as well as setting the "rules of order for the march."<sup>164</sup> Métis hunter Peter Erasmus described the goal of the hunt as ensuring the "well-being of the majority," putting in place a customary law of "communal sharing" among families engaged in the hunt.<sup>165</sup> In his memoir, Louis Riel connected buffalo hunt governance with Métis ownership of territory. By inverting the claims of Company rule in Rupert's Land, Riel argued that Métis law effectively governed many of the fur trade communities throughout the region, that "the Hudson's Bay Company was surrounded by Métis government all through the fertile zone," and that Company men in "the camps, in the 'wintering over' quarters, [and] in the Métis settlements, hunted, traded and carried on business . . . under the protection of Métis laws."<sup>166</sup>

Métis governed themselves and access to their shared territory through the buffalo hunt, a complex socio-political and economic formation that possessed constitutional qualities for the Métis. A formal election by an assembly of families occurred at the start of every hunt to appoint a leader. This process of forming an assembly and conducting an election was treated as a constitutional process that asserted Métis law and territorial access on the prairies. After the selection of the hunt's leadership, the final responsibility of the assembly of families was the codification of the Law of the Hunt, a body of basic rules that all party members were obliged to follow. By the 1840s, general rules appear to be more or less common in all the hunts. Despite such recurrence, the rules still required ratification by the assembled families to have legal authority. These rules, recorded by Alexander Ross in 1840, can be generalized to other hunts:

1. No buffalo to be run on the Sabbath-day.
2. No party to fork off, lag behind, or go before, without permission.
3. No person or party to run buffalo before the general order.
4. Every captain, with his men, in turn, to patrol the camp and keep guard.

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164. *Ibid* at 17-19.

165. Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow-Alberta Institute, 1976) at 229.

166. Riel, *supra* note 1 at 204. See also Signa AK Daum Shanks, *Searching for Sakitawak: Place and People in Northern Saskatchewan's Île-à-la-Crosse* (PhD Dissertation, University of Western Ontario, 2015) [unpublished] at 99-151, 127-28, 140, 147-48, 150 (documenting the ways in which Métis laws and legal norms consistently governed Île-à-la-Crosse in the nineteenth century, despite various attempts by the Hudson's Bay Company to implement and enforce British law).

5. For the first trespass against these laws, the offender to have his saddle and bridle cut up.
6. For the second offence, the coat to be taken off the offender's back, and be cut up.
7. For the third offence, the offender to be flogged.
8. Any person convicted of theft, even to the value of a sinew, to be brought to the middle of camp, and the crier to call out his or her name three times, adding the word 'Thief,' at each time.<sup>167</sup>

These rules represent a fairly regularized approach to the hunt government. Each of the eight rules targeted behaviours that were most likely to create dissension in a Métis camp, such as hunting the buffalo ahead of the camp.<sup>168</sup> No hunter could go ahead of the main party or break off from it without permission of the council. This rule prevented opportunistic hunting by enterprising individuals whose early runs at buffalo scared the herds away from the main camp. These "laws of the hunt" reinforced the well-known rule that the hunt would engage in "communal sharing regardless of the number of animals killed by any one man," so that every cart on the trip received enough meat to support its family.<sup>169</sup> To further ensure the communal benefit of the hunt, the hunt chief was also responsible for making "at least one free run through the herd, dedicating the beasts he then slaughtered to the old and the sick who could not hunt for themselves."<sup>170</sup> The constitutional basis of the entire political assembly, then, was one of equity among families, recognition of familial independence, and equal interest of all in the success of the hunt. The entire hunt revolved around these basic principles. Only after the "semi-religious ceremony" of electing the hunt's leadership would the Council's decisions be considered "law, entirely and everywhere, for the duration of the journey."<sup>171</sup>

By implementing and following their own laws rather than those of the Hudson's Bay Company throughout their territory, Métis demonstrated an intention to hold the land, with First Nations, for their own purposes. Through the hunt, Métis asserted their political authority and territoriality in the places they inhabited throughout the year. It was through this ongoing use that they established and maintained their occupation of territory. They also understood that their claim to territory—their Aboriginal title—was both a prior and superior

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167. Ross, *supra* note 162 at 249-50.

168. Woodcock, *supra* note 156 at 98.

169. Erasmus, *supra* note 165 at 229.

170. Woodcock, *supra* note 156 at 76.

171. Charette, *supra* note 156 at 21.

claim to the Crown's. When Canada attempted to undercut Métis control of territory, Riel responded:

What did the Government do? It laid its hands on the land of the Métis as if it were its own. By this one act it showed its plan to defraud them of their future...not only did it take the land from under their feet, it even took away their right to use it.<sup>172</sup>

Even after 1870, Métis continued to assert both their title and their rights. In the winter of 1880-1881, the new Canadian authorities prevented Métis living under the leadership of Gabriel Dumont from cutting wood for heat and building materials. In his memoirs, Dumont notes that Métis resented this: “[We] left Manitoba...because we were not free. And now they want to bother us again, to make us pay for cutting firewood.”<sup>173</sup> Métis in Saskatchewan felt entitled to cut firewood: the right to do so stemmed from their ownership of the country. Dumont's sentiment is particularly telling here in the sense that he felt they remained free in Saskatchewan, unlike many Métis in Manitoba who lived under Canadian authority, and that the Lieutenant-Governor of the Northwest Territories was testing Métis and their ability to continue to use their lands. Dumont's demand that the Métis be allowed to continue cutting wood unimpeded can be viewed not just as the exercise of an Aboriginal right, but rather as Riel states, the perpetuation of “Métis law” governing Métis lands. In this case, Dumont's people continued to govern their land into the 1880s. Their laws and ownership sustained an inherent right to harvest the lands and resources, a right that was not granted to them by the newly arrived Canadian authorities.

Despite Métis mobility and some limited Canadian presence, Métis leaders still asserted ownership over their lands. Since prairie life necessitated movement, Métis did not see their cyclical travels as undermining the ownership of their territory. Upon the arrival of Canadian authority in their country, Métis continued to assert title to their land—a title they endeavoured to keep intact even if Canadian authorities desired otherwise.

## B. CONTINUOUS OCCUPATION

If the aboriginal title claimant relies on present occupation as proof of pre-sovereignty occupation, then it must also demonstrate continuity between present and pre-sovereignty occupation.<sup>174</sup> Isaac doubts that the Métis Nation

172. Riel, *supra* note 1 at 205.

173. Gabriel Dumont, *Gabriel Dumont: Memoirs: The Memoirs as Dictated by Gabriel Dumont*, edited by Denis Combet, translated by Lise Gaboury-Diallo (Saint-Boniface: Les Editions Du Ble, 2006) at 47.

174. *Tsilhqot'in*, *supra* note 4 at para 45; *Delgamuukw*, *supra* note 9 at para 152.

could satisfy this requirement.<sup>175</sup> He notes that after the Northwest Resistance, many members of the Métis Nation went “underground” in order to avoid public persecution.<sup>176</sup> Isaac speculates that the Métis underreported their presence, and as a result, documentary evidence of Métis occupation from pre-sovereignty until the present is likely lacking.<sup>177</sup>

Overcoming this perceived obstacle is a rather simple matter. To avoid having to prove continuity from the time before British sovereignty, an Aboriginal claimant must simply avoid relying on present occupation as evidence of pre-sovereignty occupation. The continuity requirement applies only when the Aboriginal claimant relies on present occupation to prove pre-sovereignty occupation. This is clear from *Delgamuukw*, in which Chief Justice Lamer explains that using present occupation to establish pre-sovereignty occupation is an alternative option for Aboriginal claimants who might otherwise find it difficult to muster evidence dating back to the time of pre-sovereignty.<sup>178</sup> Present occupation can be a persuasive indication of pre-sovereignty occupation, but only if that occupation was substantially continuous.<sup>179</sup> Thus, for those who have sufficient evidence of pre-sovereignty occupation without relying on present occupation, there is no requirement to prove continuous occupation.<sup>180</sup>

The majority’s reasons in *Delgamuukw* point towards a persuasive rationale for not imposing continuity as a stand-alone requirement. As Chief Justice Lamer notes, any lack of continuity may be the result of “the unwillingness of European colonizers to recognize Aboriginal title.”<sup>181</sup> Imposing continuity as a stand-alone requirement could result in an implicit extinguishment of Aboriginal title in such cases. As Slattery explains, the Supreme Court of Canada in *Guerin* affirmed that Aboriginal rights, including Aboriginal title, are legal rights. Thus, as Justice Hall observed in *Calder*, they can only be extinguished by competent

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175. Isaac, *Métis Rights*, *supra* note 44 at 30-31; Thomas Isaac, *Aboriginal Law: Commentary and Analysis* (Saskatoon: Purich Publishing Limited, 2012) at 401-402 [Isaac, *Aboriginal Law*].

