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THE RESILIENCE OF MÉTIS TITLE: REJECTING ASSUMPTIONS OF EXTINGUISHMENT FOR MÉTIS LAND RIGHTS

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1. Introduction

The Crown long has disputed Métis title claims by contending that any previously existing Métis rights, including title, have been extinguished.¹ We argue, however, that Métis rights, including title, remain unextinguished in at least some areas of the Métis homeland.² In this chapter, we review the three means by which Aboriginal rights can be extinguished in Canadian law: by surrender, by legislation prior to April 17, 1982, and by constitutional amendment.³ When applied to the Métis homeland, we conclude that these

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¹ See e.g. Catherine Bell, “Métis Constitutional Rights in Section 35(1)” (1997-1998) 36 *Alta L Rev* 180 at 181 (explaining that “twentieth-century federal policy...has maintained that whatever rights [Métis] may have had were effectively terminated through the scrip distribution system”).

² The Métis Nation’s homeland encompasses much of the three prairie provinces, west into northern British Columbia, east into parts of Ontario, north into the Northwest Territories, and south into Montana and North Dakota.

³ Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2016) (loose-leaf 2016 supplement) vol 2 at 28-34.1. Kent McNeil discusses an additional possible means of extinguishing Aboriginal title which is exhibited in *Chippewas of Sarnia Band v Canada (Attorney General)*, 101 OTC 1; 40 RPR (3d) 49 (ONSC), aff’d 51 OR (3d) 641, 195 DLR (4th) 135 (ONCA); this is a kind of implicit extinguishment by executive acts: Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 *Ottawa L Rev* 301 at 327-44 [McNeil, “Extinguishment”]. Because of the legal errors within the reasoning employed in support of this means of extinguishment, McNeil refers to it as “extinguishment by judicial pronouncement”: *ibid* at 344. McNeil’s critique is sufficient to dispose of this potential means of extinguishment: *ibid*. Joseph Magnet considers and rejects conquest as an additional possible means of extinguishing Aboriginal rights: Joseph Magnet, *Métis Land Rights in Canada* (Report submitted to the Royal Commission on Aboriginal Peoples, 1993) at 74, online: <ssrn.com/abstract=2435201>. As Kent McNeil explains, American law may have allowed for extinguishment by conquest, but this “is not the law of the Crown’s dominions”: Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 246. See also Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 *Can Bar Rev* 727 at 767. *Contra Mitchell v Canada (Minister of National Revenue - MNR)*, 2001 SCC 33, [2001] 1 SCR 911 (listing three means of extinguishing Aboriginal rights: cession (surrender), legislation,

means have not effectively extinguished all Métis rights and title. This chapter builds on our previous work,⁴ in which we argue that historical Métis land use patterns can satisfy the test for Aboriginal title as set out by the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*.⁵ Once the Métis have shown that their occupation of their traditional homeland was sufficient, continuous, and exclusive, the next step is to demonstrate that their title to land has not been extinguished. This chapter takes this next step, and thus further strengthens the argument in support of Métis title.

In making this argument, we first examine the various jurisprudential arguments for the extinguishment of Indigenous title. Then, we demonstrate how Métis can argue against extinguishment through a variety of means including surrender by historic or contemporary agreement. This chapter has a particular focus on Manitoba, which has a substantive history of Métis occupation and assertions of title, while there are many other examples that would meet this test, we will analyze the Manitoba context as evidence of the strength of these claims.

In undertaking our analysis within this chapter, we do not endorse the jurisprudence pertaining to, or the existence of, the doctrine of extinguishment. This jurisprudence and this doctrine have been thoroughly and deftly critiqued elsewhere.⁶ Our goal is to supplement this critique by highlighting the historical and legal reasons for questioning the applicability of this doctrine to Métis title claims.

2. Three Means of Extinguishment

2.1 Extinguishment by Legislation

In Canadian law, Aboriginal rights, including title, could be extinguished unilaterally by competent legislation prior to April 17, 1982, when section 35(1) of the

and conquest: at para 9) [*Mitchell* cited to SCC]. This list, however, is *obiter*, and neither of the authorities provided in support of it (*Royal Proclamation, 1763*, RSC 1985, App II, No 1; *R v Sparrow*, [1990] 1 SCR 1075 at 1103) stand for the proposition that conquest could extinguish Aboriginal rights.

⁴ Karen Drake & Adam Gaudry. “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” (2016) 54:1 Osgoode Hall LJ 1.

⁵ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

⁶ See Paul Joffe & Mary Ellen Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives, A Study Prepared for the Royal Commission on Aboriginal Peoples* (Ottawa: Royal Commission on Aboriginal Peoples, 1995) at i-ii, online:

<publications.gc.ca/site/eng/9.829901/publication.html> (critiquing the doctrine of extinguishment on numerous grounds, including the apparent double-standard given the absence of a doctrine of extinguishment of non-Aboriginal rights within Canadian law and the fact that Aboriginal rights understood as human rights “are the only human rights in Canada that are subjected to extinguishment”; the lack of capacity of non-Aboriginal governments to extinguish Aboriginal rights given the contending sovereignties within Canada, which includes the sovereignty of Aboriginal peoples; and the Crown’s fiduciary duty owed to Aboriginal peoples, which constrains the Crown’s capacity to extinguish Aboriginal rights).

Constitution Act, 1982,⁷ came into effect. After the enactment of section 35(1), legislation can no longer extinguish Aboriginal rights and title.⁸ Thus, after April 17, 1982, Aboriginal rights can be extinguished only by surrender or by constitutional amendment,⁹ both of which are discussed below in the remaining sections of this chapter. This section examines whether Métis rights have been extinguished by legislation.

The Supreme Court of Canada in *R. v. Sparrow* established the current test for the extinguishment of Aboriginal rights by legislation: legislation must exhibit a clear and plain intention to extinguish the right at issue.¹⁰ The onus of meeting this test is on the party claiming the right has been extinguished.¹¹ In articulating this test, the Court affirmed the standard for extinguishment expressed by Hall J in *Calder v. Attorney-General of British Columbia*¹² and rejected the standard expressed by Judson J in *Calder*, which was that legislation that is merely inconsistent with the continued existence of an Aboriginal right is sufficient to extinguish that right.¹³ Elsewhere in his decision in *Calder*, Hall J explained that because Aboriginal rights are legal rights, they can only be extinguished by surrender or by competent legislation, and that the legislation must be specific.¹⁴ This is a high threshold.¹⁵ Courts have rarely concluded that legislation met the ‘clear and plain intention’ test and thus was effective in extinguishing Aboriginal rights or title.¹⁶

For the purpose of effecting an extinguishment, competent legislation means either federal or Imperial legislation.¹⁷ With respect to federal legislation, a majority of the Supreme Court of Canada established in *Delgamuukw* that the federal government has “the exclusive power to extinguish aboriginal rights, including aboriginal title”¹⁸ pursuant to section 91(24) of the *Constitution Act, 1867*, which provides that the federal

⁷ *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”) [*Constitution Act, 1982*].

⁸ *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR]; *Mitchell*, *supra* note 3 at para 11; *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 39, [2005] 2 SCR 220.

