

MÉTIS CLAIMS TO "INDIAN" TITLE IN MANITOBA, 1860-1870

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Abstract / Résumé

The trial court finally rendered a decision in the *MMF v. Canada* case concerning the Métis land grant in s. 31 of the *Manitoba Act, 1870*. Among other things, the expert witness for the Crown, political scientist Thomas Flanagan, claimed that the Métis never claimed Indian title during the events of 1869-70. As the trial judge largely adopted Flanagan's historical interpretation as his own in drawing conclusions of fact, it is timely to re-examines these assertions.

La cour de première instance a enfin rendu une décision dans l'affaire *FMM c. Canada*, qui touche la concession des terres aux Métis selon l'art. 31 de la *Loi de 1870 sur le Manitoba*. Le témoin expert pour la Couronne, le politologue Thomas Flanagan, prétend, entre autres choses, que les Métis n'aient jamais revendiqué le titre indien pendant les événements de 1869-70. Comme le juge de première instance a fait siennes les interprétations historiques de Flanagan pour tirer des conclusions en ce qui concerne les questions de faits, il est opportun de réexaminer ces affirmations.

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Introduction

In 1869-1870, the population of the Red River Settlement, of which the Franco-Catholic Métis formed the majority,¹ formed a provisional government in order to resist the unilateral annexation of Rupert's Land and the North-West Territories to Canada. Upon invitation from the federal government, the executive of the provisional government commissioned three delegates to negotiate the conditions of entry into Confederation based on a *List of Rights* that demanded, among other things, provincial status and local control of Crown lands. During the negotiations, the representatives of the federal government insisted on federal jurisdiction over Crown lands. The delegate of the francophone Métis, Reverend Noël-Joseph Ritchot, would only cede control of Crown lands if the population received "conditions which [...] would be the equivalent of the control of the lands of their province" (Morton, 1965: 140). Ritchot then reiterated his demand for a land grant for the future generations of Métis by way of compensation for the extinction of their Indian title. This was subsequently embodied in s. 31 of the *Manitoba Act, 1870*.

In effect, the stated objective of s. 31 was to extinguish the 'Indian title' of the Métis and put aside 1.4 million acres of federal Crown lands for "the benefit of Half-Breed families." Almost immediately, the Métis and their representatives began to complain about delays and the method of implementation of s. 31 (Ens, 1983: 2). With the influx of Anglo-Protestant migrants, the Métis eventually lost "all political power in the legislature and any power they might have retained for protection of their land rights" (ibid.: 5). Accusations of fraud and corruption in the traffic of Métis lands were confirmed as early as 1881 by the Manitoban *Commission of Inquiry into the Administration of Justice as to Infant Lands and Estates*, which implicated the judiciary at the highest levels, including Chief Justice Woods (ibid.: 9). In 1881, 1883, 1884 and 1885, the Legislative Assembly passed retroactive statutes that legalized all previous "irregular" sales of Métis lands (ibid.: 8-10). The *Official Language Act, 1890*, which suppressed French as an official language, was declared unconstitutional on two occasions, but these decisions were simply ignored by the Government and the Legislature of Manitoba (Blay, 1987: 33-39). In 1886, the Federal Parliament, insofar as it was "within the legislative authority of the Parliament of Canada" to do so, unilaterally repealed s. 31 (Chartrand, 1991a: 8). In 1921, the Federal Parliament modified the Criminal Code "to prohibit prosecutions related to any offence relating to or arising out of Métis land transactions" (Chartrand, 1991b: 476). In *Manitoba Métis Federation v. Canada (MMF 2007: par. 437)* Judge MacInnes seemed to reproach the Métis for the fact that "no court pro-

ceedings were commenced in respect of sections 31 and 32 of the *Act* until the present action, on April 15, 1981.” It is hardly surprising, however, given this legislative and judicial history, that the Métis did not bother pursuing the matter before the courts at an earlier date.

This was to change when the Manitoba Métis Federation (MMF) was created in the late 1960s. The MMF began to investigate the land question more systematically and found that some 11,500 acres had never been distributed (Pelletier, 1975: 17). On the judicial front, a francophone Métis, Georges Forest, succeeded in having the *Official Language Act, 1890*, declared unconstitutional in 1979. The Supreme Court of Canada declared that s. 23 of the *Manitoba Act* did not form part of the “Constitution of the Province” and was therefore not open to being amended by the Province of Manitoba by way of ss. 92(1) of the *Constitution Act, 1867* (*R.v. Forest*, 1979; Chartrand, 1991a: 116-119). This gave some hope to the Métis that the same legal principles may very well apply to s. 31. In addition, due to the terms of the *Constitution Act, 1871*, the MMF claimed that it was not “within the legislative authority of the Parliament of Canada” to unilaterally modify or repeal s. 31 (Corrigan, 1991: 200; Chartrand, 1991a: 111-116). Consequently, the MMF took the federal and provincial governments to court on the issue in 1981. The following year, the Aboriginal status of the Métis was confirmed by s. 35 of the *Constitution Act, 1982*, and Métis Aboriginal rights were subsequently confirmed in case law. While it took more than two decades for a trial to be held, the Manitoba Métis finally had their day in the Court in April 2006 and Judge MacInnes rendered the decision *Manitoba Métis Federation v. Canada (MMF)* on 7 December 2007.

In this case, as with almost all cases that touch on Aboriginal rights, the Crown relied heavily on expert witnesses. From a sociological perspective, the importance of scholars acting as expert witnesses lays not so much with the question of the objectivity of their research as with the political role it places them in. That is, it is a social position that allows them to invest in the juridical “field” the specific cultural and symbolic capital that they have accumulated in the academic “field” (Bourdieu, 1986), thereby allowing them to influence the construction of juridical discourse. The distinction between the subject who applies scientific methods and the object of scientific investigation, if not revealed as a fiction, is at least blurred. In addition, rather than being validated by the scientific community, results of academic research are granted legitimacy by the specific symbolic capital of the juridical field, most notably the authority of the courts to settle a debate by virtue of the doctrine *res judicata*.

In the *MMF* case, political scientist Thomas Flanagan was the Fed-

eral Department of Justice's primary expert witness. He became historical consultant for the Federal Department of Justice for this case in 1986 (Flanagan, 1991: vii). While it is true, as Irish historian Nicholas Canny (2001: 57) puts it, that the "precise impact of any one, or several, of these texts" on a judge's decision "is something that can never be measured," the influence of Flanagan's research on Judge MacInnes's decision in *MMF* is unmistakable. While MacInnes does not always explicitly refer to Flanagan's report or testimony, he often relies on the same interpretation of facts and draws the same conclusions. In terms of Métis claims to Indian title during the Resistance, Flanagan has repeatedly argued that there was no reference to these rights in the documents produced by the Provisional Government, and that the Métis simply sought local control of public lands in three of the four *Lists of Rights* (1983c: 316-317; 1985: 231; 2000: 65; *R. v. Blais*, 1997: 160). In much the same way, MacInnes held that the "four lists of rights make clear [...] that they intended and expected that the public lands would be owned by the Province so that the Provincial Legislature would then be entitled to do with those lands as it chose" (*MMF*, 2007: par. 649).