176. Isaac, *Métis Rights*, *supra* note 44 at 31; Isaac, *Aboriginal Law*, *supra* note 179 at 402.

177. Isaac, *Métis Rights*, *supra* note 44 at 30-31; Isaac, *Aboriginal Law*, *ibid*.

178. *Delgamuukw*, *supra* note 9 at para 152.

179. *Delgamuukw*, *ibid* at para 152.

180. See Kent McNeil, “Continuity of Aboriginal Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing Ltd, 2004) 127 at 135 [McNeil, “Continuity”].

181. *Delgamuukw*, *supra* note 9 at para 153.



legislation, not by mere executive acts.<sup>182</sup> Imposing continuity as a stand-alone requirement would contradict this fundamental principle by sanctioning the implicit extinguishment of Aboriginal title by those executive acts that prevented Aboriginal peoples from engaging in continuous occupation of their territories.<sup>183</sup> Likewise, numerous decisions establish that the onus of proving extinguishment is on the party alleging extinguishment, which is normally the Crown.<sup>184</sup> Imposing continuity as a stand-alone requirement would reverse the onus, insofar as Aboriginal claimants would then “be required in effect to prove that their title had not been extinguished or otherwise lost.”<sup>185</sup>

One may be forgiven for mistakenly believing that continuity is a stand-alone requirement, given the majority’s reasoning in *Marshall & Bernard*. There, Chief Justice McLachlin describes the test for continuity without acknowledging that continuity is only required when the Aboriginal nation relies on present occupation to prove pre-sovereignty occupation.<sup>186</sup> This slip is of little consequence, though, given that the analysis of occupation in *Marshall & Bernard* did not turn on whether that occupation was continuous.<sup>187</sup> Likewise, the Court in *Marshall & Bernard* did not reject Justice Cromwell’s conclusion on behalf of a majority of the Nova Scotia Court of Appeal that continuity is not a

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182. Slattery, “Understanding Aboriginal Rights”, *supra* note 73 at 749; *Calder v British Columbia (Attorney-General)*, [1973] SCR 313 at para 150, 34 DLR (3d) 145, Hall J [*Calder*]. Hall J explains that because Aboriginal title is a legal right, “it could not...be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation” [*Calder*]; *Guerin v R*, [1984] 2 SCR 335 at para 80-83, 13 DLR (4th) 321, Dickson J. See also *Sparrow*, *supra* note 3 at para 37 (citing with approval Hall J’s analysis of extinguishment in *Calder*); *Tsilhqot’in*, *supra* note 4 at para 12 (affirming the majority’s holding in *Guerin* that Aboriginal title is a legal right).

183. McNeil, “Continuity”, *supra* note 180 at 137 (explaining that insofar as Aboriginal title is a property right, it should be subject to the common law principle that land cannot “be lost by [a] wrongful taking..., whether by private individuals or by the Crown”).

184. See *Sparrow*, *supra* note 3 at 1099; *R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324; *R v Gladstone*, [1996] 2 SCR 723 at paras 31-38, 137 DLR (4th) 648; *R v Côté*, [1996] 3 SCR 139 at para 75, 138 DLR (4th) 385. See also McNeil, “Continuity”, *supra* note 180 at 137.

185. McNeil, “Continuity”, *supra* note 179 at 137. Similarly, a stand-alone continuity requirement would allow for loss of Aboriginal title due to abandonment by the Aboriginal claimants, but McNeil argues that it is doubtful whether Aboriginal title could be lost through abandonment. See McNeil, “Continuity”, *ibid* at 137-38.

186. *Marshall & Bernard*, *supra* note 54 at para 67.

187. Rather, the Aboriginal title analysis in *Marshall & Bernard* turned on the findings of lack of sufficiency and exclusivity of occupation. *Ibid* at paras 79-83.

stand-alone requirement.<sup>188</sup> More importantly, a unanimous Court in *Tsilhqot'in* reaffirmed the conditional nature of the continuity requirement. All references to the continuity requirement in *Tsilhqot'in* are qualified by the condition that it applies “where present occupation is relied on.”<sup>189</sup> The Court never describes it as a stand-alone requirement.<sup>190</sup> Moreover, the Court does not disagree with the trial judge’s assessment that continuity is not a stand-alone requirement. Rather, continuity is only relevant when “an Aboriginal claimant relies on present occupation to raise an inference of pre-sovereignty occupation.”<sup>191</sup> The application of the continuity requirement in *Tsilhqot'in* confirms this interpretation: the issue of continuity was raised in *Tsilhqot'in* precisely because the Tsilhqot'in Nation relied on present occupation to establish their claim.<sup>192</sup>

The Métis Nation can avoid the potential problems identified by Isaac by not appealing to present occupation in order to establish pre-sovereignty occupation. This will not be overly onerous for the Métis. Given the history of European displacement of Métis communities,<sup>193</sup> at least some of the Métis Nation’s claims will be to land that the Métis Nation does not presently occupy.

### C. EXCLUSIVE OCCUPATION

The third and final requirement in the test for Aboriginal title is exclusive occupation. Isaac doubts the Métis Nation’s ability to meet this requirement, due to the presence of First Nation communities and European populations in the claimed territory at the time of Crown sovereignty.<sup>194</sup> Similarly, Flanagan boldly asserts, “The Metis had no exclusive territory over which they roamed.”<sup>195</sup>

The mere fact of concurrent occupation of the same territory by multiple Aboriginal nations does not, however, preclude the possibility of Aboriginal title. On the contrary, such a scenario raises the issue of joint title. A majority of the Court in *Delgamuukw* recognized that the exclusivity requirement does not

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188. *R v Marshall*, 2003 NSCA 105 at para 160, 181, 218 NSR (2d) 78, rev'd on other grounds *Marshall & Bernard*, *supra* note 54.

189. *Tsilhqot'in*, *supra* note 4 at paras 25, 30, 45.

190. *Ibid.*

191. *Ibid* at paras 547-48.

192. *Ibid.*

193. See e.g. Victoria Zeilig, *Ste. Madeleine: Community Without a Town: Metis Elders in Interview* (Winnipeg: Pemmican Publications, 1987).

194. Isaac, *Aboriginal Law*, *supra* note 175 at 403; Isaac, *Métis Rights*, *supra* note 44 at 32.

195. Flanagan, “Métis Aboriginal Rights”, *supra* note 25 at 237.

necessarily mean unqualified exclusivity, given that “joint title could arise from shared exclusivity.”<sup>196</sup> The majority explains:

Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two Aboriginal nations lived on a particular piece of land and recognized each other’s entitlement to that land but nobody else’s.<sup>197</sup>

In *Marshall & Bernard*, Chief Justice McLachlin (writing for the majority) cites this paragraph from *Delgamuukw* and acknowledges the possibility of shared title to one and the same parcel of land.<sup>198</sup> Unfortunately, the Court provides no further guidance on the concept of joint title,<sup>199</sup> other than to note that it “has been recognized by American courts” and “is well-known to the common law.”<sup>200</sup> Kent McNeil picks up where the Court leaves off and examines the American and common law jurisprudence to develop a potential analysis of joint Aboriginal title.<sup>201</sup> McNeil concludes that common law principles on joint title (specifically those pertaining to joint tenancies and tenancies in common) will be of limited relevance, given the *sui generis* nature of Aboriginal title.<sup>202</sup> Instead, McNeil anticipates that the test that will govern is the one the Court has already established for assessing exclusive occupation.<sup>203</sup> Namely, joint Aboriginal claimants must establish that together they had “the intention and capacity to retain exclusive control” over the claimed territory.<sup>204</sup> According to McNeil, the nuance added by the American jurisprudence is that joint claimants “must have had an amicable relationship” and that this relationship must have existed for

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196. *Delgamuukw*, *supra* note 9 at para 158.

