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Abstract
Section 31 of the Manitoba Act 1870 provided for a land settlement scheme for the benefit of the families of the Métis residents, towards the extinguishment of the Indian title. There are now no Métis reserves in Manitoba; section 31 was implemented in a way which permitted the quick dispossession of the Métis in the nineteenth century. The writer argues that the mode of implementing section 31 was a breach of constitutional obligation. Reference is made to the subsequent history of the western Métis and comments are offered regarding the current significance of the Métis dispossession.

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ABORIGINAL RIGHTS:
THE DISPOSSESSION
OF THE MÉTIS

BY PAUL L.A.H. CHARTRAND

Section 31 of the Manitoba Act, 1870 provided for a land settlement scheme for the benefit of the families of the Métis residents, towards the extinguishment of the Indian title. There are now no Métis reserves in Manitoba; section 31 was implemented in a way which permitted the quick dispossession of the Métis in the nineteenth century. The writer argues that the mode of implementing section 31 was a breach of constitutional obligation. Reference is made to the subsequent history of the western Métis and comments are offered regarding the current significance of the Métis dispossession.

There is a rising tide of nationalism among the Aboriginal peoples of Canada. During the 1980s, these nationalistic aspirations were expressed in demands for the right of self-government and a land base, both to be entrenched and protected as aboriginal and treaty rights in the Constitution Act, 1982. The land-base issue is

1 The term "Aboriginal" is a generic expression which refers to the group of particular, various "peoples" in Canada, for example, the Micmac, Inuit, Métis, Tlingit, and Haida. Formerly, the generic expression in popular usage was the misnomer "Indian." It is interesting that many writers now fail to use an upper case letter for Aboriginal, although no one would have suggested a lower case "i" was appropriate for "Indian." The convention requiring an upper case letter for a word which denotes a group of humans is better observed in the case of the Australian Aborigines, the expression used for the various peoples in that country. On proper capitalization, see V. Shaffer & H. Shaw, Handbook of English, 2d ed. (New York: McGraw-Hill, 1960) c. 21, especially at 154.

2 Section 35 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, recognizes and affirms the Aboriginal and treaty rights of the Aboriginal
of particular significance for the Métis people of western Canada. Generally, no lands have been set apart for Métis people, unlike the case of the "Indian reserves." During the failed First Ministers' Conferences of the 1980s that were held to define the rights of Aboriginal peoples in the Constitution of Canada, the Prime Minister promised to discuss with the Métis their need for a land base. Reforming the Constitution to fit the circumstances of Aboriginal peoples is still a matter of outstanding business in this country. In light of all these facts, it is interesting to note that in section 31 of the *Manitoba Act, 1870*, which was the provincial constitution negotiated by the Métis of Canada, there is provision for a Métis land settlement scheme.

Peoples of Canada. Section 37 of the same Act required a meeting of Canada's First Ministers to identify and define the rights of those peoples to be included in the Constitution. A 1983 amendment added two more meetings but no agreement on the entrenchment of the rights proposed by the Aboriginal peoples resulted from the process, which ended in 1987. On the agenda items and process generally, see B. Schwartz, *First Principles Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: The Institute for Research on Public Policy, 1986) and also the series of publications by the Institute of Intergovernmental Relations at Queen's University in Kingston, Ontario.

For an examination of how the Crown purported to extinguish the Indian title of the Métis in the West and of the Métis settlements established by Alberta as a welfare scheme in the 1930s, see J. Sawchuk et al., *Metis Land Rights in Alberta: A Political History* (Edmonton: Métis Association of Alberta, 1981). "Indian" is used here to refer to the First Nations who are not Métis or Inuit, and who are defined as "Indians" by the federal *Indian Act*, R.S.C. 1985, c. I-5.


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.
It is notorious that there are now no Métis lands in Manitoba. If there are to be further endeavours to entrench land rights in the Constitution for Aboriginal peoples, and for the Métis in particular, it is significant to consider whether section 31 of the Act of 1870 contains obligations respecting the provision of lands for the Métis, or whether to premise contemporary demands for a land base on considerations wholly external to the existing constitution.

This paper argues that section 31 imposed obligations on the federal government to set aside 1.4 million acres of public lands for the benefit of the Métis families, and that the mode of implementation, i.e. the distribution of individual, alienable grants of land to only the children of heads of families in 1870, was a breach of constitutional obligation. Having made these points, the paper refers to aspects of the subsequent history of the western Métis following the dispossession in Manitoba, and offers some comments regarding the significance of the great Métis dispossession for current developments in Aboriginal issues generally, and Métis in particular.

Red River Settlement was the main community in what became the Province of Manitoba in 1870. It was located around Fort Garry at the confluence of the Red and Assiniboine Rivers on the present site of the City of Winnipeg. Although Red River Settlement had been governed by the commercial British monopolist, the Hudson's Bay Company, it was nevertheless, in 1870, very much a Métis community. Members of that people comprised about ten thousand of the total population of about twelve thousand.\(^6\)

Section 31 can only be understood as a unique response to the rather unique circumstances of the Métis of Red River in 1870. Understanding the Métis, rather than trying to describe or define them, is fundamental to appreciating the arguments offered in this paper. A brief explanation is offered here.