⁹ Jack Woodward, *Native Law* (Toronto: Carswell, 1994) (loose-leaf 2015 supplement), vol 1, ch 5 at para 750.

¹⁰ *Sparrow*, *supra* note 8 at 1099; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 180, 153 DLR (4th) 193 [*Delgamuukw*].

¹¹ *Sparrow*, *supra* note 8 at 1099.

¹² *Sparrow*, *supra* note 8 at 1098-99, affirming *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 404, 34 DLR (3d) 145 p, Hall J, dissenting [*Calder*].

¹³ *Sparrow*, *supra* note 8 at para 37, rejecting *Calder*, *supra* note 12 at 333, Judson J.

¹⁴ *Calder*, *ibid* at 402, Hall J. For an explanation why only legislation, and not executive acts, could extinguish Aboriginal title, see McNeil, “Extinguishment”, *supra* note 3 at 311-16.

¹⁵ See *Delgamuukw*, *supra* note 10 at para 180.

¹⁶ For an instance of a successful extinguishment of Aboriginal rights, see *R v Horseman*, [1990] 1 SCR 901 at para 72, 73 Alta LR (2d) 193 [*Horseman*]. For a discussion of this case, see text accompanying note 109, below.

¹⁷ For a discussion of the Imperial Parliament’s authority to extinguish Aboriginal rights, see McNeil, “Extinguishment”, *supra* note 3 at 317-18, 322.

¹⁸ *Delgamuukw*, *supra* note 10 at paras 173-74.

government has legislative jurisdiction over “Indians, and Lands reserved for the Indians”.¹⁹ This principle applies equally to Métis title, given the Supreme Court of Canada’s decision in *Daniels v. Canada (Indian Affairs and Northern Development)*, according to which Métis are “Indians” for the purposes of section 91(24) and thus within the legislative jurisdiction of the federal government.²⁰ With respect to Imperial legislation, a majority of the Court held in *R v Sappier; R v Gray* that “during the colonial period, the power to extinguish aboriginal rights rested with the Imperial Crown.”²¹

The evisceration of the doctrine of interjurisdictional immunity as applied to Aboriginal rights in *Tsilhqot’in Nation* does not alter the requirement that legislation be federal in order to extinguish Aboriginal rights. While it is true that *Tsilhqot’in Nation* stands for the proposition that Aboriginal rights, including title, are no longer within the core of the federal government’s jurisdiction pursuant to s. 91(24),²² this proposition pertains to the doctrine of interjurisdictional immunity, which provided only one of two independent rationales for the federal legislation requirement in *Delgamuukw*.²³ The other rationale rests on a pith and substance analysis, which is unaffected by *Tsilhqot’in Nation*’s removal of Aboriginal rights from the core of section 91(24). The majority in *Delgamuukw* explained that although provincial laws of general application can apply to s. 91(24) Indians and Indian land *proprio vigore* (of their own force), a provincial law of general application could not apply *proprio vigore* so as to extinguish Aboriginal rights.²⁴ In order to meet the test for extinguishment discussed above, the provincial law, of necessity, would not be a law of general application. That is, any provincial law that meets the high threshold of *Sparrow*’s clear and plain intention test would thereby be in relation to Indians and Indian lands under s. 91(24) and thus would be *ultra vires*.²⁵ In other words, the pith and substance of the provincial legislation would be in relation to s. 91(24), even though the provincial legislation would not touch upon the core of s. 91(24) after *Tsilhqot’in Nation*.

As a result, when assessing the possible extinguishment of Métis rights, absent a delegation of authority by the Imperial parliament,²⁶ provincial and colonial legislation can be excluded from the analysis. From the Métis perspective, this is one of the victories

¹⁹ *Constitution Act, 1867*, 30 & 31 Vic, c 3, (UK), s 91(24).

²⁰ *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 57, [2016] 1 SCR 99 [*Daniels*].

²¹ *R v Sappier; R v Gray*, 2006 SCC 54 at para 58, [2006] 2 SCR 686 [*Sappier & Gray*], citing *Delgamuukw*, *supra* note 10 at para 15. McNeil explains that the Imperial Parliament’s authority to extinguish Aboriginal rights would have continued after Confederation; presumably it could have extinguished Aboriginal rights by constitutional amendment until it enacted the *Canada Act 1982*: McNeil, “Extinguishment”, *supra* note 3 at 322.

²² *Tsilhqot’in Nation*, *supra* note 5 at paras 140, 151.

²³ *Delgamuukw*, *supra* note 10 at para 181.

²⁴ *Delgamuukw*, *ibid* at para 179-80.

²⁵ *Delgamuukw*, *ibid* at para 180.

²⁶ For a discussion of the significance of Imperial authority delegated to colonial bodies, see McNeil, “Extinguishment”, *supra* note 3 at 318-22.

of *Daniels* overlooked by those who questioned the value of a mere declaration that the Métis are “Indians” under s. 91(24).²⁷

An exhaustive examination of all federal and Imperial legislation from the late eighteenth century to 1982 is beyond the scope of this chapter. Nevertheless, the only potentially relevant statutes of which we are aware are the *Manitoba Act, 1870*²⁸ and the *Dominion Lands Act*.²⁹ The former sets out a process by which the Indian title of the Métis located within the original postage stamp province of Manitoba would be extinguished, and the latter does the same for the Métis located within the north-west but outside of the postage stamp province. Section 31 of the *Manitoba Act* states:

And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed, residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.³⁰

Section 125(e) of the *Dominion Lands Act*, as amended in 1879, states:

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

...

To satisfy any claims existing in connection with the extinguishment of the Indian title preferred by half-breeds

²⁷ See HW Roger Townshend, “What Difference did *Daniels* Make?” (paper prepared for the Ontario Bar Association’s 15th Annual *Charter* Conference, 6 October 2016) [unpublished, archived with the author].

²⁸ *Manitoba Act, 1870*, 33 Vic, c 3 (Canada) [*Manitoba Act*].

²⁹ *Dominion Lands Act, 1872*, 35 Vic, c 23 [*Dominion Lands Act*]. See Joffe & Turpel, *supra* note 6 (arguing that “until 1977, it would appear that the only Canadian legislative provisions expressly contemplating (though not actually legislating) ‘extinguishment’ of ‘Indian title’ were found in the *Manitoba Act, 1870* and the *Dominion Lands Act* in regard to the Métis” at 93-94 [footnotes omitted]). For a discussion of the significance of limitation statutes with respect to Aboriginal title, see McNeil, “Extinguishment”, *supra* note 3 at 325-27.

