MANITOBA METIS FEDERATION INC. V. CANADA (ATTORNEY GENERAL): BREATHING NEW LIFE INTO THE "EMPTY BOX" DOCTRINE OF "INDIAN TITLE"

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This article addresses the Supreme Court's recent decision in Manitoba Metis Federation v. Canada (Attorney General)*, the Court's interpretation of section 31 of the* Manitoba Act, 1870*, and the ways in which the ruling seems guided by, or at least concurs with, the works and opinions of Thomas Flanagan. The author highlights various cases which have dealt with Métis rights, established canons of statutory interpretation, Crown obligations, opposing scholarly views, and the distinction between historical contextual analysis and historical legal analysis. In doing so, the author argues that the decision is essentially an invocation and resuscitation of the "empty box" doctrine. This doctrine serves both to recognize Métis rights and revoke them of any tangible substance that such recognition might bring, and seemingly obfuscates the plain meaning rule of interpretation applied to the section 31 phrase: "towards the extinguishment of the Indian Title."*

Cet article porte sur la récente décision de la Cour suprême dans *Manitoba Metis Federation c. Canada (Procureur général)*, l'interprétation de la cour de l'article 31 de la *Loi de 1870 sur le Manitoba et la manière dont la décision semble avoir été influencée par les travaux et opinions de Thomas Flanagan, avec lesquels elle est d'accord. L'auteur souligne diverses causes ayant trait aux droits des Métis, aux règles établies de l'interprétation des lois, aux obligations de l'État, aux vues savantes divergentes ainsi qu'à la distinction entre l'analyse historique contextuelle et l'analyse historique judiciaire. En ce faisant, l'auteur fait valoir que la décision est essentiellement une invocation et réanimation de la doctrine de la « boîte vide ». Cette doctrine permet à la fois de reconnaître les droits des Métis et de les révoquer de tout objet matériel qu'une telle reconnaissance pourrait apporter; elle essaie apparemment de masquer la règle du sens ordinaire d'interprétation qui s'applique à l'expression suivante de l'article 31: «pour l'extinction du titre indien».*

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I. INTRODUCTION

Some 142 years after the enactment of the *Manitoba Act, 1870*,[1] the Supreme Court of Canada came down with a decision in the *Manitoba Metis Federation Inc. v. Canada (Attorney General)*.[2] The case revolved around section 31 of the *Manitoba Act, 1870*, which was subsequently constitutionally entrenched by the *Constitution Act, 1871* (UK),[3] and reads as follows:

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1 SC 1870, c 3 [*Manitoba Act*].

2 2013 SCC 14, [2013] 1 SCR 623 [*MMF*].

3 34 & 35 Vict, c 28.

> 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 a mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.[4]

The ostensible objective of section 31 was to extinguish the Indian title of the Métis and half-breeds and put aside 1.4 million acres of federal Crown lands for "the benefit of … half-breed" families and to "divide the same among the children of the half-breed heads of families."[5] As political scientist Thomas Flanagan put it, what happened to all this land "is one of the most enduring questions of Métis history."[6] According to Flanagan, it is commonly accepted that "the lands distributed to the Metis under the Act did not remain with them for long," if they ever received them at all.[7]

The Manitoba Metis Federation sought declaratory relief: (1) that enactments (Orders-in-Council) of Parliament and the Legislature of Manitoba were unconstitutional or *ultra vires*; (2) that Canada failed to fulfill its obligations, properly or at all, to the Métis under sections 31 and 32 of the *Manitoba Act*, and pursuant to the undertakings given by the Crown; (3) that Manitoba, by enacting certain legislation and by imposing taxes on lands referred to in sections 31 and 32 of the *Manitoba Act* prior to the grant of those lands, unconstitutionally interfered with the fulfillment of the obligations under sections 31 and 32 of the *Manitoba Act*; and (4) that there was a treaty made in 1870 between the Crown in the right of Canada and the provisional government and the people of Red River.[8] When the trial judge, Alan D. MacInnes, rendered his decision in *MMF* (Man QB) on 7 December 2007, he found against the plaintiff on all four counts.

In doing so, the trial judge gave juridical force to the arguments that were put forward by Canada's primary expert witness in the *MMF* case,[9] political scientist Thomas Flanagan. Following the inclusion of the Métis in section 35 and well before the *MMF* case went to trial, Flanagan launched a one-man crusade against the very notion of Métis Aboriginal

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4 *Manitoba Act*, *supra* note 1, s 31.

5 The use of "half-breed" in the English version of the *Manitoba Act*, *ibid*, and "Métis" in the French version "was the beginning of the confounding of the terms Half-breed and Métis" who had hitherto been distinguished. See John Giokas & Paul LAH Chartrand, "Who are the Métis? A Review of the Law and Policy" in Paul LAH Chartrand, ed, *Who Are Canada's Aboriginal Peoples?: Recognition, Definition, and Jurisdiction* (Saskatoon: Purich, 2002) 83 at 86; *Loi modifiant et prorogeant la loi 32-33 Victoria, chapitre 3, et concernant l'organisation du gouvernement du Manitoba, 1870*, 33 Vict, c 3 (Canada).

6 Thomas Flanagan, "The Market for Métis Lands in Manitoba: An Exploratory Study" (1991) 16:1 Prairie Forum 1 at 1.

7 Thomas Flanagan, *Metis Lands in Manitoba* (Calgary: University of Calgary Press, 1991) at 1 [Flanagan, *Metis Lands*].

8 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2007 MBQB 293, 223 Man R (2d) 42 at para 5 [*MMF* (Man QB)] .

9 Flanagan has been a historical consultant and expert witness for the federal Department of Justice since 1986 in the *Dumont v Canada (Attorney General)* and *MMF* cases: see Flanagan, *Metis Lands*, *supra* note 7 at vii, ix.

rights.[10] Since his arguments undoubtedly heavily influenced the trial judge's findings of fact and law in *MMF*, and these were subsequently confirmed by the Supreme Court of Canada, it will be necessary to specifically address the line of reasoning he deployed in opposing Métis rights. In doing so, the objective is to bring to the fore the doctrinal position that the courts have seized upon to deny that the Métis held a pre-existing Aboriginal interest in the land and further to deny that the bundle of interests they held in section 31 lands was Aboriginal title.

While there is much to be said about many facets of the *MMF* decisions, the particular aspect this article will address here is how the courts treated the explicit recognition of the Indian title of the Métis in section 31. Justice MacInnes briefly considered the plaintiff's arguments that the integrity of the Crown was at stake because it was dealing with an Aboriginal people, but found that it was only to the degree that it "would have an impact on the aboriginal rights of the Métis to the extent such aboriginal rights existed or were impacted. In this case, the aboriginal right, if any, in issue is that of aboriginal title."[11] Justice MacInnes deemed it necessary to determine whether the Métis had any "existing" common law Indian title to surrender at the time that section 31 was drafted.[12] In order to do so, he applied the three criteria from *Delgamuukw v. British Columbia*[13] for establishing Aboriginal title at law, but allowed for a post-*Powley* modification of the criterion that "the land must have been occupied prior to sovereignty"[14] to that of the "effective imposition of European control."[15] He concluded that "[o]n the evidence, the plaintiffs have not proved the existence of … aboriginal title, even allowing for modification consistent with Powley."[16] Because the Métis "did not hold at July 15, 1870, or at any time prior, aboriginal title to the lands,"[17] there was "nothing to surrender or cede"[18] and therefore nothing that could "serve as the source