Métis is an old French word which means "mixed" and has long been used in reference to people of mixed Aboriginal and European parentage. It has been used historically in Canada in reference to the population descended from Francophones and Aboriginal women. The traditional pronunciation of the word by Métis speakers is Michiṣ or Michif, in contrast with the anglicized Maytee which is now in current usage to denote one of the Aboriginal peoples recognized in the Constitution. Similarly, the English nineteenth century racial term "Half-Breed" denoted the offspring of Anglophone and Aboriginal parentage. It is recognized, however, that genetic mixing is "not itself sufficient to give rise to 'ethnogenesis' — the rise to recognition and self-consciousness of a new racial-political-cultural group." The point is that by 1870 the Métis of the Red River region had acquired a distinct national identity as a new "people," distinct from both their European and "Indian" forebears. That distinct identity had been forged, it is said by historians, from common experiences that emphasized the national consciousness of the "new nation." Those common experiences included battles against the early European colonists and Aboriginal peoples with whom the Métis shared the natural resources of the open spaces in the western plains. Perhaps most
important, the sense of a community apart was maintained by the great annual buffalo hunts of the Métis.\textsuperscript{11} One of the concerns of historians has been to examine the degree of solidarity that existed between the Métif and the "Half-Breed" people.\textsuperscript{12} It seems undeniable, that people form alliances, both personal and collective, in response to their particular, temporal needs. It should cause no surprise to find strains and stresses among the forebears of today's Métis, which comprise descendants of both groups,\textsuperscript{13} or at least no more surprise than is occasioned by the contemporary strains and stresses in Canadian society.

During the events leading to the formation of the provisional government in Red River and the negotiations with Canada regarding union with the new Dominion, Louis Riel, the Métis leader, expressed himself in a manner which illustrates the less than perfect accord between the Anglophone, Protestant "Half-Breed" people, and the francophone Métif. Addressing himself to the English side, he spoke heatedly,

\textit{Go on, return peaceably to your farms. Stay in the arms of your women. Give this example to your children. But watch us act. We will work and obtain our rights and yours. You will come in the end to share them.}\textsuperscript{14}

Such evidence of disunity is not, of course, to be emphasized today in the Métis surge towards nationalism because national movements — the rise of peoples — are not predicated upon a scientific


\textsuperscript{12} See R. Swan, Ethnicity and the Canadianization of Red River Politics (Department of History, University of Manitoba, 1988) [unpublished] and Stanley, \textit{supra}, note 6, especially c. 4.

\textsuperscript{13} The definitely pejorative term "Half-Breed" is now rarely used in the Canadian literature although the usage of the term persists, even among members of the designated group. For a discussion of the use of zoological terms to describe colonized peoples see F. Fanon, \textit{The Wretched of the Earth}, trans. C. Farrington (New York: Grove Press, 1963) at 41ff.

examination of historical minutiae, but upon the glorification of an idealized antiquity.\textsuperscript{15}

The term "Half-Breed" was used in the text of section 31 to denote the beneficiaries of the land settlement scheme it enacted.\textsuperscript{16} The term must be read as a generic label intended to include both the M\textit{\textdegree}tif and the "Half-Breed" populations. This construction accords with the nineteenth century racial connotation of the term.\textsuperscript{17} It also accords with a purposive interpretation, which the courts have established is required in construing constitutional provisions.\textsuperscript{18}

The all inclusive "racial" category is consistent with the purposes of section 31 as a statutory mechanism for removing doubt which might exist about the survival of Indian or Aboriginal title in individuals or groups who were not dealt with in the treaties signed with the "Indian" communities.\textsuperscript{19} In this way, section 31 operated as a sort of quit-claim provision and promoted the purposes of the Dominion in clearing the crown title to the public lands to implement the western agricultural settlement policy.\textsuperscript{20}

By 1870 the ancien regime in Red River was crumbling and it was the M\textit{\textdegree}tif who were most vulnerable to change as the retreating bison herds were to give way to the great enclosure movement that was to sweep the West. It was mostly the M\textit{\textdegree}tif, emphasized W.L. Morton, who participated in the great buffalo hunts which, twice a year, left Red River for the western plains. The Scot-Arcadian "Half-Breeds" were mostly agriculturalists. Each

\textsuperscript{15} Respecting the rights of the M\textit{\textdegree}tis as a people, see "We Are M\textit{\textdegree}tis," \textit{Le M\textit{\textdegree}tis}, (Winnipeg: Manitoba M\textit{\textdegree}tis Federation, 1988) at 4, 5.

\textsuperscript{16} \textit{Supra}, note 5.


\textsuperscript{18} For example, see \textit{Hunter v. Southam}, [1984] 2 S.C.R. 145 and \textit{Reference Re Language Rights Under the Manitoba Act, 1870}, infra, note 86.

\textsuperscript{19} See \textit{supra}, note 3.

\textsuperscript{20} This statutory mechanism would have been effective to avoid potential litigation challenging the Crown's title to the lands. For an analysis of the federal expansion policy see C. Martin, \textit{Dominion Lands Policy} (Toronto: McClelland & Stewart, 1973).
winter, many of the Métis failed to return to Red River, preferring to winter out on the prairie, and their absences stretched sometimes for years.\(^{21}\) In his study of the Red River economy, Morton summarized the use of the land that was made by the several groups in the local population. The "Indian" people of the area Morton described as "settlers or colonists who had renounced a nomadic for a sedentary existence."\(^{22}\) These were the people with whom the Canadian government entered into Treaty No. One in 1871.\(^{23}\)

"As the Indians erected their winter wigwams in wooded ravines," explained Morton,

> the métis built their cabins in the wooded fringe of the river front for the sake of shelter and fuel. From the river itself they drew water and fish. On the silted river banks and "dry points" and in openings in the woods, they sowed their patches of potatoes and barley. On the plain behind the women and old men cut the rank prairie hay ... like their Indian ancestors, what they desired was an extensive and seasonal use of the land, a use not confined to agriculture, and with it the right to move freely where they would. The river-front settlements of the métis, then, much like those of the Scots and the half-breeds, were an organic part of a complex way of life which varied with the seasons and rested at once on the agriculture of the riverside and the use of the plains for haying, grazing and hunting.\(^{24}\)

It is concluded that section 31 was intended to provide a permanent land base for economic adjustment and to accommodate the new agricultural economy that was to follow the westward expansion of Canadian policy. But, before moving on to the policy intents of section 31, a preliminary question must be addressed. This preliminary question concerns the reasons for the perceived need for entrenching a local land settlement scheme in a national constitutional pact. The answer must lie in what must be one of the themes of Canadian confederation, that is, the need to reconcile local interests with the national interest promoted by the federal government and the consequent desirability of guaranteeing some form of protection for the local interests against the power of encroachment by federal legislation and administration. It is well

\(^{21}\) Morton, supra, note 11 at xvii and Spry, supra, note 10.

