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Article

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A Métis Treaty Through the Lens of International Law

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Until relatively recently, European countries consistently engaged Indigenous peoples in treaties of alliance, cession, and protection, which often resulted in benefits to both parties (Kades 2001, 94; William 1999, 20). Indigenous peoples were considered sufficiently autonomous, and thus with the necessary international standing, to enter into such treaties, dating back to pre-Canadian European treaty history (Vermette 2012, 149; O'Toole 2015, 87–88; Gaudry 2016, 46–47). From the sixteenth through the nineteenth centuries, European nations signed many treaties with Indigenous peoples based on mutual understandings, grounded in both European and Indigenous legal principles (Davies 1985, 24). Indigenous peoples' sovereignty was acknowledged, including the capacity to enter into "bilateral governmental relations, to exercise power and control over their lands and resources, to maintain their internal forms of self government free of outside interference" (Williams 1999, 9).

As European thinking shifted at the end of the nineteenth century, it influenced engagement of treaties with Indigenous peoples (Davies 1985, 43). Instead of entering into agreements with Indigenous peoples on a nation-to-nation basis, European nations attempted, without any legal sourcing, to alter their relationship with Indigenous peoples in such a way as to deny their historical recognition of these peoples as sovereign entities (Davies 1985, 43; Barsh 1994, 284). The progression of European states viewing Indigenous peoples as "protected and connected," yet as fully independent nations to annexed colonies, was facilitated in large part by the rapid growth of European development in North America at that time (Getches, Rosenfelt, and Wilkinson 2006, 54–55). In other words, the original spirit and intent of treaties between European nations and Indigenous peoples were abandoned as settler peoples began to rely less heavily upon Indigenous people for basic survival (Barsh 1994, 284). This has been called the transition from protection to paramountcy (Barsh 1994, 284–86), and its unilateral alteration of binding agreements violated many norms of international law at the time, as we shall review. The legal personhood of Indigenous peoples and their capacity to enter into international treaties were denied.

Despite this early context to the treaties between Indigenous people and Europeans, there is often an assumption that Indigenous peoples lacked the international standing to

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conclude international treaties with other (European) nations.[1] It is further assumed that Métis people never concluded treaties with the Canadian government.[2] This article argues that the agreement reached leading up to the *Manitoba Act, 1870* meets the requirements for a valid treaty in international law, based on international law at the time. To be clear, we do not argue that it is the *Manitoba Act, 1870* that is the treaty, but the agreement that led Canada to pass the *Manitoba Act, 1870.* This article builds off growing literature that recognizes Indigenous-state treaties as international (Williams 1999; Getches, Rosenfelt, and Wilkinson 2006; Barsh 1994; Martínez 1998). There is also the fact that there is more recent recognition that Indigenous-Crown treaties may be international in character and concern to support the arguments put forth in this article.[3] Recognizing the international character of the agreement is critical to re-establishing the nation-to-nation relationship between Canada and Métis peoples because it recognizes the nationhood of the Métis people, allowing them to enter into treaties, and limits the power of Canadian governments to change the terms of a treaty unilaterally.

In 1870, the Métis peoples' provisional government was the dominant force in the Red River settlement, and had outright political (and legal) control from at least 1869 to 1870 (Vermette 2012, 236; Gaudry 2016, 48, 65). In 1870, Métis people sent representatives, including Father Ritchot, to engage the federal government in negotiations, which ultimately led to an agreement and Canada passing the *Manitoba Act, 1870.* A key aspect of the negotiations was the Métis people's desire to have their lands protected from the influx of settlers (Berger 2015, 2). The federal government wished to extinguish Métis title to open the land up for settlement (Berger 2015, 3). In the end, the terms of the agreement included Canada's promise to protect Métis peoples' continued prosperity in Manitoba by protecting a Métis land base. Section 31 of the *Manitoba Act, 1870* guaranteed 1.4 million acres "for the benefit of the families of the half-breed residents" (*Manitoba Act* 1870, s. 31) with further assurances made regarding the timely distribution of this land. However, the Canadian government failed to distribute the land in a timely fashion. After years of intentional inaction and negligence, including in the "scrip" distribution, 993 children still had not received land (Berger 2015, 12–13). The failure to fulfill this aspect of the agreement undermined the security of the Métis in the new province.