In cases where academic research contributes to juridical discourse, it becomes that much more important that it be subjected to the scrutiny of the scientific community. Ideally, it is prior to publication that the scientific status of research is evaluated and guaranteed by peers. In reality, and especially in the social sciences, it is most often only after publication and through public debate that hypotheses and facts are subjected to a thorough critique. In this regard, while Flanagan's research has often been criticized, few have taken the time to develop a systematic critique of the facts he puts forward and of his interpretations.² That being said, the problem is not one of individual responsibility or integrity—to paraphrase Bourdieu, no one can ever say everything, nor do so in the right order—as one concerning the effectiveness of peer evaluation in the social sciences and our ability to effectively function as a scientific community. The arguments that will be presented here are largely based on facts that were not only available to Flanagan, but more importantly to those evaluating his research.

Following the inclusion of the Métis in s. 35 of the *Constitution Act, 1982*, Flanagan proposed that it was "timely to take another look at the origin of the Métis claim to be an Aboriginal people" (1983c: 315). However, in his effort to do so, he minimizes the importance of Métis land claims and gives no importance to their existence whether it be before or after the Resistance of 1869-70. Flanagan acknowledges that the Métis view of their rights clashed with that of official policy (1983c: 316; 1985: 248) and thoroughly analyzes the development of official federal gov-

ernment policy (1990). His research is strangely silent and documentation sparse when it comes to exposing the Métis perspective, despite claims to having based his interpretation on "exhaustive study of primary sources" (2000: 69).

As the Supreme Court of Canada stated, it is "crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake" (*R. v. Sparrow*, 1990: 1112; *Van der Peet*, 1996: par. 49). If this is true regarding judicial interpretations, it is all the more so when it comes to a historical interpretation of the rights the Métis asserted, regardless of whether one agrees with them or not. The objective in this article is to demonstrate that, from the standpoint of the Métis, the reference to "Indian title" in s. 31 was in no way "expressly recognized *at the time* as being an inaccurate description" of the basis for their land claims, as the Supreme Court of Canada, relying on a statement made by John A. Macdonald some *fifteen years after the fact*, concluded in *Blais* (2003: par. 22) and which was subsequently relied upon by MacInnes in *MMF* (2007: par. 599).

The Case Against Métis Aboriginal Rights

According to Flanagan, a land grant for the children of the Métis was not "originally desired by anyone, either the Métis or the Canadian government," but "emerged as a hastily contrived compromise" (2000: 65). He considers it "unfortunate" that the government of Canada, "in a hasty and ill-considered decision," "accepted the Métis as an Aboriginal people in the Manitoba Act" (1983b: 251). The recognition of the Métis' "Indian title" is seen as the "biggest error of all in the drafting of the act" because it "established the *Métis* as an Aboriginal people" (1983a: 61). In Flanagan's view (1985: 230), the difficulties with "categorizing the Métis as an Aboriginal people" are "partly historical and logical questions about the rightness of regarding the Métis as Aboriginal, and partly practical problems arising from any attempt to give legal substance to this concept."

It is my contention here that Flanagan's research is seriously flawed and has contributed to erroneous judicial conclusions of fact, most notably in the *MMF* case. This article will be limited to Flanagan's claim that the recognition of the Métis as an Aboriginal people is difficult to justify from a historical point of view. It does not propose to address the issues concerning either the logical coherence of what can be termed the "doctrine of derivative Aboriginal rights," due to the fact that it "traces Métis rights to the ancient rights of the peoples from whom Métis people derive their Aboriginal ancestry" (Canada, 1996: 280), or the practical difficulties concerning the legal substance of this doctrine. Furthermore,

due to a lack of space, this article does not trace the entire history of Métis claims to derivative Indian title in Manitoba, but will be limited, with a few exceptions, to the decade immediately preceding the Resistance.

The Claims of Indian Title

Flanagan maintains that, during the events of 1869-70, not only did the Métis never "describe themselves as an Aboriginal people with special land rights" (*R. v. Blais*, 1997: 160) or demand "special treatment as an Aboriginal people" (1990: 73), but that there "was never a demand for special treatment of the Métis as a group" (1983c: 316; 1985: 231), nor for "a land grant or anything like it" (2000: 65).³ For these reasons, he maintains that Ritchot "was not officially instructed to negotiate the extinction of Aboriginal title, to request a land grant, or to do anything of that sort" (1983c: 317; 1985: 231; 1991: 33).⁴ On at least three other occasions, however, Flanagan grudgingly concedes the possibility that "such ideas *may* have existed" in the colony (1983c: 316, 317; 1985: 232) and asserts more affirmatively on one occasion that Ritchot "brought up an idea that [...] *had been* mentioned before in the colony" (1991: 33, my italics). Even then, he dismisses any such claims by asserting that they "did not dominate the political process over the winter of 1869-1870 in which the Métis demands were articulated" (1979: 150; 1983b: 251; 1983c: 316; 1991: 30). In any case, Flanagan abandons his initial caution and asserts that Ritchot gave "birth to the idea that the Métis inherited a share of the Indian title" (1991: 34) and that the Métis "became an Aboriginal people at Ritchot's initiative" (1983c: 317; 1985: 232; 1991: 33). He consequently treats this doctrine as being "Ritchot's theory of a Métis Aboriginal title inherited from Indian ancestors" (1983c: 318; 1985: 233) or again as "Ritchot's inheritance theory" (*ibid.*).

In almost the same breath that he denies the Métis ever made Aboriginal claims, Flanagan (1983c: 316) nevertheless acknowledges that "many Métis thought of themselves in some sense as owners of the land which they inhabited" since the unfortunate incident at Seven Oaks on 19 June 1816. Numerous historians who have raised the issue are much less ambiguous about where this conviction on the part of the Métis of being owners "in some sense" stemmed from. According to Margaret MacLeod and William Morton (1974: 23), employees of the North-West Company had convinced the Métis that they were, "through their Indian mothers, participants in the Indian title to the land." Likewise, the French ethnologist Marcel Giraud (1984: 887) mentions "le statut privilégié qu[e le groupe métis] ne cessait de revendiquer en vertu de ses origines indigènes" since the beginning of the 1800s. Giraud made a direct link

between the birth of Métis nationalism at the beginning of the nineteenth century and their land claims during the resistance in 1869-1870, emphasizing that the “revendications basées sur les droits que leur naissance leur conférait” were expressed “avec plus de violence dans les insurrections de 1869-70 et de 1885” (1984: 618-619). George Stanley (1961: 48-49) also maintained that this “same feeling of ownership and nationality” as that expressed in the early nineteenth century, “was the underlying cause of the half-breed opposition to Canadian expansion in Red River.” While Douglas Sprague (1988: 57) alludes to the fact that the Métis, William Dease, had raised the idea in the Settlement in 1869, the most detailed account of the existence of immediate references to derivative Indian title within the Settlement is that of Flanagan’s fellow expert witness for the Crown, Gerhard Ens (1994).