\(^{22}\) Morton, supra, note 11 at xiv.


\(^{24}\) Morton, supra, note 11 at xxv.
known that, but for the intervention of Riel and the Métis in 1869-70, the area that became the Province of Manitoba would have been governed essentially from Ottawa, by means of a federally appointed governor and council.\textsuperscript{25} This form of remote governance was provided for in the federal legislation of 1869 which had been passed to prepare the way for the Canadian takeover of the west from the Hudson’s Bay Company.\textsuperscript{26} The long title of the \textit{Manitoba Act, 1870}, the negotiated provincial constitution, indicated the Parliamentary intention to amend those earlier designs, by reciting its enactment "to Amend and Continue the Act 32 and 33 Victoria, Chapter 3; and to Establish and Provide for the Government of the Province of Manitoba."\textsuperscript{27} Section 31 was one of a package of guarantees for local interests that were included in the \textit{Act} of 1870. Those guarantees included provisions respecting the use of English and French in the Legislature\textsuperscript{28} and denominational schools in the province.\textsuperscript{29}

\textsuperscript{25} The relevant legislation is the \textit{Temporary Government of Rupert’s Land Act}, S.C. 1869, c. 3, ss 3 and 4 (32 & 33 Victoria). For the historical background, see Stanley, \textit{supra}, note 6.

\textsuperscript{26} Ibid.

\textsuperscript{27} \textit{The Manitoba Act, 1870, supra} note 5. The amended act referred to is the 1869 statute cited in \textit{supra}, note 25.

\textsuperscript{28} Section 23, \textit{ibid.}, provides:

Either the English or the French language may be used by any person in the debates of the House of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the \textit{Constitution Act 1867}, [infra note 30] or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

\textsuperscript{29} Section 22, \textit{ibid.}, provides:

In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:—

(1.) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:—

(2.) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen’s subjects in relation to Education:
When the Canadian representatives eventually sat down with the Red River delegates to negotiate the terms of Manitoba’s entry into the new Dominion, provision was made for the various local interests in land which existed in 1870. It was important to provide special protection for these local interests in land because, by the terms of section 30, the public lands of the new province were to belong to Canada, a deviation from the pattern set for the original four provinces by section 109 of the Constitution Act, 1867.30

The Canadian ministers readily agreed, in terms that became section 32 of the Act of 1870, to protect the local settlers’ interests, and all titles to lands derived from the holdings of the Hudson’s Bay Company were to be confirmed. It will be recalled by students of history that Selkirk had purportedly extinguished the Indian title to the lands comprising a two-mile strip on each side of the two rivers around the settlement in a treaty of 1817.31

The Hudson’s Bay Company had acquired the Selkirk lands, and the individual river lots running south on the Red and west on the Assiniboine were the subject of the protection afforded by section 32. It did not matter that most of the river lot settlers were Métis or "Half-Breeds"; section 32 confirmed the interests in land held by individual settlers, and these interests were derived from alienations from the English Hudson’s Bay Company.32

The Canadian ministers were more reluctant to concede the claims of Abbé Ritchot, the special negotiator for the Métis, to

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(3.) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.

30 (U.K.), 30 & 31 Vict., c. 3. (formerly British North America Act, 1867).
32 The exceptions are sections 32(4) and 32(5) which give a right of pre-emption based on possession of lands and a right of compensation for rights of common and cutting hay, respectively. Aboriginal title is, in its nature, a possessory interest: Calder v. A.G. British Columbia, [1973] S.C.R. 313; Guerin v. R., [1984] 2 S.C.R. 335 at 376-77.
lands to be given in compensation for the communal interests of the Métis which they held by virtue of their sharing the possession of the open spaces with other Aboriginal people. In time, however, a bargain was struck for a grant of 1.4 million acres which was expressed in section 31 to be "towards the extinguishment of the Indian title to the lands in the province."

Armed with these guarantees against the Dominion power to assert its policy over the public lands, and armed also with a promise of an amnesty for all who resisted the initial 1869 attempt by Canada to assert its jurisdiction, Ritchot was able to return to Red River in June of 1870 and to secure the agreement of the provisional government to the terms of the Manitoba Act, 1870.

The temporary military authority of the Métis which had forced the terms of agreement were now exchanged for the constitutional safeguards that were to constrain the future exercise of federal governmental authority over the public lands in the province. The story of how these constitutional safeguards were dealt with by subsequent, successive governments as the Métis lost all effective political power in the province is a story that reveals much about the value of constitutional authority in the face of unwilling and uneven political power. It is a story that replicates the general subjugation of the Aboriginal peoples by law and policy that occurred everywhere in Canada. Sadly, it is a story that has


35 For an examination of the political circumstances of the Métis loss of power, see G. Friesen, "Homeland to Hinterland: Political Transition in Manitoba, 1870 to 1879" [1979] Hist. Papers 33.

been ignored or only incidentally snickered at by this country's traditional storytellers, the historians of our universities.\textsuperscript{37} It is also a story that not only depicts the role of the law in the dispossession of a people but also challenges it to play a role in righting a great historical wrong.\textsuperscript{38}

The provisions of section 31 are untidy and ambiguous legalese. There is a preamble, starting with the uninspiring expression "And whereas" which declares the intention to appropriate 1.4 million acres of public lands for the benefit of the resident "half-breed" (\textit{sic}; "Half-Breed") families. The enacting clause then provides the framework of a settlement scheme which appears to be comprised of two phases.\textsuperscript{39}