Throughout the negotiations, Father Ritchot referred to the resulting agreement as a treaty (O'Toole 2015, 79). Unfortunately, in *Manitoba Métis Federation*, the courts erroneously held that the *Manitoba Act, 1870* was not a treaty, even though this was not

1 In Simon v. The Queen, [1985] 2 SCR 387, the court held "The principles of international treaty law relating to treaty termination were not determinative because an Indian treaty is unique and sui generis" without citing any source to substantiate this conclusion.

2 For example, see Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14.

3 See UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295; General Assembly of the Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2888 (XLVI-O/16), adopted 15 June 2016.

argued by Manitoba Métis Federation. The Supreme Court of Canada (SCC) held that Canada failed to deliver their promises without delay, as well as failing to protect against misallotment and harmful speculation (Bell and Seaman 2015, 61), but did not recognize section 31 or the *Manitoba Act, 1870* in totality as a treaty. Based on the Court's definition of a treaty in *Sioui*, Vermette argues that the agreement meets the domestic legal requirements for a treaty, criticizing the obiter comments in *MMF v Canada* stating otherwise.[4] Vermette argues that the courts misinterpreted the negotiations (2012, 361). Ritchot had expressed his dissatisfaction with the presentation of the *Manitoba Act, 1870* in Parliament, and sought assurances from the Canadian government (Vermette 2012, 123); once these were secured, Ritchot dropped his opposition to certain terms.[5] The Court viewed this as a loss for Ritchot; however, Vermette argues it was a win, as it demonstrates that the Métis did not simply accept Canada's propositions.[6]

Four factors influenced the Court's decision that the agreement resulting from the negotiations constituted a treaty: the beliefs that the *Manitoba Act, 1870* functioned largely as a political expedient; that the Act was a unilateral action of Parliament; that the Act did not seek to provide a land base or enclave of land for the Métis people; and that it cannot be equally and concurrently valid as both a treaty and a constitutional document.7 It is important to remember that just because the *Manitoba Act, 1870* was constitutionally enshrined, that "does nothing to discount the nature of the treaty" (Vermette 2012, 147). In fact, this article argues that this constitutional enshrinement (or adoption of the treaty into domestic law) could be viewed as supportive of the agreement being a treaty, which is discussed further below. Here, however, we are not arguing that the *Manitoba Act, 1870* is the treaty; rather, we are saying that, according to international treaty law that existed at the time of the agreement, the agreement meets the standards for an international treaty, despite what Canadian courts may have stated.

This article analyzes both the Métis peoples' capacity to enter into a treaty, as well as the agreement reached, against the requirements in international law for concluding a treaty, based on international law at the time of the agreement. At times, the analysis refers to modern international law concepts where these modern concepts reflect international law at the time of the agreement between the Métis and Canadian government. Based on this analysis of international law at the time the Métis people entered into negotiations with the Canadian government and concluded an agreement (the treaty under consideration here), which eventually led to the passing of the *Manitoba Act, 1870*, it is clear that the requirements for a treaty were met. Any refusal to call the agreement a treaty cannot be

4 *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14.

5 Ibid., 361.

6 Ibid.

7 For a full deconstruction of the errors, misunderstandings, and historical inconsistencies in Flanagan's arguments, and by extension the facts relied on in the MMF decision, see O'Toole (2015).

justified by international law as it stood at the time of the agreement. If the agreement met the criteria as an international treaty, then interpretation and ramifications for failing to fulfill the obligations would be governed by international law, as opposed to the current approach, which either denies that there was a treaty or puts the interpretation within the scope of Canadian government powers. It may be that international forums may be more appropriate venues for resolving disputes, although a fuller consideration of such an outcome would need to be taken up by legal scholars elsewhere.

Métis Peoples' Standing to Treat in International Law

This section specifically analyzes the agreement concluded as a result of the negotiations between the Métis provisional government and the government of Canada against international law requirements for concluding a treaty. The first requirement for concluding a treaty is that the parties have international capacity to do so. After looking at the capacity of the parties to enter into a treaty, the next section considers the negotiations and the resultant agreement specifically.