10 Thomas Flanagan, "The Political Thought of Louis Riel" in AS Lussier, ed, *Riel Mini-Conference Papers* (Winnipeg: Pemmican, 1983) 111; Thomas Flanagan,"Aboriginal Title" in *Riel and the Rebellion: 1885 Reconsidered* (Saskatoon: Western Producer Prairie Books, 1983) 75 [Flanagan, *Riel and the Rebellion*]; Thomas Flanagan,"Louis Riel and Aboriginal Rights" in Ian AL Getty & Antoine S Lussier, eds, *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 2000) 247 [Flanagan, "Riel and Aboriginal Rights"]; Thomas Flanagan,"The Case Against Metis Aboriginal Rights" (1983) 9:3 Can Pub Pol'y 314 [Flanagan, "Case Against"]; Thomas Flanagan,"Metis Aboriginal Rights: Some Historical and Contemporary Problems" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 230; Thomas Flanagan,"Louis Riel: A Review Essay" (1986) 21:2 J Canadian Studies 157; Thomas Flanagan,"From Indian Title to Aboriginal Rights" in Louis A Knafla, ed, *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 81 [Flanagan, "Indian Title to Aboriginal Rights"]; Thomas Flanagan,"Metis Land Claims in Manitoba" in John W Friesen, ed, *The Cultural Maze: Complex Questions on Native Destiny in Western Canada* (Calgary: Detselig Enterprises, 1991) 111; Thomas Flanagan,"Aboriginal Title" in *Riel and the Rebellion: 1885 Reconsidered*, 2nd ed (Toronto: University of Toronto Press, 2000) 85 [Flanagan, *1885 Reconsidered*]. Although the following manuscripts do not specifically deal with the Métis, they provide important clues to Flanagan's conception of Aboriginal rights that underlie his critique of Métis rights: Thomas Flanagan,"Francisco de Vitoria and the Meaning of Aboriginal Rights" (1988) 95:2 Queen's Quarterly 421; Thomas Flanagan,"The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy" (1989) 22:3 Can J Political Sci 589; Thomas E Flanagan,"The History of Metis Aboriginal Rights: Politics, Principle, and Policy" (1990) 5 CJLS 71; Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen's University Press, 2000).

11 *MMF* (Man QB), *supra* note 8 at para 521.

12 *Ibid* at para 561.

13 [1997] 3 SCR 1010 [*Delgamuukw*].

14 *MMF* (Man QB), *supra* note 8 at para 566.

15 *Ibid* at paras 573-77, citing *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 17 [*Powley*].

16 *MMF* (Man QB), *ibid* at para 589.

17 *Ibid* at para 594.

18 *Ibid* at para 631.

for the s. 31 grants."[19] The trial judge concluded it "was not intended by Parliament either to recognize the half-breeds as enjoying Indian title or to be entitled to share in Indian title."[20] Furthermore, since "Parliament, as a matter of law, could not create aboriginal title,"[21] Justice MacInnes dismissed the explicit reference to the "Indian" title of the Métis in section 31 by deeming it nothing more than a mere "political expedient."[22]

On 10 July 2010, Chief Justice Scott for a unanimous five member Manitoba Court of Appeal upheld the lower court decision.[23] Chief Justice Scott asserted that, with "very few exceptions … there was evidence, in many instances overwhelming evidence, to support the trial judge's conclusions with respect to the context and purpose of s. 31 of the Act, as well as the inferences that he drew from them."[24] Among these, one finds Justice MacInnes' conclusion that "s. 31 was essentially a political expedient to bring about Manitoba's entry as a new Canadian province."[25] After summarizing the findings, Chief Justice Scott repeated that he found "the evidence strongly supports the trial judge's conclusions. None of the foregoing findings of the trial judge constitute error, let alone palpable and overriding error."[26] He then specifically came back to "the trial judge's conclusion that s. 31 was essentially a political expedient and the reference to 'extinguishment of the Indian Title', was the vehicle of convenience chosen to accomplish it."[27]

Chief Justice Scott did, however, fault the trial judge's finding that the honour of the Crown and the fiduciary obligations of the Crown toward the Métis were not at stake.[28] Judge MacInnes had limited his analysis to "aspects of fiduciary duty cases pertaining to surrenders of land"[29] when what was required was "first, *a specific or cognizable Aboriginal interest* and second, an undertaking of discretionary control over that interest by the Crown in the nature of a private law duty."[30] As a result, the Court of Appeal sidestepped the issue of the Indian title of the Métis by asserting that it did "not find it necessary to decide whether the Métis had Aboriginal title" since "Aboriginal title is not a mandatory prerequisite to find a fiduciary obligation."[31] Ultimately, however, Chief Justice Scott concluded that the "trial judge did not commit palpable and overriding error when he rejected the appellants' assertions that Canada had breached any duty that might have been owed to the Métis. The appellants' appeal with respect to the issues surrounding s. 31 of the Act therefore cannot succeed."[32]

The Supreme Court of Canada overturned the decisions of the trial judge and the Court of Appeal when it concluded that the delays in the implementation of the section 31 grant did

19 *Ibid* at para 594.
20 *Ibid* at para 656.
21 *Ibid* at para 652.
22 *Ibid* at para 656.
23 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2010 MBCA 71, 255 Man R (2d) 167.
24 *Ibid* at para 238.
25 *Ibid*.
26 *Ibid* at para 240.
27 *Ibid* at para 242.
28 *MMF* (Man QB), *supra* note 8 at paras 617-46. Having found that the Métis did not hold Aboriginal title, Justice MacInnes dismissed the plaintiffs' arguments that the Crown had a fiduciary obligation toward the Métis while implementing section 31 and that the honour of the Crown was at stake.
29 *MMF* (Man CA), *supra* note 23 at para 470.
30 *Ibid* at para 468 [emphasis added].
31 *Ibid* at para 474.
32 *Ibid* at para 668.

not uphold the honour of the Crown, which requires the Crown to act diligently.[33] However, the basis for the Court's decision was that section 31 establishes "a constitutional obligation explicitly directed at an Aboriginal group"[34] and not because it was dealing with an Aboriginal interest in land. When it came to determining whether a fiduciary obligation was owed to the Métis, the Court recalled that one of the conditions that gives rise to a fiduciary obligation on the part of the Crown is a "specific or cognizable Aboriginal interest" in land.[35] The Court then specified that an Aboriginal people with an interest in land is "not sufficient to establish an Aboriginal interest in land. The interest … must be distinctly Aboriginal: it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land."[36] Although the Court cited *Powley* in this regard, it was indirectly referring to one of the aspects of Aboriginal title that it had outlined in *Delgamuukw*. The Court then recalled the trial judge's finding of fact that "the Métis used and held land individually, rather than communally" and that their "ownership practices were incompatible with the claimed Aboriginal interest."[37] It concluded that "the trial judges findings of fact that the Métis had no communal Aboriginal interest in land are fatal to this contention."[38] In doing so, the Court upheld the trial judge's application of the *Delgamuukw* criteria to determine whether the Métis held a pre-existing Indian title prior to the date of "effective control." When the Court recalled that an "Aboriginal interest in land … cannot be established by treaty, or, by extension, legislation,"[39] it essentially confirmed the trial judge's ruling that "Parliament, as a matter of law, could not create aboriginal title."[40]

Throughout this article, it will be argued that the Supreme Court of Canada failed to overturn several of the trial judge's palpable and overriding errors both of law and fact. The article will first consider the implications of what has been termed the "empty box" doctrine of Aboriginal rights. From there, it will look closer at how the courts justification for treating the Indian title in section 31 as an empty box — that it was merely a "political expedient" — measures up to well-established interpretative canons of parliamentary statutes. Because the courts relied heavily on extrinsic evidence in order to arrive at this conclusion, the established case law on extrinsic evidence will be reviewed in order to evaluate whether the trial judge gave it undue legal consideration. From there, the Supreme Court's use of the "constitutional imperative" in *Powley* will be reviewed and its failure to apply it in *MMF* will be questioned.

