DEFINING "EFFECTIVE CONTROL" FOR NORTHERN MÉTIS COMMUNITIES

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The "effective control" doctrine arose within the Powley decision two decades ago as an adaptation of the Aboriginal rights test from Van der Peet. Though the doctrine is a required component to asserting Métis rights, there is limited understanding of how and when "effective control" occurs. The Courts have yet to clearly define the doctrine, leading to varying applications within jurisprudence. In the absence of clear definitions, this article proposes three components to the doctrine: surveillance; regulation of Aboriginal uses of land and resources; and regulation of other aspects of Aboriginal lives. These components are applied to northern Alberta to understand what events and government actions are relevant in precipitating "effective control." The conclusion drawn is that "effective control" potentially occurred much later than previously contemplated by legal decisions and government pronouncements.

TABLE OF CONTENTS

I.	INTRODUCTION	883
II.	SEEKING CONTROL IN THE NORTHWEST	885
III.	JUDICIAL DECISIONS ABOUT "EFFECTIVE CONTROL"	890
IV.	DEFINING EFFECTIVE CONTROL	894
V.	DATES FOR EFFECTIVE CONTROL OVER	
	ABORIGINAL PEOPLE IN NORTHERN ALBERTA	896
VI.	CONCLUSION	902

I. INTRODUCTION

"Effective control" is a doctrine in its infancy in the jurisprudence about Aboriginal or Indigenous peoples. It is often invoked but rarely, perhaps never, defined carefully, despite its significance for government policy and legal proceedings about Métis rights.¹ The legal

Professor Emeritus of Native Studies, University of Alberta; Native Bridges Consulting, Inc. This article originated in one section of an expert report I prepared for the Willow Lake Métis community, at Anzac, Alberta, which has made a "credible assertion" submission to the Government of Alberta (*The Willow Lake Métis: A Distinctive Métis Community* (Expert Report) by Patricia A McCormack (2021) [unpublished]). These documents remain confidential. The approval of the Willow Lake submission will provide the community with formal recognition and entitle it to be consulted in the same circumstances that are now mandated for First Nations and Métis Settlements. Much of that report, including the section on effective control, has been incorporated into a more substantial manuscript being prepared about Métis peoples in northern Alberta (Athabasca: AU Press) [forthcoming]). The manuscript benefited from materials and discussions with Peter Fortna (Willow Springs Strategic Solutions). While some of our recent research into these topics has been supported by local Métis organizations, it is also part of our broader personal research interests. I am indebted to Karin Buss and Dana Martin for reading and commenting on earlier drafts and to various anonymous reviewers for their insightful comments. Karin Buss has been particularly helpful as this article nears completion.

The doctrine of effective control may also be relevant to Aboriginal rights in more remote, difficult-toreach regions far from centres of European trade or settlement, which often lack a clear date for European-Indigenous contact. For example, while the date for the establishment of rights under *Treaty No. 8 Made June 21, 1899*, online: <www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572> [*Treaty 8*] in northern Alberta is precise — 1899 — that does not establish a date for the *Van der Peet* test for Aboriginal rights (*R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]): 1778, when trader Peter Pond first reached the Athabasca River; 1899, the year that the treaty was negotiated; c. 1920, when outsiders first began to interfere with local Aboriginal activities in a major way; or c. 1940, when

contours of the doctrine are still being developed. It has not yet been discussed in detail even by Métis scholars. It arose in R. v. Powley as "an adaptation of the pre-contact approach [from Van der Peet] to meet the distinctive historical circumstances surrounding the evolution of Métis communities."² The Supreme Court of Canada held in the Van der Peet decision that the relevant point in time for determining if a distinct Aboriginal practice or custom existed was at the point of contact with Europeans, but pointed out that such a time could not work for the Métis, who developed as distinct Aboriginal people(s) at later times as a result of contact.3 A relevant time frame had to be identified for the practices of the Métis community that constitute their Aboriginal rights. According to the Supreme Court in Powlev:

This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.⁴

The Supreme Court did not define "political and legal control," and these terms do not match precisely with "effective control of European laws and customs."5 Moreover, the decision did not flesh out, or articulate, the criteria or thresholds for what constituted "effective control" in either instance, which Frank Tough has called an empirical problem.6

This article examines the concept of effective control, provides a rigorous definition, and discusses when it was likely to have occurred in northern Alberta. First, it outlines briefly how Canada sought to establish its "political and legal control" in the Northwest after 1870 and provides some definitions for those terms. The Northwest of the day included all those lands that Canada had just acquired from the Hudson's Bay Company. Second, it reviews the key judicial decisions concerning Métis with reference to "effective control." It then proposes a definition of "effective control" with three necessary components. Finally, it identifies appropriate dates for this rights threshold for northern Alberta. The Province of Alberta has put forward 1900 as the date of "effective control" in its northern regions; I argue that later in the twentieth century, perhaps as late as the decade of the 1940s, is more

Powley SCC, supra note 2 at para 37 [emphasis added].

[&]quot;effective control" was finally established in most of northern Alberta (as this article contends). "Contact" for First Nations rarely resulted in any European political or legal control, however those terms are defined. European sovereignty was at best simply asserted and theoretical or de jure, not de facto. These issues point to some of the entire Aboriginal law canon, which are beyond the scope of this article.

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²⁰⁰³ SCC 43 at para 36 [*Powley* SCC]. *Van der Peet, supra* note 1. The jurists did not take into account that ethnogenesis continued to occur for "Indians" after contact, with new "Indian" groups coming into existence due to their own internal dynamics and the complex circumstances of the early fur trade world, as with the Métis.

Ibid.

Frank J Tough, "'Little Is Known of the Interior': Applied Historical Cartography and Métis Aboriginal Rights in the Île-à-la-Crosse Region, Saskatchewan" (2021) 56:4 Cartographica: Intl J Geographic Information & Geovisualization 320 at 322 [Tough, "Little is Known"]. As lawyer Dana Martin reminded me, the legal profession relies heavily on precise language and is aware that legal decisions may be "torn apart later in litigation," yet may still fail to attend closely to detail is important details (email from Dana Martin to Patricia A McCormack (9 June 2022)). I am often appalled at the problemetic use of enthropological and historic concerns and information by the courts problematic use of anthropological and historic concepts and information by the courts.

appropriate for most parts of the north and that "political and legal control" may not have been fully complete even then.⁷

II. SEEKING CONTROL IN THE NORTHWEST

Canada acquired the Hudson's Bay Company territories shortly after Confederation without any consultation with people who lived there, and Canadian officials were sent packing by Red River residents when they arrived in 1869.⁸ Canada's first step in seizing political power in the Northwest was to resolve the 1869–1870 crisis at Red River — the so-called "Riel Rebellion" — by passing the *Manitoba Act* of 1870, which created a postage stamp-size province in what is now the Winnipeg area and established its government.⁹ The provisions of this act were significant in establishing the legitimacy of the Canadian political and legal system in the new province as well as in recognizing the Métis people formally and creating procedures for dealing with Métis rights to land — both as people with Aboriginal rights and as people already settled on the land in many places — in lands beyond the Manitoba boundary. To their dismay, resident Métis people found that their own political power quickly diminished.¹⁰ The federal government already had a process for acquiring land from "Indians" by means of treaties, which had developed in the pre-1870 Canadian colonies.¹¹

⁹ *Ibid.*

 ⁷ Alberta, Indigenous Relations, *Métis Credible Assertion: Process and Criteria* (Guide), (Edmonton: Indigenous Relations, 2019) [*Métis Credible Assertion*].
 ⁸ An Act for the temporary Government of Rupert's Land and the North-Western Territory when united

⁸ An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada, SC 1869, c 3. The federal government was optimistic when passing this short piece of legislation premised on the notion that Canadian authority in the Northwest would be unquestioned. It was intended as a "temporary provision for the Civil Government of such Territories until more permanent arrangements can be made" (*ibid*).

The two terms "politics" and "power" are typically used without definitions, as if everyone agrees on their meanings, yet they are complex. The *Canadian Oxford Dictionary* has multiple definitions of "politics," the first of which relate to government, which makes sense in terms of its origin as "the art of 'civil administration": Katherine Barber, ed, *Canadian Oxford Dictionary* (Don Mills: Oxford University Press, 2001) at 1122, sub verbo "politics"; John Ayto, *Dictionary of Word Origins* (New York: Arcade, 1990) at 402, sub verbo "politics." However, its second definition is broader: "activities concerned with the acquisition or exercise of authority or power in an organization etc": Barber, *ibid.* "Politics" operate in all societies. The expansion of European fur trade systems in Canada led to changes in some aspects of pre-existing Aboriginal political systems but did not displace them. The extension of Canadian political systems often led to further changes in Aboriginal political systems but still did not necessarily replace them with government institutions or officials. "Power" similarly has multiple definitions, with the primary definition meaning "the ability to do or act," from a Latin term meaning to "be able or powerful": *Barber, ibid* at 1136, sub verbo "power"; Ayto, *ibid* at 408, sub verbo "power." More colloquially, it implies the ability to achieve a goal or to get something done, which speaks to matters of control. It is discussed later in the article.

speaks to matters of control. It is discussed later in the article.
 Terminology for Aboriginal/Indigenous peoples is complex and has evolved over time. Many earlier terms are considered repugnant or inappropriate today, yet they cannot simply be replaced in historical discussions by those terms preferred today. This article strives to respect both historical and contemporary usages. While "Indigenous" has replaced "Aboriginal" in much scholarly writing, the two terms have the same meaning. This article uses "Aboriginal" preferentially, in line with Thomas Isaac's call for "legally-known and legally-defined terms": A Matter of National and Constitutional Import: Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Metis Federation Decision by Thomas Isaac, Catalogue No R5-123/2016E-PDF (Ottawa: Indigenous and Northern Affairs Canada, 2016) at 4; Patricia A McCormack, The Métis of Northern Alberta (Athabasca: AU Press) [forthcoming] [McCormack, Northern Alberta].