Under international law, the capacity to enter into a treaty revolves around the definition of statehood, which has long been part of customary international law and was articulated in the Montevideo Convention of 1933. The criteria for statehood are population, territory, government, and capacity to enter into international relations.[8] These criteria are now clearly established in customary international law, which was emerging at the time of the Métis negotiations and resultant agreement with the Canadian government (Corten and Klein 2011, 113). These requirements flow from the application of the declarative theory of statehood, which focuses on meeting objective criteria, which in turn is the predominant approach in customary international law (Grant 1998, 403). However, principles of recognition can also play a part in determining capacity to enter into treaties. Indeed, the recognition of the Métis people by the Canadian government at the time of the negotiations plays a key part in demonstrating these elements.[9]

Notwithstanding formal requirements for statehood, Chief Justice Marshall recognized the Cherokee Nation as a state in an 1831:

> The Cherokees are a state. They have been uniformly treated as a state since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States

8 Montevideo Convention on the Rights and Duties of States, "Article 1," Seventh International Conference of American States (Montevideo, December 26, 1933); Hersch Lauterpacht, Recognition in International Law (Cambridge University Press, 2012), 419.

9 For additional information, see John Giokas, "Domestic Recognition in the United States and Canada," in Paul Chartrand, ed. Who Are Canada's Aboriginal Peoples? (Saskatoon: Purich Publishing Ltd., 2002), 130–33.

> by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state; and the courts are bound by those acts.[10]

To show that the Métis met these sorts of requirements, it is necessary to delve further into what historically constituted sufficient population, territory, government, and the capacity to enter into international relations. Each is examined in turn.

Permanent population

The first requirement is a permanent population.[11] International law does not mandate any minimum number of occupants or inhabitants as a requirement of statehood (Grant 1998, 412). The population of the Red River settlement in 1870 is estimated at about 12,000 (Dahl 2013, 97). As of 2011, modern-day Winnipeg is home to 46,325 Métis, the largest of any Métis population in any metropolitan area (Statistics Canada 2017). French settlers had begun intermarrying with Saultaux and Ojibway as early as the late 1600s, providing the roots for what would become a distinct Métis culture. So, while the Red River Settlement was eventually established in 1812 (Sprague and Frye 1983), "the research does support that claim that a separate Métis identity was well established before the events of 1812–1814" (O'Toole 2013, 147).

It is the permanency aspect of the population that is critical (Grant 1998, 417). This aspect is fairly straightforward in terms of the presence of that population in the Red River at the time of the negotiations (Sprague and Maillot 1985, 1). The settlement was secured by a system of river lots. The intended, continued permanence of the Métis presence at the settlement was a key factor in the Métis peoples' decision to contest the sale of Rupert's Land. Métis people viewed themselves, and were viewed by others, as a people, distinct from First Nations and settlers.[12] A primary goal of the negotiations was to guarantee an enclave for the Métis population, a result of the influx of new settlers (Vermette 2012, 86).

Finally, the permanence of the Métis population at the settlement can be seen in its distinct culture, including the music, language, laws, and practices of the Métis people (Vermette 2012, 30). These distinctive elements arose out of a shared geography. This development has been called the "flowering of a Métis national consciousness at Red River after 1815" (O'Toole 2013, 165). This locus of culture stood in contrast to what had been seen elsewhere, such as in the development of the Great Lakes Métis (O'Toole 2013, 165). The identity of the Métis at the Red River settlement was necessarily based out of that location, reinforcing their geographic permanency.

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10 The Cherokee Nations vs. The State of Georgia 30 US (5 Peters) 1.

11 Montevideo Convention, "Article 1."

12 R v Powley [2003] 2 SCR 207.

Territory

The next requirement to enter into treaty is having a defined territory.[13] The Métis people occupied a specific area of land in southern Manitoba at the time of the agreement.[14] The district of Assiniboia was an area that covered a fifty-mile radius around Upper Fort Garry. As mentioned above, Métis people had developed a system of land-holding (the river lot system) over a defined territory in the Red River area. Much of the land claimed by the Métis people falls within the geographical area of the postage stamp province. In 1869, the Red River Métis took control of the Red River region, resisting the transfer of title to the Hudson's Bay Company and therefore establishing Métis peoples' presence on the territory, and claim to the land. Moreover, the recognition of an established Métis territory is established plainly by the Canadian government's pursuit of the extinction of their title (Chartrand 1991, 78–79). Not only is their territory recognized by these sources of international law, but the area the Métis people refer to as their homeland was recognized at the time of the agreements by the Canadian government itself.