Although this forces Ens to mildly criticize Flanagan’s historical interpretation to the extent that it “does not [...] accurately describe competing paradigms that were part of the public debates on resistance before October 1869,” he nevertheless tries to salvage Flanagan’s conclusion as “an accurate assessment of Riel’s paradigm” (ibid.: 122). Flanagan’s own position on “Riel’s paradigm,” however, is that it “stood in the tradition of Métis nationalism” that “had persisted across the generations,” stretching back to the early nineteenth century (1983b: 251). That being said, if Flanagan states that Riel effectively endorsed the doctrine of derivative Aboriginal rights (1979: 148; 1983c: 320; 1985: 237), he also maintains that the “question of Aboriginal rights played no role in the public debates” during the Resistance (1979: 150) and that Riel “made no public claims of special protection for the Métis” (ibid.: 139), or that he at least “skirted the question of Métis title” (1983b: 251).

Prelude to the Resistance:⁵ 1860-1868

It is true, as Flanagan claims (1983c: 317; 1985: 231), that the demands of the Métis in the four *Lists of Rights* and the various declarations concerned, among other things, the control of public lands and an elected local legislature where they would form the majority. It would nevertheless be false to claim that Indigenous rights were entirely absent from these documents (O’Toole, 2006: 539-542). If Morton (1969: 29-30) believed that the most fundamental and the most urgent question was that of political rights, he nevertheless recognized that the land issue was “so much to the fore and so obviously important, that it is a temptation to explain the Resistance as primarily a reaction of Native settlers to a rush of land-hungry immigrants.” If the role that the land question played should not be exaggerated, one must avoid falling into the opposite extreme by claiming that it was entirely absent.

As we have seen, the Métis in the Settlement had claimed derivative Indian title since at least 1816. A decade before the Resistance, the question was raised once again. The event that brought the issue to the fore was the *Report of the Imperial Parliament's Select Committee on the Hudson's Bay Company*, which suggested either annexing the Red River Settlement to Canada in its seventh point (1857: iii) or "to consider whether some temporary provision for its administration may not be advisable" in the ninth point (*ibid.*: iv). As annexation involved the surrender of the HBC's title to the Crown, the Métis expressed concern about the recognition of their share of Indian title in the territory. The local newspaper, the *Nor'Wester* reported on 14 March 1860 and on 15 June 1861 that meetings took place where the Métis asserted they had a share in Indian title. In the first meeting, the chairman Pascal Breland stated that, "I think there is a third party that can urge a claim – namely the Natives who are partly the descendants of the first owners of the soil." He continued, saying that, "I think it is not unlikely that the Half-Breeds of the country—representatives of the Cree and other tribes—might put in a good claim. They are Natives; they are present occupants; and they are representatives of the first owners of the soil with whom (as I have said) no satisfactory arrangement has been made." In what sounded like a rehearsal for the events of 1869-70, Breland warned that if "we have such a claim, now is the time to urge it. For perhaps this very winter the Home [i.e. Imperial] Government may make a definite and final settlement of the affairs of this country."

The article then states that the "meeting was addressed by Messrs Urbain Delorme, William Dease, Pierre Falcon, William Hallet, George Flett,⁶ John Bourke, William M. Gilles and others, who warmly advocated the rights of the Half-Breeds to the land." Many of these people were still present in the Settlement eight and a half years later when the land issue would flare up again. The anonymous reporter listed the resolutions that the four-hour meeting arrived at, amongst which was: "That as no proper arrangement has been made with the Native tribes regarding their lands, the Half-Breeds who are now on the soil, and who, besides being Natives, are the immediate representatives of these tribes, ought to use every legitimate means to urge their claims to consideration to any arrangement that the Imperial Government may see fit to make."⁷ Interestingly, the meeting was adjourned with the intention of meeting again in the spring, when the winterers would be able to participate. Just as was the case in 1816,⁸ the issue of Métis land claims was well known all throughout the North-West and not only in the Red River Valley.⁹

The second article reported "Indignation Meetings" that took place

a year later, on 26 and 29 May 1861, on the White Horse Plains and in Headingly respectively. The Hudson's Bay Company intended "to exact payment for all land within five years, [...] or they would be sold to the first purchaser in which case all improvements would be forfeited" (*Nor'Wester*, 15 June 1861: 2). A deputation from the White Horse Plains meeting, including Pascal Breland, Urbain Delorme "and other influential men in the district," attended the 29 May meeting in Headingly at a certain J. Taylor's residence. According to the reporter, the "principal reasons urged against compliance with the late claims are, that the Company have no rights to the land themselves, never having purchased it, and that the Half-Breeds have a very palpable right, being the descendants of the original lords of the soil" (*ibid.*). In other words, in the view of the Métis, their claim to the lands that they occupied was based on the doctrine of derivative Indian title and not an adversative possession ("squatter's rights"), as the expression "peaceable possession" in s. 32 of the *Manitoba Act* would later suggest. In any case, from at least this moment on, everyone in the colony would have been aware of the issue of land claims, whether those of the "old settlers," of the Métis, or of the Amerindians.

The question is not so much why Flanagan consistently fails to make any mention of these incidents and persistently attributes the doctrine of derivative Indian title to Ritchot, but why such an obvious "selection of evidence to support a thesis" (Flanagan, 1991: viii) has not only gone unnoticed by colleagues who have evaluated his work, but has remained unchallenged by the scientific community subsequent to publication. Again, these are not new facts and have been previously mentioned in the works of authors to which Flanagan frequently refers. For example, these meetings as well as the claims of derivative Indian title are explicitly mentioned in works by Giraud (1984: 902) and Morton (1967: 105). Even Ens (1996a: 33) cites the 15 June 1861 Report of the *Nor'Wester*, mentioning that the Métis claimed to have rights as the "descendants of the original lords of the soil."

Representatives of the Indian Tribes

As we have seen, during the meeting in March 1860, the Métis claimed to be the "representatives" of the Indians. This self-proclaimed role may stem from the fact that their cousins in the United States "were influential with Indian tribes and served as intermediaries when those tribes made treaties with the American government" (Flanagan, 1991: 23; Thorne, 2001: 95). The U.S. policy of "granting reserves to 'half-bloods' as a regular feature of treaties" apparently began after the War of 1812 (Thorne, 2001: 94). Lewis Cass, the architect of the policy of allotting

inalienable, individual tracts of land to mixed bloods, claimed it was to "secure their permanent attachment to our Government" and to "ensure their fidelity" (*ibid.*: 95).

When the Red Lake and Pembina treaties were negotiated in 1863, the governor of the Territory of Minnesota, Alexander Ramsey, complained that the Anishinaabeg (Ojibwa or Chippewa) brought with them a group of Métis from St. Joseph almost twice their number. The Métis "insisted in regarding themselves as individually and collectively the guardians and attorneys of the Pembina Chippewas in all matters touching disposition of their landed interests" (Foster, 2001: 100). It will be recalled that the Pembina and St. Joseph Métis had kinship ties with the Métis in the District of Assiniboia and "were for all practical purposes a southern extension of the colony of Assiniboia" (Flanagan 1991: 23). It would appear that the Red River Métis actually attempted to put into practice their claim to be the "representatives" of the Amerindians.¹⁰