The federal government laid the groundwork for extending its political power elsewhere in its new lands by enacting several key pieces of legislation:

- An Act to make further provision for the government of the North-West Territories, which provided for an interim government by providing that "the existing laws should continue in force" (continued from the 1869 legislation);¹²
- An Act respecting the Public Lands of the Dominion, which provided for the survey and distribution of land;¹³
- An Act to provide for the establishment of "The Department of the Interior," in 1873, with broad responsibilities for "the control and management of the affairs of the North West Territories," including Indian Affairs;¹⁴
- An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories of 1873 which provided for a judicial system and created the North West Mounted Police, who travelled to the Northwest in 1874;¹⁵
- An Act to amend and consolidate the Laws respecting the North-West Territories which allowed some measure of local government;¹⁶ and
- An Act to amend and consolidate the laws respecting Indians, which was based on colonial legislation for Indians and laid out how Indians and their lands would be governed in the future.¹⁷

Taken together, this legislation provided a framework that allowed for the legal expansion of the Canadian nation-state into the Northwest.¹⁸ It did not necessarily lead to political, economic, and legal control.

Yet the ambitions of federal officials were far greater than their capacities, which politicians of the day freely acknowledged. For example, in a speech in 1873, the Honourable Dr. John Schultz, a Member of Parliament from Red River, stated that the Indians in the Northwest were "absolute lords as yet of their hunting grounds" and pointed out that the peaceful situation could change if Canada failed to approach the Indians to their satisfaction.¹⁹ In the same year, Sir John A. Macdonald acknowledged that Canada could not

- 14 SC 1873, c 4, ss 2–3.
- ¹⁵ SC 1873, c 35.

¹⁷ SC 1876, c 18.

¹² SC 1871, c 16.

 $^{^{13}}$ SC 1872, c 23.

¹⁶ SC 1875, c 49, ss 7, 9–10 [North-West Territories Consolidation Act].

¹⁸ See Patricia A McCormack, Fort Chipewyan and the Shaping of Canadian History, 1788–1920s: "We Like to be Free in This Country" (Vancouver: UBC Press, 2010) at ch 4, see especially 55–58 [McCormack, Fort Chipewyan].

¹⁹ "Speech on Indian Affairs in the North West Territories delivered by Hon Dr Schultz, MP," Ottawa Times (31 March 1873) at 2; "Indian Dissatifaction," House of Commons Debates, 2-1, vol 5 (31 March 1873) at 151 (John Christian Schultz) [Schultz Debate].

provide protection for all the traders in the Northwest.²⁰ Lewis H. Thomas has pointed to the first Council of the North-West Territories' "impotence as a legislative body, and the federal government's indifference to its activities."²¹ Even after the *North-west Territories Consolidation Act* of 1875²² was passed and proclaimed in 1876, Alexander Morris claimed that "[i]nsuperable geographic difficulties' ... will prevent their efficient government from any part of the Western Territories proper."²³

The expansion of the state was not a unitary event, but occurred in a piecemeal and uneven fashion over a very long time, although it is unclear how that concept relates to legal concepts of sovereignty.²⁴ Robert Irwin has looked at sovereignty as the expansion of state authority, a kind of practical sovereignty.²⁵ It was incremental and multi-layered, continuing in some remote regions into the twentieth century, as legislation continued to evolve and the individual institutions comprising the state were gradually established throughout the Northwest in the form of localized, representative agents. It was predicated in part on the growth of transportation and communication infrastructure that created reasonable access to distant points, which tended to reflect economic needs more than political ones.

Canada's underlying goal was to use its authority to enable processes of settler colonialism in its new territories. The deceptively simple organizing principle underlying the concept of settler colonialism is that in order to build new societies, European settlers had to obtain land occupied and used by Aboriginal peoples. As Schultz himself pointed out, Canada wanted to fill "these newly acquired valleys with the teeming population of the old world."²⁶ To do so required that Europeans eliminate the Aboriginal people in some way, freeing up the land so that it was available for use by more "advanced" European people.²⁷ In southern regions, settler colonialism was predicated on agrarian economies, especially farming but also ranching. Neither was particularly successful in northern regions, except for the Peace River country of northwest Alberta and adjacent British Columbia.

²⁰ Ibid at 157 (Hon Sir John Alexander Macdonald). This remark was curious, in that there was no evidence that traders were in any danger. In fact, it was respected Hudson's Bay Company managers who often eased the way for Canadian officials in the years that followed. Perhaps Macdonald was drawing on a widespread stereotype about the war-like nature of Indians. Another interpretation holds that the "myth of the settler peacemaker" was "a form of public consciousness that denies the violence of colonial expansion": Eugenia Kisin, "Unsettling the Contemporary: Critical Indigeneity and Resources in Art" (2013) 3:2 Settler Colonial Studies 141 at 143, borrowing from Paulette Regan, Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada (Vancouver: UBC Press, 2010), 83–142.

²¹ Lewis H Thomas, *The North-West Territories 1870-1905* (Ottawa: Canadian Historical Association Booklets, 1970) at 72.

 $^{^{22}}$ Supra note 16.

²³ Thomas, *supra* note 21 at 83 [footnotes omitted].

²⁴ Here I distinguish legal considerations of sovereignty from on-the-ground power, control, and authority.

²⁵ Robert Irwin, "Assembling Sovereignty: Canadian Claims to the Athabasca District Prior to Treaty No. 8" (2020) 48:4 J Imperial & Commonwealth History 619.

 $^{^{26}}$ Schultz Debate, *supra* note 19 at 151.

²⁷ See Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 J Genocide Research 387; Lorenzo Veracini, "Introducing Settler Colonial Studies" (2011) 1:1 Settler Colonial Studies 1; Cole Harris, A Bounded Land Reflections on Settler Colonialism in Canada (Vancouver: UBC Press, 2020).

The province of Alberta acknowledged that northern Alberta was different in two important developments in the 1940s. First, at the beginning of the decade it introduced a system of registered trap lines and trapping areas, despite promises in Treaty 8 about the right of Treaty Indians to trap, along with other promises in Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River²⁸ and Treaty 8 about the protection of the Aboriginal peoples' ways of life.²⁹ The new structure was intended to draw the enterprise of trapping into a system of state control by parcelling out land as leases to individual trappers, who would enjoy exclusive control over the fur-bearing animals of those lands, a state-sanctioned form of land tenure. Aboriginal people took a range of actions to protect their resources where they could, especially calling on their treaty rights, but mostly to no avail. White trappers had long called for the formal regulation of trapping areas. Once in place, the registered trap line system (now the Registered Fur Management System) would finally allowed White trappers to oust Aboriginal trappers from the land legally and to maintain control over lands and resources that were still critical to successful Indigenous economies.³⁰ What was part of a way of life for Aboriginal trappers was transformed into an industry regulated by provincial officials, over Aboriginal and federal objections.

Second, in 1948 and 1949 the Government of Alberta used two orders-in-council to create the "Green Area," made up of Crown land and typically referred to as "Crown land" or "public land."³¹ The remaining provincial lands were designated the "White Area," suitable for agriculture and settlement. The Green Area comprised most of the forested land of northern Alberta and the eastern slopes of the Rocky Mountains. It was intended to protect timber and mineral resources of those lands for industrial development. The lands were "forthwith withdrawn from settlement" and intended to be used "solely for commercial and industrial uses."³² It was a clear statement about the government's intentions and support solely for uses of the land that would create profits. There was no room in this policy for traditional Aboriginal land uses, although they continued nevertheless.

As with nineteenth century agriculture in the south, the registered trap line system and the priority afforded industrial land uses in the north in the 1940s were both predicated on the implicit understanding that Aboriginal peoples would inevitably be displaced from their lands. It is hardly surprising that to achieve these goals of alternate land uses, governments had to be able to impose their own political systems in a meaningful way, which would allow them to control Aboriginal people in an effective manner. As the article later shows, while "effective control" may have occurred in Alberta in other areas during the period of

²⁸ Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, 1876, online: <www.rcaanc-cirnac.gc.ca/ eng/1100100028710/1581292569426> [Treaty 6].