³⁰ *Manitoba Act, supra* note 28, s 31. Nineteenth century legislation typically used the term “half-breed” in the English version of official documents and “Métis” in the French versions. We use the terminology referred to in the legislation when doing analysis, we use the term “Métis” which is the preferred name among Métis.

resident in the North-West Territories outside the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting lands to such persons, to such extent and on such terms and conditions, as may be expedient.³¹

Given the constitutional status of the *Manitoba Act*,³² s. 31 *prima facie* falls within the category of constitutional amendments, which are considered at section 2.3, below. The test for extinguishment by means of legislation and for extinguishment by means of constitutional amendment, though, is one and the same.³³

At first glance, both provisions might appear to satisfy *Sparrow*'s clear and plain intention test; they explicitly state that their purpose is to extinguish the Indian title of the Métis. These explicit statements might seem not only to meet but to exceed the threshold for extinguishment, according to which the legislature's intention must be clear and plain, but need not be express.³⁴ As Joffe and Turpel rightly recognize, though, these provisions contemplate, but do not actually legislate, an extinguishment of Métis title.³⁵ In other words, the intention exhibited within these provisions is not to extinguish Métis title directly, but rather to allow for an extinguishment upon the occurrence of certain, future, events. More specifically, s. 31 of the *Manitoba Act* outlines a process for distributing 1.4 million acres of land to the children of Métis heads of families, the purpose of which is to extinguish Métis title. Similarly, s. 12(e) of the *Dominion Lands Act* gives the Governor in Council the power to extinguish Métis title by granting land.³⁶ The office of the Superintendent General of Indian Affairs seems to have recognized the accuracy of this interpretation when it issued a report in 1906 stating that the Aboriginal title of the "Indians and half-breeds" in a certain portion of Saskatchewan and Alberta had not yet been extinguished; the report recommended making a treaty with the Indians and settling the claims of the half-breeds.³⁷ If s. 12(e) by itself had extinguished the Aboriginal rights of the Métis, then the 1906 report would have been redundant and therefore unnecessary with respect to the Métis. Thus, s. 31 and s. 12(e), in and of themselves, do not satisfy the clear and plain intention test as they only allude to another means for future extinguishment. The analysis, then, requires an examination of the events and actions undertaken to implement these provisions. The issuance of scrip was a method of

³¹ *Dominion Lands Act*, *supra* note 29, s 12(e).

³² *Constitution Act, 1982*, *supra* note 7, *Schedule to the Constitution Act, 1982*.

³³ *Horseman*, *supra* note 16, provides an instance of an extinguishment by means of constitutional amendment. *Horseman* was decided before *Sparrow*, and so the court in *Horseman* does not refer to *Sparrow*'s clear and plain intention test. That being said, the majority in *Gladstone*, which was decided subsequent to *Sparrow*, explains that the reason an extinguishment was found in *Horseman* was because the constitutional document in question—the Natural Resources Transfer Agreement—evinced "the necessary clear and plain intention to extinguish aboriginal rights to hunt commercially": *R v Gladstone*, [1996] 2 SCR 723 at para 38, 137 DLR (4th) 648 [*Gladstone*].

³⁴ *Gladstone*, *ibid* at para 34; *Delgamuukw*, *supra* note 10 at para 180.

³⁵ Joffe & Turpel, *supra* note 6 at 93-94, 107. See also Magnet, *supra* note 3 at 73.

³⁶ *Dominion Lands Act*, 1872, 35 Vic, c 23. 12(e).

³⁷ See *R v Morin and Daigneault*, [1996] 3 CNLR 157, [1996] SJ No 262 at 11, citing Order-in-Council 1459 [*Morin & Daigneault*].

implementing both s. 31 and s. 12(e).³⁸ Scrip referred to a certificate that entitled the holder “to receive payment later in the form of cash, goods or land.”³⁹

Sections 31 and 12(e), as well as the issuance of scrip pursuant to these provisions, has been the subject of various instances of litigation, none of which is determinative of the issue of the extinguishment of Métis title. In *Manitoba Métis Federation Inc v. Canada (Attorney General)*, the trial judge concluded, and the Court of Appeal agreed, that the purpose of s. 31 was not to extinguish the Indian title of the Métis.⁴⁰ At first glance, this appears to be a victory for the Métis. This conclusion, however, was the position advanced by the Crown in attempting to counter the Métis claimants’ argument that the language of s. 31 constituted an admission that the Métis of the Red River in 1870 held Indian title. The trial judge and the Court of Appeal rejected the position of the Métis claimants and held that the language of extinguishment in s. 31 was used as a matter of political expediency, “to make palatable to the Opposition the grant of land and thereby ensure passage of the *Act*.”⁴¹ At the same time, the Court of Appeal made the incongruous statement that the ability of the Métis of the Red River “to claim Aboriginal title was lost (or at least seriously impeded) through” the enactment of s. 31.⁴² This statement is not determinative of the significance of s. 31, as it is not based on an application of *Sparrow*’s clear and plain intention test to s. 31. In fact, no level of court in *Manitoba Metis Federation* applied the clear and plain intention test to s. 31. It was not necessary to do so because the claim advanced in *Manitoba Metis Federation* was for breach of fiduciary duty, not for Aboriginal title.⁴³

In *R. v. Morin and Daigneault*, a judge of the Saskatchewan Provincial Court held that the scrip issued to the Métis for the sake of implementing a later version of s. 12(e) of the *Dominion Lands Act* was not effective in extinguishing the Métis claimants’ Aboriginal right to fish.⁴⁴ The *Dominion Lands Act* makes no mention of fishing rights and thus did not meet the clear and plain intention test for extinguishing fishing rights.⁴⁵ The question whether scrip extinguished the Aboriginal title of the Métis claimants, however, was not before the Court.⁴⁶ This question is at issue in *Morin v. Canada*.⁴⁷

³⁸ *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 37, [2013] 1 SCR 623 (explaining that scrip was issued to those inadvertently left out of the allotment of land made pursuant to s. 31) [*Manitoba Metis Federation*].

³⁹ Jean Teillet, *Métis Law in Canada* (Pape Salter Teillet, 2016) (loose-leaf, 2016 supplement) at 3-11.

⁴⁰ *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2010 MBCA 71 at paras 188, 238, 242, 255 Man R (2d) 167 [*Manitoba Métis Federation CA*].

⁴¹ *Manitoba Métis Federation CA*, *ibid* at para 188, 242.

⁴² *Manitoba Métis Federation CA*, *ibid* at para 505.

⁴³ A majority of the Supreme Court of Canada concluded—in the course of holding that the Métis had not established the communal interest in land necessary to ground a fiduciary duty—that the Métis plaintiffs failed to establish that the Métis held Aboriginal title to their lands: *Manitoba Metis Federation*, *supra* note 38 at para 59. For a critique of the majority’s reasoning on this point and a defence of the argument in support of Métis title, see Drake & Gaudry, *supra* note 4.

⁴⁴ *Morin & Daigneault*, *supra* note 37 at 12.

⁴⁵ *Morin & Daigneault*, *ibid* at 11-12.

⁴⁶ *Morin & Daigneault*, *ibid* at 11.

According to Jean Teillet, to date, this is the only claim seeking a declaration that the Métis have Aboriginal title.⁴⁸ Teillet reports, however, that the proceedings in this case are currently stayed.⁴⁹

We argue below that the nature of the events and actions surrounding s. 31 and s. 12(e) is such that the analysis which best upholds the honour of the Crown and facilitates reconciliation is one viewed through the lens of a potential surrender, rather than extinguishment by legislation or constitutional amendment. For this reason, we examine s. 31 and s. 12(e) below within the section on extinguishment by surrender.