Ramsey confirmed that these Métis considered themselves "to a certain extent, *the real owners of the soil* and as having *even greater interest in any treaty for its purchase* than its far less numerous or powerful Aboriginal occupants" (Foster, 2001: 100, my italics). Although he refused to recognize the Métis collectively as a distinct Aboriginal people with Indian title, he did accept that they could claim Aboriginal rights as individual members of an Indian tribe (*ibid.*). For this reason, Ramsey excluded the representatives of the Métis from the negotiations, but allowed the Anishinaabeg Chiefs to represent and include the Métis in the treaty as "Indians." In this way, the Federal Government of the United States forced the Métis "to seek recognition by identifying themselves *according to their relationship to the Ojibwa, ignoring their separate history, lifestyle, language and religion—their very identity as Métis*" (*ibid.*: 101, my italics). Section 8 of the treaty provided for a homestead of 160 acres that was to be granted to "each male adult half-breed or mixed-blood who is *related by blood* to the said Red Lake or Pembina bands who has *adopted the habits or customs of civilized life* [...]" (Flanagan, 1991: 24; Ens, 1996b: 48, my italics). The sufficient and necessary criterion, then, to participate in the treaty was the blood-tie between the individual and the band. In other words, it was neither in Canada nor with Ritchot that "arose for the first time the idea that Aboriginal title could be transmitted through racial heritage, even though the descendants' way of life might differ radically from that of their ancestors" (Flanagan, 1983c: 317; 1985: 232).¹¹

Two other treaties with the Red River Anishinaabeg preceded the 1863 treaty. The first, signed in 1851, but never ratified, was to distribute \$25,800 to the Métis (Flanagan, 1991: 23). Apparently, Rev. Georges

Belcourt, a missionary who had formerly worked in the White Horse Plains, had encouraged the Métis to demand a free land grant (*ibid.*). However, on 24 August 1849, U.S. Major Woods had already told the Pembina Métis that, "in virtue of their Indian extraction, those living on our side of the line were regarded as being in possession of the Indians' rights upon our soil" (Woods, 1850: 28). According to Rev. Georges Dugas (1906: 102-103), the failure to consult the Métis, which could have been interpreted by the Métis as a refusal to recognize their rights, "eut pour effet d'indisposer les Métis contre les Américains."¹²

Another treaty, signed at La Pointe, Wisconsin in 1854, also contained a clause concerning a land grant for the Métis (Flanagan, 1991: 24-25). In any case, Alexander Ross (1972 [1856]: 403), who lived in the Settlement at the time, wrote that "[e]ver since the road to St. Peter's has been opened, it has been rung in the ears what large sums of money the Americans pay for Indian lands; and the half-breeds, *being the offspring of Indians*, come in for a good share of the loaves and fishes on all such occasions" (my italics). It seems that the Métis were in contact with the Red Lake Anishinaabeg during the Resistance in 1869-70, for on 18 July 1870, "a large party of Red Lake Indians arrived; and it is said Riel had an interview with them and gave them presents" (Begg, 1871: 382).

On the balance of probabilities, the Métis north of the 49th parallel were well aware of the content of these treaties. The latter would have confirmed in their eyes that they had derivative Indian title, regardless of their way of life. These precedents likely confirmed in the minds of the Manitoba Métis that the land claims of their cousins south of the border had been recognized during treaty negotiations with the Indians. This would explain why they were so easily aroused by any attempt to extinguish Indian title without including them in the process.

The Construction of Dawson Road

This is precisely what happened five years after the 1863 treaty, when the engineer John Allan Snow, a Canadian government employee responsible for the construction of Dawson Road, attempted to buy land directly from the Indians at St. Anne's (Oak Point or Pointe-de-Chêne) in the autumn of 1868. Reverend Dugas stated that Snow "a mis le feu au pays" and the Métis came to warn him not to "mettre le pied de ce côté-là s'il tenait à garder sa tête sur ses épaules" (Morton, 1969: 569). According to Thomas Spence's deposition to the *Select Committee of the House of Commons on the Causes and Difficulties in the North-West Territories in 1869-1870*, Snow bought a five square mile block of land from the Indians to which the Métis considered they had rights "as a

settlement" (Canada, 1874: 133). Ritchot, who attended Snow's trial, confirmed that the principal cause of the difficulty then was "the rumor that these employees had made a treaty with the Indians for a certain tract of land, part of which the people of the country had claimed for themselves" (Canada, 1874: 68). Finally, according to the deposition of surveyor John Stoughton Dennis, "I was told by Dr. Schulz that a short time previous to my arrival in the country that he and Mr. Snow had staked out and bought from the Indians, lands at St. Anne's, Point[e] de Chêne, a mile square, which the French half-breeds *laid claim to in some way*" (Canada, 1874: 187, my italics). Although these references do not explicitly mention Indian title, it is easy to see why neither Morton (1967: 118) nor Giraud (1984: 963) hesitated to make a connection between the incident at Oak Point and the Métis claims of derivative Indian title.

The Period of the Resistance: 1869-1870

On 24 July 1869, the *Nor'Wester* published an article that defended Indian title against that of the HBC (Begg, 1871: 85). Another article published the same day in the same paper called for a public meeting in the Court House on 29 July and was signed by William Dease, Pascal Breland,¹³ Joseph Genton and William Hallet. Three of these individuals had spoken in favor of Métis land claims based on derivative title at the meeting in 1860 and Breland had also taken this position a year later at the "indignation meetings" in 1861. During the meeting, Dease claimed that, "it was necessary for the [Hudson's Bay] Company, before selling their rights, to have the consent of the half-breeds, as they were Natives of the soil and were descended from the original possessors" (Begg, 1871: 87). When Hallet was asked to speak, he stated that the goal of the meeting was to determine whether the land belonged to the HBC or to the Métis and Indians (Begg, 1871: 87; Bumsted, 1996: 47). Dease, however, also proposed setting up "an independent government of their own to treat with Canada or any other country" (Begg, 1871: 89). Ironically, John Bruce, future president of the provisional government, "castigated Dease for advocating revolt" (Ens, 1994: 117). If Riel opposed Dease on this issue, it should not be concluded that he disagreed with Indian title claims. Indeed, Governor McTavish wrote that there "was general agreement on the claim of Indians and Métis to the lands of the North-West and to compensation" (Morton, 1969: 33, note 1). In any event, according to the reporter, the Court House "was filled to overflowing." It seems evident that Ritchot would have been well aware of Métis claims to derivative Indian title well before he left for Ottawa as a delegate.

Land Surveys and the Extinction of Indian Title

The second incident that provoked the Métis resistance to annexation was the land surveys. It was perfectly evident to McTavish that the surveys would bring about a reaction from the Métis concerning their Indian title. Less than two weeks after the meeting in the Court House on 29 July, the Governor wrote on 10 August that he expected that "as soon as the survey commences the half-breeds and Indians will at once come forward and assert their right to the land and possibly stop the work till their claim is satisfied" (Stanley, 1961: 56; Bumsted, 1996: 49). On 21 August, Dennis wrote to McDougall that the Métis "have gone so far as to threaten violence should surveys be attempted to be made" (Canada, 1870: 6). While it is true that the Métis "were afraid that the new survey might disturb their traditional land holdings" (Flanagan in *Blais*, 1997: 156), it was explicitly recognized *at the time* that they were not simply claiming a fee simple title to individual lots by virtue of adverse possession ("squatter's rights"). In a letter dated 12 October 1869, Governor McTavish stated that the Métis "say they know the survey could proceed without any injury to anyone: but stopping it is always a beginning, and they consider if the Canadians wish to come here, the terms on which they were to enter should have been arranged with the local Government here, as it is acknowledged by the people of the country" (Canada, 1870: 47).