II. THE "EMPTY BOX" DOCTRINE

Strictly speaking, the term "empty box" was coined in reference to the content of section 35, which depends on whether the Aboriginal rights were still "existing" at the time that Imperial Parliament enacted the *Canada Act 1982*.[41] To the extent that "there was no

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33 *MMF*, *supra* note 2 at para 128.
34 *Ibid* at para 72.
35 *Ibid* at para 51.
36 *Ibid* at para 53.
37 *Ibid* at para 56.
38 *Ibid* at para 59.
39 *Ibid* at para 58.
40 *MMF* (Man QB), *supra* note 8 at para 652.
41 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

recognition of aboriginal and treaty rights in Canadian law before 1982, then section 35 had 'recognized and affirmed' nothing.… The federal government had an 'empty box' theory. A box of rights had been protected by section 35, but unfortunately the box was empty."[42] Flanagan has basically extolled the application of this doctrine to section 35 rights of the Métis. In Flanagan's view, the inclusion of the Métis in section 35 of the *Constitution Act, 1982* is a historical mistake.[43] For Flanagan, "the best policy for the time being would be to emphasize the word 'existing' in section 35(1) of the *Constitution Act, 1982*."[44] In other words, Flanagan suggests using the interpretative canon of reading down in order to empty section 35 of any legal substance insofar as the Métis are concerned. As we can see in the context of section 35, the empty box doctrine allows one to take into account the *formal* recognition of Aboriginal rights all the while emptying such recognition of any corresponding substantive legal content.

Like section 35, Flanagan has bemoaned the fact that "the language of [section 31 of] the [*Manitoba Act*] established the *Métis* as an aboriginal people," claiming that the "biggest error of all in drafting the act was to state that the grant was 'towards the extinguishment of the Indian Title to the lands in the Province.'"[45] Justice MacInnes seemed to agree with Flanagan when he found that the Métis had "nothing to surrender or cede."[46] In applying the *Delgamuukw* criteria to section 31, the trial judge was basically first reading in the expression "existing," then using it to read down the express mention of Indian title. When the Supreme Court of Canada concluded that "the words of s. 31 do not establish pre-existing communal Aboriginal title held by the Métis,"[47] it also basically applied the empty box doctrine. In other words, section 31 had recognized and affirmed nothing.

As Flanagan has correctly pointed out, this "is not strictly speaking a theory of aboriginal 'rights'; for the indigenous population will have no rights enforceable against the sovereign, even though sovereign policy may concede to the aborigines certain rights enforceable against other subjects."[48] According to Flanagan, one of the main propositions of this doctrine concerning title is that the "nomadic use of land for hunting, fishing and food gathering does not constitute ownership in any sense recognizable in European systems of law; thus they have no property rights to be respected."[49] Another proposition, however, is that "[*e*]*xpediency* or humanitarianism may dictate the acquisition of land through negotiated 'treaties', which may generate subsidiary rights once they are in force; but these 'treaties' are ultimately a matter of policy."[50] As we have seen, Judge MacInnes dismissed the recognition of Indian title in section 31 as a mere political expediency.

It is precisely in this light that several judges in the *St. Catharines Milling and Lumber* affair considered Indian title. The trial judge, Chancellor Boyd of the Ontario Chancery, asserted that, "[a]s heathens and barbarians it was not thought that they had any proprietary

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42 Douglas Sanders, "The Supreme Court of Canada and the 'Legal and Political Struggle' Over Indigenous Rights" (1990) 22:3 Can Ethnic Studies 122 at 125.
43 Flanagan, "Case Against," *supra* note 10 at 314.
44 *Ibid* at 324.
45 Flanagan, *Riel and the Rebellion*, *supra* note 10 at 61.
46 *MMF* (Man QB), *supra* note 8 at para 631.
47 *MMF*, *supra* note 2 at para 59.
48 Flanagan, "Indian Title to Aboriginal Rights" *supra* note 10 at 90.
49 *Ibid*.
50 *Ibid* [emphasis added].

title to the soil" and "no legal ownership of the land was ever attributed to them."[51] After referring to "'the Indian title' so called," he drew the conclusion that before "the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown."[52] Further on, he added that "the claim of the Indians by virtue of original occupation is not such as to give any title to the land itself, but only serves to commend them to the consideration and liberality of the Government upon their displacement."[53] On appeal, Justice Burton of the Ontario Court of Appeal spoke of "so-called Indian title" and stated, "that in truth the recognition of any right in the Indians has been on the part of the Government a matter of public policy determined by political considerations, and motives of prudence and humanity, and has not been a recognition of property in the soil capable of being transferred."[54] For example, in terms of the first proposition, Justice Burton held that the nature of "Indian title was a mere occupancy for the purpose of hunting. It is not like our tenure, they have no idea of a title to the soil itself. It is over-run by them rather than inhabited."[55]

At the Supreme Court of Canada, Justice Henry asserted that it "was never asserted that any title to [unoccupied land] could be given by the Indians" and "the Indians were never regarded as having a title."[56] Interestingly, Justice Henry took on the problem of the explicit reference to Indian title in treaties — much like that of the Métis in section 31. In his view, if treaties were signed, it was merely as a sort of quitclaim for the "cession of all the Indian rights, titles, and privileges *whatever they were*."[57] That the treaties were "signed by certain Indians is not evidence of a purchase" of Indian title since "[t]he consideration was, … on the face of the treaty, an act of bounty on the part of Her Majesty. It is not an acknowledgement of any title in fee simple in the Indians."[58] If lands were reserved for Indians, it was merely "the right to use them for hunting purposes, but not as property the title of which was in them."[59] Similarly, in response to the argument of the appellants that negotiation of land surrenders amounted to "a recognition of their title to a beneficiary interest in the soil," Justice Taschereau held that this was simply for "obvious political reasons, and motives of humanity and benevolence" and did "not give them any title in law, any title that a court of justice can recognize against the crown."[60]

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51 *R v The St Catharines Milling and Lumber Company* (1885), 10 OR 196 at 206 (Ch Div).

52 *Ibid* at 230.

53 *Ibid* at 234. One finds here the same arguments that Flanagan has advanced in his "Case Against" the Aboriginal title of the Métis, *supra* note 10. Despite the evidence put forward by the defendant that various legal instruments and judiciary decisions had explicitly recognized the "Indian title" of the Aboriginals, Chancellor Boyd basically decided that "Indian title so-called" was an "empty box" that had come about for reasons of political expediency.

54 *R v The St Catharines Lumber and Milling Company* (1886), 13 OAR 148 at 161 (CA).

55 *Ibid* at 159. More recently, Chief Justice McLachlin for the majority of the Supreme Court entertained this latter proposition when she stipulated that the "Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice *and translate that practice*, as faithfully and objectively as it can, *into a modern legal right*" and then left open the possibility that some Aboriginal people may be too nomadic to ground Aboriginal title (*R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 at paras 48, 66 [emphasis added]).

56 *The St Catharines Milling and Lumber Company v The Queen* (1887), 13 SCR 577 at 639 [*St Catharines* (SCC)].

57 *Ibid* at 640 [emphasis added]. A quitclaim is "a formal release of one's claim or right" *Black's Law Dictionary*, 9th ed, *sub verbo* "quitclaim." In other words, the suggestion is that the government never really believed that Indians had good title and merely paid consideration for their unfounded claims to avoid litigation, or, in this case, out of political rather than legal considerations.

58 *St Catharines* (SCC), *supra* note 56 at 640-41.

59 *Ibid* at 642.

60 *Ibid* at 648-49.