197. *Ibid.*

198. *Marshall & Bernard*, *supra* note 54 at para 57.

199. In *Delgamuukw*, the majority acknowledged that some Carrier-Sekani and Nishga peoples had territorial claims that overlapped with those of the Gitksan and Wet’suwet’en plaintiffs, but did not analyze those claims, presumably because it ordered a new trial. *Delgamuukw*, *supra* note 9 at paras 6, 9. Overlapping claims were not at issue on appeal to the Supreme Court of Canada in *Tsilhqot’in*. *Tsilhqot’in supra* note 4 at para 6.

200. *Delgamuukw*, *supra* note 9 at para 158.

201. Kent McNeil, “Exclusive Occupation and Joint Aboriginal Title” (2015) 48 UBC L Rev 821 [McNeil, “Joint Aboriginal Title”].

202. *Ibid* at 869.

203. *Ibid* at 857.

204. *Tsilhqot’in*, *supra* note 4 at paras 47-48; *Marshall & Bernard*, *supra* note 54 at para 57; *Delgamuukw*, *supra* note 9 at para 156 (quoting Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 204).

“a long time.”<sup>205</sup> McNeil explains that when two Aboriginal groups contest one another’s occupation,

for Aboriginal title to exist, a court would either have to find that one group was in exclusive occupation and members of the other group were trespassers, or divide the land between the two groups by drawing a boundary between their respective territories. If neither of these options for unshared Aboriginal title was available on the facts, neither group would have title.<sup>206</sup>

The notion of joint title seems well suited to the Métis Nation. As Jean Teillet observes, Métis history is for the most part “a story of sharing, not exclusion.”<sup>207</sup> Whether the Métis together with one or more First Nations can jointly establish the requisite intention and capacity to retain exclusive control over any part of the plains will depend on the available evidence about the specific territory at issue. Current historical scholarship indicates that at least some Métis can satisfy McNeil’s amicability requirement. The Métis on the plains, for example, entered into alliances with First Nations through peace treaties, trade arrangements, and intermarriages<sup>208</sup> that allowed Métis to occupy land jointly with First Nations throughout the nineteenth century. A good argument can be made that this satisfies the requirement that the amicable relationship between joint claimants must have existed for a long time.

Plains Cree scholar Robert Alexander Innes reveals that diplomatic relations between the Métis, Cree, Saulteaux, and Assiniboine of the nineteenth century northwest show signs of a close-knit alliance system.<sup>209</sup> Of particular importance is the general lack of historical evidence of conflicts between these peoples.<sup>210</sup> Indeed, the historical record contains clear examples of these four nations together fighting other nations—particularly their shared traditional rivals the Dakota and the Blackfoot—over rather small matters like stolen horses. There is no evidence, however, to suggest that the Métis, Cree, Saulteaux, or Assiniboine

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205. McNeil, “Joint Aboriginal Title”, *supra* note 201 at 853, 854, 855.

206. *Ibid* at 853-54.

207. Teillet, *supra* note 5, ch 3 at 3.6.

208. See Groves & Morse, *supra* note 7 at 288.

209. Robert Alexander Innes, “Multicultural Bands on the Northern Plains and the Notion of Tribal Histories” in Jarvis Brownile & Valerie Korinek, eds, *Finding a Way to the Heart: Feminist Writings on Aboriginal and Women’s History in Canada* (Winnipeg: University of Manitoba Press, 2012).

210. *Ibid* at 132-33.

fought one another in battle.<sup>211</sup> The conflicts that arose between these four peoples seem to have been settled through a normalized process of diplomacy rather than warfare. They were able to live together on relatively peaceful terms in an otherwise competitive region.<sup>212</sup> Enduring diplomacy and alliance were possible because the four distinct cultures contained enough “common points” that these communities were able to build “social, political, military, and economic alliances.”<sup>213</sup> The result was a complex network of families that bound these four peoples to one another. In fact, these four peoples became so diplomatically intertwined and closely allied that throughout the nineteenth century, they regularly lived together in intercultural bands and communities. Métis lived with Cree, Saukteaux, and Assiniboine in nominally “Indian” bands; Métis joined Cree buffalo hunts and trading parties; and Métis welcomed their “Indian” kin into their families through marriage and into their political culture as members of the great Métis buffalo hunts.<sup>214</sup>

As Innes’s work demonstrates, the northern plains were characterized by a complicated, multicultural political system, which makes the imposition of a one people, one territory scheme inappropriate. Scholarship has only started to embrace what Neal McLeod refers to as the “ambiguous genealogies” of the northern plains. Like Innes, McLeod argues that Indigenous families living on the prairies were much more multicultural than indicated by standard historical depictions, meaning that the plains political organization was based more on kinship than a sense of belonging to a nation.<sup>215</sup> Nicole St-Onge also notes that while “nationalist and other ethnic ideologies hold that social and cultural boundaries are unambiguous and clear-cut” in their everyday usage, “identities are negotiable and situational and the actual lived context of the Métis Nation contained anomalies, fuzzy boundaries and ambiguous criteria of belonging.”<sup>216</sup> Where the nation began and ended was not always well defined; some level of overlap with other Indigenous peoples was prevalent. Nonetheless, the peoples

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211. Dumont, *supra* note 173 at 36; WL Morton, “The Battle at Grand Coteau: July 13 and 14, 1851,” (1959-60), *MHS Transactions*, online: <[www.mhs.mb.ca/docs/transactions/3/grandcoteau.shtml](http://www.mhs.mb.ca/docs/transactions/3/grandcoteau.shtml)>.

212. Innes, *supra* note 209 at 127.

213. *Ibid* at 133.

214. *Ibid*.

215. Neal McLeod, “Plains Cree Identity: Borderlands, Ambiguous Genealogies and Narrative Irony” (2000) 20 *Can J Native Stud* 437.

216. Nicole St-Onge, “Uncertain Margins: Metis and Saukteaux Identities in St-Paul Des Saukteaux, Red River 1821-1870” (2006) 53 *Manitoba History* 2 at 2.

of the prairies possessed a clear understanding of kinship and relatedness that transcended “national” belonging.

Many of the men who are remembered as the great Plains Cree and Saulteaux leaders had at least one Métis parent, an unproblematic reality in those days. Innes notes:

Chief Poundmaker’s mother is reputed to have been Métis. ...Chief Little Bone or Michel Cardinal, was of Saulteaux/Métis ancestry, and had many wives who were either Saulteaux or Métis, or both. Chief Gabriel Cote, or the Pigeon, was the son of a Saulteaux mother and Métis man. ...Chief Cowessess may have been Marcel Desjarlais, who was of Saulteaux and Métis ancestry.<sup>217</sup>

The noticeable existence of Métis parentage among the Cree political elite attests to the level of integration achieved in the nineteenth century. This integration emerged out of more localized intermarriage practices. Given that Métis lived in close proximity to their First Nation allies, marriages between Métis and First Nations families were common. Indeed, they were seen as beneficial alliance-building practices between families. St-Onge notes extensive inter-generational marriage alliances in mid-nineteenth century Red River, between Métis and Saulteaux families in the St-Paul des Saulteaux mission.<sup>218</sup> Such relationships were motivated by a socio-economic incentive that not only extended family use rights to Métis families for the abundant Saulteaux fisheries in the Interlake region, but also brought many Saulteaux families from St-Paul into the great bison hunts.<sup>219</sup> As a result of these marriage networks, Métis and Saulteaux could each enhance their economic prospects through increased access to land. In fact, one of the benefits of intermarriage was access to the resources of both families, increasing the families’ economic prospects and ensuring a greater sharing of resources between extended family networks. Thus, relationships between Métis and at least some First Nations were not only amicable; they also functioned as a means of sharing land.

McNeil identifies an additional potential issue with respect to joint title claims: Even if the relationship between joint Aboriginal claimants is amicable, courts may still inquire “whether one group had exclusive occupation and members of the other group entered with permission, in which case the former group would have title and the members of the latter group would be guests.”<sup>220</sup> In other words, courts may consider whether Métis merely used land at the

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217. Innes, *supra* note 209 at 133.