While Flanagan recognizes that Riel saw the Métis not only as a nation but as Natives who "shared Aboriginal title to the land" (Flanagan, 1979: 148), he claims that Riel "skirted the question of Métis title" in the *Declaration* of 8 December 1869 (1983b: 251) and that "the question of Aboriginal rights played no role in the public debates" during the Resistance (1979: 150). However, when surveyor Colonel Dennis reported a private meeting with Riel on 1 October 1869, he mentions that Riel asked him what the intentions of the government were concerning the extinction of Indian title and the lands occupied by the settlers. Dennis reported that he reassured Riel that the government had the intention of extinguishing the Indian title "upon equitable terms" (Canada, 1874: 186). Now, according to Flanagan, Riel had "no real concern with the Indians" before 1878 (1979: 149). Why then would he show such concern for the extinction of Indian title in 1869? As we have seen, U.S. practice had established the precedent of dealing with "Half-breed" claims during negotiation of Indian treaties. Surely, it was not simply a coincidence that the precise moment Riel chose to raise the issue of Métis land claims during the Convention's discussion of the second *List of Rights* was when they reached the 15th clause, which demanded treaties with the

Indians (*New Nation*, 4 Feb. 1870: supplement). Riel asked rhetorically whether Indians had a claim to the *whole* country. Riel's suggestion that the Indians were not "the only parties in the country who have to be settled with for land claims" clearly insinuated that there was "some section [of the country] for which the Half-breeds would have to be dealt with" (*ibid.*). It is evident that Riel was not concerned with Indian title *per se*, but with the derivative title of the Métis.

As Riel's ambiguous inquiries suggest, the exact basis of Métis land claims are not always clear. On the one hand, Dennis' letters and reports seem to make a clear distinction between the question of the extinction of Indian title and that of quieting titles to individual lots. On the other hand, he reports that the Métis claimed to have a collective right to lands that they did not necessarily occupy. In a letter dated 12 January 1870, that was published in *The Globe* in Toronto (Morton, 1969: 485), Dennis reported that on 11 October 1869, a group of about eighteen Métis claimed "the country on the south side of the Assiniboine [...] as the property of the French half-breeds" (Canada, 1870: 7). Later, Dennis mentioned that the Métis claimed certain lands "in some way" (Canada, 1874: 186). One finds a similar expression when Riel spoke of "a country which they claimed as their own" before the Council of Assiniboia on 25 October 1869 (Canada, 1874: 98).

Certainly, Riel does not explicitly mention Indian title at this point. However, according to Flanagan (1983b: 251), in Riel's mind, "Métis title was clearly not a mere encumbrance on the sovereign's title but sovereignty plus full ownership – not individual ownership in fee simple, perhaps, but a collective ownership by the Métis as a nation." In other words, Flanagan clearly recognizes that Riel, and most likely other Métis, did not simply claim to hold a bundle of private, individual property rights, but rather a collective public title. Flanagan (1986: 88) later added a qualification, stating that Riel "was not clear on sovereignty." Indeed, insofar as the Provisional Government recognized the sovereignty of the Crown during the Resistance, the title the Métis claimed could not be that of sovereignty: it was perhaps closer to public and private *dominium* rather than sovereign *imperium*.¹⁴

This is confirmed by other references Dennis made to Métis land claims that reflect a close association in their minds between Indian title and Métis title. For example, on 21 August 1869, he wrote to the Lieutenant Governor in waiting, William McDougall, "a considerable degree of irritation exists among the Native population in view of surveys and settlements being made without the Indian title having been first extinguished" (Canada, 1870: 5). Dennis repeated this warning on 28 August, insisting that he had "again to remark the uneasy feeling which exists in

the half-breeds and Indian element with regard to what they conceive to be premature action taken by the Government in proceeding to effect a survey of the lands, without having first extinguished the Indian title," then repeated that "this must be the first question of importance dealt with by the Government" (ibid.: 7). On 11 October, Dennis again remarked on "the unsettled state of the land tenure as regarded by the half-breeds and Indians" (ibid.: 7).

It is impossible to explain the preoccupation of the Métis with the extinction of Indian title by claiming they merely wanted a quieting of titles to the individual lots that they effectively occupied. Dennis and other contemporaries recognized that the Métis claimed a tract of land that they did not actually occupy. When the Métis inquired about Indian title, this obviously did not stem from an altruistic sense of duty to "represent" the Amerindians and thereby selflessly assure that the latter would be fairly compensated for the extinction of their title. The only logical conclusion that explains why the Métis were so concerned about the extinction of Indian title is that they believed that they themselves held a co-existing radical or derivative Indian title, and in either case had a right to compensation for its extinction. Past experience and circumstances, which had shown that the best chance of obtaining official recognition of their title was to be present during treaty negotiations with their Amerindian cousins, effectively imposed a doctrine of derivative title.

The "List of Rights" in John Young Bown's Letter

Flanagan (1983c: 324, note 3; 2000: 199, note 2) rejects Harry Daniels' (1981: 56) claim that a letter, dated 18 November 1869, from John Young Bown, Member of Parliament, to John A. Macdonald, is proof that "the Métis of Red River were demanding a land grant" well before it was brought up by Ritchot during the negotiations some six months later. In order to discredit the content of the letter, Flanagan relies on *ad hominem* and "guilt by association" attacks on its presumed source. He asserts that John Young Bown "undoubtedly" obtained this information from his brother, Walter Robert Bown, owner of the *Nor'Wester* and member of the "Canadian party." However, even if this is true, where Walter Bown himself "had gotten this information was not made clear" (Bumsted, 1996: 79).¹⁵ If the ultimate source is unknown—unless of course one presumes Walter Bown was simply making it all up—it is entirely plausible that Walter Bown was John Bown's source. Indeed, the former's statement to the Select Committee in his deposition of 2 May 1874, that he believed the Métis "claimed the lands under an Indian title" is certainly consistent with the content of John Bown's letter (Canada, 1874:

113). As such statements contradict Flanagan's position that the Métis never claimed Indian title, it is understandable that he would attempt to undermine their credibility, dismissing them on the grounds that Walter Bown was a "well-known antagonist of the Métis" and could therefore scarcely be considered "a reliable interpreter" of the "true desires" of the Métis (1983c: 324, note 3; 2000: 199, note 2).¹⁶

It is certainly reasonable to maintain a *prima facie* presumption of unreliability. On the other hand, it could just as reasonably be argued that Bown's letter is all the more reliable precisely because he was an "antagonist of the Métis." In either case, it is a classical case of circular reasoning to draw a conclusion from a presumption without demonstration. While Flanagan (1983c: 316) claims that the letter is "misinterpreted" by Daniels, he offers no alternative interpretation. One method of interpreting a text is to investigate the possible motives an actor would have for making such statements. Of course, attributing motives is always hazardous as it relies on inductive reasoning. As induction involves a process of elimination, it is only reliable in circumstances where the potential causes or reasons are limited in number. Even then, each of these would have to be exhaustively explored so as to determine which corresponds best to the available facts. It is evidently impossible to do so in an article, or even in several books, which once again brings us back to the question of the effectiveness and suitability of peer review in the social sciences prior to publication.