2.2 Extinguishment by Surrender

Just as the federal government has jurisdiction to extinguish Aboriginal rights, so too does it have jurisdiction to accept a surrender of Aboriginal rights,⁵⁰ which undoubtedly includes Métis rights after the Supreme Court of Canada's decision in *Daniels*. Thus, any supposed surrender made solely to a provincial government can be excluded from the analysis.

2.2.1 Historical Treaties

History provides little evidence of extinguishment of Métis rights through surrender by treaty. Although individuals of mixed ancestry were occasionally admitted into treaty, generally Métis collectives in Canada did not execute historical land surrender treaties, with only one possible exception, discussed below. Those Métis who entered into a treaty on an individual basis did not thereby extinguish their descendants' Aboriginal rights.⁵¹ As the Supreme Court of Canada in *R. v. Powley* explains, extinguishment depends, at least in part, on whether the Métis community collectively adhered to a treaty.⁵² The federal government attempted to avoid treaty-making with Métis collectives whenever possible, preferring instead to deal with the Métis as individuals by issuing scrip to them pursuant to the *Dominion Lands Act*, discussed below at section 2.2.4. The one exception just mentioned is the 1875 Half-breed adhesion to Treaty 3 signed by the "Half-breeds" at Rainy River and Rainy Lake in northwestern Ontario.⁵³ The claim that those the Crown referred to as "Half-breeds" who executed the

⁴⁷ *Morin v Canada & Saskatchewan* (Q.B. File No. 619-1994). See Teillet, *supra* note 39 at 11-90.

⁴⁸ Teillet, *supra* note 39 at 11-90.

⁴⁹ Teillet, *ibid* at 11-90.

⁵⁰ *Delgamuukw*, *supra* note 10 at para 175.

⁵¹ *R v Powley*, 2003 SCC 43 at para 35, [2003] 2 SCR 207 [*Powley*].

⁵² *Powley*, *ibid*.

⁵³ The "Half-breeds" in the Rainy River and Rainy Lake area in Ontario signed an adhesion to Treaty 3 on September 12, 1875: 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, Cat No Ci 72-0366, online: Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679>.

adhesion constituted a “Métis” community is contested.⁵⁴ If the community at issue is a Métis community, the question arises whether the adhesion to Treaty 3 extinguished the rights and title of that Métis community.

The federal and provincial governments take the position that the numbered treaties, given their written text, effected an extinguishment by surrender of Aboriginal rights, including title, and replaced those rights with the hunting, fishing and other rights set out in the treaties.⁵⁵ Decisions of the Supreme Court of Canada thus far have been consistent with this interpretation,⁵⁶ including with respect to Treaty 3.⁵⁷ Indigenous peoples, in contrast, have long disputed the Crown’s interpretation.⁵⁸ Both the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission explain that Indigenous peoples understood and still understand treaties as agreements to share the land on a nation-to-nation basis, and not as “extinguishments” or “surrenders” of “rights”.⁵⁹ This interpretation is based on oral agreements and Indigenous legal institutions such as the exchange of wampum belts,⁶⁰ and is supported not only by

⁵⁴ On the one hand, Victor Lytwyn characterizes those who executed the adhesion to Treaty 3 as being “Métis”: Victor P Lytwyn, “In the Shadows of the Honorable Company: Nicolas Chatelaine and the Métis of Fort Frances” in Nicole St-Onge, Brenda Macdougall & Carolyn Podruchny, *Contours of a People: Metis Family, Mobility, and History* (Norman: University of Oklahoma Press, 2012) 194 at 194, 219-220. On the other hand, Sara Mainville, who is a descendant of Nicholas Chatelaine (who signed the adhesion to Treaty 3 on behalf of the “Half-breeds”), characterizes Chatelaine as being “a French/Anishinaabe ‘half-breed’” and not as being “Métis”: Sara J Mainville, “Treaty Councils and Mutual Reconciliation under Section 35” (2007) 6 *Indigenous LJ* 141 at 142.

⁵⁵ For example, the written text of Treaty 3 states, in part: “[the Indigenous signatories] do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the [the limits specified in the treaty]”: *ibid.*

⁵⁶ See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

⁵⁷ See *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

⁵⁸ See e.g. Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 173; John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155; Alan Pratt, “The Numbered Treaties and Extinguishment: A Legal Analysis, A Discussion Paper for the Royal Commission on Aboriginal Peoples” (1996), online: <<http://www.prattlaw.ca/articles/TreatiesandExtinguishmentSeptember1996.pdf>>.

⁵⁹ Royal Commission on Aboriginal Peoples, *The Final Report of the Royal Commission on Aboriginal Peoples, Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 41-46; Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: Reconciliation – The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal & Kingston: McGill-Queen’s University Press, 2015) at 34 [TRC, *Reconciliation*].

⁶⁰ See Venne, *supra* note 58 at 173. See Borrows, *supra* note 58 at 163-64.

Indigenous traditions, but also by the research of non-Indigenous scholars.⁶¹ Regardless of the Supreme Court of Canada’s decisions applying the Crown’s interpretation, this issue is far from settled.⁶² It engages the question whether land is a part of our community with which we are in a relationship and to which we owe responsibilities, or a form of property over which we exercise rights. In other words, this issue goes to the heart of the difference between Indigenous constitutional and legal orders, on the one hand, and western constitutional and legal orders, on the other.⁶³ This is the very issue that must be addressed if reconciliation is to be possible. Not surprisingly, the Truth and Reconciliation Commission, in its final report, devoted considerable attention to Indigenous understandings of the treaties, and also called on the federal government, on behalf of all Canadians, to renew or establish treaty relationships in accordance with the principles of mutual recognition and mutual respect.⁶⁴ Thus, dismissing an Indigenous understanding of the numbered treaties is not an option for those who value reconciliation.

2.2.2 Modern Agreements

In many instances, Canada has acted as if Métis title has been adequately extinguished which would make any modern agreements with Métis, for the purposes of extinguishment of title, unnecessary.⁶⁵ But in comprehensive land claims processes in the territorial north, the federal government has seemed to presume that some Métis title claims are outstanding. While the apparent method of extinguishment through scrip was practiced in both the north and south, when the comprehensive land claims processes were initiated in the Northwest Territories, so too were land claims with Métis, both inside and outside of Dene claims negotiations. As Larry Chartrand notes, both the *Sahtu Dene and Métis Comprehensive Land Claim Agreement* and the Northwest Territory Métis Nation Agreement-in-Principle presume that scrip did not sufficiently extinguish Métis title so as to leave it an ongoing burden on the Crown. Yet, the historical factors by which Métis title was supposedly extinguished through scrip in the Northwest Territories are not markedly different from the historical factors of those places in the south where

⁶¹ See Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto, University of Toronto Press, 2014); John S Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal & Kingston: McGill-Queen’s University Press, 2010).

⁶² For a recent collection of essays examining this topic, see John Borrows & Michael Coyle, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

⁶³ For an examination of the fundamental differences between an Anishinaabe constitutional order and a western liberal constitutional order, see Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847. See also McNeil, “Extinguishment”, *supra* note 3 (explaining that extinguishment by surrender, “while permissible in Canadian law, may not be permissible” under Indigenous law at 307).

⁶⁴ TRC, *Reconciliation*, *supra* note 59 at 33-38, especially Call to Action 45 at 37-38.