218. *Supra* note 216 at 6-7.

219. *Ibid* at 8-9.

220. McNeil, “Joint Aboriginal Title”, *supra* note 201 at 856.

discretion of First Nations. At least some treaty negotiations indicate that Métis were considered to have their own rights in shared land, equal to those of First Nations. For example, allied Métis and Cree bands in the Saskatchewan District sought Métis inclusion in Treaty 6 via a treaty adhesion. At Fort Walsh in 1881, when Canadian government agents refused to distribute treaty annuities to Treaty 6 bands that had left their reserves to hunt buffalo in southern Saskatchewan, other Treaty 6 bands began to refuse their annuities.<sup>221</sup> In solidarity with their Cree relations, the local Assiniboine bands refused their treaty annuities until the Cree received their annuities as well.<sup>222</sup> As the standoff intensified, two Treaty 6 chiefs, Lucky Man and Little Pine, refused their own bands' annuities and told the Canadian officials that they were to pay "every native of this country," pointing to Métis in the vicinity and thereby indicating that the Métis were to be taken into the treaty.<sup>223</sup> Expansion of the treaty to include Métis relatives seemed to be a reasonable request from the chiefs' perspective.<sup>224</sup> While the situation was defused when buffalo were spotted nearby, the intent of these chiefs was clear: Their insistence on the inclusion of their Métis kin in the treaty illustrates their understanding that Métis held rights to Treaty 6 land that were at least as strong as theirs.

Another notable example is the "Halfbreed Adhesion" to Treaty 3.<sup>225</sup> In 1875, the "Halfbreeds"—in other words, the Métis—in the territory around Rainy Lake and Rainy River, in what is now northwestern Ontario, signed an *Adhesion* to Treaty 3. According to the *Adhesion*, the Métis signatories agreed to surrender all of their rights, title, and interest in their lands to the Queen, as specified in Treaty 3.<sup>226</sup> If the Métis had been occupying the territory at Rainy River and Rainy Lake at the pleasure of the local First Nation, then the First Nation's surrender in Treaty 3 would have been sufficient to extinguish any and all existing Aboriginal title. Yet, the Crown saw fit to obtain a surrender from the Métis as well. From the Crown's perspective, then, First Nation occupation of

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221. Michel Hogue, "Disputing the Medicine Line: The Plains Crees and the Canadian-American Border, 1876-1885" (2002) 52 *Montana: The Magazine of Western History* 2 at 10-11.

222. *Ibid.*

223. *Ibid.*

224. *Ibid.*

225. *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions* (1871), online: <[www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679](http://www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679)> [*Treaty Three*].

226. *Adhesion by Halfbreeds of Rainy River and Lake* (1875), online: <[www.metistreatiesproject.ca/wp-content/uploads/2016/03/ADHESION-BY-HALFBREEDS-OF-RAINY-RIVER-AND-LAKE.pdf](http://www.metistreatiesproject.ca/wp-content/uploads/2016/03/ADHESION-BY-HALFBREEDS-OF-RAINY-RIVER-AND-LAKE.pdf)> [*Adhesion*].

the land at Rainy River and Rainy Lake did not preclude the possibility of Métis having equivalent rights in the same tract of land. Nor did the Métis view their land rights as being subordinate to those of First Nations. According to Riel, when Canadian authorities arrived in the Red River in 1870, they identified the Métis as “the people who owned the Northwest Territories. The Indian blood in their veins established their right to the land. They held possession of this land jointly with the Indians.”<sup>227</sup>

Even though the concept of joint title seems especially well suited to the Métis context, the trial judge in *Manitoba Metis Federation* held that the Métis of the Red River did not hold joint title with the First Nations of that territory.<sup>228</sup> Justice MacInnes based his conclusion on the lack of evidence of Métis objection to the land surrender treaties executed by First Nations in the area. He noted that in 1817, Lord Selkirk entered into a treaty with First Nations that purported to extinguish their Indian title in the Red River area known as the settlement belt, and that the Crown later entered into Treaties 1 and 2, which purported to extinguish the Indian title of the First Nations signatories to the land beyond the settlement belt.<sup>229</sup> Justice MacInnes then concluded, “There is no evidence of any objection by the Métis on either occasion suggesting that they, not the Indians, held Aboriginal title over that land.”<sup>230</sup>

The trial judge’s reasoning is a *non sequitur*. Identifying the exact lapses in logic is especially important because the Supreme Court of Canada adopted his reasoning.<sup>231</sup> First, why should the Métis object to First Nations’ surrender of their own title?<sup>232</sup> Nothing in the Selkirk treaty<sup>233</sup> or in Treaties 1 and 2 purports to extinguish the title of the Métis.<sup>234</sup> Second, Treaties 1 and 2 were executed

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227. Riel, *supra* note 1 at 200.

228. *MMF Trial Decision*, *supra* note 46 at para 588.

229. *Ibid* at para 586.

230. *Ibid* at para 587.

231. *Manitoba Metis Federation*, *supra* note 13 at para 56.

232. Although the written text of historical land surrender treaties purports to extinguish the rights and title of the signatories to the land in question, most, if not all, First Nations take a very different view of the meaning and significance of the so-called historical land surrender treaties. See Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purish Publishing Ltd, 2013) (for an account of the perspective of the Anishinaabek signatories to Treaty 1).

233. Lord Selkirk’s Treaty with the Indians (1817), online: <[www.mhs.mb.ca/docs/pageant/21/lordselkirk treaty.shtm](http://www.mhs.mb.ca/docs/pageant/21/lordselkirk treaty.shtm)>.

234. Treaties 1 and 2 Between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions (1871), online: <[www.aadnc-aandc.gc.ca/eng/1100100028664/1100100028665](http://www.aadnc-aandc.gc.ca/eng/1100100028664/1100100028665)> [Treaties 1 and 2].



in 1871—one year after the Métis of the Red River ratified section 31 of the *Manitoba Act, 1870*, which purported to extinguish the title held by the Métis in exchange for 1.4 million acres of land. The Métis had no reason to object to Treaties 1 and 2, as they had already dealt with their own interest in the land a year earlier. The trial judge’s failure to recognize this point is especially baffling, given that the primary issue at trial and the main topic of his 1217 paragraph decision was the significance of section 31 of the *Manitoba Act, 1870*.

### III. IN DEFENCE OF MÉTIS TITLE: REJECTING THE IMMOBILITY CRITIQUE

This brings us to the second argument against Métis title. While some critics seek to undermine Métis title on the basis of the *mobility* of the Métis, others do so on the basis of their supposed *immobility*. Borrows identifies a similar contradiction applied to Indigenous peoples generally:

While Indigenous peoples are told we cannot have rights if we move too much, we are also informed we cannot possess rights because our societies move too little. Caught in these cross-currents, Indigenous peoples face contradictory doctrines that deny legal rights for reasons directly opposed to one another.<sup>235</sup>

The immobility that concerns Borrows is the courts’ view that Indigenous cultures are too settled, and therefore unable to develop over time. As a result, practices that developed subsequent to European contact are not protected as Aboriginal rights.<sup>236</sup> In contrast, we are concerned in this article with the supposed physical immobility of the Métis. The notion that the Métis were too immobile to establish Aboriginal title rests on a depiction of the Métis as unconnected individuals holding discrete lots along river ways in a manner similar to private ownership under the common law.<sup>237</sup>

This characterization emerges in the Supreme Court’s decision in *Manitoba Metis Federation*.<sup>238</sup> The majority rejected the argument that the Crown owed a fiduciary duty to the Métis on the ground that the Métis in the Red River settlement had no Aboriginal interest in the land that could trigger a fiduciary

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235. Borrows, *Freedom*, *supra* note 6 at 31.

236. *Ibid* at 31-32.