In terms of section 35, the empty box doctrine had previously received an echo in several decisions. In *Sawridge Band v. Canada (T.D.)*,[61] Justice Muldoon, after citing section 35(2), could not resist adding a personal commentary in parentheses, writing that "[t]his sounds curious since the Métis can hardly be thought of as 'Aboriginal', having been a people only since the advent of the European people and then called 'half-breeds' because of their mixed ancestry. The constitution makers *indulged in history's revision here*."[62] At an earlier stage of the *MMF* saga, when the Crown attempted to have the Manitoba Metis Federation's claims thrown out of court on the basis that the MMF did not have standing, Justice Twaddle of the Manitoba Court of Appeal hinted at the empty box doctrine. He mentioned that section 35(1) "recognised the existing aboriginal rights of the Métis," but immediately added "whatever they were."[63] The Attorneys General of Canada and that of certain provinces, notably Ontario, put forward this argument in the *Powley* case.[64] In his only reference to section 35 in the entire *MMF* decision, Justice MacInnes acknowledged that section 35 recognizes and affirms that the Métis are an Aboriginal people. However, he immediately qualified this with a "but," and cited Chief Justice Lamer to the effect that "s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were 'existing' in 1982."[65] He seemed to be expressing a doubt as to whether, insofar as the Manitoba Métis are concerned, there is anything for section 35 to recognize and affirm.

Even the Supreme Court of Canada appeared to give countenance to this doctrine to interpret section 31 in *R. v. Blais*.[66] The central question in *Blais* was not the Indigenous title of the Métis, but whether the Métis were included in the expression "Indians" for the purposes of section 13 of the *Natural Resources Transfer Agreement*, which was ratified by the Canadian Parliament under *The Manitoba Natural Resources Act*[67] and confirmed by the Imperial Parliament under the terms of the *Constitution Act, 1930*.[68] In order to decide the issue, the Court referred to section 31 of the *Manitoba Act* as part of the "historical context" in which section 13 of the *NRTA* was adopted. The Court decided that, in order to ascertain "which group or groups the parties to the *NRTA* intended to designate by the term 'Indians,'" it had to "look at the prevailing understandings of Crown obligations and the administrative regimes that applied to the different Aboriginal groups in Manitoba."[69] In order to distinguish the use of the expression "Indian" in section 31 from that of "Indian" in section 13 of the *NRTA*, the Court recognized that "[w]hile s. 31 states that this land is being set aside 'towards the extinguishment of the Indian Title to the lands in the Province', this was expressly recognized *at the time* as being an inaccurate description."[70]

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61 [1996] 1 FC 3.
62 *Ibid* at 32 [emphasis added].
63 *Dumont v Attorney-General of Canada* (1988), 52 DLR (4th) 25 at 41 (Man Ca) [*Dumont*].
64 Andrea Horton & Christine Mohr, "*R. v. Powley*: Dodging *Van der Peet* to Recognize Métis Rights" (2005) 30:2 Queen's LJ 772 at 778-79.
65 *MMF* (Man QB), *supra* note 8 at para 618, citing *Delgamuukw*, *supra* note 13 at para 133.
66 [2003] 2 SCR 236 [*Blais*].
67 *The Manitoba Natural Resources Act*, SC 1930, c 29.
68 *Natural Resources Transfer Agreement*, a schedule to the *Constitution Act, 1930*, 20-21 Geo V, c 26 (UK), reprinted in RSC 1985, App II [*NRTA*].
69 *Blais*, *supra* note 66 at para 19.
70 *Ibid* at para 22 [emphasis added].

The Court seemed as though it was doing precisely what Flanagan had suggested in terms of section 35 — it read down section 31 so as to render the reference to the Indian title of the Métis virtually meaningless. Subsequently, Justice MacInnes in *MMF* cited the relevant paragraphs in *Blais*,[71] and claimed that "the Supreme Court in *Blais* decided that the Métis were not Indians under s. 31 of the [*Manitoba*] *Act*."[72] Justice MacInnes' reasoning here seems to be that, since the Métis were not Indians, they could not be vested with *Indian* title and it is in this sense that "Indian title" is an inaccurate description. In this case, Justice MacInnes was not simply reading *down* the reference to Indian title in section 31; he was reading it *out* entirely.

III. INDIAN TITLE: POLITICAL EXPEDIENT OR LEGAL PRINCIPLE?

As we have seen, when it came to interpreting the expression, "towards the extinguishment of the Indian Title to the lands of the Province," Justice MacInnes explained away the reference to Indian title in section 31 by holding that it was nothing more than a "political expedient."[73] Similarly, Flanagan thought that the Métis "land grants were a matter of policy, not satisfaction of a right"[74] since "the case for Metis aboriginal rights is weak at the level of first principles," and was only "accepted by the government for reasons of short-term expediency."[75] Flanagan asserted that the "Metis saw that the extinguishment of Indian title was an opportunity for them to reap a windfall benefit."[76] In other words, in Flanagan's view, the Métis land grant "was less an extinguishment of aboriginal title than a political concession designed to buy them off."[77] There is hardly anything particularly new or original about treating the Indian title of the Métis as nothing more than a "boon" and totally lacking in principle. Following the United States government's promise to recognize the Indian title of the Métis, Red River amateur historian Alexander Ross wrote in 1857:

> The Pembina *squatters* are chiefly half-breeds from Red River; many of them without house, home, or allegiance to any Government — wanderers at large, citizens of the wilderness. They have crossed the British line, as the gold-hunters of California cross the mountains, *in search of gain*. Ever since the road to St. Peter's has been opened, it has been rung in their ears what large sums of money the Americans pay for Indian lands; and *that half-breeds, being the offspring of Indians, come in for a good share* of the loaves and fishes on all such occasions. *Their cupidity* being thus excited, is the real cause of the half-breeds having settled down on the American side; their movements being accelerated of late by the report that the Pembina lands were to be purchased forthwith by the American Government, and that all British subjects were in future to be debarred from hunting south of the line. As to any definite grievance under the government of the Hudson's Bay Company, or their calling for American protection, it is all pure fiction; let the Americans but withhold from them *the anticipated boon* they have in view — that is, *a share in the sale of the Pembina lands* — and they will soon return again to their cherished haunts in the north.[78]

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[71] *MMF* (Man QB), *supra* note 8 at para 599.
[72] *Ibid* at para 616.
[73] *Ibid* at para 656.
[74] Flanagan, "Metis Aboriginal Rights," *supra* note 10 at 235.
[75] *Ibid* at 240 [footnote omitted].
[76] Flanagan, *Metis Lands*, *supra* note 7 at 25.
[77] Flanagan, *Riel and the Rebellion*, *supra* note 10 at 64; *1885 Reconsidered*, *supra* note 10 at 71.
[78] Alexander Ross, *The Red River Settlement: Its Rise, Progress, and Present State* (Minneapolis: Ross and Haines, 1957) at 403-404 [emphasis added].