In the first phase, the Lieutenant-Governor of the province is charged with the duty of selecting the lands, in locations according to his discretion, and of dividing the lands among the children of the heads of families. In the second phase the lands are to be granted to the children, but according to settlement and other conditions as

\begin{itemize}
  \item Subjugation, Self-Management And Self-Government of Aboriginal Lands and Resources (Kingston: Queen's University, 1986).
  \item W.L. Morton indicates that he discerns the outline of a communal, inalienable settlement scheme in comments that he makes in footnote references to various documents associated with the passage of the \textit{Manitoba Act} bill in 1870, in \textit{Manitoba: The Birth of a Province, supra}, note 33. For example, in response to Ritchot's description of allotments of blocks of land to be held in common, Morton comments: "Ritchot is attempting to devise a land system suited to the combined intense use of lands in the homesteads and the extensive use of the plains which had been worked out in the fifty years of the Red River Settlement. Only the development of short season, drought resistant wheat, and soil practices kept him from being entirely right" at 159, n. 80. Since the intention of the statute is to be discerned in 1870 and not later when those practices developed, the Ritchot scheme is an appropriate indicator of the objects of section 31. Ritchot also described the Red River delegates' demands for statutory restrictions on alienation "to ensure the continuance of these lands in the \textit{métis} families" at 143. To this Morton gives the condescending remark: "This of course was never done and the good priest's hope of anchoring the \textit{métis} on land perpetually theirs was not realized" at 143, n. 36. That is about the total of traditional historians' acknowledgement of the true intention behind section 31.
  \item A number of recent historical works have examined the \textit{métis} dispossession. The main work is D.N. Sprague, \textit{Canada and the \textit{Métis}, 1869-1885} (Waterloo: Wilfred Laurier University Press, 1988). See also the articles cited in \textit{infra}, notes 53 and 55 and Mailhot's thesis, \textit{supra}, note 34.
  \item See \textit{infra}, note 81 and accompanying text.
  \item For the text of section 31 of \textit{The Manitoba Act, 1870}, see \textit{supra}, note 5.
\end{itemize}
the federal government might impose. At the heart of the ambiguity in section 31 is the need to reconcile an eventual grant to only children of heads of families with the intention declared in the preamble to provide a benefit for the families. During the 1870s, the Métis families were adamant in their view that the lands were provided for their benefit. It is contended here that the purposes of section 31 are revealed and the ambiguity is resolved by referring to the policy of the Indian settlement legislation that Parliament had before it when section 31 was enacted.

These statutes in pari materia expressed the Indian enfranchisement policy which aimed at gradually carving out individual parcels from a communal land base from the reserve lands. In this way, the legislation was designed, in the words of the Indian superintendent of 1871, "to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life." According to this policy, the federal government undertook to supervise the granting of particular lots of land to individuals on

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40 See Public Archives of Manitoba (hereinafter PAM), Records of the Legislative Assembly, RG 7, B1, Sessional Papers, Box 12, File 3, Commission to Investigate the Administration of Justice in the Province of Manitoba, "Exhibit A – Statement by E.M. Wood on History of Half-Breed Infants' Claims" (2 December 1881) (Commissioners: F. McKenzie & T.A. Bermer) [unpublished].

41 Parliament enacted, in 1869, An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, Chapter 42, S.C. 1868-69, c. 6. The earlier statutes containing the same model are: An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands, S.C. 1867-68, c. 42; An Act Respecting Civilization and Enfranchisement of Certain Indians, S. Prov. C. 1859, c. 9; An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians, S. Prov. C. 1857, c. 26; An Act for the Protection of the Indians in Upper Canada from Impositions, and the Property Occupied or Enjoyed by Them from Trespass and Injury S. Prov. C. 1850, c. 74.

42 In fact, the "Indian enfranchisement" policy never worked because of the resistance of the people. See J.S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in Getty & Lussier, eds., supra, note 10 at 56-64. This historical fact is irrelevant for the purposes of discerning the legislative intent in 1869, which is to be presumed to be in accordance with the existing policy in statutes in pari materia.

the basis of their perceived ability to protect their individual land interest in the public market. Until that time, each family retained only the right to reside upon, and use the communal lands of the group. When this policy is applied to construe section 31, the benefit to the families consists of a licence of occupation to permit accommodation to the new economic order, and to secure the lands within the families. The objects of traditional colonial policy are also apparent in the mandate to establish settlement conditions as conditions precedent to grants of estates to the children. It was the view of Archbishop Taché in the 1870s and of government officials later in the West that lands for Métis families could only be secured by attaching restrictions on alienation as conditions, in order to protect them from the speculation that obtained in the public market. Now the immediate model for the draughtsman of section 31, the particular Indian enfranchisement scheme that had been enacted by Canada in 1869, was not enacted for the Indian nations of the West, but for, in the words of a commentator,

the Six Nations and other Indian people with long contact with Europeans and who were supposed to have received a rudimentary training in "civilization" under earlier legislation and missionaries, [and was] intended to provide further training in Euro-Canadian values.

In this way, section 31 was uniquely designed to accommodate the circumstances of the Métis of Red River. In the racially conscious times of the day, partial European ancestry equalled partial "civilization" and required an accommodation different from the communal treaty lands given the "Indian" nations of the West.