Some may dispute Métis peoples' claim to the defined territory by relying on the doctrine of discovery, whereby the Crown acquired underlying title, and a right against all other discovering European nations to perfect this title by removing the Indian interest.[15] Discovery did not transfer the full title "without actual possession … nor furnish a just cause for acquisition of territory by conquest." In *Worcester v. Georgia*, Chief Justice Marshall provides some clarification for the original application of the doctrine:

> Discovery gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it ... It was an exclusive principle which shut out the right of competition among those [Europeans Princes] who had agreed to it ... It regulated the discoverers; but could not affect the rights of those alreadyin possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.[16]

Even if one attempts to rely on this doctrine to deny that Métis peoples fulfill the territorial requirement (and it should be noted that the doctrine has been repudiated internationally—in the UN *Declaration,* for example), the doctrine does not take away an Indigenous people's capacity to enter into legal agreements. In fact, the doctrine requires the European nation to perfect its title through actions such as treaties.[17] Therefore, the doctrine of discovery cannot be used to deny Métis peoples' right to their lands, but rather would only operate to provide Britain, or Canada, a right against other Europeans in acquiring full title to land through treaties (Gaudry 2016, 46–74).

13 Montevideo Convention, "Article 1".

14 Manitoba Metis Federation Inc. v. Canada (Attorney General) 2013 SCC 14, at para 9; Chartrand 1991, 52.

15 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

16 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) at 516.

17 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

Government

The next requirement for standing to conclude a treaty is that a government is in effective control of its territory (Vidmar 2013, 98). Again, international law does not require a particular type of government structure, but only requires that a government exist (Grant 1998, 412). The Métis peoples' government in the Red River region is well-documented. The Métis people had a parish system governing the Red River settlement, with each parish selecting from a representative for the provisional government. The Métis government was based on the bison hunt formation. This was used to form the Comité national Métis in the summer of 1869. This Comité then declared itself the provisional government in December 1869 without the support of the twelve representatives of the Protestant parishes; only including the twelve Catholic parishes. After the Convention of Forty in February 1870, the Protestant parishes joined the provisional government.

A parish system governed the city planning of the Red River settlement. The settlement was divided into river lots, several of which together constituted a parish. Each parish was complete with a church, and each governmental delegate was selected from a corresponding parish. According to Vermette, "these parishes served as the conduits for distributing information around the settlement … It was, therefore, a natural fit to have each of these parishes select a representative to form a cohesive Métis voice. Each representative was selected to represent their parish and in turn form a broad representation of the community during the convention" (Vermette 2012, 63).

The Métis provisional government drafted the first List of Rights, which was discussed and adopted by the delegates from all the parishes (twenty-four representatives) (Vermette 2012, 63; O'Toole 2015, 81). This government was comprised of three branches: an elected legislature, an executive reporting to the legislature, and a fledgling judicial branch (Vermette 2012, 63). It was the provisional government that sent the three delegates to negotiate on behalf of the community with the government of Canada (Vermette 2012, 63). Based on this description, it is clear that there was a government and it had control over their territory, as established by the structural organization of their community, as well as the government's representation of the members of that community in Ottawa.

Capacity to enter legal relations

The next requirement of statehood is the capacity to enter into legal relations.[18] The current position of the Supreme Court of Canada that Indigenous-Crown treaties are *sui generis* (not international law treaties) does not accurately reflect international law on the matter.[19] Special Rapporteur Miguel Alfonso Martinez found that treaties initially entered into with Indigenous peoples, based on their "intrinsic natures, forms, and contents, make it clear that the Indigenous and non-Indigenous parties mutually bestowed on each other

18 Montevideo Convention.

19 Simon v. The Queen [1985] 2 S.C.R. 387.

(in either an explicit or implicit manner) the condition of sovereign entities in accordance with the non-Indigenous International Law of the times" (Martínez 1998, 23). Martinez concludes that as European strength in the Americas grew, it was no longer beneficial to Europeans to honour the status of Indigenous peoples as they once had (Martínez 1998, 36). However, that by no means signifies that at the time of the agreement between the Métis and the Canadian government, the Métis people were not recognized as capable of international legal standing. He writes, "In the case of Indigenous peoples having concluded treaties or other legal instruments with the European settlers and/or their continuators in the colonization process, the Special Rapporteur has not found any sound legal argument to sustain the position that they have lost their international juridical status as nations" (Martínez 1998, 34).