⁶⁵ For a discussion of modern Métis land agreements, see Teillet, *supra* note 39 at 3-14 to 3-17. For a discussion of modern Métis self-government agreements, see Teillet, *ibid* at 10-2 to 10-5.

Métis title is presumed by the federal government to have been effectively extinguished by the same scrip policy via the *Dominion Lands Act*.⁶⁶

In each of these situations Métis were issued scrip, while also currently rejecting the claim that scrip was sufficient for the extinguishment of their title. In essence, Chartrand argues that “the experience in the Northwest Territories demonstrates that the federal government is prepared to include Metis communities as eligible for the comprehensive claims process.”⁶⁷ However, it has not extended the same treatment to Métis communities south of the 60th parallel, even though the historical federal policy applied to the Métis there was the same. Chartrand argues that the main reason for this was jurisdictional. The lack of provincial jurisdiction north of the 60th parallel precluded government inaction based on denial-of-jurisdiction arguments. As Chartrand notes, the decision in *Daniels* that Métis are within federal jurisdiction now precludes those same arguments south of the 60th parallel.⁶⁸ Chartrand concludes that “there are Metis claims south of 60° to lands and resources that are arguably no different in kind than those in the north and should be equally acknowledged. Consequently, the existence of Metis specific modern treaties in the north offers a solid precedent for the promotion of Metis treaties in other parts of Canada.”⁶⁹ Modern agreements in the north, while proposing to extinguish Métis title, have in fact recognized its continued existence.

The willingness of the federal government to negotiate with Métis in the North on issues of land rights and title that it claims to have already extinguished through scrip grants generations ago, is evidence that the federal government may also be having doubts about the efficacy of the extinguishment of Métis title.

2.2.3 Section 31 of the *Manitoba Act*

Section 31 of the *Manitoba Act* is set out above at section 2.1. In this provision, the government of Canada recognizes the existence of Métis “Indian title” in Rupert’s Land in 1870 for the purposes of extinguishment. In the House of Commons on May 2, 1870, Sir John A. Macdonald stated that these 1.4 million acres would constitute a “reservation” for “the purpose of extinguishing the Indian title and all claims upon the lands within the limits of the province.”⁷⁰ Sir George-Etienne Cartier also argued in the House that like treaties with the Indians, a large Métis land reserve was necessary “for the

⁶⁶ Larry Chartrand, “Metis Treaties in Canada: Past Realities and Present Promise” in Christopher Adams, Gregg Dahl & Ian Peach, eds, *Metis in Canada: History Identity Law and Politics*, 2nd ed (Edmonton: University of Alberta Press) [forthcoming] at 33-34, 36, 37-38. [include full citation and final pagination once available.]

⁶⁷ Chartrand, *ibid* at 37. [include final pagination once available.]

⁶⁸ Chartrand, *ibid* at 38. [include final pagination once available.]

⁶⁹ Chartrand, *ibid* [include final pagination once available.]

⁷⁰ Sir John A Macdonald, quoted in “Extracts from the Debates on the Manitoba Bill, May 2 - May 9, 1870” in WL Morton, *Manitoba: the Birth of a Province* (Altona, MB: DW Friesen & Sons Ltd, 1965) at 168-169 [“Extracts”].

purpose of extinguishing the claims of half-breeds.”⁷¹ The Act’s passage would, it was believed, facilitate the Métis’ “extinguishment of the Indian Title to the lands in the Province,” through the appropriation of “ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the halfbreed residents.”⁷² The Act, as well as Macdonald’s and Cartier’s statements in Parliament, seem to assume that there was a Métis share of “Indian title” to extinguish.

Section 31 should be analyzed within the framework of a potential surrender, and not as a potential extinguishment by constitutional amendment. As discussed below, section 31 is not a unilateral constitutional provision; rather, it reflects a bilateral agreement between two parties reached after extensive negotiations, which resulted in modifications to each side’s initial position.⁷³ Analyzing s. 31 as a surrender—as opposed to as a unilateral constitutional amendment—better reflects the agency of the parties, which in turn is more likely to uphold the honour of the Crown⁷⁴ and to promote reconciliation.⁷⁵ The holding in *Manitoba Metis Federation* that s. 31 is not a treaty⁷⁶ does not preclude conceptualizing s. 31 within the surrender framework. In that decision, a majority of the Supreme Court of Canada held that the Métis plaintiffs failed to establish that the Crown owed a fiduciary duty to the Métis when implementing s. 31; nonetheless, the majority held that s. 31 is a constitutional obligation which engages the honour of the Crown and which the Crown failed to implement diligently.⁷⁷ According to the Court, this constitutional obligation is analogous to a treaty promise, has a treaty-like history and character, establishes solemn promises “which are no less fundamental than treaty promises”, and is the result of negotiations aimed at reconciling Métis Aboriginal rights with the Crown’s claim to sovereignty.⁷⁸ Given the treaty-like and bilateral nature of s. 31, it is more appropriate to analyze it as a surrender than as a unilateral constitutional amendment.

The Supreme Court of Canada’s decision in *Ontario (Attorney General) v. Bear Island Foundation* establishes a contentious yet not-overturned principle pertaining to extinguishment by surrender.⁷⁹ In this case, the Temagami First Nation argued that it had

⁷¹ Sir George Etienne Cartier, quoted in “Extracts”, *ibid* at 176.

⁷² *Manitoba Act*, *supra* note 28, s 31.

⁷³ See Adam Gaudry, *Kaa-tipeyimishoyaahk - ‘We are those who own ourselves’*: *A Political History of Métis Self-Determination in the North-West, 1830-1870* (PhD Dissertation, University of Victoria, 2014) [unpublished] at 294-295.

⁷⁴ See *Manitoba Metis Federation*, *supra* note 38 (explaining that the honour of the Crown is engaged “in situations involving reconciliation of Aboriginal rights with Crown sovereignty” at para 68).

⁷⁵ See TRC, *Reconciliation*, *supra* note 59 (explaining that reconciliation refers to “establishing and maintaining respectful relationships” at 17). Analyzing section 31 as a unilateral constitutional amendment would not accord due respect to the parties’ relationship.

⁷⁶ *Manitoba Metis Federation*, *supra* note 38 at para 93.

⁷⁷ *Manitoba Metis Federation*, *ibid* at paras 64, 75, 91, 128.

⁷⁸ *Manitoba Metis Federation*, *ibid* at paras 71, 92.