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Viewed in this light, section 31 was a "fast-track" version of the Indian enfranchisement legislation applied in eastern Canada. There is ample evidence of expressions that the Métis of 1870 were in need of a special land protection regime. Louis Riel himself had said to the council of Assiniboia in 1869 that the Métis needed to protect themselves from the expected immigration from the East. Manifestly, if the lands were given for the protection of the local Métis interests, section 31 required that the lands be kept within the families for as long as needed to provide a basis for economic adjustment to the new agricultural economy. In short, the land settlement scheme was intended to ensure the survival of the Métis as a people. It was as Durealt Co. Ct J. stated in R. v. Forest in 1977:

The French [speakers] particularly were apprehensive about the transfer of their homeland to Canada and viewed the prospects of immigration from Ontario as a threat to their culture and way of life, indeed to their very survival as a people.

The scheme of section 31 was implemented neither in accordance with the long established policy of extending governmental protection over the lands given in exchange for the Indian title, nor in accordance with the policy of keeping such lands out of the public market. Alienable, free grants of land were given to "the children of the Half-Breed heads of families" which was interpreted as all those who were not married in 1870 and the

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46 One of the requirements of the legislative policy was that a considered judgment be made in the case of each individual whether or not an alienable estate ought to be granted, based on an assessment of the individual's ability to protect his interest in the public market.

47 North-West Territories Report, supra, note 34. See also The James Wickes Taylor Correspondence 1857-1870, H. Bowsfield, ed. (Winnipeg: Manitoba Record Society Publications, 1968) esp. at 102-103.

48 This would have required, in addition to prohibitions on alienation to non-Métis, that the lands be selected where they could be useable for the transition to a full-time sedentary agricultural economy. This meant the lands would have to be near the rivers because, in fact, no one farmed away from the rivers before 1880. W.L. Morton, "Agriculture in the Red River Colony" (1949) 30 Can. Hist. Rev. 305 at 320.


50 An Act to Remove Doubts as to the Construction of Section 31 of the Act 33 Victoria, Chapter 3, and to Amend Section 108 of the Dominion Lands Act, S.C. 1873, c. 38, s. 1. An
A great Métis land grab was on. The distribution scheme, which was not even begun until 1876, operated to fuel a booming real estate economy that promoted quick profits for speculators and a rapid expansion of the federal policy of agricultural settlement of the West. John A. Macdonald, who was the architect of section 31, took the opportunity in 1885 to chide the Liberal administration for its role in favouring the land speculators at the expense of the Métis during the Liberal administration in 1873-1878:

So, with a largeness of heart unparalleled in their dealings with the Half Breeds of Manitoba or any other section of the people of Canada, the Government decided that they would give to each halfbreed child entitled to share in the reserve a free patent for 240 acres. This might look like liberality to the halfbreeds, but if we take a peep behind the screen we find that before that date [1876], apparently despairing of ever receiving patents for their lands, the majority of the claimants had disposed of their rights for a mere song, to speculative friends of the Government; and it was no doubt for the benefit of cormorants of this class that the hearts of Mr. Laird and his colleagues so suddenly expanded.

According to recent research, by 1886 virtually all claims to the 1.4 million acres had been disposed of. Nearly six thousand individual patents had been issued but less than twenty percent of the patentees emerged as owners of their land once it was granted by the Crown. Government officials were implicated in one of the most highly-placed extortion rackets in Canadian history. Lawyers joined the free trade in Métis infant lands and in 1881 the province established a judicial inquiry into the practices of the provincial

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51 The failure to implement section 31 according to its intent as soon as possible, or within a reasonable time, is a breach of the obligation to implement the section: R v. Mercure, [1988] 1 S.C.R. 234 at 281.

52 Canada, H.C., Debates, at 3114 (6 July 1885).


54 Ibid., at 431-33.
courts in dealing with the traffic in infant lands that was channelled through the judicial system. The Chief Justice and his family were implicated. In giving his testimony, one court official stated his opinion this way: "I never suspected for a moment that a system which turned out to be so vicious could possibly exist in any civilised country." Various recommendations were made by the Inquiry, such as the establishment of an official guardian for the infant lands. Instead, the provincial government passed retroactive legislation to legalize the irregularities which had given rise to the Inquiry. In his own inimitable style, the anthropologist Giraud summarized the land grab era in a manner that has typified Canadian historical writing about the Métis people:

[In their contact with the Ontarians, they suffered the effects of their weakness of will and of their traditions of living, which, by attaching them to nomadism, had prevented them from appreciating the true value of the land and from adapting gradually to the economy that was destined hence forward to impose itself on the plains of the west.]

By 1885, over eighty per cent of the Métis population in the North-West Territories had come from Manitoba, with the greatest concentration around Batoche on the Saskatchewan River, where Gabriel Dumont and his men fought the Canadian army, the last Aboriginal group to face the army until Oka in the summer of 1990.

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56 Supra, note 40 at 31, "Statement by William Leggo" (2 December 1881).
57 Ibid., "Report of Counsel Appointed by the Hon. the Attorney-General to Assist the Commissioners" (10 December 1881).
58 Supra, note 55 at 10. The Acts which accomplished the purpose were: S.M. 1883, c. 29 and S.M. 1884 c. 8 and 24.
60 P.R. Mailhot & D.N. Sprague, "Persistent Settlers: The Dispersal and Resettlement of the Red River Métis, 1870-1885" (1985) 17:2 Can. Ethnic Stud. 1 at 7. The events at the Oka blockade were widely reported in Canadian newspapers in the summer of 1990. For example, see The Ottawa Citizen (25 September 1990) A11.
Why was the Métis land scheme dealt with in this way? It was fully realized by all concerned that alienable individual grants would not benefit the Métis. Archbishop Tache had urged the government to restrict alienation for several generations. When the same policy of purporting to extinguish the Indian title of the Métis in the other western regions by giving grants of alienable lands and scrip was introduced, John A. Macdonald commented that

[t]he government knew ... the Minister of the Interior knew that we were not acting in the interests of the half-breeds in granting them scrip, in granting him the land.\textsuperscript{61}

And again Tache urged the establishment of Métis land bases secure from public market activity:

Raise the Half-Breed to the condition of landlords; you will thereby confer a real benefit on them, and we will not see a repetition of the regrettable occurrence which took place in Manitoba.\textsuperscript{62}

If it was known that alienable grants would not protect Métis interests, then the answer to the question posed above must lie in the pressures to promote a free land market for the purposes of the Dominion policy of westward national expansion. The answer lies in the views of such men as Chief Justice Wood who declared that "as to the Half-Breed reserve, like all other reserves of every kind, they are a curse to the country, and should be distributed without delay."\textsuperscript{63} Accordingly, he urged the freeing of the lands so that the province "would fill up quickly with an Ontario population and would yield a profitable return for the money expended on it."\textsuperscript{64} Adam Archibald, the first Lieutenant-Governor of the province, advised the federal government:

So far as the advance and settlement of the Country is concerned, it would be infinitely better to give a Half-Breed a title in Fee to his lot. He might make bad

\textsuperscript{61} Canada, H.C., \textit{Debates}, at 3117 (6 July 1885).

\textsuperscript{62} Letter from Tache to J.S. Dennis, Deputy Minister of the Interior (29 January 1879), in a letter quoted in Saskatchewan Archives Board, Premier's Office, R-191, Box 1, P. - M2, "Saskatchewan Métis: Brief on Investigation Into the Legal, Equitable and Moral Claims \textsuperscript{sic} of the Métis People of Saskatchewan in Relation to the Extinguishment of the Indian Title" (Regina, 28 July 1943) (P.C. Hodges & E.D. Noonan, Counsel) at 82.

\textsuperscript{63} PAC, Mackenzie Papers, M.G. 26B at 803.

\textsuperscript{64} \textit{Ibid.} at 602.
use of it ... He might sell it for a trifle ... Still the land would remain, and in passing from the hands of a man who did not know how to keep it ... [would] the most likely ... turn the lands to valuable account.65

The experiences in the west beyond Manitoba confirmed the view that giving alienable lands did not benefit the Métis. In 1878 and 1885, government officials recommended giving inalienable lands.66 But the government continued the great land grab by issuing alienable scrip certificates redeemable for public lands to extinguish the Métis title to the land. From 1885, a separate scrip commissioner accompanied the western treaty commissions. Speculators accompanied these travelling frauds, buying the scrips for cash "for a mere song" as Macdonald had put it. One of these speculators recounted using his cash-filled saddle bags as a pillow during his scrip-buying campaigns.67

Any Aboriginal man who could show some non-Aboriginal ancestry was given the option of taking Métis scrip instead of "treaty status." Many individuals were tempted by the prospect of a quick cash settlement to leave the ranks of "treaty Indians" on the reserves and to join the growing ranks of the landless Métis.68 This phenomenon gave rise to the growing numbers of landless "non-status" Indians who joined the ranks of the dispossessed Métis. Subsequent generations of these people have been doomed to live in Third World conditions in settlements often on the edge of "Indian" reserves, unable by government policy to participate in the community life or the regime of federal administration of reserve populations under the Indian Act legislation.69 The enactment of section 15 of the Canadian Charter of Rights and Freedoms70 in 1982 has raised the question whether the federal government has an obligation to provide equal benefits for the various groups of

66 Supra, note 42.
67 Sawchuk, supra, note 3 at 131.
68 Ibid., at 130ff.
69 Indian Act, supra, note 3.
Aboriginal peoples recognized in the Constitution. Further, recent case law suggests the existence of a general fiduciary duty towards Aboriginal people that may have been breached by the historical exclusionary policies, at least those which still have a contemporary impact.

The great destitution of the Métis continued to be the object of various so-called "rehabilitation" schemes. Between 1896 and 1910, a federal scheme in Alberta established destitute Métis upon inalienable settlement lands administered by the Catholic Church. For many reasons the plan failed but the idea was resurrected in a different form in the twentieth century. In the 1930s, pursuant to the recommendations of a commission of inquiry, the Alberta government passed legislation to establish a number of settlement colonies for destitute Métis. Eight of these have survived and are now the subject of action to entrench their status in the provincial constitution. In Saskatchewan, a number of "rehabilitation" schemes were also established during the 1940s and 1950s. In 1951, the Regina Leader Post described what it called the "appalling" living conditions of the Métis in the province:

The Métis were without employment or regular income and depended entirely on municipal and government relief. And they lacked the incentive to do anything but exist in their miserable little homes, many of which were without floors or proper windows.

The schemes in Saskatchewan were established pursuant to the authority of a generally applicable statute, The Rehabilitation Act, and involved no recognition of particular rights.

71 Ibid., Part II, s. 35.


73 Sawchuk, supra, note 3 at 159ff.

74 Ibid. Several bills were introduced in the Alberta legislature on November 1, 1989 for this purpose.

75 Regina Leader Post (3 October 1951). A copy of this paper is in the archival records of the Gabriel Dumont Institute in Regina but it remains uncatalogued.

76 R.S.S. 1953, c. 245.
It is interesting to note that in 1966, Maclean's magazine reported the visit of a University of Toronto student project, *Neestow*, which visited the Green Lake community rehabilitation project in Saskatchewan. The report stated that "the settlement was set up 25 years ago as a model community — today, it is a rural slum."\(^7\)

After having been used as an instrument of dispossession in the nineteenth century, the law played a relatively minor role in the drama of the circumstances of the Metis in the prairie provinces. After World War I, Metis veterans took advantage of their heightened social status to press for the application of legal penalties to those who had defrauded them of their lands. In 1920 a petition was submitted to the Prime Minister asking for the establishment of a Royal Commission to investigate alleged cases of scrip fraud. The reply was the same one given in Manitoba a generation earlier. The alleged frauds are a matter of private litigation between the parties and not the concern of the government. One Metis veteran in Alberta by the name of Graham did initiate proceedings, charging an Edmonton millionaire named Secord with forgery of documents related to Metis lands. The evidence submitted to the magistrate was sufficient to have Secord remanded for trial in a higher court but intervening circumstances ensured he would never face trial. In light of the response in Manitoba to the findings of the 1881 Commission of Inquiry, it is not surprising to learn that the Criminal Code was amended to prohibit prosecutions related to any offence relating to or arising out of Metis land transactions.\(^8\)