²⁹ Brenda Marie Ireland, "Working A Great Hardship On Us": First Nations People, the State and Fur Conservation in British Columbia before 1935 (MA Thesis, University of British Columbia, 1995) [unpublished], online: University of British Columbia Open Collections <open.library.ubc.ca/soa/cIRcle/ collections/ubctheses/831/items/1.0086730>.

See McCormack, Northern Alberta, supra note 11; Dawn Balazs, A Short Analysis of the Transfer of Natural Resources to Alberta in 1930 and a Preliminary Study of the Registered Trapline System (Ottawa: Indian Association of Alberta Treaty, 1976).

³¹ See Alberta, Sustainable Forest Management Facts and Statistics: Forest Management Plans, ISBN: 9781460135266 (Edmonton: Agriculture and Forestry, 2017); The Provincial Lands Act, OC 113-48, (1948) Alta Gaz, 182; OC498-49, (1949); McCormack, Northern Alberta, ibid.

³² *The Provincial Lands Act*, OC 113-48, (1948) Alta Gaz, 182.

agricultural expansion and settlement, it did not occur in Wood Buffalo National Park until the 1920s, and elsewhere in the Treaty 8 region it may not have occurred until the 1940s, and in some places even later.33

The circumstances that faced Métis peoples in the Northwest were one result of expanding settler colonialism. Government officials defined Métis peoples and Indians as very different Aboriginal peoples, and they developed substantially different approaches for dealing with each.³⁴ They typically considered Indians to be primitive people, deficient in values and behaviours prized by Europeans and defined by their "Indian' way of life,"35 which meant an existence based on land-based hunting, fishing, trapping, and gathering subsistence activities as opposed to farming and/or wage labour. It was widely believed that Indians needed ongoing supervision and protection on their reserves to become "assimilated," which meant to "progress" toward "civilization." Métis - usually called "Half-breeds" - were considered more like Europeans due to their "White blood" (often phrased as being "more like White men") and already on their way to assimilation.³⁶ Thus, government officials did not believe that Métis peoples required any special assistance from the federal government once their Aboriginal claims were settled. Further, they decided that Métis peoples did not fall under its responsibilities for "Indians and their lands" under the British North America Act of 1867 (now the Constitution Act, 1867).³⁷ These approaches amounted to dual paradigms of philosophy and operation.

Métis people were not formally recognized in Canada as "Aboriginal" until the Constitution Act, 1982,³⁸ which affirmed that they had "[A]boriginal and treaty rights."³⁹ It took over 20 more years for the Supreme Court of Canada to make its pathbreaking ruling in *Powley*, which set the stage for the new doctrine of "effective control."⁴⁰

35 McCormack, Fort Chipewyan, ibid at 302, n 5.

³³ There were significant differences in the expression of capital from the late nineteenth to the late twentieth century, but those are not the concern of this article.

³⁴ See especially McCormack, Northern Alberta, supra note 11. See also The Willow Lake Métis: A Distinctive Métis Community (Expert Report) by Patricia A McCormack (2021) [unpublished] [McCormack, Willow Lake Métis]; McCormack, Fort Chipewyan, supra note 18.

³⁶ See Beaver Lake Cree Nation, An Expert Report: The Ethnohistory of the Beaver Lake Cree, by Patricia A McCormack (2020) [unpublished] [McCormick, Ethnohistory] (Beaver Lake Cree Nation was represented by Robert James, Karey Brooks, and Jeff Langlois of James Freemand Kyle Law Corporation); Gwnneth Jones, "Expert Report for Daniels v Canada" (2011), online: *YUMPU* <yumpu. com/en/document/view/49288305/expert-report-for-daniels-v-canada-gwynneth-jones-june-2011>. People of mixed ancestry who "lived like Indians" were usually accepted into treaties and governed by policies and legislation for Indians, sometimes even when they claimed to be Half-breeds/Métis and wanted to be able to apply for Half-breed scrip. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

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³⁸

Constitution Act, 1982, ss 35(1)–(3), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. *Ibid.* While officials occasionally grouped Métis together with Indians, these instances did not constitute 39 formal recognition as distinctive rights-bearing Aboriginal people. A useful discussion is Frank Tough's analysis of the NRTA (An Act representing the Transfer of Natural Resources of Alberta, SA 1930, c21): "'Neither Fish nor Indians': Pursuing Crown-Métis Relations Through Historical Evidence Concerning Policies and the Constitution Act, 1930" in Frederica Wilson & Melanie Mallet, eds, Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance (Toronto: Irwin Law, 2008) 153.

⁴⁰ Supra note 2 at para 37. In Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12, the Supreme Court ruled that Métis peoples should be considered "Indians" under section 91(24) of the Constitution Act, 1867, a status Inuit had achieved in 1939 in Reference Re British North America Act, 1867, [1939] SCR 104.

III. JUDICIAL DECISIONS ABOUT "EFFECTIVE CONTROL"

In the seminal 1998 R. v. Powley trial, Judge Vaillancourt distinguished between "the concepts of 'contact' and 'effective control' as it relates to the original Indian society and the subsequent Metis community."41 He accepted evidence that the shift from "almost exclusive tribal domination" to "European control" occurred in the Upper Great Lakes "sometime between 1815 and 1850."42 However, he did not explain how it happened in terms of on-theground practices, the scope of those practices, or their territorial reach. Instead, he said, simply, that "effective control passed from the Aboriginal peoples of the area ... to European control,"43 as if the Ojibwa and Métis peoples of the Great Lakes region had somehow handed off a political baton to the Canadian representatives. In the 2000 appeal to the Ontario Superior Court of Justice, Justice O'Neill accepted this range of dates but still failed to define these critical elements.⁴⁴ The Ontario Court of Appeal in 2001 referred to the "difference, if any, between the assertion of sovereignty and effective control," but did not explore this matter further because all parties agreed that 1850 was an appropriate cut-off date.⁴⁵ The Supreme Court decision affirmed the trial judge's finding and provided some of the elements that could act as guidelines.⁴⁶ It highlighted the importance of treaties and European/Euro-Canadian settlement.47

A brief look at the concept of "sovereignty" can contribute to this discussion. Formally defined as "the absolute and independent authority of a community, nation, etc." within a specific territory,⁴⁸ more colloquially sovereignty means "countries get to control what happens inside their borders and can't interfere in what happens elsewhere."49 Externally, state sovereignty refers to the ability of a state to maintain a "measure of control" in its dealings with other states, which includes maintaining the integrity of its borders.⁵⁰ Yong Hee Lee has used the term "effective control" in this regard, which he defined as "an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis."51 Internally, state sovereignty relates to the ability of a state to exercise its power to maintain public order over the population and territory within the boundaries of the state, which is done through the multiple institutions that collectively comprise the state. G.M. Ferreira has contrasted what he calls "effective government," an indicator of internal sovereignty, with "good

⁴¹ R v Powley (1998), [1999] 1 CNLR 153 at para 88 (ONCJ). 42

Ibid at para 90. 43

⁴⁴

Ibid [emphasis added]. *R v Powley* (2000), 47 OR (3d) 30 at para 26 (ONSC). 45

R v Powley (2001), 53 OR (3d) 35 at para 96 (ONCA). 46

Powley SCC, supra note 2 at para 40.

⁴⁷ Ibid.

⁴⁸ Barber, supra note 10 at 1390, sub verbo "sovereignty"; see also Daniel Philpott, "Sovereignty" (31 May 2003), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/sovereignty/>; Edward Watson McWhinney, "Sovereignty" (7 February 2006), online: <thccanadianencyclopedia.ca/en/ article/sovereignty>.