Some quarter of a century later, Lieutenant Governor Archibald stated that it is difficult to understand what the phrase "toward the extinguishment of Indian title" in section 31 meant. It is worth quoting at length his comments on the matter:

> The Half-breed population of this Province is largely from beyond the Province. White men, who have lived in the most remote parts of this Continent, and have formed connexions with Indian women of the interior, as they advance in years remove to Red River, and there is not probably a tribe of natives between this and the Rocky Mountains, or between this and the North Pole, or between this and the Coast of Hudson's Bay or Labrador, which is not to some extent represented in the Half-breeds of Red River.
>
> The words therefore, "towards the extinguishment of the Indian Title in these lands" *if they were really meant to apply to those who could have any claim*, as descendants of the tribes who occupied the Lands of Manitoba, would exclude all Half-breeds whose Indian Ancestors were not of certain Tribes and Families; but *I presume the intention was not so much to create the extinguishment of any hereditary claims* (as the language of the Act would seem to imply) *as to confer a boon* upon the mixed race inhabiting this Province, and generally known as Half-breeds. If so, any person with a mixture of Indian blood in his veins no matter how derived, if resident in the Province at the time of the transfer would come within the class of persons for whom the boon was intended.[79]

This false dichotomy that diametrically opposes "so-called rights" based on political compromise or expediency and rights based on principle was applied to reject a large and liberal interpretation of language rights in *MacDonald v. City of Montreal*.[80] Justice Beetz, for the majority, claimed that language rights "are based on a political compromise rather than on principle and lack the universality, generality and fluidity of basic rights resulting from the rules of natural justice."[81] In *Société des Acadiens v. Association of Parents*,[82] Justice Beetz for the majority again repeated that language rights "are based on political compromise," whereas "legal rights tend to be seminal in nature because they are rooted in principle."[83] In what may seem to be particularly relevant to section 31, he then suggested that the "legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise."[84]

As we have seen, there is nothing particularly new or original about attempting to discredit the recognition of Indian title in treaties generally, as was the case with several judges in *St. Catharines Milling*, by reducing them to a mere political expediency. While Chief Justice Lamer for the majority in *Van der Peet* did not go so far as to claim Aboriginal rights are a result of political compromise or expediency, much like Justice Beetz said in the case of language rights, he did stress that "aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society."[85] In his view, "Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment"[86] because in "the liberal enlightenment view, … rights are held by all people in society because each person is entitled to dignity and respect. Rights

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79 Cited in *MMF* (Man QB), *supra* note 8 at para 163 [emphasis added].
80 [1986] 1 SCR 460.
81 *Ibid* at 500.
82 [1986] 1 SCR 549.
83 *Ibid* at 578.
84 *Ibid* at 579.
85 *R v Van der Peet*, [1996] 2 SCR 507 at para 19 [*Van der Peet*].
86 *Ibid*.

are general and universal."[87] Further on, Chief Justice Lamer also emphasized that the purpose of section 35 is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[88] However, the term "reconciliation" is a synonym of, and suggests, political compromise. Similarly, "treaty rights" could suggest rights arrived at through negotiation and compromise.

However, in *Reference re Secession of Quebec*,[89] the Court highlighted that "even though those provisions were the product of negotiation and political compromise, *that does not render them unprincipled*. Rather, such a concern reflects a broader principle related to the protection of minority rights."[90] The application of this principle of constitutional interpretation to section 31 would hardly be anachronistic or retroactive. The Court pointed out that "it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation."[91] This was quickly taken up insofar as language rights are concerned in *R. v. Beaulac*.[92] Justice Bastarache, for the majority of the Court, noted that, though "constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights."[93] For Justice Bastarache, the "principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State" and it "also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation."[94] In *Arsenault-Cameron v. Prince Edward Island*,[95] the Supreme Court unanimously confirmed *Beaulac* when it recalled that, "[a]s this Court recently observed in *R. v. Beaulac*, … the fact that constitutional language rights resulted from a political compromise is not unique to language rights and does not affect their scope."[96]

Similarly, the Court clearly affirmed in *Re Quebec Secession* that Aboriginal rights are rooted in the underlying principle of the protection of minorities.[97] To be sure, while Chief Justice Lamer emphasized that "[t]he Court must define the scope of s. 35(1) in a way which captures *both* the aboriginal and the rights in aboriginal rights,"[98] he curiously left out their rights as "peoples." In this regard, while he mentioned that the "liberal enlightenment view

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87 *Ibid* at para 18.
88 *Ibid* at para 31.
89 [1998] 2 SCR 217 [*Re Quebec Secession*].
90 *Ibid* at para 80 [emphasis added].
91 *Ibid* at para 81. See "Minorities and Minority Rights" in Janet Ajzenstat et al, eds, *Canada's Founding Debates*, (Toronto: University of Toronto Press, 2003) 327.
92 [1999] 1 SCR 768 [*Beaulac*].
93 *Ibid* at para 24. Justice Bastarache notably cited Alan Riddell, in "À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80" (1988) 29:3 C de D 829. Justice Bastarache noted that at 846, Riddell "underlines that a political compromise also led to the adoption of ss. 7 and 15 of the *Charter* and argues, at p. 848, that there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. I agree that the existence of a political compromise is without consequence with regard to the scope of language rights."
94 *Ibid*.
95 2000 SCC 1, [2000] 1 SCR 3.
96 *Ibid* at para 27.
97 *Re Quebec Secession*, *supra* note 89 at para 82.
98 *Van der Peet*, *supra* note 85 at para 20 [emphasis in original].

[is] reflected in the American Bill of Rights,"[99] he neglected to mention that the liberal enlightenment view is also to be found in the American *Declaration of Independence* which is not based on individual rights, but on the right of *peoples* "to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them."[100] In any event, the Court has clearly rejected the pretence that certain constitutionally guaranteed rights should be interpreted restrictively because they are a mere expedient that resulted from a historically situated political compromise. One is left wondering why, contrary to its own previous decisions, the Court allowed the trial judge's conclusion of law concerning section 31 to stand.

IV. THE "MINIMAL RELEVANCE" OF EXTRINSIC EVIDENCE

Curiously, in order to refute the plaintiff's arguments based on statements made by Prime Minister John A. Macdonald and Georges-Étienne Cartier, Justice MacInnes made some preliminary remarks about the weight that should be given to debates recorded in *Hansard* and recalled that, while "the law is that their speeches are admissible, the court must remember that they do not reflect the will of Parliament or the will of Cabinet."[101] As Justice MacInnes himself recognized, it is only in cases of ambiguity that one needs to have recourse to external evidence.[102] Since Justice MacInnes resorted to several elements of extrinsic aids to interpret section 31 to arrive at the conclusion that the reference to Indian title in section 31 was merely a political expedient, this would seem to suggest that he found the expression Indian title in section 31 to be ambiguous.

Justice MacInnes was arguably less cautious with extrinsic evidence when it came to citing it in favour of the defendant's position. To provide but one of many examples, he notably first referred to the Supreme Court of Canada's citation of Macdonald's statement before the House of Commons in 1885 that the expression Indian title in section 31 was "an inaccurate description,"[103] then mentioned it more explicitly a second time[104] before arriving at the conclusion that "it is unrealistic and in my view wrong to conclude that Parliament, by enacting section 31, intended to create aboriginal title or anything tantamount to it."[105] In Justice MacInnes' favour, it must be said that the Supreme Court of Canada perhaps misled him somewhat by appearing to give undue weight to extrinsic evidence under the guise of applying a historical method of interpretation, notably that of a statement made by Macdonald before the House of Commons.[106] What Justice MacInnes failed to grasp was that it was within the context of a *factual* historical analysis that the Court raised the question of the use of the term "Indian" to designate the title of the Métis under section 31 of the *Manitoba Act* and was in no way meant to be read as a *legal* analysis of section 31.

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99 *Ibid* at para 18.
100 *Declaration of Independence*, (1776).
101 *MMF* (Man QB), *supra* note 8 at para 556.
102 *Ibid* at para 648.
103 *Ibid* at para 599, citing *Blais*, *supra* note 66 at paras 20-29.
104 *MMF* (Man QB), *ibid* at para 649, citing *Blais*, *ibid* at para 22.
105 *MMF* (Man QB), *ibid* at para 651.
106 *Blais*, *supra* note 66 at para 18. The Court was relying on a statement made by Macdonald before the House on 6 July 1885 to the effect that the "phrase [toward the extinguishment of Indian title] was an incorrect one" because it was not so much "any right [the Métis had] to those lands … as it was a question of policy."