By entering into negotiations with the Métis, the Canadian government demonstrated that it viewed them as having standing to treat, similar to other Indigenous nations at the time. As Vermette points out, this can be seen as "a recognition of the situation at hand which was that a 'Halfbreed' collective had established themselves as a recognizable political entity capable of negotiating for or enforcing their interests" (Vermette 2012, 31). It is clear that Canada's negotiators were, in the words of Martinez, "clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period under consideration" (Martinez 1998, 14).

The *Manitoba Act, 1870* recognized the Métis people as a "distinct cultural and political community," with a "clearly defined sense of separate identity" (Vermette 2012, 20). Métis people were understood as a "separate and distinct tribe of Indians for a considerable time" (Pulla 2013, 400), different from the Saulteaux and Swampy Cree who also occupied much of the Red River Valley at the time (Chartrand 1991, 31). Métis people also concluded other treaties, including the 1845 peace treaty with the Sioux, and adhered to Treaty No. 3 (O'Toole 2013, 177). Though the Métis people were subsequently denied their status as sovereign nations by their treaty partners, "the obligations under their treaties didn't disappear" (Wiessner 1994, 592). Despite this recognition, the ability of the Métis to fulfill this requirement for the capacity to enter into treaties is still considered contentious by many.

However, Indigenous peoples' capacity to enter into international treaties has been historically recognized in international law and international relations. Francisco de Vitoria (1483–1586) asserted that Indigenous peoples in the Americas were rational human beings and the true owners of their lands (Barsh 1994, 81). Indigenous peoples, Vitoria asserted, were in a position of authority over the land equal to or greater than that of the Spanish authorities (Barsh 1994, 81). Vitoria recognized Indigenous peoples' autonomy and the illegitimate tactics of trying to take away their title to the lands they occupied in the Americas (Barsh 1994, 81). The source of Indigenous peoples' rights was natural law, arising out of a people's connection to the land (Davies 1985, 20–21). Vitoria's conclusions on the standing of Indigenous peoples was codified into Spanish law shortly after their publication, and subsequently adopted by the Royal Council of Spain (Barsh 1994, 91).

The Holy See also adopted Vitoria's approach by accepting that Indigenous nations were recognized as legitimate, and that their lands could not be taken without compensation (Barsh 1994, 79).

Vitoria's approach of recognizing the legitimacy of Indigenous nations continued despite some growing resistance from Hugo Grotius (1583–1645). Grotius was an original founder of the doctrine of discovery (Davies 1985, 23). As discussed above, this doctrine was used to limit Indigenous peoples' rights, and to abuse, enslave, and massacre them (Davies 1985, 20), but this was a gross departure from international norms of the time. Certainly, Vitoria's understanding of the Law of Nations recognized at the time that "certain rights inhere in men as men and that state equality was applicable to all states" (Davies 1985, 20). The doctrine continued to recognize the rights of Indigenous peoples to their lands, and that states needed to acquire full title through treaty or "otherwise" (Kades 2001, 75).

To determine whether the Métis people had standing to treat according to international law at the time, it is useful to refer to the Vienna Conventions on the Law of Treaties (VCLT) (Corten and Klein 2011, 109). To be clear, the VCLT is referenced for the sake of ease, as it codified the international law of treaties that existed when the Métis people entered into the agreement with the government. International law did recognize the standing of the Métis to enter into treaties with other nations. The VCLT states that "Every State possesses capacity to conclude treaties." According to Steinberger, "The concept of State in international law has always been an open concept whose contents changes according to the necessities of the international society and the specific purpose of international law" (Steinberger 1967, 415). This purpose is "governed by open concepts capable to meet socio-political developments of the international community (Steinberger 1967, 418).

In North America, both Canada and the United States widely engaged in treaty-making with Indigenous peoples. In the period leading up to the *Manitoba Act, 1870*, the United States engaged in and concluded over 350 treaties with Indigenous peoples (Hollis 2012, 133). The government recognized these treaties as nation-to-nation agreements, and they were conducted according to special interpretive measures in order to accommodate adequately the Indigenous peoples with whom the government treated (Hollis 2012, 133). In Canada, the practice of treaty-making was also widespread. Britain engaged in treaty-making with Indigenous peoples before and after the *Manitoba Act, 1870*, from the Peace and Friendship treaties in Atlantic Canada in the 1700s, to the Upper Canada Land Surrenders in 1750–1850s, to the Robinson treaties in 1850, to the Number Treaties 1–11 across central Canada from 1871–1921.