237. See Flanagan, “The Case against Métis Aboriginal Rights”, *supra* note 36 at 318.

238. Various commentators have provided thoughtful case comments on *Manitoba Metis Federation*. See O’Toole, “Case Commentary”, *supra* note 46 at 184; Sacha R Paul, “A Comment on *Manitoba Metis Federation Inc v Canada*”, Case Comment, (2013-2014) 37 Man LJ 323.

duty.<sup>239</sup> According to the majority, the type of interest in land needed to trigger a fiduciary duty is a collective or communal one.<sup>240</sup> The Métis in the Red River settlement, in contrast, held discrete lots along the rivers.<sup>241</sup> The majority emphasized two features of Métis landholding in the Red River valley: First, the Métis held their lots individually rather than communally, and second, the Métis permitted alienation of their lots.<sup>242</sup> Although the parties directed their arguments towards the issue of fiduciary duty, the majority also concluded that the lack of any communal Aboriginal interest in land meant that the Métis in the Red River did not have Aboriginal title to that land.<sup>243</sup> Thus, the Métis could not establish Aboriginal title because of their practice of parceling land into individual lots, which they occupied with some permanence by building upon and farming each lot.<sup>244</sup> In other words, the Métis were too immobile to establish Aboriginal title.

If the Red River Métis cannot establish Aboriginal title, then it may seem that all hope is lost for any other Métis community in Canada, given that the intensity of occupation in the Red River valley presumably could not have been exceeded by any other community, Métis or otherwise.<sup>245</sup> However, several scholars have already deftly critiqued the majority's rejection of Aboriginal title in *Manitoba Metis Federation*.<sup>246</sup> Some, for example, have questioned whether the rejection of Aboriginal title was beyond the court's remit, given that the Métis plaintiffs did not assert a claim for common law Aboriginal title<sup>247</sup> and hence did not

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239. *Manitoba Metis Federation*, *supra* note 13 at paras 53, 59.

240. *Ibid.*

241. For a description of Métis river lots, see Chartrand, "Métis Aboriginal Title", *supra* note 8 at 162; Flanagan, *Métis Lands*, *supra* note 22 at 16 (cited in Larry Chartrand, "Métis Aboriginal Title", *supra* note 8 at 162, n 42); Robert Coutts, "The Role of Agriculture in an English Speaking Halfbreed Economy: The Case of St. Andrews, Red River" (1988) 4:1 & 2 Native Studies Rev 67 at 72-73.

242. *Manitoba Metis Federation*, *supra* note 13 at para 56.

243. *Ibid* at para 59.

244. Coutts traces the Métis pattern of land-holding in the Red River to the Scottish "infield and outfield system" utilized by the Selkirk settlers. Coutts, *supra* note 241 at 73. Chartrand cites this passage from Coutts, and also acknowledges the similarity of Métis land-holding patterns to the French seigniorial system. Chartrand, "Métis Aboriginal Title", *supra* note 8 at 162, n 42.

245. Paul, *supra* note 238 at 335. As Paul puts it, the result of the majority's conclusion on this point is that "Métis title may never get off the ground".

246. See e.g. O'Toole, "The Red River Jig", *supra* note 23; O'Toole, "Flanagan on the Stand", *supra* note 22; O'Toole, "Métis Claims", *supra* note 23 (skillfully critiquing the trial judge's findings based on Thomas Flanagan's evidence).

247. See O'Toole, "Case Commentary", *supra* note 46 at 184.

present any evidence at trial about Métis use and occupation of land.<sup>248</sup> Instead, the Métis relied on the explicit terms of section 31 of the *Manitoba Act, 1870*, which state that the grant of land to the Métis in that provision was directed “towards the extinguishment of the Indian Title to the lands in the Province.”<sup>249</sup> On the surface, these words appear to be a clear admission by the Crown that the Métis of the Red River held an interest in their land (which was labeled “Indian title”), and that that interest was being extinguished by section 31.<sup>250</sup> Rather than consider this submission, a majority of the Court set up and defeated a straw man argument. It considered and rejected the claim, advanced by no one, that legislation such as section 31 could *establish* Aboriginal title.<sup>251</sup>

The remainder of this section builds upon this chorus of critique. It argues that the Court’s conclusion that Métis in the Red River did not have Aboriginal title because they held land individually suffers from at least two additional flaws. The first is that this is simply not the test for Aboriginal title. The second is that even if this were the test for Aboriginal title, the test would embody a vicious circle.

#### A. THIS IS NOT THE TEST FOR ABORIGINAL TITLE

As discussed in section 3 above, to prove Aboriginal title, an Aboriginal nation must show that its occupation of the land was sufficient and exclusive on the relevant assessment date, and in certain circumstances, continuous to the present day. This test makes no mention whatsoever of also having to engage in a pattern of communal landholding. If such a requirement were part of the test for Aboriginal title, then the Court would have said so in *Tsilhqot’in*, which was released a year after *Manitoba Metis Federation*. In *Tsilhqot’in*, the Court exhaustively detailed the legal principles pertaining to Aboriginal title but did not state that Aboriginal title presupposes communal landholding. Nor did it make any such statement in *Delgamuukw* or *Marshall & Bernard*.<sup>252</sup> Granted, the Court’s jurisprudence,

248. See Teillet, *supra* note 5 at 3-10; *MMF Trial Decision*, *supra* note 46 at para 9.

249. *MMF Trial Decision*, *supra* note 46 at para 54.

250. See Paul, *supra* note 238 at 336.

251. *Ibid* at 336-37. O’Toole, “Sous la loupe”, *supra* note 46 at 96-97.

252. See *Tsilhqot’in*, *supra* note 4 at paras 24-66. *Contra* Paul, “Comment on *Manitoba Métis Federation*”, *supra* note 238 at 335 (assuming that communal land ownership is a requirement of Aboriginal title and critiquing the majority in *Manitoba Métis Federation* for failing to employ the flexibility shown in *Powley*, where the Supreme Court of Canada modified the timeframe for establishing a Métis Aboriginal right “from the point of contact to the point of effective European control in order to recognize the fact that the Métis did not exist as a community at the point of contact”); Groves & Morse, *supra* note 7 at 280.

including *Tsilhqot'in* defines Aboriginal title as a collective interest in land.<sup>253</sup> It is important to understand, however, that this refers to the *content* of Aboriginal title, not the test for establishing Aboriginal title.<sup>254</sup> What successful Aboriginal title claimants *receive* is a collective interest, but proving that they historically engaged in a pattern of communal landholding forms no part of the test they must meet in order to secure that collective interest.

The absence of any requirement to prove communal landholding in the test for Aboriginal title is no accident. To understand why, it is necessary to distinguish between rights and jurisdiction. Aboriginal rights jurisprudence and scholarship are replete with references to Aboriginal rights because section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing “rights” of the Aboriginal peoples of Canada.<sup>255</sup> Similarly, the *United Nations Declaration on the Rights of Indigenous Peoples* protects Indigenous “rights.”<sup>256</sup> But the term “rights” in this context is a misnomer—Aboriginal peoples are peoples, and peoples or nations exercise jurisdiction. Individuals, on the other hand, possess rights.<sup>257</sup> When the claims of Indigenous peoples are articulated in terms of a western, liberal framework, they are closer to claims to exercise jurisdiction than claims to possess rights.<sup>258</sup> The focus on the language of “rights” has led to the conundrum of how to provide a theoretical foundation for the existence of “collective rights.”<sup>259</sup> This conundrum disappears when Indigenous peoples are understood as seeking

253. *Tsilhqot'in*, *supra* note 4 at parass 74-75; *Delgamuukw*, *supra* note 9 at para 115; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 25, [2001] 3 SCR 746.

254. The discussion of the collective nature of Aboriginal title occurs under the main heading, “What Rights does Aboriginal Title Confer” and under the sub-heading, “The Incidents of Aboriginal Title”. See *Tsilhqot'in*, *supra* note 4 at paras 67, 73. It does not occur in the section entitled “Is Aboriginal Title Established?” or in the sub-section entitled “The Test for Aboriginal Title”. See *Tsilhqot'in*, *supra* note 4 at para 24.

255. *Constitution Act, 1982*, *supra* note 3, s 35(1).

256. United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res 61/295 (UNGAOR, 61st Sess, Suppl no 49) [UN Declaration].

257. Within the framework of liberalism, the rights-bearer is the individual. See Dale Turner, *This is not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 13; Gordon Christie, “Law, Theory and Aboriginal Peoples” (2005) 2:1 *Indigenous LJ* 67 at 81.

258. See Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45:5 *Stan L Rev* 1311 at 1354-55 (explaining that the rights “sought by Aboriginal people are jurisdictional in nature and involve elements of sovereignty and governance over individuals, groups and territory”).