In any event, what weight should be given to a statement made by a single parliamentarian in order to determine the will of Parliament? As Earl Loreburn stated long ago in *Attorney-General for the Province of Ontario v. Attorney-General for the Dominion of Canada*, Parliament had spoken, and "with the wisdom *or expediency* or policy of an Act, lawfully passed, *no Court has a word to say*."[107] As Peter Hogg noted, the reason it is not open to the courts to concern itself with the underlying policy of a statute is because it amounts to an usurpation of the legislative powers of Parliament and the executive powers of the Crown.[108] In *Re Residential Tenancies Act, 1979*, Justice Dickson wrote that, "generally speaking, speeches made in the Legislature *at the time of enactment of the measure* are *inadmissible* as having *little evidential weight*."[109] In *Re Upper Churchill Water Rights Reversion Act*, Justice McIntyre was of the opinion that "the speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence."[110] While he agreed that "[t]hey represent, no doubt, the considered views *of the speakers* at the time they were made, "[they] *cannot be said to be expressions of the intent of the Legislative Assembly*."[111]

In *Mahe v. Alberta*, the respondent maintained "that s. 23 should be interpreted in light of the legislative debates leading up to its introduction."[112] Chief Justice Dickson rejected this argument on the basis that the Supreme Court "has stated that such debates may be admitted as evidence, but it has also *consistently taken the view that they are of minimal relevance*."[113] In the case at bar, the Chief Justice was of the opinion that "the *evidence from the legislative debates contributes little to the task of interpreting* s. 23 and, accordingly, I place *no weight upon it*."[114] In addition, as constitutional law professor Joseph Magnet reminds us, "by allowing ambiguities in the statute to be resolved by statements in the legislature, *ministers would be given power in effect to legislate indirectly* by making such statements."[115]

In *Re B.C. Motor Vehicle Act*, Justice Lamer stated that "speeches and declarations by prominent figures are inherently unreliable."[116] Macdonald's speech is a classical example of a politician saying whatever he has to in order to slip out of the corner his adversary painted him into. One must keep in mind that the North-West Rebellion had just taken place in March of that year. Opposition Leader Edward Blake brought a motion of blame against Macdonald's government and charged it with "grave instances of neglect, delay and mismanagement, prior to the recent outbreak, in matters deeply affecting the peace, welfare and good government of this country."[117] He then delivered a thoroughly documented blistering indictment that takes up 35 pages of *Hansard*.[118] Blake argued, among other things, that the government first mismanaged the implementation of section 31, then neglected to respond to petitions from Métis claiming Indian title in the North-West before 1879 and,

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107 [1912] AC 571 at 583 (PC) [*Ontario v Canada*] [emphasis added].
108 Peter W Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 2002) at 288.
109 [1981] 1 SCR 714 at 721 [emphasis added].
110 [1984] 1 SCR 297 at 319.
111 *Ibid* [emphasis added].
112 [1990] 1 SCR 342 at 369.
113 *Ibid* [emphasis added].
114 *Ibid* [emphasis added].
115 Joseph Eliot Magnet, "The Presumption of Constitutionality" (1980) 18:1 Osgoode Hall LJ 87 at 100, cited in *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 508 [emphasis added].
116 *Re BC Motor Vehicle Act*, *ibid.*
117 *House of Commons Debates*, 5th Parl, 3rd Sess, Vol 20 (6 July 1885) at 3075.
118 *Ibid* at 3075-110.

finally having recognized such title, failed to act on it. Macdonald's twofold response was predictable: (1) it was the Liberals who were in power from 1873 to 1878 and whose friends had speculated in Métis lands; and (2) the recognition of Métis title in Manitoba was a political expedient — there was therefore no legal basis to Métis claims to Indian title in the North-West and no obligation on the government to act on such spurious claims. Of course, had the Court bothered to consult primary sources instead of merely quoting an extract of Macdonald's speech cited in one of Flanagan's articles, it might have been better positioned to evaluate its reliability and hence the proper weight it should have been given.[119]

Worse still, Macdonald did not even make this statement "at the time" of the enactment of section 31 of the *Manitoba Act*, as the Supreme Court of Canada implied, but on 6 July 1885 — in other words some *15 years after* the relevant time period. During the debates "at the time of enactment of the measure," as Justice Dickson put it in *Re Residential Tenancies Act, 1979*, Macdonald explicitly recognized when the bill was first introduced in the House of Commons on 2 May 1870 that section 31 lands were to constitute "a reservation for the purpose of extinguishing the Indian title."[120] He repeated that "[t]his reservation, as I have said, is for the purpose of the extinguishing the Indian title."[121] Two days later, he further stated that the Métis "had *a strong claim* to the lands, *in consequence of their* [Indian] *extraction*."[122] In reference to the Métis, Macdonald even spoke of "tribes."[123] On 9 May 1870, Cartier "contended that any inhabitant of the Red River country having Indian blood in his veins was considered to be an Indian."[124]

If the statements made by the ministers that sponsored section 31 when it was debated in Parliament are anything to go by, it is somewhat difficult to claim that the phrase "towards the extinguishment of Indian title" was recognized as an "inaccurate description"[125] *at the time*. Furthermore, the reason Justice MacInnes held that the inclusion of the expression "Indian title" was nothing more than a "political expedient" was because Macdonald and other members of the executive used it successfully "to satisfy the delegates and *make palatable to the Opposition in Parliament the grant of land to the children of the half-breeds* and to thereby ensure passage of the *Act*."[126] Likewise, the Supreme Court claimed there was never "a motion to delete the section providing the children's grant."[127] Yet, even expert witness Flanagan was of the opinion that, "Liberal members *repeatedly attacked* the notion that the Metis had inherited a share of Indian title."[128] In other words, the Liberal opposition was far from finding the land grant to Métis children palatable. Moreover, far from ensuring passage of the *Manitoba Act*, the reference to Indian title was actually one of the main obstacles both to the land grant and the passing of the *Act*.

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119 For a very different conclusion concerning this quote, see Justice Phelan's analysis in *Daniels v Canada (Indian Affairs and Northern Development)*, 2013 FC 6, [2013] 2 FCR 268 at paras 414-18 [*Daniels*].

120 *House of Commons Debates*, 1st Parl, 3rd Sess (2 May 1870) at 1302].

121 *Ibid.*

122 *House of Commons Debates*, 1st Parl, 3rd Sess (4 May 1870) at 1359. See Flanagan, "Case Against," *supra* note 10 at 318.

123 *Ibid.*

124 *House of Commons Debates*, 1st Parl, 3rd Sess (9 May 1870) at 1450. Again, see additional evidence of this policy in Justice Phelan's analysis in *Daniels*, *supra* note 119 at paras 414-18.

125 *Blais*, *supra* note 66 at para 22.

126 *MMF* (Man QB), *supra* note 8 at para 656 [emphasis added].

127 *MMF*, *supra* note 2 at para 30.

128 Flanagan, *Metis Lands*, *supra* note 7 at 42 [emphasis added].

Contrary to what the Supreme Court of Canada stated, there was a motion to delete the children's grant outright — and along with it, any mention of Indian title. On 9 May 1870, MP Mr. Ferguson "moved that the said clause 27 not form part of the Bill." However, a "division was taken; yeas 37, nays, 67."[129] Later that same day, he again "moved an amendment striking out clause 27, providing half-breed reservation of 1,400,000 acres; lost by yeas, 40; nays 77."[130] Furthermore, there were several motions to amend it."