⁴⁹ "What is Sovereignty," online: Council on Foreign Relations < world101.cfr.org/how-world-works-andsometimes-doesnt/building-blocks/what-sovereignty>. Legally, Canada became fully independent and "sovereign" in a series of steps that began with the British North America Act in 1867 (supra note 37). gained strength with the Statute of Westminster in 1931((UK), 22 Geo V, c 4), and was finally achieved

with the *Constitution Act* in 1982 (*supra* note 38); McWhinney, *ibid*. GM Ferreira, "Good Governance and the Failed State" (2008) 41:3 Comp & Intl LJS Afr 428 at 429. 50

⁵¹ Yong Hee Lee, "Reviews on the Concept of Effective Control in International Legal Cases and with Regard to Dokdo" (2013) 35:4 Ocean & Polar Research 313 at 313.

governance."52 He cited Enrico Milano in defining "effectiveness" as "a measure of the relationship and congruence between a rule or a legal situation and social reality."53 That suggests that even if a "rule or legal situation" is present, it may not be "effective" if it differs from "social reality."54 That also speaks to notions of what "political and legal control" might

The literature on the history of sovereignty ties the concept to the development of what Daniel Philpott called "a system of sovereign states, culminating at the Peace of Westphalia in 1648" (external sovereignty).⁵⁵ Yet the idea of supreme authority within or over a territory has applied historically more broadly, to Aboriginal societies whose members occupied specific lands or regions, though their borders may have been less clearly delineated than those of modern states. It entered into the Tsilhqot'in Nation v. British Columbia decision, which spoke to the "exclusivity of occupation" by the Tsilhqot'in Nation over their traditional lands, as "[t]hey repelled invaders and set terms for the European traders who came onto their land."56

In R. v. Laviolette, the Crown proposed that "effective control" began in 1870, which was the date that Rupert's Land joined Canada,57 although it is unlikely that anyone familiar with Western history would agree that Canada enjoyed any kind of authority or control over the Northwest at that time.⁵⁸ Justice Kalenith drew on the *Powley* decision, looking "to the time when Europeans effectively established political and legal control in a particular area,"59 or real authority. He added an additional indicator: effective control takes place when "the Crown's activity has the effect of changing the traditional lifestyle and the economy of the [Métis] in a given area,"60 although he did not link this point to what else political or legal control might mean or address potential thresholds. Nor did he acknowledge the fact that changes to Aboriginal ways of life and economies occurred for many reasons, both before and after agents of the Crown - federal or provincial officials - had arrived and sought to

Ibid.

comprise.

⁵² Ferreira, supra note 50 at 429, 442.

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Enrico Milano, Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy (Leiden: Martinus Nijhoff, 2006) at 24, quoted by Ferreira, *ibid* at 430. *Ibid*. Ferreira also discussed what he considered to be "failed states," which the World Bank (WBO, World Development Report 1997: The State In a Changing World (Oxford: Oxford University Press, 1997) at 158) defines as a "fundamental loss of institutional capability": Ferreira, *ibid* at 433–34, quoting 54 WBO, ibid. The situation in the Canadian Northwest after the assertion of Canadian sovereignty but before the expansion of the institutions of the Canadian state gave it the same appearance as a "failed state," in that no "effective government" had yet been developed, in contrast to existing systems of governance in the provinces at the same time.

⁵⁵ Philpott, supra note 48.

⁵⁶ 2014 SCC 44 at paras 3, 47-49 [Tsilhqot'in]. However, Canada considers that while occupation is a right, the right occurs under the umbrella of sovereignty of Canada as a nation-state. 57

²⁰⁰⁵ SKPC 70 at para 38 [Laviolette] 58

See R v Hirsekorn, 2013 ABCA 242 at para 67 [Hirsekorn ABCA]. Thus, it is surprising to see a "Research Summary" by Neil Reddekopp that supported the 1870 date of effective control for the part of Alberta covered by Treaties 4, 6, and 7: Alberta, Legislative Assembly, "Research Summary" by Neil Reddekopp, Sessional Paper, 26-3, No 1044/2007 (6 December 2006) at 2. In all fairness to Reddekopp, he had not anticipated that this confidential report would be made public when it was tabled as Alberta Sessional Paper 1044/2007, c 2006, and is not his final word: email from Neil Reddekopp to Patricia McCormack (21 November 2021). Treaty No. 4 Between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at the Qu'appelle and Fort Ellice, 15 September 1874, online: </br><www.rcaanc-cirnac.gc.ca/eng/1100100028689/158129 3019940>[Treaty 4]; Treaty 6, supra note 28; Treaty and Supplementary Treaty No. 7 between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod, 22 September 1877, online: <www.rcaanc-cirnac.gc.ca/eng/1100100028793/1581292336658> [Treaty 7].

⁵⁹ Laviolette, supra note 57 at para 39.

⁶⁰

establish political and legal control. He seems to have conflated "control" by Canada with the presence of Canada's representatives, which does not speak directly to causation. Such confusion shows up in other decisions, as in *R. v. Goodon*.⁶¹ Despite that, Justice Kalenith ruled that there was "no real change in lifestyle in the area … until 1912 when the Department of the Interior established townships and set aside two on either side of Green Lake. At this time the [Métis] also registered their land claims under the new land system."⁶² Thus, he found that effective control occurred in 1912⁶³ and indicated that it was linked to land surveys, even though he provided no information about control elsewhere in the much broader historic region he recognized in his decision.

In R v. Goodon, the Court followed Powley in stating that European "control was determined to be the period when settlement was encouraged and treaties were negotiated to allow the development of the region."64 As a definition of the concept of "control," it lacks clarity. As in Laviolette, it lacks a coherent link to the very meaning of the word "control," but the Court did try to add to the concept by looking at European impacts and Métis resistance. In Goodon, Judge Combs pointed out that the Powley decision "determined that a relatively lengthy period of time can be identified as the relevant time period.³⁶⁵ He drew on events of Red River history to add that the Métis "continued through the mid 19th century to resist the imposition of European control" and that after the Sayer Trial, "the [Métis] population considered themselves immune to European control."66 "It is clear that although the Europeans had control over their European settlers, their control over the [Métis] was entirely subject to their [Métis] acquiescence. In other words, they had no effective control."67 Once the Dominion Lands Act was passed in 1872, "the traditional [Métis] practices and customs were impacted by the influx of European settlers,"68 although that still does not speak directly to issues of governance and control or the role of settlers. Moreover, such impacts occurred only in areas that had been surveyed and were taken up by homesteaders. Surveying was a slow process that took many years to accomplish in southern regions and even much longer in the north. Hence, the Court concluded that effective control in the new province of Manitoba occurred in 1870 and in the rest of what is now southern Manitoba around 1880.69

In the *R. v. Hirsekorn* decisions,⁷⁰ "European control" was said to have occurred with the arrival of the North-West Mounted Police (NWMP) in southern Alberta in 1874 because "the

⁶¹ 2008 MBPC 59 [Goodon].

⁶² *Laviolette*, *supra* note 57 at para 41.

⁶³ Ibid.

 G_{65}^{64} Goodon, supra note 61 at para 67.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* at para 69. Who those Europeans were is unclear, given that Canada had not yet expanded into the Northwest. The only candidates were European fur traders, a few missionaries, and at Red River, the Governor and Council of Assiniboia, established by the Hudson's Bay Company in 1835. See e.g. Dale Gibson, *Law, Life, and Government at Red River*, vol 1 (Toronto: McGill-Queen's University Press, 2015).

⁶⁷ *Ibid.*

⁶⁸ Ibid.

⁶⁹ *Ibid*.

⁷⁰ Hirsekorn ABCA, supra note 58; R v Hirsekorn, 2010 ABPC 385 [Hirsekorn ABPC].

NWMP took control rapidly."71 The decision listed six reasons to support this circular explanation, following the trial judge:

- 1. Prime Minister Mackenzie admitted in 1873 that there was no law and order in the North West Territories but he was of the view that the North West Mounted Police would be successful in asserting and upholding authority in the area.
- The arrival of the North West Mounted Police did cause southern Alberta to become a much safer 2. place due to the fact the whiskey traders went back to the United States and the Indian hostilities came to an end. This social control came hand in hand with legal control.⁷²
- Rather than using violence, the Indians, particularly the Blackfoot confederacy, turned to the North 3. West Mounted Police to resolve disputes, and also engaged in the use of petitions, not violence, to improve their plight.
- 4. As the police moved further into southern Alberta people of mixed ancestry also moved further and in larger numbers into southern Alberta. First, their activities increased, and then, they actually began to settle the area.
- Métis settlements closely followed the building of North West Mounted Police posts in southern 5. Alberta. By 1879 Métis settlements began to develop around Calgary and Fort Macleod.
- 6. Compared to the time period prior to 1875, vital events increased in the Cypress Hills area and other regions in southern Alberta after the arrival of the North West Mounted Police, specifically spiking from 1875 to 1878.73

These points draw on the implicit idea that it is the state — Canada — that has a monopoly on violence within its borders. In fact, systems of "law and order" existed in the Northwest prior to the arrival of the North-West Mounted Police: those of the First Nations, Métis, and European traders. The control exercised by traders was limited mainly to their employees and was not always effective even at the trading posts, as fur trade records have shown. Aboriginal people used violence in highly selective ways, in accord with their own political systems and following their rules and traditions. Historic and ethnographic records show that they all had systems to maintain peaceful relations within their own communities and between different groups and to justify violence internally and against outsiders. However, in the past Canada never considered Aboriginal practices as anything more than "custom." It is only recently that Aboriginal scholars have reframed custom and norms into

⁷¹ Hirsekorn ABCA, ibid at paras 67-68; Hirsekorn ABPC, ibid at paras 136, 138. The creation of the NWMP was due in part to Canada's fears about its inability to enforce its southern border - the fortyninth parallel - if the United States chose to expand northward. Michel Hogue has pointed out that even the arrival of the NWMP did not prevent the Métis and other Indigenous people from moving freely across the international border, which led to concerted efforts by US military and Canadian Mounties to maintain border security, not always successfully: Michel Hogue, *Metis and the Medicine Line: Creating a Border and Dividing a People* (Regina: University of Regina Press, 2015) at ch 4. This situation revealed "the inchoate state of nation-making projects" on the northern Plains that persisted till about 1885: Hogue, ibid at 181.