259. See Darlene M Johnston, “Native Rights as Collective Rights: A Question of Group Self-Preservation” (1989) 2:1 *Can JL & Jur* 19 (for attempts to resolve this conundrum in the context of Indigenous claims); Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (Oxford: Hart, 2011).

something akin to jurisdiction, not rights. Although the concept of Aboriginal title includes elements of a property right,<sup>260</sup> it is *sui generis*, and as such also includes elements of jurisdiction.<sup>261</sup> For example, the majority in *Delgamuukw* explains that Aboriginal title land is “held by all members of an Aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of Aboriginal title which is *sui generis* and distinguishes it from normal property interests.”<sup>262</sup> Similarly, the Supreme Court in *Tsilhqot’in* explains that Aboriginal title cannot “be described with reference to traditional property law concepts,”<sup>263</sup> and that the content of Aboriginal title includes “all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group.”<sup>264</sup> Thus, if prior to Crown sovereignty an Aboriginal nation exercised jurisdiction by implementing its laws throughout its territory, then exercising jurisdiction would be an incident of its Aboriginal title.<sup>265</sup>

This framing of the issue is consistent with the distinction between the internal and external aspects of Aboriginal title, as articulated by Slattery<sup>266</sup> and developed by McNeil.<sup>267</sup> The external aspects of Aboriginal title, such as the rules

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260. *Tsilhqot’in*, *supra* note 4 at para 73 (explaining that “Aboriginal title confers ownership rights similar to those associated with fee simple”).

261. See Kent McNeil, “Site-Specific or Territorial?”, *supra* note 108 at 760; PG McHugh, “A Common Law Biography of Section 35” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 137 at 145-46, 149-51 (explaining how some non-Indigenous scholarship initially influenced section 35(1) jurisprudence to articulate Aboriginal title in terms of rights, especially property rights, instead of self-government, or in other words in terms of *dominium* instead of *imperium*; some jurists have striven to collapse this distinction, with the result that the Supreme Court of Canada has recently begun to move away from the property rights paradigm to adopt a more public law-focused approach); Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48:3 UBC L Rev 873 at 878-79.

262. *Delgamuukw*, *supra* note 9 at para 115. See also McNeil, “Joint Aboriginal Title”, *supra* note 208 at 865.

263. *Tsilhqot’in*, *supra* note 4 at para 72.

264. *Ibid* at para 75.

265. But see Gordon Christie, “Who Makes Decisions Over Aboriginal Title Lands?” (2015) 48:3 UBC L Rev 743 (identifying the various ways in which the Supreme Court of Canada in *Tsilhqot’in* limits the ability of Aboriginal title holders to exercise governing authority, or in other words, jurisdiction).

266. See Brian Slattery, “The Metamorphosis of Aboriginal Title” in Maria Morellato, ed, *Aboriginal Law since Delgamuukw* (Aurora, Ontario: Canada Law Book, 2009) at 155 [Slattery, “Metamorphosis”].

267. See Kent McNeil, “Site-Specific or Territorial?”, *supra* note 108 at 760.

regarding the justification of a Crown infringement, are consistent from one Aboriginal nation to another and are determined by the common law.<sup>268</sup> The internal aspects of Aboriginal title, in contrast, are determined by the laws of each Aboriginal nation and thus may differ from nation to nation.<sup>269</sup> An Aboriginal nation's laws govern issues such as landholding within its territory. Landholding patterns may therefore differ from nation to nation.<sup>270</sup> If Aboriginal nations are entitled to apply their own laws to their territory, they exercise jurisdiction. Thus, both section 35 and the *United Nations Declaration on the Rights of Indigenous Peoples* would have been more accurate if they had used the term "jurisdiction" instead of imprecise terms such as "rights" or "collective rights."<sup>271</sup>

The confusion in *Manitoba Metis Federation* results from referring to the jurisdiction of Aboriginal peoples as a "collective right" in the land, and then conflating the collective right with a communal landholding pattern.<sup>272</sup> There is no necessary connection between holding a collective right in land and using that land in a communal way. The collective right that Aboriginal title-holders have should be understood as a right to exercise jurisdiction. The Aboriginal nation may exercise its jurisdiction in whatever manner it chooses, subject to the limitation that the land cannot be used "in a way that would substantially deprive future generations of the benefit of the land,"<sup>273</sup> and subject to any justified Crown infringements.<sup>274</sup> The Aboriginal nation may exercise its jurisdiction by implementing laws providing for communal landholding, or by implementing

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268. See Slattery, "Metamorphosis", *supra* note 266 at 155; Kent McNeil, "Site-Specific or Territorial?", *supra* note 112 at 760.

269. See Kent McNeil, "Site-Specific or Territorial?", *supra* note 112 at 760. See also *Mabo*, *supra* note 76 at paras 68, 75 (explaining that the incidents, or internal aspects, of 'native title' are "determined by the laws and customs of the indigenous inhabitants" while the external aspects, such as rules pertaining to extinguishment, are based on the common law).

270. See Kent McNeil, "Site-Specific or Territorial?", *supra* note 108 at 760.

271. See *Delgamuukw*, *supra* note 9 at para 115 (for use of the term "collective right"). See also the *UN Declaration*, *supra* note 255 at preamble, art 7(2), art 40. The *UN Declaration* confirms the jurisdictional nature of Indigenous rights insofar as it requires states to give due recognition to Indigenous peoples' laws (article 27), to "obtain their free and informed consent prior to the approval of any project affecting their lands" (article 32(2)), and insofar as it protects the right of Indigenous peoples to maintain their "juridical systems or customs" (article 34).

272. See *Manitoba Metis Federation*, *supra* note 13 at paras 53-59 (especially para 53). See also *Delgamuukw*, *supra* note 9 at para 115 (equivocating between the terms 'communal' and 'collective', but not requiring proof of communal land-holding as part of the test for Aboriginal title).

273. *Tsilhqot'in*, *supra* note 4 at para 74.

274. *Sparrow*, *supra* note 3 at para 71.

laws providing for individual landholding. If it implements laws allowing for individual landholding, its Aboriginal title is not negated, just as the jurisdiction of the Crown is not negated by virtue of the fact that the common law allows for individual landholding.

It may be tempting to object, as the trial judge in *Manitoba Metis Federation* seemed to do, that even though the Crown can exercise its jurisdiction by authorizing communal landholding, individual landholding, or even some as yet unheard of form of landholding, this same range of options is excluded from Aboriginal jurisdiction by virtue of the principle of inalienability. This principle holds that Aboriginal title land cannot be alienated except upon surrender to the Crown. Freedom of alienation is often a concomitant of individual landholding, as it was for the Métis in the Red River. According to the trial judge, this was fatal to the notion that the Métis held Aboriginal title. The trial judge held that the principle of inalienability was a requirement of the test for Aboriginal title and that the Métis failed to meet this requirement because Métis and non-Métis individuals in the Red River area bought and sold individual plots of land.<sup>275</sup> The Supreme Court of Canada apparently affirmed this conclusion.<sup>276</sup>

The problem with this line of thought is that the principle of inalienability is not a requirement of the test for Aboriginal title. As discussed above, the three requirements for establishing Aboriginal title—sufficient, exclusive, and in certain circumstances, continuous occupation—make no mention of the principle of inalienability.<sup>277</sup> Just as the collective nature of Aboriginal title is part of the content of Aboriginal title, not part of the test for establishing it, so too is the principle of inalienability. It is not necessary for Aboriginal claimants to prove that they never alienated land in order to establish Aboriginal title. Rather, the principle that Aboriginal title is inalienable except upon surrender to the Crown means that any attempt by the Aboriginal nation to alienate its title to anyone other than the Crown will be void. The Aboriginal nation can authorize individual landholding as well as the alienation of individual lots, as long as the Aboriginal nation retains its Aboriginal title, or in other words, its jurisdiction, over the land. Similarly, the Crown does not lose its jurisdiction by authorizing the alienation of individual plots of land, even if those plots are alienated to citizens of other countries.

To summarize, an Aboriginal nation need not prove communal landholding in order to establish Aboriginal title, because communal landholding is only one

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275. *MMF Trial Decision*, *supra* note 46 at paras 591-92.