In any case, one plausible explanation is that the attribution of claims of Indian title to the Métis may result from Bown being an interested propagandist. It was certainly not unusual for the *Nor'Wester* to defend claims to Indian title. For example, the first page of the first issue of the *Nor'Wester* following Confederation contained a letter from Alexander Isbister, a Half-Breed lawyer working out of London and associated with the Aborigine's Protection Society,¹⁷ and an article that was dedicated to the question of Indian title (13 July 1867). Two years later, another article that defended the Indian title appeared in the edition of 24 July 1869. It was in the very same issue that the previously mentioned public meeting was called for in the Court House on 29 July (Begg, 1871: 85). Why would individuals, who were not exactly members of the Aborigine's Protection Society, defend the Amerindian's title?

If the so-called Canadian party was an "antagonist of the Métis," it is well known that they were even more so of the HBC and its Council of Assiniboia. As we have seen, the idea of Métis having Indian title goes back at least to the incident at Seven Oaks. At the time, the North-West Company used the issue of Métis title to weaken the legality of the HBC's land grant to Lord Selkirk (MacLeod and Morton, 1973: 27). Likewise, in

the 1850s, the Toronto *Globe* and the Canada First movement revived the question of existing Indian title with a view to undermining the validity of the HBC's *Charter*.¹⁸ For A.S. Morton (1974: 857), it was clear that "the idea carefully installed by the North West Company in the struggle against Selkirk's claims to the soil was reawakened by the reckless conduct of the editors of the *Nor'Wester*."

Aside from a collective interest in annexation, the members of the Canadian party tried to personally gain from such recognition. There is some indication that such "antagonists" defended Indian title precisely because they hoped to make a windfall profit by staking claims immediately before annexation. Donald Smith reported that some recent Canadian arrivals had "denounced the[Métis] as 'cumberers of the ground,' who must speedily make way for the 'superior race' about to pour upon them." He continued:

It is also too true that in the unauthorized proceedings of some of the recent Canadian arrivals, some plausible ground had been given for the feeling of jealousy and alarm with which the contemplated change of Government was regarded by the Native population. In various localities these adventurers had been industriously marking off for themselves considerable, and in some cases very extensive and exceptionally valuable tracts of land, thereby impressing the minds of the people with the belief that the time had come when, in their own country, they were to be entirely supplanted by the stranger [...]. (Canada, 1870: 9)

Dennis' deposition to the Select Committee confirmed that Schultz sought to buy land directly from the Amerindians (Canada, 1874: 68; 186-7), and it seems he was the mastermind behind the scheme of selling liquor to Amerindians, for which Snow was convicted, with a view to buying their land (A.S. Morton, 1973: 867). All this would seem to support the hypothesis that what motivated Bown to communicate Métis demands accurately was that it was primarily self-serving to do so.¹⁹

Furthermore, according to Begg (1871: 89), Dease defended Indian title at the meeting of 29 July because he was "prompted by others to do it."²⁰ It was "brought about by the very men who then, and afterwards, staked out large tracts of country in the Settlement, thinking that their claims would hold good by the payment of a nominal sum to liquidate the right of *the settlers or Indians—as they termed them*—to the land" (*ibid.*, my italics).²¹ According to Begg, the *Nor'Wester* "endeavoured by that meeting to show to the world that the people of the country were then agitated by the land question against the Hudson's Bay Company (Begg, 1871: 89).²²

It may be true, as Ens (1994: 116) points out, that *generally* speaking, Dease's proposals reflected "a position that owed nothing to the Canadians in Red River." As we have seen, other Métis leaders had previously taken up this position on the land question in 1860. Riel himself went so far as to try to have a clause annulling the "bargain" between Canada and the HBC added to the second *List of Rights (New Nation, 4 Feb. 1870: supplement)*. It does not necessarily follow that the *specific* instance of a *particular* meeting "owed nothing to the Canadians." The fact that Breland later "declared that he had never given his signature to the notice that appeared in the *Nor'Wester*" (Begg, 1871: 89-90) indicates that, for some reason, he wished to make a point of disassociating himself from the Dease on this occasion. This may be because Dease had become too closely associated with the Canadians.

Once again, we find here an inappropriate use of the principle of the excluded middle. Certainly, the members of the Canadian party were "antagonists" of the Métis. However, being given the precedents of speculation in Métis lands in the United States (Flanagan, 1991: 23-25), they nevertheless had their own reasons, in the short term, to support Métis demands for a land grant, albeit for diametrically opposite reasons in the long term. Certainly, Dease may have had his own reasons for defending Métis title, but it is entirely possible that the Canadian party approached him precisely for this reason. It is possible that the Canadian party were using traditional Métis demands to achieve their own ends. The irony of seeing such antagonists "défendre les prétentions des Indiens et des Métis à la propriété souveraine du sol" all the while preparing to "faire bon marché des droits des métis, à encourager les spoliateurs de leurs terres" did not escape Giraud (1984: 952). If so, it was not in Bown's interest to misrepresent Métis demands as they coincided with his own.

Another method to determine the meaning of a text is an inter-textual approach. While Flanagan considers it "misleading" to refer to the letter's content as a "Bill of Rights," Daniels was not the first to do so. Arthur S. Morton (1973: 877) also referred to it as the "earliest statement of the 'rights' claimed" by the Métis. According to Bown's letter (*ibid.*), the Métis demanded:

1. That the Indian title to the whole territory shall at once be paid for.
2. That on account of their relationship with the Indians a certain portion of this money shall be paid over to them [the Métis].
3. That all their claims to land shall be at once conceded.
4. That [2]00 acres shall be granted to each of their children.²³
5. That they and their descendants shall be exempted from taxation.

6. That a certain portion of lands shall be set aside for the support of the R.C. Church and the Clergy.
7. That Dr. Schultz and others shall be sent out of the Territory forthwith.

Curiously, Flanagan never mentions the last three of these. It cannot be said, in terms of *these* items, that Bown was "hardly a reliable transmitter" of Métis demands. Clauses five and six are found, explicitly and implicitly, in the four *Lists of Rights*.²⁴ As for the seventh item, the Métis' intense dislike of Schultz and other members of the Canadian party is hardly a secret and Bown's willingness to communicate something so unfavorable to himself and his colleagues renders particularly untenable any presumption of unreliability. Flanagan provides no convincing explanation as to why the Métis claims to Indian title and a land grant would be the only exception to what otherwise seems to be an accurate representation of their demands.

In fact, the first four items are corroborated by other sources. The demand for compensation for the extinction of Indian title is necessarily implied in the consistent references to treaties with the Indians in all four *Lists of Rights*. Both the first and the second item correspond exactly to what was generally agreed upon at the meeting of 29 July 1869, and is further substantiated by the Métis' repeated association of the compensation of their land claims to the extinction of Indian title. In this regard, Pierre Delorme, a Francophone Métis who served as one of the delegates from Pointe-Coupée to the Convention of Forty (Begg, 1871: 247), put a strange twist on the doctrine of derivative of Indian title. According to the diary of reporter P.G. Laurie, Delorme wanted "Indian status [to] be extended to their wives, thus allowing the Métis to benefit from any Indian land settlement" (Pannekoek, 1991: 192).²⁵ Thomas Bunn understood that the Francophone Métis "claimed that the country belonged to the half-breeds *under the same kind of title by which the Indians claim, namely, by birth, residence and occupation*" (Canada, 1874: 115).