In Manitoba, formal protests had been made early in this century regarding the differential application of federal policy

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\(^8\) Sawchuk, *supra*, note 3 at 146ff. Section 20 of *An Act to Amend the Criminal Code*, S.C. 1921, c. 25 amended the *Criminal Code*, R.S.C. 1906, c. 146, s. 1140(1) by prohibiting prosecution for an offence after the expiration of three years from the time of its commission if such offence be "(iv) Any offence relating to or arising out of the location of land which was paid for in whole or in part by scrip or was granted upon certificates issued to half-breeds in connection with the extinguishment of Indian title."
towards Métis people in different regions. In 1937, Giraud’s study of Manitoba Métis communities located away from the Winnipeg vicinity led him to conclude that permanent land bases ought to have been provided, as had been done in the case of the "Indian" reserves.

The major challenge to the great Métis land grab has been the recent case of *Dumont v. A.G. Canada* in Manitoba, in which a statement of claim was initially filed in the Court of Queen’s Bench in April, 1981. The plaintiffs, who are now made up of Métis individuals, the Manitoba Metis Federation, and the Native Council of Canada, are seeking a declaration that the federal and provincial statutes, which were passed in purported implementation of the Manitoba land settlement scheme, were constitutionally invalid. The main basis for the challenge is that the statutes were amendments to section 31 and therefore were beyond the competence of Parliament and the legislature to enact.

The Métis case (the name is that of the current President of the MMF), after being filed in 1981, lay dormant in the system until 1985 because of an expectation on the part of the plaintiffs that the process of constitutional reform negotiations required by section 37 of the *Constitution Act, 1982* might result in the entrenchment of

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79 See "Excerpt from the Diary of Jean-Baptiste Chartrand," in Lussier & Sealey, eds., *vol. 2*, supra, note 10 at 49. The "diary" is in fact a journal of Napoleon Chartrand, brother of Jean-Baptiste, and is in the author’s possession.


82 Hereinafter MMF.

83 Section 31 is part of the Constitution of Canada pursuant to the *Constitution Act, 1871*, and, because of section 52 and the Schedule (Item 2), to the *Constitution Act, 1982*. The Supreme Court of Canada rejected a motion by the defendant, the Attorney-General of Canada, to strike out the action on the ground it raises no justiciable issue. The action is now back before the Court of Queen’s Bench in the province and at the time of writing the government parties have again appealed a decision by a judge of Queen’s Bench in favour of the Métis plaintiffs on another preliminary motion.
significant rights. During that period of time the MMF conducted discussions with the province to determine if there might be a basis for an agreement to resolve the section 31 issue. These discussions took place during the public turmoil over the "French language rights" issue in Manitoba. This issue concerned the obligation of the government to publish acts of the Legislature in English and French, based on section 23 of the *Manitoba Act, 1870*. The public opposition to the section 23 rights tells us something about the contemporary attitude towards the recognition of distinct rights in Canada that were negotiated at the time the country was established. The recent "Meech Lake" debacle\(^{84}\) has, of course, been rather instructive in that regard, as well.

The other provision for guaranteeing local interests in the Act of 1870, the denominational schools provision, was judicially interpreted late in the last century.\(^{85}\) In the *Reference Re Language Rights Under the Manitoba Act, 1870*,\(^{86}\) the Supreme Court decided that section 23 contains positive governmental obligations that are judicially enforceable. Describing section 23 as "the culmination of many years of co-existence and struggle between the English, the French, and the M\text{6}tis in Red River Settlement,"\(^{87}\) the Court commented on its role in the protection of rights that flow from the *Manitoba Act of 1870*:

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\(^{84}\) The 1987 *Constitutional Accord* is examined and the text of the "Meech Lake" Accord documents are reproduced in P.W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988). The Accord has already generated a voluminous literature. For example, see K.E. Swinton & C.J. Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord*, (Toronto: Carswell, 1988); B. Schwartz, *Fathoming Meech Lake*, (Winnipeg: Legal Research Institute of the University of Manitoba, 1987); and R. Macdonald, "...Meech Lake to the Contrary Notwithstanding" 29 Osgoode Hall L.J. 253 and 483. The Accord failed to get the required unanimous support from the provinces and did not pass into law.


\(^{87}\) Ibid., *Re Manitoba Language Rights Reference* at 731.
The judiciary is the institution charged with the duty of ensuring that the
government complies with the Constitution. We must protect those whose
constitutional rights have been violated, whomever they may be, and whatever the
reasons for the violation ... The constitution of a country is a statement of the will
of the people to be governed in accordance with certain principles held as
fundamental and certain prescriptions restrictive of the powers of the legislature and
government ... and it is ... our duty to ensure that the constitutional law prevails.\(^8^8\)

There would be considerable irony, and the words of the
Court would ring hollow, if in the end the original guarantees in
sections 22 and 23, which now largely enure to the benefit of a non-
Métis population, were to be upheld by the courts while rejecting
the contemporary significance, in the case of section 31, of rights
which must necessarily benefit only the Métis whose ancestors
negotiated all the guarantees.

The Métis in Manitoba have taken court action as a last
resort in trying to deal with the existing system. Requests for a
Royal Commission to investigate the claims behind the failures to
properly implement section 31 were not accepted in 1969, and again
in 1984.\(^8^9\) If court action does not result in judicial support of the
sort given in the case of section 23, the Métis of the province are
poised to assert the illegitimacy of a constitution which fails to meet
the Supreme Court's own test of being "a statement of the will of
the people." Métis agreement to the *Manitoba Act, 1870* was
secured in light of a promise of an amnesty that was broken. That
broken promise establishes an illegitimacy that would unavoidably be
raised should the breaches of the obligations in section 31 not be
resolved.