⁷⁹ *Ontario (Attorney General) v Bear Island Foundation*, [1991] 2 SCR 570, 83 DLR (4th) 381 [*Bear Island* cited to SCR]. For a critique of *Bear Island*, see Kent McNeil, “The Temagami

never signed the Robinson Huron Treaty, which purports to cover the traditional territory of the Temagami First Nation, and hence the First Nation’s Aboriginal rights remained unextinguished. The Supreme Court of Canada rejected this argument and held that regardless of whether any representative of the Temagami First Nation actually signed the Robinson Huron Treaty in 1850, the Aboriginal rights of the Temagami First Nation were surrendered when the First Nation subsequently received treaty payments and was assigned a reserve.⁸⁰ In other words, if an Aboriginal nation receives the benefits of a surrender, it is held to the burden of the surrender. We contend that the inverse of this proposition should also be true: if an Aboriginal nation does not receive the benefits of a surrender, it should not be held to the burden of the surrender.⁸¹ Given the severe consequences of the *Bear Island* principle—including the total loss of Aboriginal rights potentially without any negotiation or legislative expression whatsoever—fairness and the honour of the Crown requires the protection of Aboriginal rights by the inverse of the *Bear Island* principle. We argue below that the Métis did not receive the benefits of s. 31, and thus they should not be held to the burdens of s. 31. That is, s. 31 did not effect an extinguishment by surrender of Métis title.⁸²

After years of delays, s. 31 lands were eventually distributed by the federal government as individual grants ranging from 160 and 240 acres, a process which was reproduced in the scrip commissions that followed. While at first glance scrip and s. 31 grants may appear to complete the exchange of Métis “Indian title” for individual land grants, this process departed drastically from the manner in which the Métis originally agreed to extinguish their “Indian title” in the *Manitoba Act*.⁸³ As part of their agreement to extinguish their title, the Métis leadership expected to be in control of the distribution of these s. 31 lands through a committee of their own making that was authorized by the Canadian executive for this purpose.⁸⁴ This committee was also to exercise some level of

Indian Land Claim: Loosening the Judicial Strait-jacket” in Matt Bray & Ashley Thomson, eds, *Temagami: A Debate on Wilderness* (Toronto: Dundurn Press, 1990) 185.

⁸⁰ *Bear Island*, *supra* note 79 at 575.

⁸¹ See Magnet, *supra* note 3 (arguing that in the context of a surrender, “if the *quid pro quo* of a treaty or agreement is not forthcoming, then the agreement is void” at 70).

⁸² See also Magnet, *ibid* at 70-71. Even if s 31 had extinguished Métis title, that extinguishment would only be effective within the territory covered by the original postage stamp province of Manitoba created by the *Manitoba Act*: *R v Goodon*, 2008 MBPC 59 at para 77, 234 Man R (2d) 278.

⁸³ See Darren O’Toole, “Métis Claims to ‘Indian’ Title in Manitoba, 1860-1870,” (2008) 28 *The Canadian Journal of Native Studies* 214; Paul LAH Chartrand, “Aboriginal Rights: The Dispossession of the Métis” (1991) 29:3 *Osgoode Hall LJ* 457. See also Magnet, *supra* note 3 (arguing that “neither level of government met the positive obligations imposed by the *Manitoba Act*” at 84).

⁸⁴ The trial in the *Manitoba Metis Federation* case concluded that Parliament assigned the power to distribute lands to the Governor-Governor of Canada and that “Canada never agreed to place any of the lands in the new province under the jurisdiction, authority or control of the local Legislature”, largely by privileging the Parliament speeches of Canadian politicians on the topic: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2007 MBQB 293 at paras 491-97, 223 Man R (2d) 42. But, as the trial judge also acknowledges, the representatives of the Provisional Government were told by Macdonald and Cartier that the original agreement was to

continued jurisdiction over these s. 31 lands into the future, to protect them from sale to non-Métis speculators and settlers. Therefore the implementation of a scrip system at the hands of the federal government was a substantial unilateral change which undermined the principal agreements represented in the *Manitoba Act*. If s. 31 of the *Manitoba Act* was never properly implemented, then the success of s. 31's extinguishment of the "Indian title" of Métis at Red River is also questionable. Furthermore, since Métis received little benefit from the distribution of these grants, they hardly reflect fair compensation for the extinguishment of Métis title.

In order to fully appreciate the depth of the *Manitoba Act*, we must go beyond the text of the document. While the text of s. 31 suggests that this land was to be chosen and distributed by the Lieutenant-Governor of Manitoba, this language obscures the complex negotiations and oral agreements that provide the basis for a more robust interpretation of the meaning behind s. 31. In the winter of 1870, the Provisional Government of Assiniboia dispatched three delegates to negotiate with the Canadian government a satisfactory agreement that required, among other things, the protection of current landholdings of Métis living at Red River.⁸⁵ These negotiators had, over the course of several weeks, met with Macdonald and Cartier agreeing upon what would later become the *Manitoba Act*. Since the *Manitoba Act* was the result of a protracted and meticulous negotiation process between representatives of the Métis-controlled Provisional Government of Assiniboia and the Government of Canada in April and May 1870, Canada's faithfulness to the agreement is vital if Canada now claims that Métis title was extinguished. If we are to respect the interpretation of Métis contemporaries, we can view s. 31 as an agreement where Métis would extinguish their share of "Indian title" in the new province, in exchange for a federally recognized reserve of Métis land, amongst other Canadian political concessions.⁸⁶ The sole surviving account of the negotiations is from the appointed representative of the Métis at Red River, Abbé Noel-Joseph Ritchot. In his journal, he recorded that the original agreement was that s. 31 lands would be under the control of the new provincial legislature, "which could pass laws to ensure the continuance of these lands in *métis* families."⁸⁷ When this was later altered to place the s.31 lands under the *federal* legislature's control, Ritchot wanted assurance that these lands would be protected as if under provincial control. The agreed-to compromise was that these lands would be overseen by a committee created "as soon as might be [possible] after the Bill should be passed" via an executive order from the Privy Council.⁸⁸ Through this oversight committee, the Métis would be in control of the entire reserve selection and distribution process—from selecting the reserve lands, to dividing

be respected and that any change in language was used purposefully to get the bill through Parliament. Being told this by presumably honourable agents of the Crown, the representatives likely assumed that the federal authorities would simply authorize the new provincial government to enact their own land distribution policy, as this is essentially what Canadian leaders told them.

⁸⁵ Thomas Flanagan, "The Case against Métis Aboriginal Rights," (1983) 9 *Canadian Public Policy* 314 at 317.

⁸⁶ See Gaudry, *supra* note 73 at 336-337.

⁸⁷ Noel Ritchot, "The Journal of Rev. N.-J. Ritchot, March 24 to May 28, 1870" in W.L. Morton, *Manitoba: The Birth of a Province*, (Altona, MB: D.W. Friesen & Sons Ltd.: 1965) at 143.