What the Liberal opposition took issue with was not a land grant to the children as such, but both to the reference to Indian title[131] and to the "restrictive policy" of a "reserve" that Indian title implied, since this would remove the land indefinitely from the market and create a land-lock.[132] Both Alexander Mackenzie and William McDougall tried to modify section 31 with a homestead law or grants of 200 acres to *all* settlers.[133] Their primary objective was to remove any restrictions on alienation: first, by replacing a collective land grant *en bloc* with individual grants; and second, by extending the grant to all the children of the Settlement regardless of ancestry and thereby avoiding any mention of Indian title. The will of Parliament could not have been more clearly expressed when it voted down a proposal to amend section 31 by deleting any reference to "Indian title" in section 31 by a vote of 80 against and 37 in favour.[134]

Not only is this arguably an overriding and palpable error in a finding of fact, but it is also an overriding and palpable error in a finding of law. To paraphrase Earl Loreburn, once the *Manitoba Act* was adopted by the House of Commons and the Senate, and then signed by the Governor General, and once the *Constitution Act, 1871* was adopted by the Imperial House of Commons and the House of Lords, and then signed by the Queen, Parliament had spoken, and "with the wisdom or expediency or policy" of section 31, "no court has a word to say."[135] With respect, it is doubtful that the will of Parliament in the enabling statutes that establish courts of law was to authorize courts to second-guess the wisdom of Acts of Parliament by questioning whether they were enacted was done out of policy or principle, including their explicit recognition of the Indian title of the Métis.

V. THE "CONSTITUTIONAL IMPERATIVE"

In *Van der Peet*, the Supreme Court of Canada established that, because "it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the

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129 *House of Commons Debates*, 1st Parl, 3rd Sess, (9 May 1870) at 1451.
130 *Ibid* at 1490.
131 *Ibid* (2-10 May 1870) at 1306, 1435-36, 1447, 1449, 1451, 1501.
132 *Ibid* at 1329, 1387, 1420, 1426, 1438, 1449, 1459-60. The opposition was entirely correct in this regard. Ritchot specified that the demand of 200 acres was not only for the "enfants nés," but for the "enfants à naître" during a period of "pas moins de 50 ou 75 ans" as well as "chacun de leurs descendants à partir de cette époque" with "une loi de protection pour la conservation de ces terres dans la famille": George FG Stanley, "Le journal de l'abbé N.-J. Ritchot – 1870," (1964) Revue d'histoire de l'Amérique française 17:4, 537 at 548-49. Macdonald's notes also mention that that the land was to be distributed "under such legislative enactments which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families." See DN Sprague, *Canada and the Métis, 1869-1885* (Waterloo: Wilfrid Laurier University Press, 1988) at 58.
133 *House of Commons Debates*, *ibid* at 1448-49, 1454, 1459.
134 *Ibid* at 1501.
135 *Ontario v Canada*, *supra* note 107 at 583.

courts must look in identifying aboriginal rights."[136] As Métis law professor Larry Chartrand observed, a "strict application of the Aboriginal rights test [in *Van der Peet*] would have meant that no Métis group could ever claim an Aboriginal right."[137] Well before the *Van der Peet* decision, Flanagan questioned whether "the Metis [are] an aboriginal people, since by definition they did not emerge until the coming of the white man."[138] Long before the Court rendered its decision in *Powley*, Flanagan was of the view that treating the Métis as a distinct Aboriginal people was not based on cogent reasoning since the presence of the Métis "was so obviously a result of white intrusion that it challenges credibility to call it original possession."[139]

When it came to Métis Aboriginal rights under section 35 in *Powley*, the Court took notice of the fact that "Métis cultures by definition post-date European contact."[140] The Court explicitly modified the criteria for the cut-off date established in *Van der Peet* in order to accommodate the fact that the Métis came into being as a people after the initial contact with Europeans. In effect, the Court confirmed "the basic elements of the *Van der Peet* test" but modified "certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims."[141] Consequently, the Court applied a post-contact, pre-control test.[142] The justification for doing so was the "constitutional imperative that we recognize and affirm the aboriginal rights of the Métis."[143] The Court asserted that such a "modification *is required* to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights"[144] and that section 35 "*requires* that we recognize and protect those customs and traditions that were historically important features of Métis communities."[145]

The Court specified in *Powley* that the "overarching interpretive principle for our legal analysis is *a purposive reading* of s. 35."[146] From the point of view of such a purposive reading, "[t]he inclusion of the Métis in s. 35 represents Canada's *commitment to recognize and value* the distinctive Métis cultures … which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities."[147] The Court again emphasized that "[t]he inclusion of the Métis in s. 35 is *based on a commitment* to recognizing the Métis and *enhancing their survival* as distinctive communities."[148] According to the Court, "[t]he purpose and *the promise* of s. 35 is *to protect*

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136 *Van der Peet*, *supra* note 85 at para 60.
137 Larry N Chartrand, "Métis Aboriginal Title in Canada: Achieving Equality in Aboriginal Rights Doctrine" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon: Purich, 2004) 151 at 155.
138 Flanagan, "Riel and Aboriginal Rights," *supra* note 10 at 251.
139 Flanagan, "Metis Aboriginal Rights," *supra* note 10 at 236; Flanagan, "Case Against," *supra* note 10 at 320.
140 *Powley*, *supra* note 15 at para 16.
141 *Ibid* at para 14.
142 *Ibid* at para 37.
143 *Ibid* at para 38.
144 *Ibid* at para 18 [emphasis added].
145 *Ibid* [emphasis added].
146 *Ibid* at para 13 [emphasis added].
147 *Ibid* at para 17 [emphasis added].
148 *Ibid* at para 13 [emphasis added].

practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture."[149]

However, as Horton and Mohr have pointed out, the "constitutional imperative" justification for modifying the "pre-contact" criterion in *Van der Peet* to that of "pre-control" in *Powley* arguably raises more questions than it answers.[150] Admittedly, "the legal basis for this date … was not clearly articulated" by the Court.[151] However, this author is not sure "the legal basis for this date is less certain," as Horton and Mohr claim.[152] The constitutional imperative is based on the fact that we live in a democratic regime of parliamentary supremacy, where "important public policy choices should be made in the elected legislative assemblies, and not by non-elected judges."[153] The constitutional imperative is quite simply an application of the infamous plain meaning rule, in a constitutional context. According to the Court, "where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be."[154] Surely, if this rule applies to ordinary legislation, it is all the more imperative to give full legal effect to the Constitution.

The Supreme Court acknowledged that "[t]he Métis argue that the trial judge and the Court of Appeal erred in going behind the language of s. 31 and demanding proof of a collective Aboriginal interest in land."[155] In effect, counsel for the Manitoba Metis Foundation were arguing the same position as Métis legal scholar Paul Chartrand, who claimed that because the Aboriginal title of the Métis was statutorily recognized in section 31, the Métis do "not require a [common law] legal basis for asserting Indian title … in 1870."[156] The rationale is essentially that of *expressio unius est exclusio alterius*, which Lord Dunedin expressed in *Whiteman v. Sadler* in these terms: "it seems to me that express enactment shuts the door to further implication."[157] By way of analogy, the express recognition of Indian title in section 31 "shuts the door to further implication" — in other words, from having to have recourse to the *Delgamuukw* criteria to establish at law a pre-existing aboriginal title.

What the plaintiff was essentially asking the Court to do is to simply defer to the will of Parliament and confirm what a plain language reading of the expression "Indian title" in the *Manitoba Act* explicitly states: *title*. Surely, the constitutional entrenchment of Indian title in section 31 excludes the courts from reading it out of the section altogether. It is all the more so puzzling in that it is certainly a trite principle of interpretation that "Parliament does

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149 *Ibid* [emphasis added].

150 Horton & Mohr, *supra* note 64 at 796.

151 *Ibid*.

152 *Ibid*.

153 Hogg, *supra* note 108 at 288.

154 *R v McIntosh*, [1995] 1 SCR 686 at 704, Lamer CJC.

155 *MMF*, *supra* note 2 at para 57. As the plaintiffs' position was that there was no need to go behind the language of section 31 which clearly recognized the Indian title of the Métis, they did not submit evidence or make representations with the specific objective of supporting a common law Aboriginal title claim.