⁷²

Social control did not happen immediately, but took some time to be accomplished. *Hirsekorn* ABCA, *supra* note 58 at para 67; *Hirsekorn* ABPC, *supra* note 70 at para 138. This final point 73 was more relevant to timing of Métis settlement than to effective control.

"Indigenous legal orders."⁷⁴ In 1874, the Blackfoot people made a formal alliance with the Mounted Police. That was what finally allowed the Métis and some other Aboriginal peoples to enter southern Alberta peacefully and facilitated Treaty 7 in 1877.

All the legal decisions have shortcomings in identifying *causal* relationships between the presence of Europeans and the control they were presumed to exercise over Métis. The fact that aspects of Aboriginal cultures and ways of life changed over time is often presented as evidence of "effective control," despite the fact that Aboriginal peoples were always dynamic in transforming aspects of their way(s) of life in various ways, both before and after the arrival of Europeans. Frank Tough has looked at the significance of formal mapping, which can facilitate and legitimize dispossession.⁷⁵ But, mapping alone does not signify control, effective or otherwise. The very presence of Europeans/Euro-Canadians and the things that they did, such as offering to trade imported manufactures for furs, stimulated some shifts in Aboriginal cultures and ways of using the land and its resources, even in the absence of any European attempts to control Aboriginal peoples, and often not in directions preferred by Europeans, a telling distinction.

IV. DEFINING EFFECTIVE CONTROL

The discussion here hinges on a closer examination of the two terms, "effective" and "control." For "effective control" to occur, government officials and agents must be "effective," which means that they must be able to produce the result(s) they desire. That speaks to having the power to impose their "control," which means influencing and especially *directing* the behaviour of Aboriginal people. Thus, I propose that to be meaningful, effective control has three components, to be elaborated in greater detail, below, being: (1) surveillance; (2) regulation of Aboriginal uses of land and resources; and (3) regulation of other aspects of Aboriginal lives. Each component must be documented as occurring — not simply asserted or taken for granted. This approach takes the discussion in a different direction from the formal indicia of political and legal control, treaty making, and granting of land to settlers. None of these are satisfying as tests for effective control.

First, government officials must be able to surveil the local Aboriginal populations. If they did not know what Aboriginal people were doing, they were hardly in a position to take actions either to influence or direct their behaviour. Dr. David Lyon, who directs the Surveillance Research Centre at Queen's University, has defined surveillance as "focused, systematic and routine attention to personal details for purposes such as influence, management," or entitlement.⁷⁶ Michel Foucault's work argued that such surveillance acted/s as a form of control and the exercise of power. Surveillance has become critical to control

⁷⁴ See e.g. Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, Dialogues on Human Rights and Legal Pluralism (New York: Springer, 2013) 229. Much of the work by Aboriginal scholars has build on the broader field of legal pluralism (see e.g. Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (Princeton: Princeton University Press, 2000)

⁷⁵ 76

Tough, "Little Is Known," *supra* note 6. David Lyon, *Surveillance Studies: An Overview* (Cambridge, UK: Polity, 2007) at 14, cited by Dave Rideout, "Surveilling Surveillance" (17 July 2018), online (blog): <www.queensu.ca/gazette/ stories/surveilling-surveillance>; David Lyon, Surveillance Society: Monitoring Everyday Life (Buckingham: Open University Press 2001); David Lyon, ed, Theorizing Surveillance: The Panopticon and Beyond (Portland: Willan, 2006).

in the "modern era," not only because people internalize the rules but also because they are afraid of being caught if they violate them.⁷⁷ Such surveillance was important to federal officials tasked with supervising treaty Indians who were transitioning to agriculture. They assumed that Indians had to be supervised closely in all aspects of their personal lives, with no regard for issues of privacy, and they reported what they found in great detail in Indian Affairs annual reports found in the federal Department of Indian Affairs Sessional Papers. The early NWMP attempted to do surveillance when they made their northern patrols, but these were few in number, limited in geographic scope, and largely ineffectual.

Second, officials must be able to regulate Aboriginal uses of the resources of their wildlife resources and their lands (in northern Alberta, called the "bush"), which provided them with the means of production and the source of their livelihood. Officials must have the power to do so even in the face of Aboriginal objections to their directives. Power is not some kind of abstraction of institutions. It involves a real relationship between individuals, one of which is the ability to compel or prevent certain behaviours on the part of the other. The exercise of such power acts as a form of domination, often considered oppressive by Aboriginal people.⁷⁸ This component is in line with *Goodon*, which considered resistance and impact of regulatory systems.⁷⁹

Third, officials must be able to regulate Aboriginal lives in other ways reflecting laws, policies, and systems imposed by the state. For example, they must be able to compel school attendance, remove "squatters" from Crown lands, and enforce the wide variety of other laws and regulations devised by the state for its citizens, which collectively entail forms of control. In the north, there is no clear date for most of these features. School attendance was predicated on missionary activities, and in the early twentieth century, most residential schools were too small to accommodate all the children of a region. Moreover, government officials expected Indigenous children to continue to support themselves as their parents did, by living off the land, so there was no incentive for the forms of assimilation seen in southern residential schools. Surveying local settlements began in the north in the 1910s, with more

⁷⁷ Michel Foucault, Discipline and Punish: The Birth of the Prison, translated by Alan Sheridan (New York: Vintage Books, 1995). An obvious and common sense example today is the reasons that people obey speed limits when driving. Some do so because they accept the legitimacy of the regulations; others do so only when they fear getting caught speeding through surveillance cameras or radar traps. As a strategy for control, surveillance has expanded in today's world, supported by new technologies such as computer records, cameras, and social media. As computer scientist Jaron Lanier has pointed out, modern surveillance, the lack of privacy, and the information it produces are a measure of power. "Privacy is the arbiter of who gets to be more in control" (Jaron Lanier, "How Should We Think about Privacy? Making Sense of One of the Thorniest Issues of the Digital Age" (2013) 309:5 Scientific American 65 at 66).

⁷⁸ See e.g. Ivan Manokha, "Surveillance, Panopticism, and Self-Discipline in the Digital Age" (2018) 16:2 Surveillance & Society 219 at 220. When *Treaty 8, supra* note 1 was negotiated in 1899, the idea that wildlife use could be regulated was presented to Aboriginal people as something to be imposed strictly for conservation reasons for the needs of Aboriginal people themselves. Aboriginal people were not opposed to this position and understood its logic. However, later regulations did not consider Aboriginal needs, knowledge, or viewpoints, and were based on what government officials considered appropriate. They accommodated many other users, including White outsiders and international interests. Aboriginal people challenged many regulations but were powerless to intervene in government decision- making (Patricia Mccormack, *How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region* (PhD Thesis, University of Alberta, 1984) [unpublished] [McCormack, *How the (North) West Was Won*]; McCormack, *Fort Chipewyan, supra* note 18 at 222; Patricia A McCormack, *Fort Chipewyan and the Shaping of Canadian History: 1920s–1980s*, (Vancouver: UBC Press) [forthcoming] [McCormack, *Fort Chipewyan 1920s–1980s*].

⁷⁹ Goodon, supra note 61.

widespread surveying occurring later. There was little settlement, which only began in 1910, in the Peace River county.⁸⁰

Taken together, these components comprise what Audra Simpson calls "specific technologies of rule."⁸¹ As Neil Reddekopp has opined, "the most important consideration in determining the Date of Effective Control is the time at which incursion by non-[A]boriginal people went from being a mere annoyance to a clear and present danger to a wildlife harvesting way of life,"⁸² which suggests the need to identify thresholds. It was not the presence of administrative systems or even local officials — a local annoyance — that necessarily defined effective control, but what they were capable of seeing and enforcing. It involved a congruence between legal and social realities that did not exist earlier. These are basically the same impacts that define the imposition of internal colonization by the state, which sought to impose the economic and political control of Aboriginal people, much of it mediated by the imposition of new legal systems, along with measures to change the beliefs and values of Aboriginal peoples. Colonialism operates at multiple levels, including personal or domestic and intimate domains.⁸³ That suggests that efforts to impose "effective control" went hand-in-hand with efforts to impose colonial relations.⁸⁴

V. DATES FOR EFFECTIVE CONTROL OVER Aboriginal People in Northern Alberta

Applying the test to northern Alberta reveals that "effective control" was easier said than done. It occurred much earlier in southern treaty areas than in those to the north, and in the north it occurred unevenly, with different dates for different places. It was complicated by the sheer size of northern lands, which over time were described in different ways but normally included all the lands north from Lac La Biche and Lesser Slave Lake, and sometimes included lands immediately north of Edmonton.