These matters will be important in the course of future
debates on constitutional reform respecting Aboriginal peoples.
Section 31 can take on a contemporary significance as a part of the

\(^8^8\) *Ibid.* at 745.

\(^8^9\) Dissenting in the Manitoba Court of Appeal in *MMF v. A.G. Canada*, *supra*, note 81
at 52, O'Sullivan J. lamented the inadequacy of the judicial process for resolving disputes
based on constitutional facts which depend upon historical interpretation as well as social and
political analysis. In his view, since "constitutional facts can only be ascertained by a process
quite foreign to the ordinary trial procedures, it may be that justice with regard to minorities
can only be attained by the creation of constitutional courts or by developing within the
existing court system a special process for dealing with constitutional facts. A time-honoured
method of dealing with the kind of claim now before us is the Royal Commission and that
may be at the present time the best way to deal with the claims of the Métis."
national land claims agreement process involving Aboriginal peoples and the Crown. Abbé Ritchot, the special negotiator for the Métis, bargained with the federal ministers in 1870 to obtain lands in satisfaction of the Métis claim and section 31 expressly recognized its object of extinguishing Métis Indian title to the lands in the province. In terms, then, section 31 is a land claims agreement and is therefore arguably entrenched as one of the "treaties" which are now afforded protection in section 35 of the Constitution Act, 1982. Out of the failed First Ministers' Conferences, held pursuant to section 37 have come developments that signify the importance of the land base issue for the Métis of contemporary Canada. At the 1985 meeting, the Prime Minister gave a formal commitment to attempt to recognize the special needs of the Métis, including the need for a land base. Since 1988, the MMF in Manitoba has been discussing with both federal and provincial officials the establishment of "Métis self-government institutions" and agencies designed to provide, in the absence of constitutional change, increased decision-making power for the Métis people in respect to the delivery of public services that directly affect them.

What is the character of these endeavours? They are attempts at political compromise to determine the place of the Métis within Canada's institutional framework. A learned commentator has stated that

> [t]he native peoples simply do not fit. Attempts to make them fit have failed constantly but still they continue. An indisputable fact of Canadian life is that about one citizen in twenty has almost no place in that life. What is even more tragic is that the native peoples are the direct descendants of those who settled the land ages before the "ethnic" groups and even the two "charter" groups arrived. They are at the same time Canada's original people and her national shame, one that has not gone unnoticed in the court of world opinion.

For the Métis, the fact they have almost no place in Canadian life is revealed by the social, political, and economic conditions which

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90 Ibid. at 48-51. O'Sullivan J. took the view that section 31 embodied a treaty.

91 Supra, note 4.

represent the continuing legacy of the great Métis land dispossession.\(^93\)

Aboriginal peoples are no longer content to suffer the vision of Canadian society that the terms of the *Constitution Act, 1867* indicated when it gave to Parliament the power to aim its legislated policies at them.\(^94\) Both political discourse and judicial activity — and the latter may, of course, be only a difficult form of political discourse — are parts of the process of crafting a better vision of Canadian society. The section 31 litigation is part of that process. There is another important recent judicial development that has begun crafting a legal governmental obligation based on undertakings in an ancient political discourse. It is the fiduciary obligation of the Crown to promote the interests of the Aboriginal peoples of Canada. It is interesting to recall that in its origins, the fiduciary duties of the government arose from the Crown's undertaking to promote the interests of the Aboriginal peoples of Canada. It is interesting to recall that in its origins, the fiduciary duties of the government arose from the Crown's undertaking to promote the land interests of the Aboriginal peoples against interference by third parties, an undertaking that was given in exchange for the Aboriginal peoples' renouncing resort to self-help to protect their lands.\(^95\) That is certainly a part of the historical background of the enactment of section 31, as it is part of the background of Crown-Aboriginal people relations generally. It is interesting to observe that when the government is seen to fail in its duty, resort is once again had to the notion of self-help, as was demonstrated in the summer of 1990 by the events in Québec and by the blockades that occurred across the country. Quite

\(^93\) Canada, Minister of Supply and Services, "The Indians and Mdtis of Canada" *Perspectives Canada III*, 1980, c. 10.

\(^94\) Section 91(24) of the *Constitution Act, 1867*, supra, note 30 gives Parliament the exclusive power to make laws in respect to "Indians, and Lands reserved for the Indians." It is an open question whether the Mdtis people whose rights are guaranteed in section 35 of the *Constitution Act, 1982*, supra, note 2 are included within the category of "Indians" for the purposes of section 91(24). See the view expressed in P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 553 and the authorities cited in note 10 on that page.

coincidentally, when the army moved in at the Mercier Bridge blockade that summer, it was a military movement toward the bridge named after Honoré Mercier, a local politician who attacked the federal government's treatment of the Métis after the army had been sent to Saskatchewan in 1885.96

The true interpretation of section 31 provides a challenge to the traditional history of the Canadian west. The process of interpretation should be significant in the current dialogue to determine if a better place can be provided for the Métis in Canada. Seventy-four year old Adelard Belhumeur expressed the feeling of many Métis when he said to a Maclean's interviewer in 1985: "A Métis is nothing. He hasn't got a country."97 The demand is the same as that made by Louis Riel in a memorandum written in 1873:

It is our business to demand, and to find in Canadian Confederation, that personal security and that public liberty which we require and is our undoubted right.98

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97 Mr. Belhumeur is quoted by Andrew Nihiforuk, "A People in Search of Salvation" Maclean's (20 May 1985) 15.