⁸⁸ Ritchot, *ibid* at 147.

and distributing them, to enacting laws through the local legislature to prevent outsiders from acquiring these lands. Even though Ritchot complained that the language of the Manitoba Bill did not contain reference to this oversight committee, both Macdonald and Cartier reassured him that the verbal understandings of the Act would inform its interpretation and implementation.⁸⁹

That the Métis were willing to extinguish their share of Indian title is clearly articulated in this agreement; what is less clear, however, is whether the distribution of the 1.4 million acres can be said to have adequately extinguished the Métis share of the title to what is now southern Manitoba. Instead of the implementation of this verbal agreement, a scrip system was employed as a means to extinguish the title of individual claimants. In Manitoba, the federal government did not begin the distribution of these lands until 1876. Since the safety and social position of Métis had declined significantly in the six years following the passage of the *Manitoba Act*, compounded with administrative delays, Métis families often chose to leave Manitoba and the scrip system offered quick cash in exchange for severely discounted land grants in the 1.4 million acre Métis reserve.⁹⁰ So transitory was the benefit to Métis families, scrip could not have amounted to realistic compensation for the value of Métis title to southern Manitoba.⁹¹ Ultimately, rather than extinguishing Métis title through a negotiated agreement given ascent by the *Manitoba Act*, Métis title was purportedly extinguished through policy that differed significantly from the agreement that gave rise to s. 31.⁹²

From this policy, Métis lands flowed quickly into the hands of speculators and Canadian settlers. Fraudulent dealing also dispossessed Métis families of these land grants intended for their children, but four times between 1881-1885 Manitoba's Legislative Assembly passed retroactive statutes to legalize all "irregular" sales of Métis lands and to protect those, often powerful interests, who were implicated in this dispossession.⁹³ Due to these delays and irregularities, the Supreme Court held in *Manitoba Metis Federation* that:

Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis people of Manitoba, an Aboriginal people, and it engaged the honour of the Crown. ... Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. ... Although the honour of the Crown obliged the government to act with diligence to fulfill s. 31, it acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant.

⁸⁹ JM Bumsted, *The Red River Rebellion*, (Winnipeg: Watson Dwyer Publishing, 1996) at 182.

⁹⁰ John Leonard Taylor, "An Historical Introduction to Métis Claims in Canada" (1983) 3:1 Canadian J Native Studies 151 at 157.

⁹¹ See Flanagan, *supra* note 85 at 323.

⁹² Taylor, *supra* note 90 at 166-167.

⁹³ O'Toole, *supra* note 83 at 242.

If the original purpose of this agreement was to extinguish the Métis people's share of Indian title in southern Manitoba by an agreed-upon process, the Crown ultimately failed to act honourably in its desire to extinguish Métis title. Deriving little benefit from this unilateral shift in policy and with little realization of the dream of a substantial Métis land-base in Manitoba, it is difficult to argue that the implementation of s. 31 of the *Manitoba Act* resulted in the meaningful extinguishment of Métis title on the terms originally agreed to by the Métis at Red River. The result is that, even among the most vocal critics of the existence of Métis title, there is general consensus that “it does not appear that the Métis derived much benefit from s. 31 of the *Manitoba Act*.”⁹⁴ It is therefore our position that Métis Aboriginal title was not surrendered via the *Manitoba Act*, and that Métis title persists in what has become southern Manitoba.

2.2.4 Scrip Issued Pursuant to the *Dominion Lands Act*

The question whether scrip issued pursuant to the *Dominion Lands Act* extinguished Métis title has been addressed exhaustively elsewhere.⁹⁵ To this discussion we will add only the following arguments: This question should be analyzed as a potential extinguishment by surrender rather than as a potential extinguishment by legislation. If the issuance of scrip constitutes the former and not the latter, then an analysis of whether the legislation authorizing scrip exhibits the requisite clear and plain intention is insufficient to answer the extinguishment question. It will be necessary to apply the principles pertaining to extinguishment by surrender, including the principle—supported by recent jurisprudence—that only the collective can make a surrender given that Aboriginal rights are collective rights. Scrip could not extinguish Aboriginal rights, including title, because scrip was issued on an individual, not a collective, basis.

Just as s. 31 and the events surrounding its implementation are better analyzed as a potential surrender, so too is the scrip issued pursuant to the *Dominion Lands Act*. As discussed above, with one possible exception, the government dealt with Métis interests in land by issuing scrip, whereas it entered into what it claims are land surrender treaties with First Nations.⁹⁶ The issuance of scrip should be analyzed as a potential surrender because from the perspective of the Canadian government, the purpose scrip was meant

⁹⁴ Flanagan, *supra* note 85 at 157.

⁹⁵ See Joffe & Turpel, *supra* note 6 at 124-28; Magnet, *supra* note 3 at 69-86; Chartrand, *supra* note 66 at 30-34 [update pinpoint when published].

⁹⁶ As stated above, although Métis individuals were admitted into treaty, the Canadian government for the most part did not enter into treaties with Métis collectives: see section 2.2.1 above. When scrip was offered, some Métis withdrew from treaty in order to take scrip. Gerhard Ens & Joe Sawchuck describe some instances in which almost an entire band withdrew from treaty in order to take scrip (e.g. the Sandy Bay band, the Bobtail band, and the Papaschase band): Gerhard J Ens & Joe Sawchuck, *From New Peoples to New Nations: Aspects of Métis History and Identity from the Eighteenth to Twenty-First Centuries* (Toronto: University of Toronto Press, 2016) at 205-215. It might be tempting to conclude that these are instances of the federal government accepting collective surrenders from Métis. However, even in these instances, scrip was issued on an individual as opposed to a collective basis. Scrip was not issued to a band as a whole; each individual had to decide whether to withdraw from treaty and accept scrip: see Ens & Sawchuck, *ibid* at 203, 207, 212, 215.

to serve was analogous to that of the so-called land surrender treaties.⁹⁷ For example, beginning in 1889 with the adhesion to Treaty 6, scrip commissioners accompanied treaty commissioners and issued scrip to Métis individuals at the same time treaty commissioners entered into treaties with First Nations.⁹⁸ Similarly, the court in *Morin & Daigneault* concluded that “the impression given to the Indian and Métis population was that you had to make a choice and it made little difference whether you were Indian or Métis and whether you took treaty or scrip.”⁹⁹ Granted, the choice between scrip and treaty had significant consequences in terms of colonial constructions of one’s identity and the identity of one’s descendants.¹⁰⁰ The court’s point here, though, is that Canadian officials intended both scrip and treaties to serve the same purpose, namely, to extinguish outstanding claims to land. Thus, just as treaties are categorized as potential surrenders, scrip should be as well.

If the acceptance of scrip is a potential surrender, then assessing extinguishment requires applying the principles pertaining to extinguishment by surrender, and not merely the principles pertaining to extinguishment by legislation. A key principle regarding extinguishment by surrender is that the surrender, to be effective, must be made by the collective.

Joffe and Turpel have argued persuasively that scrip transactions could not have extinguished the Aboriginal title of the Métis, as title is a collective right, but scrip was issued to and accepted by individuals who did not have the capacity to extinguish collective rights.¹⁰¹ Decisions released subsequent to the publication of Joffe and Turpel’s report confirm the principles underlying their argument. The Supreme Court of Canada in *Behn v. Moulton Contracting Ltd.* concluded that Aboriginal rights are collective in nature and held by the “Aboriginal group”.¹⁰² *Tsilhqot’in Nation* confirmed that Aboriginal title is a “collective title” held not only for the present members of the Aboriginal community in question, but for all succeeding generations as well.¹⁰³ The Supreme Court of Canada in *Powley* confirmed that to extinguish Aboriginal rights, a surrender must be made by the collective, and that this principle applies just as much to the Métis as it does to First Nations.¹⁰⁴ In *R. v. Blais*, the Supreme Court of Canada contrasted the scrip process with the treaty process and noted that the Métis were dealt with on an individual basis while treaties with First Nations were concluded on a collective basis.¹⁰⁵ Similarly, the court in *Morin & Daigneault* confirmed that Métis scrip recipients were dealt with as individuals and not as a collective.¹⁰⁶ Thus, if the Métis can

⁹⁷ *Contra* Joffe & Turpel, *supra* note 6 (arguing that Métis had “no choice but to accept scrip” at 125).