Powley's primary indicator of control was the presence of a treaty. The first set of numbered treaties — Treaties 1–7 — was negotiated between 1870 and 1877 in southern regions of the North-West Territories.⁸⁵ Central and southern portions of Alberta were encompassed by *Treaty 6* and *Treaty 7*. In the years that followed, the amendments to the *Indian Act*⁸⁶ and Indian Affairs policies that gave power over reserve economies, education of children, and many personal matters to Indian Affairs personnel who administered the reserve system, combined with enforcement by the NWMP and their successors, resulted in

⁸⁰ McCormack, *Fort Chipewyan*, *supra* note 18 at 222.

Audra Simpson, "On Ethnographic Refusal: Indigeneity, 'Voice' and Colonial Citizenship" (2007) 9 Junctures 67 at 67.

⁸² Email from Neil Reddekopp to Patricia McCormack (21 November 2021).

See e.g. Ann Laura Stoler, "Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies" (2001) 88:3 J American History 829; McCormack, Fort Chipewyan, supra note 18 at 222.
 Chipewyan, Supra Chipe Chi

⁸⁴ See McCormack, *Fort Chipewyan, ibid*, ch 4.

⁸⁵ Treaties 1 and 2 Between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent, August 1875, online: Government of Canada <www.rcaanc-cirnac.gc.ca/eng/1100 100028664/1581294165927> [Treaties 1 & 2]; Treaty 3 Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods, 3 October 1873, online: <www.rcaanc-cirnac.gc.ca/eng/1100100028675/1581294028469> [Treaty 3]; Treaty 4, supra note 58; Treaty 6, supra note 28; Treaty 7, supra note 58.

⁸⁶ RSC 1985, c I-5.

"effective control" by 1885 on most reserves in these treaty regions. Federal officials were quite forthright about their intention to "manage" and control Indians and their way of life. The ability of government officials to surveil people on reserves can be seen in the large amount of personal detail about residents provided in the annual reports, even including their sleeping arrangements, published in Canada's "Sessional Papers."⁸⁷ Indian Affairs administration continually tightened its control over Indian persons and the reserves through amendments to the *Indian Act* and unlegislated policies, such as the infamous pass system instituted in 1885 and enforced by the NWMP.⁸⁸ It controlled reserve economies and even the personal income of status (Treaty) Indians who lived there. This complex system of Indian Affairs regulation was in full operation by the time *Treaty 8* was negotiated in 1899 in northern Alberta and was a reason that northern Aboriginal peoples were reluctant to enter into treaty and insisted on guarantees about their right to continue their land-based livelihoods.

By contrast, Métis were not administered by Indian Affairs. In the north, their way of life had much in common with that of Treaty Indians and even the Indian Bands on the northern fringes of *Treaty 6* whose members chose not to settle on reserves and who spent most of their year on the land (as in the bush), continuing to hunt, fish, trap, and gather. These so-called "hunting Bands" included those at Lac La Biche and neighbouring Beaver Lake as well as all the regions to the north, which included lands later covered by *Treaty 8* and *Treaty 10.*⁸⁹ The local Indian Agent had little to say about them, because he rarely saw them except when paying annuities or when mid-winter privations forced them back to Lac La Biche, Beaver Lake, or another settlement in the hope of some aid from the Indian Agent or missionary.⁹⁰ There is virtually no information at all about Métis in this region, many of whom were mixed-ancestry people who entered *Treaty 6* as Cree peoples, but in 1885 and later withdrew from treaty and applied for 'Half-Breed' scrip, thus affirming a Métis identity. Those who did so seem to have been motivated at least in part by a desire *not* to be controlled by Indian Affairs agents.

Even by the 1890s, when federal fishing regulations were first imposed at Lac La Biche and Beaver Lake, which affected Cree and Métis peoples equally, there is no indication that government agents tried to undertake surveillance or impose control over fishing on more remote lakes. Even in this portion of the *Treaty 6* region, there was no surveillance of Aboriginal activities except occasionally at Lac La Biche and Beaver Lake, virtually no impact on the bush-based activities of Aboriginal people of the region (except for fishing on

 ⁸⁷ House of Commons, "Report of the Department of Indian Affairs" Superintendant General, Sessional Papers, No 15 (1883) at Ixxxi-Ixxxiii.

See e.g. F Laurie Barron, "The Indian Pass System in the Canadian West" (1988) 13:1 Prairie Forum 25; Sarah Carter, Lost Harvests: Prairie Indian Reserve Farmers and Government Policy, 2nd ed (Montreal: McGill-Queen's University Press, 1995); Keith D Smith, Liberalism, Surveillance, and Resistance: Indigenous Communities in Western Canada, 1877–1927 (Edmonton: AU Press, 2009). After 1885, Indian Affairs actions were heavily influenced by a memorandum prepared by Hayter Reed for Indian Commissioner Edgar Dewdney (Memorandum from Hayter Reed to Indian Commissioner Edgar Dewdney (20 July 1885), Ottawa, Library and Archives Canada (RG 10, vol 3710, file 19,550-3).

⁸⁹ Bands are capitalized to reflect the fact that they were creations of the *Indian Act* and Indian Affairs personnel and to distinguish them from the local bands of First Nations that constituted the real social units until the treaties were negotiated and continued in many ways thereafter. The hunting Bands in the northern edge of *Treaty 6* had more in common with the peoples of *Treaty 8* and *Treaty 10* regions, and it would have made more sense for them to have entered into one of those treaties. *Treaty No. 10*, 1906, online: ">www.rcaanc-cirnac.gc.ca/eng/1100100028874/1581292941464> [*Treaty 10*].

⁹⁰ McCormack, *Ethnohistory*, *supra* note 36.

those two lakes), and no other restrictions enforced by either federal or provincial agents. Thus, no effective control existed, with the limited exception of the settlement of Lac La Biche itself. That situation contrasts to the abundant control exercised by Indian Affairs personnel stationed at nearby reserves focused on agriculture, such as Saddle Lake. Thus, it seems that effective control could occur at different times and in different ways for First Nations and Métis peoples, even within the same treaty region.

By World War I, the Alberta and Great Waterways Railroad had been built from Edmonton to Lac La Biche, where an Alberta provincial policeman was posted. That led to greater control at Lac La Biche and Beaver Lake but not elsewhere in the bush, especially at remote locations such as Primrose Lake and the lakes north of Lac La Biche, where many people lived for much of the year. The local police officer enforced the law in the settlements and to some extent along the railway line; he did not venture far from those points.⁹¹ In 1919, Angus Brabant, then the Hudson's Bay Company manager at Fort McMurray, predicted that the coming of American trappers to northern Alberta — all within the *Treaty 8* region — would ruin the fur trade because the provincial game laws could not be enforced.⁹²

The railway was finally completed to the Clearwater River and waterways in the 1920s, but it seems to have made little difference in the enforcement of wildlife regulations. In 1971, Dumas Tremblay, the president of Conklin Métis Local 116, in the vicinity of the railway, wrote that "[t]hirty years ago a bushman was allowed to kill a moose for himself and family when needed without interference."⁹³ Similarly, Ron Huppie, a Métis man who grew up along the railway line, explained that in the past they hunted moose even in summer, when it was illegal to do so: "[W]e went and got a moose whenever we wanted. We went and got caribou."94 They also killed ducks in springtime with impunity.95 Even as late as the 1940s, it was mainly Métis who lived along the line, where many of them had jobs, but "the only time you saw a white man basically was when the train went by."⁹⁶ That speaks to the dearth of settlement. Huppie's uncle, Fred, finally got a domestic licence for fishing on Winefred Lake because by the 1970s "it was ... getting to be a lot of white people around [that is, surveillance] so you had to legally do it, so you got a domestic licence to catch fish for your dogs."97 The game regulations did not make any special provisions for Métis hunting, so the fact that some people believed they were "allowed" to do so speaks to the lack of official surveillance and enforcement and probably a measure of tolerance by game officials. Such illegal hunting or "poaching" was simultaneously an assertion of personal agency and a denial of state enforcement power.⁹⁸ Métis at Conklin talk about "being sneaky," or

⁹¹ McCormack, *Willow Lake Métis, supra* note 34.

⁹² Letter from Brabant to Commissioner of District Parks Branch JB Harkin (17 January 1919), Ottawa, Library and Archives Canada (RG 10, vol 4084, file 496,658).

⁹³ Letter from Dumas Tremblay to the Métis Association of Alberta (25 September 1972), Calgary, Clerkew Libergrand Archives (Métic Association of Alberta Renze, 1802, 1070, acc M4755, 514 (65))

Glenbow Library and Archives (Métis Association of Alberta Papers, 1892–1979, acc M4755, file 465).
 ⁹⁴ Interview of Ron Huppie by Sara Loutitt and Sherri Labour (26 March 2008), Anzac, Willow Lake Historical Archive [unpublished] (included with permission) [Huppie].

⁹⁵ *Ibid* at 20.

 $^{^{96}}$ *Ibid* at 24.

 $^{^{97}}$ Ibid at 28.