The third item does not mention Indian title but nevertheless corresponds to a number of land-related demands discussed during the Convention of Forty and included in the various *Lists of Rights*, including a homestead law, pre-emption rights, and the right of commons or the quieting of titles. Delorme, for example, wanted a quieting of titles to the land the Métis heads of family actually occupied (Pannekoek, 1991: 192). The Half-Breeds seemed particularly anxious about commuting the hay privilege into fee simple title (*New Nation*, 4 February 1870: supplement; 11 February 1870: 1). Without dwelling too much on this item, it nevertheless demonstrates that Ritchot (1964: 547) was hardly innovating or

"improvising" when he fought for commutation in fee simple of leases, adversative possession, staked claims and the hay privilege.

As for the fourth item, Delorme also insisted that "200 additional acres be given for each of their children" (Pannekoek, 1991: 192), thereby giving further credence to Bown's letter. Now, during the negotiations between the Red River delegates and the federal government, Ritchot initially refused a maximum limit of 100,000 acres and proposed instead 200 acres for "[a]ll the [Métis] settlers established in the country" as well as 200 hundred acres for the children of Métis, "born or to be born, and each of their descendants [...] (with a safeguarding law to keep the land in the family)" (Morton, 1965: 142).²⁶ Again, it is surely no mere coincidence that Ritchot's demand for 200 acres for both adults and children is not only congruent with Delorme's demands, but that his demand for the children corresponds exactly to the fourth item on Bown's list. Again, the demand for a land grant seems to have been well discussed and thought out and was not simply improvised during the negotiations, as Flanagan claims.

Generally speaking, the third and fourth items are congruent with the reference to the tracts of land mentioned above, that the Métis "claimed for themselves" or "laid claim to in some way" or "as a settlement." If Bown's letter in itself does not sufficiently "prove that the Métis of Red River were demanding a land grant as early as November 1869" (Flanagan, 2000: 199, note 2), it would seem that as early as 29 December 1869, McDougall was perfectly aware of the land issue and of the idea of a territorial enclave for the Franco-Catholic Métis.²⁷ In an interview with the newspaper correspondent John Ross Robertson of the *Daily Telegraph* of Toronto, MacDougall made the following remarks:

Co[rrespondent]. – What was the object of their opposition?

Gove[rnor]. – The object of the half-breeds, at least of their leaders, seemed to be to secure from the Canadian government a *large tract of land between Pembina and Fort Garry.*

Cor. – Similar to the Canada Clergy Reserve lands?

Gov. – Yes – *exclusively for the French; and in order to secure it the leaders had organized the half-breeds, as I have before stated.* (Morton, 1969: 480, my italics).

Robert Machray, the Anglican bishop of Rupert's Land confirmed these claims when he wrote on 11 March 1870 that "the rights that have hitherto been put forward by the French [Métis] and debated are note what they really care for, but that they wish for a Section of the country to be restricted to the French Population" (Morton, 1969: 506). Four years later, as a witness under oath during the trial of Ambroise Lépine for the murder of Thomas Scott, Machray confirmed that, "Riel called upon me

a day or two before the execution of Scott and said the French wanted land set apart exclusively; discussed on two points, *desirability of a Province and of reserves*;²⁸ I think the desire for reserves was the cause of all the trouble; the French did not wish to be mixed [with the English], but to be all together" (Elliot and Brokovski, 1974: 52, my italics). Riel wrote to Ritchot on 19 April 1870, instructing him to insist "that the country be continued to be divided in two, in order that the two populations living apart may be kept as a safeguard of our most endangered rights" (Morton, 1969: 137, note 1) and that "this division of the country be done solely under the authority of the Legislature."²⁹

Riel's idea, far from going "beyond the spontaneous desires of the average Métis" (Flanagan, 1979: 153),³⁰ was shared by Delorme, who also apparently wanted "the tract of land lying south of the Assiniboine River to be set aside as a self-governing colony free from all taxation" (Pannekoek, 1993: 192-193). It is surely no mere coincidence that this latter demand concerning taxation corresponds to the fifth item in Bown's letter. Moreover, the tract of land he mentions is exactly that mentioned by Dennis in his letter of 11 October 1869 (Canada, 1870: 7) and by McDougall in his interview with the *Daily Telegraph*. Apart from Delorme's obvious reference to a territorial enclave, what is even more condemning for Flanagan's assertions is Delorme's specification that it was to be a "self-governing colony." This was not simply a case of quieting the titles nor, more generally, of individual property rights. The comments of Dennis, McDougall, Machray, Riel and Delorme indicate that the 200 acre grants to both adults and children were to be grouped together in an enclave. The Métis did not view individual and collective rights as being mutually exclusive, but as being, not unlike the fee simple and Crown title, complementary and congruent.

Thus, on a balance of probabilities, it can be said that the list of demands in Bown's letter contains "a plausible approximation of the Métis shopping list" (Burnsted, 1996: 79).

Conclusion

Based on the historical evidence presented here, it can be asserted beyond a reasonable doubt that the Manitoba Métis did indeed make land claims based on the doctrine of derivative Indian title during the Resistance of 1869-70. Of course, whether or not such claims of a share in Indian title *should have* been recognized and subsequently inserted into a statute is another question.³¹ On this point, I agree with Flanagan (1991: 153) that no "amount of historical research can answer such counterfactual questions." In this regard, Flanagan (2000: 8), alluding to the German historian Leopold von Ranke (1795-1886), claims to simply

“reconstruct history *wie es eigentlich gewesen ist* ('as it really was').” However, his anachronistic and counterfactual position that the statutory recognition of the Indian title of the Métis was the “biggest error of all in the drafting of the act” (Flanagan, 1983a: 61) and “a historical mistake” (Flanagan, 1983c: 314) is rather about history *wie es nicht geschehen sein sollte* ('as it should not have happened') and displays a certain discontent with 'history as it really was.' Certainly, at “the end of the day, one may wish that something else had happened, that the government had treated the Métis differently” (Flanagan, 1991: 10), but the plain historical fact is that the federal Parliament recognized the Indian title of the Manitoba Métis in s. 31 of the *Manitoba Act, 1870*.

Notes

1. The population of the Settlement was about 12 000, which included about 4500 Half-Breeds and 5500 Métis (Canada, 1871: 91).
2. The *Report of the Royal Commission on Aboriginal Peoples* (1996) does contain a nine-page critique of Flanagan's research (333-342). It was written by three jurists who, for the most part, simply reiterate Sprague's arguments and are more concerned with the legal consequences than with advancing research in the social sciences.
3. Flanagan (1979) had recognized earlier that Louis Riel wanted a land grant. But he later seems to suggest that this demand was not shared by his fellow Métis and that, in any case, it was 'illogical.'
4. For a different interpretation of Ritchot's mandate, see O'Toole, 2006: 542-5.
5. While Pr. Fred Shore objects to the use of the term “resistance” (Blais, 1997: 170), I think it is a rather apt description of the movement in 1869-70. While it is true, as Shore claims, that the objective was to negotiate the terms of entry into Confederation (ibid.: 167), this nevertheless implied a resistance to Canada's policy of unilateral annexation of the North-West as a *lebensraum* for Caucasian Anglophone Protestants.
6. Flett would later criticize the idea when Riel brought it up during discussion of the 15th article of the second *List of Rights* during the Convention of Forty (*New Nation*, Feb. 4 1870).
7. At this same meeting, a motion was unanimously carried that the Council of Assiniboia should be elected. This was consistently demanded in all four *Lists of Rights* ten years later.
8. At the time, Cuthbert Grant resided in the Qu'appelle Valley in present day Saskatchewan.