⁹⁸ See Taylor, *supra* note 90 at 164-66.

⁹⁹ *Morin & Daigneault*, *supra* note 37 at 14.

¹⁰⁰ See Ens & Sawchuck, *supra* note 96 at 132.

¹⁰¹ See Joffe & Turpel, *supra* note 6 at 133.

¹⁰² *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 30, [2013] 2 SCR 227.

¹⁰³ *Tsilhqot’in Nation*, *supra* note 5 at para 74.

¹⁰⁴ *Powley*, *supra* note 51 at para 35.

¹⁰⁵ *R v Blais*, 2003 SCC 44 at para 34, [2003] 2 SCR 236 [*Blais*].

¹⁰⁶ *Morin & Daigneault*, *supra* note 37 at 12, 13.

establish Aboriginal title, any extinguishment argument based on the issuance of scrip will not be compelling.

2.3. Extinguishment by Constitutional Amendment

Aside from s. 31 of the *Manitoba Act*, considered in section 2.2.3 above, three other constitutional amendments or potential constitutional amendments are worth addressing: the Natural Resources Transfer Agreements (NRTAs), the Charlottetown Accord, and the Canada-Métis Nation Accord.

The three NRTAs (one for each of the prairie provinces) have constitutional status by virtue of the *Constitution Act, 1930*.¹⁰⁷ Each contains the following provision: “the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof”.¹⁰⁸ In *R. v. Horseman*, the Supreme Court of Canada held that this statement, combined with Alberta’s legislation regulating trafficking in wildlife, extinguished the Treaty 8 right to hunt for commercial purposes in Alberta.¹⁰⁹ This conclusion does not impact the hunting or fishing rights of the Métis, as the Court held in *Blais* that the Métis are not Indians for the purpose of this provision of the NRTAs.¹¹⁰ The Supreme Court of Canada’s conclusion in *Daniels* that the Métis are Indians for the purpose of s. 91(24) of the *Constitution Act, 1867*, does not alter the principle from *Blais*.¹¹¹ Thus, the NRTAs do not effect an extinguishment of Métis rights.¹¹²

Despite Canada’s assumption that Métis title was previously extinguished, it has also acted in ways that suggest there is doubt about the efficacy of that extinguishment. In 1992, the Métis Nation and the Government of Canada agreed to the “Métis Nation Accord” as a component of the Charlottetown Accord constitutional amendment package. Both parties agreed to pursue comprehensive land claims and self-government negotiations, which meant the relevant provinces (with the exception of Alberta) would “make available their fair share of Crown lands for transfer to Métis self-governing institutions.”¹¹³ These lands and their subsequent governance would be organized as a “land negotiation process” between Canada, the provinces, and representatives of the Métis Nation.¹¹⁴ The parties also “agreed to constitutionally entrench a commitment to negotiate land with the Métis.” In Canada, these kinds of comprehensive land claims

¹⁰⁷ *Constitution Act, 1930*, 20-21 Geo V, c 26 (UK) [*Constitution Act, 1930*].

¹⁰⁸ *Constitution Act, 1930*, *ibid*, s 13 in Schedule 1 (Manitoba) and s 12 in Schedules 2 (Alberta) and 3 (Saskatchewan).

¹⁰⁹ *R v Horseman*, *supra* note 16 at para 72. See also *R v Badger*, [1996] 1 SCR 771 at para 46, 133 DLR (4th) 324.

¹¹⁰ *Blais*, *supra* note 105 at para 1.

¹¹¹ *Daniels*, *supra* note 20 (distinguishing the conclusion in *Daniels* from *Blais* at paras 44-45).

¹¹² See Catherine Bell and Clayton Leonard, “A New Era in Métis Constitutional Rights: The Importance of *Powley* and *Blais*” (2003-2004) 41 *Alta L R* 1049 at 1081.

¹¹³ Royal Commission on Aboriginal Peoples, “Appendix 5D: Proposed Métis Nation Accord” in *The Final Report of the Royal Commission on Aboriginal Peoples, Perspectives and Realities*, vol 4 (Ottawa: Supply and Services Canada, 1996), s 4(b) at 255.

¹¹⁴ *Ibid*, s 4(d) at 255.

processes have almost exclusively concerned lands and Indigenous peoples where title is unextinguished or extinguishment was questionable. Presumably, such negotiations would have been unnecessary if the Crown was confident it had legitimately extinguished Métis title across the West. More recently, on April 13, 2017, the Métis National Council and the five provincial Métis organizations signed an agreement in principle with the Government of Canada to “advance reconciliation of the rights, claims, interests and aspirations of the Métis Nation and those of all Canadians.”¹¹⁵ While the agreement does not mention “land claims” in particular, it is nonetheless cognizant that “outstanding claims against the Crown” may still exist and establishes a new “Permanent Bilateral Mechanism” to address such claims.¹¹⁶ This accord would also likely be unnecessary if the federal government had extinguished Métis title to the satisfaction of its own institutions and citizens.

The federal government’s conduct with the Métis Nation Accord shows that there are cracks in the confidence in Métis extinguishment. While there remains resistance to acknowledge that Métis title persists, there is also a growing realization that Métis lands and rights are live issues that must be dealt with in more substantive ways than previously. Métis title and its unsuccessful extinguishment require a level of attention and dialogue previously missing, and if the Métis Nation Accord and more recent negotiations are any indication, the future lies not in denying Métis title, but in negotiating the terms for its recognition.

3. Conclusion

With the failure of Canada to extinguish Métis title through surrender, legislation, or constitutional amendment, it is therefore logical and just to assume that Métis title to the Métis homelands persists. While Manitoba Métis in 1870 may have been willing to surrender their share of title to their homelands, they were willing to do so only under certain circumstances and with a guarantee that these rights would be fairly compensated with a large land reserve. It is unjust to assume that if the Crown did not fulfill its end of the bargain, Métis should be held to theirs. If Métis title was not successfully extinguished through any of these means, the Crown possesses substantial and ongoing obligations to the Métis people. Both the honour of the Crown and the principle of reconciliation require that these obligations be addressed. Indeed, this would have profound implications for the current state of Métis-Canada relations. It would require a substantial redress and recognition of Métis lands (alongside the lands of other Indigenous peoples) and it would necessitate good faith negotiations between the two parties to rectify the current situation. The recognition that Métis title is unextinguished, far from ushering in an era of uncertainty and contention, could also be the opportunity to rectify historical and contemporary injustices, providing the moral imperative to build better relations with one another. This outcome, however, is dependent upon good faith actions from Canadian political and juridical leaders, grounded in a deep analysis of

¹¹⁵ *Canada-Métis Nation Accord* (13 April 2017), online: <www.metisnation.ca/wp-content/uploads/2017/04/Canada-Me%CC%81tis-Nation-AccordEn.pdf>.

¹¹⁶ *Ibid.*

historical events, which contradict the colonial imagination that has for so long shaped Métis-Canada relations.