276. *Ibid* at para 56.

277. See *Tsilhqot'in*, *supra* note 4 at paras 24-66.

possible manifestation of Aboriginal title. It is true that the jurisdiction historically exercised by Aboriginal peoples can play a role in establishing Aboriginal title. As discussed above, when assessing Aboriginal title, the common law perspective must be balanced with the Aboriginal perspective, which includes the laws of the Aboriginal nation.<sup>278</sup> Examples of an Aboriginal people implementing its own laws—or in other words, exercising jurisdiction—can serve as evidence of sufficient occupation over the land.<sup>279</sup> To assume that that jurisdiction can only be exercised in the form of communal land holding is to succumb to false stereotypes about Indigenous relationships to land at the expense of actual historical evidence.

One need not look far into Métis history to find examples of Métis exercising jurisdiction in the Red River settlement and on the prairies more generally. Prior to the Crown's effective control of the northwest Métis regularly governed the land—alongside First Nations—using their own laws and for generations were capable of implementing their own laws to govern both their own people and outsiders in the Métis homeland. One consistent feature of Métis communities was the long-lot river lot system, which “apportioned in narrow frontage lots that were worked for a considerable distance back from the river.”<sup>280</sup> In Red River, the river lots ran back two miles from the river, but contained another two miles of “hay privilege,” an area of land that was treated as individually held property used for grazing animals. While the Hudson's Bay Company considered this land to be beyond the two miles of land surrendered by the Selkirk Treaty in 1817,<sup>281</sup> Métis like Peter Erasmus considered these lots to be settled “by common consent.”<sup>282</sup> While many individuals' lots were not contained in the Company's land registry (and were thus subject to re-organization by surveyors from 1869), many Métis like Erasmus still considered Métis as the owners of their river lots:

[T]he system became a source of grievance in that no recognition of the lines of occupation was considered by the government surveyors, but the land was divided into quarter sections. Frequently, these river lot parcels, *owned* by the residents for

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278. *Ibid* at paras 34-35, 41.

279. See *Delgamuukw*, *supra* note 9 at paras 147-48 (for passages affirming the principle that the laws of the Aboriginal claimant nation are relevant in establishing sufficiency of occupation); *Tsilhqot'in*, *ibid* at paras 35, 41. See also Borrows, “Durability”, *supra* note 77 at 717-20 (discussing the role *Tsilhqot'in* law played in the trial judge's finding that the *Tsilhqot'in* nation established sufficient occupation).

280. Erasmus, *supra* note 165 at 3.

281. See Gaudry, *supra* note 31.

282. Erasmus, *supra* note 165 at 3.



as long as fifty years in some cases, were crossed by survey lines. The people feared the loss of *their* land...<sup>283</sup>

Even the most prominent critic of Métis title, Tom Flanagan, identifies an agreed upon process through which Métis could claim lands they viewed as held in common for their individual family:

They would mark off land by putting stakes in the ground, cutting blazes on the trees, or plowing a furrow around the edge. They might also erect a roofless square of logs as a sign of intended future occupation. A man might claim several for his sons, brothers, or in-laws. The land might be used for years in seasonal ways—cutting hay and timber, pasturing livestock, making maple sugar—without being occupied year-round. The final step of settling on the land, building a permanent house, and planting crops might not come until years after such episodic visitation.<sup>284</sup>

Occasionally, Métis would register their lots with the Company, but most Métis families did not. Their own customary practice extended a form of collective jurisdiction over their territory, which, as Riel noted, surrounded the Company's forts in the settlement with Métis river lots, following Métis law with little regard for the Company's rule. In the introduction to Alexander Ross's *Red River Settlement*, W.L. Morton reminds historians that through much of the settlement's history, "the plain truth was that there was no means of raising a public force that could impress the Métis," and that "the peace was kept in Assiniboia by influence and persuasion, seldom by authority."<sup>285</sup> While the Company claimed to be the sole "civilized" authority at Red River, the reality on the ground was that Métis law and politics were in effective control of the settlement. Because of this, few Métis registered their land with the Company—which was not necessarily seen as the competent authority for this—and Métis only became concerned about

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283. *Ibid* at 3.

284. Flanagan, *Métis Lands*, *supra* note 22 at 19.

285. W.L. Morton, "Introduction to the New Edition" in Ross, ed, *The Red River Settlement*, *supra* note 166 at xxii. This, however, is not the universal view; some scholars fail to treat Métis as a legal entity with a legal code of its own. Dale Gibson, *Law, Life and Government at Red River: Settlement and Governance, 1812-1872* (Montreal: McGill-Queen's University Press, 2016) at 351. Gibson argues that the Red River population showed the justice system a "widespread acceptance" even at times of conflict over its procedure. However, consistent with his previous work, Gibson generally fails to acknowledge Métis actions as collective actions governed by another form of law, constructing Métis rejection of the HBC fur trade monopoly—an important moment in Métis nationalist rememberings—as a mere "riot" against an established and legitimate authority. However, Métis collective action is self-evident at Red River, due to a surviving archive which shows Métis political and legal assertions, and contests with the supposedly prevailing HBC-run legal system. While the Company's law certainly existed it was regularly contested and never fully accepted by Métis.

external recognition of their river lots when the impending arrival of Canadian surveyors in 1869 threatened their expropriation.

As previously demonstrated, legitimate authority for Métis of this era was constructed by those who would be governed by it. In other words, Métis were resistant to Company authority and other forms of Crown authority because they were not a party to its creation. In instances where Company and Métis authority clashed, Métis almost always asserted their own jurisdiction in its place, and due to the political and military realities described by Morton, they did so successfully in most cases. In 1834, Métis obstructed the Company's justice system by preventing one of their own from facing a public whipping for a theft conviction, a punishment Métis found unconscionable given that under buffalo hunt law it was reserved for habitual thieves, not first-time offenders.<sup>286</sup> In 1845, Métis refused to pay Hudson's Bay Company import duties, and in 1849, the Métis declared with great efficacy the death of the Company's monopoly on the sale of fur, ushering in an era of Métis free trading and unprecedented economic power.<sup>287</sup>

While Métis used the buffalo hunt to ensure their independence from Company authority, they also at times used it to govern the behaviour of non-Métis. On an individual level, it has long been noted that fur traders adopted the protocols of Indigenous peoples to successfully trade with them.<sup>288</sup> On another level, Métis also brought the Company and its servants "under the protection of Métis laws."<sup>289</sup>

In 1875, Saskatchewan Métis leader Gabriel Dumont's hunting brigade confronted a group of three Métis "free hunters" who were hunting with a party of Company men. These three Métis had been contracted to provision local Hudson's Bay Company trading posts with buffalo meat. They were also members of Dumont's brigade and thus party to its law and under its jurisdiction. Since they had left the camp in the spring to lead a Company hunting party, they had violated Métis laws by "going before" and hunting ahead of the main party and thus risking the dispersal of the buffalo before Métis families could hunt for themselves. Due to this violation of Métis law, Dumont and his hunters informed the Company party that they were forbidden to hunt. However, the Métis also

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286. JM Bumsted, *Trials and Tribulations: The Red River Settlement and the Emergence of Manitoba, 1811-1870* (Winnipeg: Great Plains Publications, 2003) at 72.

287. *Ibid* at 99.

288. Michael Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia: University of Pennsylvania, 2012) at 15-16.

289. Riel, *supra* note 1 at 204.

offered them a place in the Métis brigade under Métis leadership, law, and jurisdiction, which would result in a share of the camp's meat as well. Only under the control of the Métis camp would these men be allowed access to the buffalo. When the Company party refused this offer, the three Métis were subjected to fines for violating their laws and the Company party was dismissed to complain to Canadian authorities. Before 1870, little could have been done, but by 1875 Canada had a military presence in the region, so Dumont's assertion of Métis jurisdiction in this matter caused the dispatch of the Northwest Mounted Police to Batoche. Interestingly, the Northwest Mounted Police seemed more concerned about preventing another Red River Resistance than they were with disrupting Métis customary hunting laws. Reports of this incident eventually made their way to London, where the Imperial Secretary for the Colonies expressed sympathy for the Métis, noting, it "would be difficult to take strong exception to the acts of a community which appears to have honestly endeavoured to maintain order by the best means in its power."<sup>290</sup> Through such means, Métis continued to practice independent self-governance and assert collective jurisdiction over their territory. This is demonstrative not only of an enduring collective interest in the land but an ongoing Aboriginal exercise of jurisdiction.