⁹⁸ Thomas Widlock, "Hunting and Gathering" (18 May 2020), online: The Open Encyclopedia of Anthropology <anthroencyclopedia.com/entry/ hunting-and-gathering>.

"*kimuch*," as a way to evade government control when officials sought to impose it.⁹⁹ In short, there was only limited control. It may not be appropriate to call that truly "effective control" until an unspecified threshold was reached. Effective control for those First Nations and Métis associated with Lac La Biche/Beaver Lake and the northern half of the railway, all of whom used surrounding areas for their bush subsistence activities, occurred at a much later date in some places, perhaps only when there was an *effective* provincial fish and wildlife department with resident agents after World War II and, as Huppie claimed, when "a lot of white people" were around, who provided informal surveillance of Aboriginal activities.¹⁰⁰

The date of effective control is a key piece in Alberta's *Métis Credible Assertion* process, which is a set of steps Métis peoples must take if they want to be recognized formally as Métis communities for purposes of consultation with respect to their Aboriginal rights.¹⁰¹ Point 5 of the *Métis Credible Assertion* process requires "Identification of the Relevant Time" for a historic Métis community, which is a time "prior to effective European control."¹⁰² It specifies 1900 for "policy purposes" as the date for effective control in the *Treaty 8* region, but the document does not contain a definition of the term or an explanation of why that date was chosen.¹⁰³ It may have been at least in part because of *Powley*'s emphasis on treaties as indicators, with *Treaty 8* negotiated in 1899 and 1900, but that makes it a date simply for the extension of formal Canadian sovereignty and theoretical control.¹⁰⁴

There is an unpublished Alberta document that points to the presence in northern Alberta of geologists, appointed administrators, and NWMP in the late nineteenth century, suggesting that these few persons created a regime of effective control, a far-fetched assumption.¹⁰⁵ The

⁹⁹ Peter Fortna, Wahkotowin, Keemooch, and Home: A History of the Conklin Métis Community, 1886-2020 (Willow Springs Strategic Solutions: Cochrane) at 3–4, online: cproquest.com/docview/
2708431147/>; James C Scott, Weapons of the Weak: Everyday Forms of Peasant Resistance (New Haven: Yale University Press, 1985) [Scott, Weapons of the Weak].

White newcomers, especially if they were trappers, often resented what they considered to be special privileges of treaty Indians and acted in discriminatory ways, such as trying to force Aboriginal trappers off their trap lines. They also complained to law enforcement agents about specific Aboriginal people.
 Métis Credible Assertion, supra note 7.

¹⁰¹ Metis Credible Assertion, supra note

Ibid at 5.

¹⁰³ Ibid. In 2006, Neil Reddekopp, a lawyer then working as the Assistant Deputy Minister of Land and Resource Issues for Alberta Aboriginal Relations, wrote a "Research Summary" that proposed that the date of effective control for the part of Alberta covered by *Treaty 8* was 1900, except perhaps in "the interior of the *Treaty 8* area and the north west corner of the Province," where he speculated that the date "could be in the 1920s or 1930s" (Reddekopp, *supra* note 58 at 2). He also used this date for the lands covered by *Treaty 10*, even though it was not negotiated until 1906. He did not provide any explanation for the dates he proposed (see Reddekopp, *supra* note 58). In 2009, Arthur Ray wrote a report for the Office of the Federal Interlocutor for Métis and Non-Status Indians, "Determining Effective European Control in Alberta." Several requests (to Indigenous and Northern Affairs Canada, Library and Archives Canada, and the Minister of Crown-Indigenous Relations Marc Miller) for a copy of this report were not successful. It is unknown if this report was shared with Indigenous Relations in Alberta and influenced the selection of this date.

¹⁰⁴ The use of treaties to distinguish northern from southern regions in Alberta is imprecise. Aboriginal people living in the northern fringes of the *Treaty 6* region should also be considered northern. Based on their hunting, the people who lived at Lac La Biche could easily have entered into *Treaty 8* rather than *Treaty 6*, and they lived and used lands in the *Treaty 8* and *Treaty 10* regions.

¹⁰⁵ I read this document at some time in the past and have reconstructed its contents from memory. I have been unable to locate it in my files for a precise citation. My hunt for it afforded a glimpse into the workings of the Indigenous Relations bureaucracy involved with Métis communities seeking the government stamp of credible assertion, which was less than cooperative. I made calls and sent emails between 4 January 2022 and 24 March 2022 to Gabriel Potter, then Acting Manager of Strategic Engagement, who had referred to the contents of this document in a meeting so presumably had a copy. When all queries went unanswered, I wrote to Minister Rick Wilson on 30 March 2022, asking him to direct this public servant to respond. While Potter eventually replied (email from Gabriel Potter to

geologists never tried to assert control in any way; they were in the north simply to survey for resources and information about the country, and they were few in number. While provision for justices of the peace were in place since 1870, none were appointed in northern Alberta until 1886, when one man was appointed at Dunvegan, with two more men appointed the following year at Peace River and Athabasca Landing.¹⁰⁶ By 1889, there seem to have been none in these or other northern locations.¹⁰⁷ Little is known about the roles they played, and they seem to have been less important locally than the local preeminent Hudson's Bay Company administrators and Christian missionaries. Mounted Police officers were initially present only on brief winter trips, then in small detachments, established mainly in the early twentieth century. They were largely incapable of doing much enforcement. Aboriginal people were opposed to any surveying and to a police presence, especially if the police intended to interfere with their way of life.¹⁰⁸ They were not willing to concede any of their authority to these "outsiders." If real internal sovereignty is shown by real authority and power, Canada did not suddenly acquire such power in 1899 or 1900 or in earlier years. The negotiation of the treaty was simply the first step on what would be a long, slow road to achieve effective control. The government document also ignores the fact that whether or not Canada even enjoyed sovereignty (authority) in the north had been a matter for public debate among western settlers.109

In 1899, *Treaty 8* could only be concluded because the commissioners "...solemnly assure[d] them [Indians] that only such laws as to hunting and fishing *as were in the interest of the Indians* and were found necessary in order to protect the fish and fur-bearing animals would be made, and that *they would be as free to hunt and fish after the treaty as they would be if they never entered into it*."¹¹⁰ That was a strong promise that government agents would *not* impose control except for fundamental conservation reasons in the interests of the Indians themselves. In the end, the federal government reneged on this promise, and it mostly allowed Alberta to do so too, which hardly reflected well on the "honour of the Crown."¹¹¹

Patricia A McCormack, 14 April 2022), he was unwilling to make the document available, asserting that it was part of a confidential Métis credible assertion application. Inasmuch as this document is purported to justify the government's assertion of 1900 as a date of effective control, it should be attached to other related documents on the government's website and at the very least be available to a member of the public upon request.

 ¹⁰⁶ House of Commons, "Report Concerning the Administration of the North-West Territories for the Year 1886" by E Dewdney (Lieutenant Governor of the North-West Territories), *Sessional Papers*, No 7 (1887) at 5; House of Commons, "Report Concerning the Administration of the North-West Territories for the Year 1887" by E Dewdney (Lieutenant Governor of the North-West Territories), *Sessional Papers*, 6-2, vol 12, No 14 (1888) at 6.

¹⁰⁸ McCormack, *Fort Chipewyan*, *supra* note 18.

¹⁰⁹ Treaty 8 First Nations, *Treaty No 8 and Issues of Taxation* (Expert Report) by Patricia A McCormack & Gordon Drever (1999) [unpublished] (this report was prepared for Akaitcho Tribal Council, Lesser Slave Lake Indian Regional Council, Athabasca Tribal Council, and Kee Tas Kee Now Tribal Council, represented by Karin Ross and Elizabeth Johnson of Ackroyd, Piasta, Roth & Day).

¹¹⁰ *Treaty 8, supra* note 1 [emphasis added]; McCormack, *Fort Chipewyan, supra* note 18, ch 8.

Both the federal and especially the provincial governments were eager to remove any special rights from status Indians. The concept of "honour the Crown" is being read here backwards in time.

After the treaty, the expansion into the north of the institutions of the federal and provincial states and their enforcement capabilities - their "discrete practices of power"112 - occurred in an uneven, incremental manner. The few police officers who were stationed at major locations were as hampered in their activities in the bush as the police officer had been at Lac La Biche in the Treaty 6 region.¹¹³ Early twentieth century police reports show the growth of the number of Royal Northwest Mounted Police detachments. For example, in 1908 there were five divisional posts in Alberta, but only one in the north. In that year its headquarters had newly moved from Lesser Slave Lake to Athabasca Landing, the main route to points farther north and better situated for communication.¹¹⁴ The northern division had only five detachments: Fort Chipewyan; Smith's Landing (now Fort Fitzgerald); Fort Vermilion; Peace River Crossing; and Lesser Slave Lake. They were minimally staffed, typically with two men. As Commissioner A.B. Perry remarked, "[e]ach detachment serves a large area, often much larger than it can properly police."¹¹⁵

All government officials, including police, had to rely on cumbersome transport and communication methods. Police patrols occurred mainly in winter, on foot with dog teams that travelled as directly as possible. Officers saw few Aboriginal people along these routes and made no effort to visit outlying camps. In summer, police and Alberta Game Guardians¹¹⁶ were largely restricted to the rivers and lakes that constituted the major water travel routes. Enforcement officials rarely travelled into the interior of the country, which was where most Aboriginal peoples - Métis and First Nations alike - did their hunting and other land-based activities. That meant that government agents were unable either to surveil the activities of local people or to interfere with them, except when some direct evidence of "wrong-doing" came to their attention.