9. While s. 31 may very well have encouraged post-1870 Métis land claims in the North-West, the latter certainly did not find their origin in such government "errors."
10. The third and fourth *Lists of Rights* drawn up by the executive of the Provisional Government insisted that "the treaties be concluded with the different Indian tribes [...] by and with the advice and co-operation of the Local Legislature" or "at the request and with the co-operation of the Local Legislature." Since the local legislature would have been made up of a majority of elected representatives of the Métis, this article would have allowed them to play their self-proclaimed role as representatives of the Amerindians and thereby be in a position to ensure recognition of their own derivative Indian title during the negotiation of any such treaties, as their U.S. cousins had done. Ritchot realized, however, that "Indians and lands reserved for Indians" was an exclusive federal jurisdiction (1964: 564).
11. Ritchot arrived in the Settlement in 1862 and may very well have been aware of s. 8 of the 1863 treaty. For similar contemporary cases of "identity manipulation," see Hele, 2007.
12. For MacInnes J., an Act of Parliament is "a unilateral process which is the antithesis of a treaty or an agreement" (*MMF*: par. 486). However, in the United States, if the executive branch could negotiate treaties, they nevertheless had to be subsequently ratified by Congress. In much the same way, international treaties are embodied in Acts of Parliament. There is no inherent contradiction between a statute and a treaty.
13. According to Begg, Breland denied having signed the petition (Begg, 1871: 89).
14. "*Imperium* is the legal competence of a state, including the general power of government, administration, and disposition of territory. *Dominium* is public ownership of property within the state and private ownership recognized as such by domestic law" (Henderson et al., 2000: 91).
15. Bumsted mistakenly attributes the letter directly to Walter Bown.
16. Flanagan admits, however, that "in the letter J.Y. Bown was trying to inform the Prime Minister about the situation in Red River" (1983c: 324, note 3) and most notably of the "alleged demands of the Métis" (2000: 199, note 2). Regardless of the credibility of Bown's letter, it would have made Macdonald aware that the Métis were demanding recognition of their "Indian" title. When Ritchot brought up the issue of derivative Indian title during negotiations, it would not have seemed like a "hastily improvised" claim to Macdonald.
17. For an account of the (mis)fortunes of the Métis Petition of 1847

- concerning, *inter alia*, their hunting rights, see Bumsted, 2000: 91-114.
18. The individuals around the *Nor'Wester* and the so-called Canadian party were closely connected to the *Toronto Globe*. This latter paper often used the issue of the HBC's treatment of Aboriginal peoples and Aboriginal title as a means to undermine the legitimacy and legality of the HBC's *Charter*.
 19. Even the *Nor'Wester* (24 July 1869: 2) reported that "certain parties," "upon reading the Report of the Dominion delegates to London" concerning the terms of agreement with the HBC, "engaged the services of a surveyor and had the unoccupied land surveyed into claims."
 20. While Ens claims that "the notion that Dease and Hallet were dupes of John Christian Schulz [...] is based on an entirely uncritical acceptance of comments of Fathers Dugast and Ritchot," he fails to mention Begg's corroborating version and Dease's subsequent presence amongst the Canadian faction, which won him the reputation of being a "loyal" Half-Breed. For his part, Bumsted (1996: 79) remarks that Begg "insisted without evidence," but neglects to mention the supporting evidence of Dugast and Ritchot. Ens (1994: 115) also points to Dease's role in the March 1860 "Land Question" meeting as proof that Dease was "far from being inspired by Schultz's Canadian faction in Red River." What he does not mention is that the meeting was held in the Royal Hotel (*Nor'Wester*, 14 March 1860: 2), which was owned by Schultz's half-brother, Henry McKenney. The two later opened a store which "became the forgathering place of a Canadian party" (A.S. Morton, 1973: 854). It is not entirely impossible that Dease was already a "dupe" of the Canadian party in 1860. That being said, "an Aboriginal rights position designed by the traditional leadership of the Métis" (Ens, 1994: 115) and the Canadian faction's "Aboriginal rights paradigm" are not mutually exclusive.
 21. Begg's language is ambiguous here. Who are these "settlers" that the speculators call "Indians?" This could refer to the "settled Indians" in St. Peter's, or to the Métis, who were also often referred to as "settlers."
 22. Begg was so convinced the land question had been raised by the Canadian party, that in a letter of 17 December 1869 to the editor of the *Globe* he wrote that "a mistaken idea is afloat in Canada that the question is one of land. This is a complete error, as you will see at once on referring to the [first] *List of Rights*" (Bumsted, 2003: 177). However, this *List of Rights* explicitly demanded a Homestead Act

and pre-emption rights.

23. The amount in A.S. Morton's list is 300 acres, while in Daniels (1981: 56), Bumsted (1996: 79) and Flanagan (1983c: 324, note 3) it is 200. While Flanagan cites Daniels, he also refers to the original document in the archives. I therefore presume that the correct amount is 200 and not 300 acres.
24. The first *List of Rights* demanded: 1) The right to elect our own Legislature; and 5) A portion of the public lands to be appropriated to the benefit of the schools [...] and parish buildings. As schools in the Settlement were denominational, this latter demand implies Clergy reserves. The second *List* demanded that: 1) duties upon goods imported into the country shall continue as at present; and 2) there shall be no direct taxation.
25. However awkward, this was a clever, albeit sexist, way of avoiding the misapplication of the principle of the excluded middle, which rendered Indian title and British civil and political rights mutually exclusive. As married women, regardless of origin, were legal minors at the time with no political rights and limited civil rights, recognition of the derivative Indian title of Métis women would not have carried the same degree of social stigma and risk of a reduced legal status for women as it did for men.
26. Ritchot specified that they could take the 200 acre lots "where they would in a single parcel *or in several*." This of course would have allowed the Métis to regroup their lots in such as way as to form an enclave.
27. McDougall mentions a Yankton, Dakota newspaper printed "a communication under date 23rd September, detailing the plans, grievances and demands of the half-breeds," but doesn't give any particulars (Canada, 1870: 66).
28. Machray's version demonstrates that the status of a province and of a Métis enclave were not mutually exclusive in Riel's eyes. Indeed the one—provincial status and control over public lands—is what would allow the other.
29. "Exigez que le pays se divise en deux pour que cette coutume des deux populations vivant séparément soit maintenue pour la sauvegarde de nos droits les plus menaces. Cette mesure, je n'en doute pas, va faire bien des grimaces, mais pour que la grimace soit plus complète, ayez la bonté d'exiger que cette division du pays soit faite par l'autorité de la Législature seulement" (Riel, 1985: 86).
30. This is further demonstrated by an anonymous interlocutor, who "was a half-breed, and gloried in the name an race," informed Major J. Wallace that he "would never give up the rights he had in the lands"

(Canada, 1870: 61).

31. In this regard, Flanagan overemphasizes the statutory recognition of Métis title. It is not entirely impossible that Métis title would have eventually been recognized at law or in equity by the courts, as was the case of Indian title.

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