While departing in some ways from the European norms of the day, Métis occupation of land nonetheless made sense to Métis who understood these rules and agreed to be governed by them. Métis were also successful at exerting influence, control, and even governance over outsiders who, despite their pretensions to the contrary, were not in firm control of the places they claimed as theirs by sovereign right.

## B. A VICIOUS CIRCLE DOES NOT PROMOTE RECONCILIATION

The second problem with the conclusion that the Métis in the Red River did not have Aboriginal title because they held land individually is that it results in a vicious circle. On the one hand, we learned from *Delgamuukw*, *Marshall & Bernard*, and *Tsilhqot'in* that to establish Aboriginal title, the Aboriginal nation must show that it occupied land in a way that is comparable to what is required to establish title at common law.<sup>291</sup> Granted, the Court discusses balancing the common law perspective with the Aboriginal perspective.<sup>292</sup> But the role of the Aboriginal perspective in this balancing exercise is subsidiary to that of the common law insofar as Aboriginal practices and customs are not the ultimate

290. Woodcock, *supra* note 156 at 103, 110.

291. *Marshall & Bernard*, *supra* note 54 at para 54; *Tsilhqot'in*, *supra* note 4 at para 42.

292. *Tsilhqot'in*, *supra* note 4 at para 34; *Marshall & Bernard*, *supra* note 54 at paras 45, 46.

determinants of sufficient occupation. The common law standard—specifically, that of a general occupant—is still the standard that must be met.<sup>293</sup> The role of the Aboriginal perspective is merely to ensure that when Aboriginal practices and customs are compared to the common law standard, the comparison is carried out in a culturally sensitive way.<sup>294</sup> *Tsilhqot'in* affirms the overriding principle articulated in *Marshall & Bernard*<sup>295</sup> that the common law standard governs the Aboriginal title analysis.<sup>296</sup> Thus, when Aboriginal nations fail to establish Aboriginal title, as they did in *Marshall & Bernard*, it is because their manner of occupying the land was too nomadic to meet the common law standard for occupation.<sup>297</sup>

On the other hand, the implication of the *Manitoba Metis Federation* decision is that if the occupation exhibited by the Aboriginal nation is too close to the common law standard, then the Aboriginal title claim fails. The Métis of the Red River fulfilled and likely exceeded the standard of a general occupant insofar as they demarcated individual lots, farmed those lots, and built permanent dwellings on them.<sup>298</sup> We must comply with the common law to win, but if we comply with the common law, we lose. This cannot be the test that Métis have to meet in order to establish Aboriginal title because if it is, it is Kafkaesque.

The Supreme Court has emphasized that the goal of section 35 is to promote reconciliation between Aboriginal nations and the non-Aboriginal citizens of this country.<sup>299</sup> The Truth and Reconciliation Commission recently released its final report, with ninety-four calls to action designed to promote reconciliation.<sup>300</sup> Reconciliation should rank high on this nation's agenda. But a test that is impossible to meet because it embodies a Kafkaesque vicious circle will do nothing to promote reconciliation.

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293. *Tsilhqot'in*, *supra* note 4 at paras 39, 42.

294. *Marshall & Bernard*, *supra* note 54 at para 48; *Tsilhqot'in*, *supra* note 4 at para 50.

295. *Marshall & Bernard*, *supra* note 54 at para 48.

296. *Tsilhqot'in*, *supra* note 4 at paras 42, 50.

297. *Marshall & Bernard*, *supra* note 54 at para 77.

298. See *Tsilhqot'in*, *supra* note 4 at para 39 (affirming that acts such as “enclosing, cultivating... [and] building upon” land are the most “obvious” indicia of occupation at common law).

299. See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, [2005] 3 SCR 388; *Van der Peet*, *supra* note 3 at para 31; *Tsilhqot'in*, *supra* note 4 at para 17; *Haida Nation*, *supra* note 54 at para 20; *Delgamuukw*, *supra* note 9 at 186.

300. The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada, 2015) at 319-37.

## IV. CONCLUSION

Despite the foregoing analysis illustrating the strength of potential Métis title claims, Canada's response to this issue has been exceedingly slow. The federal government has been addressing unresolved Aboriginal title claims by negotiating modern treaties pursuant to its Comprehensive Land Claims Policy since 1973,<sup>301</sup> and yet as Douglas Eyford notes, this policy does not address the rights of Métis people.<sup>302</sup> In his report on the reform of the Comprehensive Land Claims Policy, Eyford exhorts Canada to “do more in its relationship with the Métis to ensure their section 35 rights are appropriately recognized and can be meaningfully exercised.”<sup>303</sup> He also recommends that Canada “develop a reconciliation process to support the exercise of Métis section 35(1) rights and to reconcile their interests.”<sup>304</sup> Similarly, in August 2015, the Métis Nation of Ontario passed a unanimous resolution calling on the federal government to establish a land claims process addressing outstanding Métis land claims.<sup>305</sup>

In response to Métis calls for action and to Eyford's report, Canada recently appointed Thomas Isaac as the Ministerial Special Representative to Lead Engagement with Métis.<sup>306</sup> Isaac heard from Métis communities from early June 2015 to mid-January 2016, and on 21 July 2016, released a report containing seventeen recommendations for a new framework to address section 35 Métis rights.<sup>307</sup> Isaac found that “[o]utside of litigation, Métis presently have no

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301. Indigenous and Northern Affairs Canada, “Renewing the Federal Comprehensive Land Claims Policy”, online: <[www.aadnc-aandc.gc.ca/eng/1405693409911/1405693617207](http://www.aadnc-aandc.gc.ca/eng/1405693409911/1405693617207)>.

302. Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (2015) at 11, 44, online: <[www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford\\_newDirection-report\\_april2015\\_1427810490332\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford_newDirection-report_april2015_1427810490332_eng.pdf)>.

303. *Ibid* at 44.

304. *Ibid* at 86.

305. Métis Nation of Ontario, News Release, “Advancing Métis Land Claims Emerge as Major Issue at MNO Annual General Assembly” (25 August 2015), online: <[secure.campaigner.com/Campaigner/Public/t.show?8nmqs--4t0qz-151jj8u4&\\_v=2](http://secure.campaigner.com/Campaigner/Public/t.show?8nmqs--4t0qz-151jj8u4&_v=2)>.

306. Government of Canada, News Release, “Minister Valcourt Announces Launch of New Discussions on Section 35 Rights for Métis” (4 June 2015), online: <[news.gc.ca/web/article-en.do?nid=984379&tp=1](http://news.gc.ca/web/article-en.do?nid=984379&tp=1)>.

307. Indigenous and Northern Affairs Canada, “Engagement with Métis”, online: <[www.aadnc-aandc.gc.ca/eng/1433442735272/1433442757318](http://www.aadnc-aandc.gc.ca/eng/1433442735272/1433442757318)>; Thomas Isaac, *A Matter of National and Constitutional Import: Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Métis Federation Decision* (Ottawa: Indigenous and Northern Affairs Canada, 2016), online: Indigenous and Northern Affairs Canada <<http://www.aadnc-aandc.gc.ca/eng/1467641790303/1467641835266>> [Isaac, *Métis Rights Report*].

formal means to bring claims relating to section 35 rights before Canada for consideration.”<sup>308</sup> Accordingly, he recommends that “Canada either amend its existing Comprehensive Land Claims and Specific Claims Policies, or develop a new policy, that expressly addresses Métis section 35 rights claims and related issues.”<sup>309</sup> Isaac includes Métis land claims among the types of claims this new or amended policy should address.<sup>310</sup> Given the arguments presented here outlining the strengths of potential Métis title claims, Canada would do well to implement these recommendations forthwith.

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308. Isaac, *Métis Rights Report*, *ibid* at 30.

309. *Ibid* at 30, 44.

310. Isaac, *Métis Rights Report*, *ibid* at 30 (listing “the Métis land claim in North-West Saskatchewan” as an example of the unresolved Métis claims that should be addressed by Canada and also the provinces”).