156 Paul LAH Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991) at 78-79 [footnote omitted].

157 *Whiteman v Sadler*, [1910] AC 514 at 527 (HL). That is, "to express or include one thing implies the exclusion of the other" (*Black's Law Dictionary*, 9th ed, *sub verbo* "*expressio unius est exclusio alterius*").

not legislate in vain."[158] Or, as Sir Francis Bennion reminds us, "if a word or phrase appears [in the enactment,] *it was put there for a purpose and must not be disregarded.*"[159] One could also cite the legal maxim used in contractual interpretation *verba ita sunt intelligenda ut res magis valeat quam pereat.*[160]

That the Court could have supported this conclusion is evident in the trial judge's reasoning in *Blais*. When expert witness Flanagan basically invited Justice Swail to read down the reference to "Indian" title in section 31 by claiming that the "the frame of reference was the 'Law of Nations' not aboriginal rights,"[161] he explicitly refused to do so. On the contrary, Justice Swail implicitly applied the plain meaning rule of interpretation when he retorted that "section 31 of the *Manitoba Act* clearly acknowledges Aboriginal rights of the Metis when it says: … '*towards the extinguishment of the Indian Title to the lands in the province … for the benefit of the families of the half-breed residents.*'"[162] The Manitoba Court of Appeal upheld Judge Swail's decision on this point when it confirmed that, "[s]ection 31, therefore, acknowledged that the Métis enjoyed what we now know as 'aboriginal rights.'"[163]

VI. CONCLUSION

In *Sparrow*, the Supreme Court of Canada asserted that section 35(1) is "a solemn commitment that must be given meaningful content" and that its objective is to ensure that Aboriginal rights "are taken seriously."[164] In *MMF*, the Supreme Court of Canada confirmed that section 31 of the *Manitoba Act*, much like section 35 of the *Constitution Act, 1982*, is a constitutional obligation toward an Aboriginal people.[165] As such, surely section 31 is no less "a solemn commitment that must be given meaningful content" than section 35 and, as a constitutional obligation, is to be "taken seriously." Nevertheless, rather than confirming that section 31 constitutes a noble commitment that requires the courts to recognize and value distinctive Métis culture in order to enhance their survival as distinctive communities, the Supreme Court endorsed a view of section 31 Métis Aboriginal rights as an "empty box." The Métis had no interest in land to surrender or cede in 1870 and so section 31 recognized and affirms nothing. In doing so, the Court implicitly endorsed the view that Parliament inserted the term "Indian title" in section 31 merely as a "political expedient." Furthermore, in order to arrive at this conclusion, the courts made questionable legal use of extrinsic evidence to determine the will of Parliament. Yet, the "constitutional imperative" on which the Court insisted in *Powley* was strangely absent in *MMF*.

The outcome is all the more surprising when one considers the relevance of the principles underlying equitable doctrines like that of promissory estoppel and fraud to the Court's

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158 See e.g. *Upper Lakes Group Inc v Canada (National Transportation Agency)* (1995), 125 DLR (4th) 204 at 222, Isaac CJ (FCA).

159 FAR Bennion, *Statutory Interpretation: A Code*, 2nd ed (London: Butterworths, 1992) at 807 [emphasis added].

160 "Words are to be understood that the object may be carried out and not fail" (*Canada Square Corp v VS Services Ltd* (1982), 34 OR (2d) 250 (CA)).

161 *R v Blais* (1996), [1997] 3 CNLR 109 (Man Prov Ct) at 118.

162 *Ibid* [emphasis in in original; underscore added].

163 *R v Blais (ELJ)*, 2001 MBCA 55, 156 Man R (2d) 53 at para 10, Scott CJ.

164 *R v Sparrow*, [1990] 1 SCR 1075 at 1108, 1119.

165 *MMF*, *supra* note 2 at para 91.

analysis of section 31. To rely on promissory estoppel, the plaintiff "must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position."[166] Due to the fears of the Scots Half-Breeds that the recognition of their Indian title would compromise their civil and political rights and freedoms,[167] it was one of the most debated clauses of the *Manitoba Act* before the Legislative Assembly of Assiniboia. When the latter voted unanimously to accept the terms of the *Act*, the Métis clearly did so based on the understanding that their Indian title had been recognized. Surely on this basis alone, the Crown is estopped from claiming that it never *really* meant to recognize and affirm the Indian title of the Métis in section 31. Yet, as we have seen in *Blais*, the Court accepted the federal government's position when it cited statements made by Macdonald 15 years after the fact that the recognition of Indian title in section 31 was an "inaccurate description." In doing so, the Court all but endorsed what amounts to equitable fraud on the part of a minister of the Crown, that is, a "conduct which, *having regard to some special relationship* between the two parties concerned, is an unconscionable thing for the one to do towards the other."[168] This sits rather uneasily with the Supreme Court of Canada's stipulation in *R v. Badger*, that "[*i*]*nterpretations* of … *statutory provisions which have an impact upon … aboriginal rights* must be approached in a manner which maintains the integrity of the Crown.… *No appearance of 'sharp dealing' will be sanctioned*."[169]

Nor are the implications of the Court's decision limited to Métis Aboriginal rights. In going behind the language of Indian title in section 31, the Court basically resuscitated the empty box doctrine that was applied to Indian title in *St. Catharines Milling and Lumber* at the end of the nineteenth century. As we have seen, in *St. Catharines Milling and Lumber* several judges decided that First Nations had no title to surrender or cede to the Crown and that the recognition of "Indian title so-called" in treaties was done out of "bounty and benevolence" or "motives of prudence and humanity" — in other words, as a political expedient to pacify unruly savages.[170] From now on, the courts may once again go behind the language of the explicit recognition of Indian title in treaties. This may open a floodgate of litigation, where from now on First Nations who have entered treaties will nevertheless be forced to prove pre-existing rights or title according to the *Van der Peet* or *Delgamuukw* criteria before the courts will find an Aboriginal right to hunt or an Aboriginal interest in land.

It is all the more curious in that the Supreme Court recognized the "treaty-like history and character" of section 31 because it "sets out solemn promises — promises which are no less fundamental than treaty promises" and that "no greater solemnity than inclusion in the Constitution of Canada can be conceived."[171] In this regard, it is not without interest to recall Justice Hall's remarks in *Calder v. Attorney-General of British Columbia*: "[s]urely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian

[166] *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 at 57.
[167] Darren O'Toole, "The Red River Jig Around the Convention of 'Indian Title': The Métis and Half-Breed *Dos à Dos*" (2012) 69 Manitoba History 17.
[168] *Kitchen v Royal Air Forces Association*, [1958] 2 All ER 241 at 249 (CA), Lord Evershed, MR.
[169] [1996] 1 SCR 771 at para 41 [emphasis added].
[170] *Ibid*, notes 51-60.
[171] *MMF*, *supra* note 2 at para 92.

right, *they were a gross fraud* and that is not to be assumed."[172] Similarly, in his dissenting decision in *Dumont*, Justice O'Sullivan remarked that "there is a school of thought that says the framers of the Constitution were of the view that the Métis people as such had no [Aboriginal] rights and that a cruel deception was practised on them and on the Queen whose duty it is to respect the treaties and understandings that she has entered into with her Métis people."[173] To paraphrase Sanders in terms of Aboriginal rights in section 35, the problem with the empty box doctrine from a legal point of view is that it implies that the "recognition and affirmation" of Indian title in section 31 is "at worst a con job."[174] Surely the honour of the Crown demands something more.

172 [1973] SCR 313 at 394 [emphasis added].
173 *Dumont*, *supra* note 63 at 29.
174 Sanders, *supra* note 42 at 125.