The possible dates for "effective control" reflect this history, which means that control itself occurred at different times in different areas. Effective control could be achieved only when agents of the state were able to spend ample time in the bush itself. The earliest that may have happened in the Treaty 8 region was in the federal lands of Wood Buffalo Park, where wardens were stationed at cabins throughout the park in the 1920s.¹¹⁷ Even then, their control was far from complete. Aboriginal residents resented the wardens and the fact that many of their traditional activities had been criminalized; they took measures to hide much of what they did. No comparable enforcement existed outside park boundaries in the 1920s or 1930s, and it was still incomplete in most parts of the northern bush used by Aboriginal people by the time of World War II. While the provincial government had wildlife regulations in place since its 1907 Game Act,¹¹⁸ it could do little to enforce them in early years.

¹¹² Enrique Galvan-Alvarez, Ote Birk Laursen & Maria Ridda, "Decolonising the State: Subversion, Mimery and Criminality" (2020) 23:2 Postcolonial Studies 161 at 163. McCormack, *Fort Chipewyan, supra* note 18, ch 5, see especially 92–98. 113

¹¹⁴ House of Commons, "Annual Report of Superintendent WH Routledge, Commanding 'N' Division" by WH Routledge, Sessional Papers, No 28 (1909) at 115. 115

House of Commons, "Commissioner's Report" by AB Perry (NWMP Commissioner), Sessional Papers, No 28 (1909) at 1.

¹¹⁶ Limited information is available about the activities of Alberta Game Guardians in the early twentieth century. They were probably more influential in some areas than others. 117

McCormack, Fort Chipewyan 1920s-1980s, supra note 78; McCormack, "How the (North) West Was Won," supra note 78. 118

The Game Act, SA 1907, c 14.

That is reflected in the earlier remarks by northern Métis about how they continued to hunt anytime they wanted with impunity until large numbers of Whites arrived in their midst in the 1970s and provincial officials became more dedicated to enforcing game regulations. While Alberta wanted to regulate all Aboriginal land uses, for the most part it was unable to do so, although it had some limited success with commercial trapping and finally succeeded more fully in the 1940s, when it implemented its registered trap line system over the objections of both First Nations and Métis peoples. One might have expected that the creation of the Green Area in 1948, which set apart northern Alberta as lands for resource extraction rather than settlement, would have been accompanied by an expansion of interested departments and their personnel, hoping to support new logging and energy industries, though this aspect of provincial history has not been well explored. Thus, the decade of the 1940s can be considered an appropriate date for meaningful control over the actions of Aboriginal peoples in the bush, although control was hardly complete, as shown in Huppie's remarks.

There have still been pockets where Aboriginal groups actively contested provincial and federal authority in the later twentieth century, which speaks to the unevenness of state expansion. For example, the people of the Lubicon Lake region experienced years of frustration in being recognized as status Indians and acquiring a reserve in their traditional lands within the Green Area. In the 1980s, they claimed that neither Alberta nor Canada had any jurisdiction or control over them because they had never entered into *Treaty 8* or ceded their lands.¹¹⁹ They maintained that "we're acting under our own lawful authority, which is the only lawful authority in our area."¹²⁰ They patrolled their territory and set up blockades, requiring anyone coming onto their lands to "obey Lubicon laws."¹²¹ These extreme actions finally led to an agreement with Alberta. Aboriginal people still resort to blockades to challenge industrial actions, most recently the building of new pipelines. It is a form of subversion or resistance available to people who are otherwise powerless in the face of modern state domination, what James Scott has called the "weapons of the weak."¹²²

VI. CONCLUSION

After the *Powley* decision,¹²³ governments in jurisdictions containing Métis communities had to develop policies to identify those communities to facilitate formal consultations and to identify dates for Métis Aboriginal rights. Those dates also mark the legal divisions between historical and contemporary Métis communities. Judicial decisions since *Powley* provided examples of potential dates of "effective control" in different regions, but they rarely involved any definitional rigour.

This article has defined "effective control" as the ability of government officials to surveil the local Aboriginal populations, to regulate their uses of the resources of the bush, and to

 ¹¹⁹ Darlene Abreu Ferreira, "Oil and Lubicons Don't Mix: A Land Claim in Northern Alberta in Historical Perspective" (1992) 12:1 Can J Native Studies 1 at 24 [Ferreira, "Oil and Lubicons Don't Mix"].
 ¹²⁰ Karen Booth, "Within Rights to Evict Crews — Lubicon Chief," *Edmonton Journal* (14 January 1987)

Karen Booth, "Within Rights to Evict Crews — Lubicon Chief," *Edmonton Journal* (14 January 1987) C6.
 C6.

¹²¹ Ferreira, "Oil and Lubicons Don't Mix," *supra* note 119 at 25.

Scott, Weapons of the Weak, supra note 99; James C Scott, Domination and the Arts of Resistance: Hidden Transcripts, (NewHaven: Yale University Press, 1990).

¹²³ *Powley* SCC, *supra* note 2.

903

control their lives in other ways reflecting state-imposed regulatory laws, policies, and systems. Each of these components must be documented as occurring and impacting. To be "effective," government officials and agents must be able to produce the result they desire, which is to impose "control": to be able to influence and direct the behaviour of Aboriginal people. The fact that Aboriginal people may have changed their behaviour in response to the presence of outsiders is a separate issue and did not mean that "effective control" had occurred, unless those changes were due to the imposition of state authority.

In the north, most enforcement agents, who included Game Guardians and Mounted Police, were few in number and had considerable difficulties travelling in the bush until the second half of the twentieth century, which meant that "effective control" developed in different places at different times. Often these men lacked essential bush skills, which hindered their abilities to travel in the bush. Sometimes "effective control" can be assigned to a specific date at a specific place; sometimes it involved a range of dates. The fact that the Government of Alberta chose 1900 as the date for effective control in the north does not reflect the documented reality of the extension of institutions of the state into the north or how those institutions affected the people they intended to regulate. It would take many years before Canada, and after 1905, the province of Alberta, could create the on-the-ground institutions, policies, and enforcement practices that could be said to effect political control and legal control. Effective control began first in the settlements where government agents were living on-site, followed by the major transport routes that facilitated travel by agents (such as railways and steamboats), and last into the remote corners of the bush, where few agents either cared to go or were even able to go. The expansion of effective control was piecemeal, accompanying the gradual expansion of different institutions of the state into the north, much of which was predicated on improved infrastructure for land-based travel. It was greatly helped by the diminished land-based Aboriginal economy in the 1950s and 1960s and by the provision of land for industrial activities that attended forestry and energy enterprises, which simultaneously removed it from its Aboriginal users.

This article has argued that effective control in northern Alberta only *began* in a very small way after *Treaty 8* was negotiated, although it continued to expand over time. There is no indication of what would constitute a threshold or tipping point for when Alberta officials would move from limited or no control to effective control. The exception was Wood Buffalo Park in the 1920s, with its system of wardens stationed throughout the park to surveil resident Aboriginal peoples and control their hunting and trapping activities as much as possible. No comparable enforcement existed elsewhere in northern Alberta in the 1920s or 1930s, and it was still a moving target in most parts of the lands used by Aboriginal peoples by the time of World War II. That is reflected in remarks by Aboriginal peoples, including Métis peoples, about how they continued their land-based activities with relative impunity until large numbers of Whites arrived in their midst. Effective control was finally achieved more fully in the 1940s, when Alberta initiated and was able to enforce a system of registered trap lines and when it turned its governing eye more directly to the northern portion of the province. Thus, the 1940s can be considered an appropriate date for meaningful control for much of northern Alberta.

It is useful to relate the concept of the establishment of effective control — the term used in legal decisions and government policies — to the establishment of a colonial regime, which has involved control of Aboriginal peoples by European colonizers in order to generate capital from their lands and sometimes their labour. Colonization created a structural relationship of inequality that persists today. That accords with the definition of colonization by Georges Balandier as "economic exploitation … based on the seizure of political power."¹²⁴ Thus, the "political and legal control" called for in *Powley* may be considered a hallmark of when internal colonization was largely accomplished and points the way to further issues of decolonization and reconciliation, though such language rarely appears in government pronouncements.

¹²⁴ G Balandier, "The Colonial Situation: A Theoretical Approach (1951)" in Immanuel Wallerstein, ed, Social Change: The Colonial Situation (New York: John Wiley & Sons, 1966) 34 at 37.