In addition to international law's historical recognition of Indigenous peoples' capacity to enter into treaties, international law has again recently recognized the international character of Indigenous-government treaties in article 37 of the UN *Declaration on the Rights of Indigenous Peoples* (Hollis 2012, 133). As well, the American Declaration on the Rights of Indigenous Peoples recognizes Indigenous treaties, and the need to uphold the original spirit and intent. In that way, international law is swinging back toward recognizing the capacity of Indigenous peoples to enter into treaties, historically and contemporarily. This section

demonstrated the standing of the Métis people to enter into treaties in international law, as characterized by a permanent population, territory, government, and capacity to enter into international relations. In the next section, it will be determined whether the specific agreements reached between the Métis and the Canadian government constituted a treaty.

Requirements for a Treaty in International Law

If the determination of standing looked to the overarching international norms that determined the Métis peoples' ability to treat, the examination of whether we have a valid treaty would look more specifically at the unique factors at play during the negotiations. This section will demonstrate that the agreement reached between the Métis and the Canadian government leading up to the *Manitoba Act, 1870* constituted a valid treaty.

There are four stages to the treaty-making process as recognized in international law: a) treaty negotiations; b) conclusion of the treaty text; c) expressions of consent to be bound; and d) entry into force. While these stages are common to many treaties in international law, the practice of treaty-making remains a "remarkably flexible process" that "[leaves] room for indefinite variations" (Hollis 2012, 178). Aside from the prohibition of agreements which violate *jus cogens* (universally accept international norms), once people have standing to treat, they may agree on just about anything (Hollis 2012, 178). This section will again rely on the Vienna Convention on the Law of Treaties (VCLT) for its description of international treaty law, because it represents broader customary international norms that existed when the agreement under discussion here was reached between the Métis people and the federal government (Corten and Klein 2011, Preface). At the time of the Métis-Canada negotiations, one can find several examples of treaties negotiated according to both Indigenous and European practices (Getches, Rosenfelt, and Wilkinson 2006, 74-139). Despite diplomatic processes varying greatly among Indigenous peoples, and more than one procedural approach being recognized, it is clear that international law accepted treaties concluded according to Indigenous laws (Getches, Rosenfelt, and Wilkinson 2006, 74-139).

It is helpful in this case to walk through the negotiations that led to the agreement according to the four-part process described above. It is a goal of this discussion to support the claim that the negotiations resulted in an agreement that constitutes a treaty under international law, though it is important to distinguish that while some stages of the treaty process appear to have been accomplished after the negotiations, the resultant legislation was merely a legal instrument that documented the essential agreement, and should not be viewed as the agreement itself (Gaudry 2016; O'Toole 2015). In other words, the part of the treaty that became constitutionally enshrined as the *Manitoba Act, 1870* is considered here only as part of the process (that part which transformed the treaty into Canadian law).

A) Treaty negotiations

The first stage to conclude a treaty is the treaty negotiations. Generally, international law neither dictates nor precludes specific forms of negotiation. The negotiations should simply be held with the intention of constituting a legally binding agreement governed

by international law (Hollis 2012, 179). Negotiations begin after representatives of each party "receive, exchange, and examine their respective full powers" (Hollis 2012, 181). Full powers are described as "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiation, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty" (Hollis 2012, 185). Again, this may take place in formal or informal settings, and at various levels.

As argued above, the Métis people had full authority to enter into treaties in international law, even though Canadian courts and governments retroactively denied this authority. At the time of the negotiations, the authority of both sides was not disputed (O'Toole 2015, 91). Prime Ministers John A. Macdonald and George-Étienne Cartier represented the Crown (Gaudry 2016, 61; O'Toole 2015, 83; Vermette 2012, 118). Father Joseph-Noël Ritchot, Judge John Black, and Alfred Scott were appointed as representatives of the Settlement and had particular instructions from the Métis provisional government (Vermette 2012, 114–18). As discussed above, the Métis people had a parish system governing the Red River settlement, with each parish selecting a representative for the provisional government. The provisional government sent three delegates to negotiate on behalf of the community with the government of Canada (Vermette 2012, 63). This process reflects many of the very processes undertaken by nations in international law to appoint representatives to treaty negotiations (Corten and Klein 2011, 135).

Canada recently argued that Ritchot had no mandate to negotiate a land claim for the Métis, that his opinions were in the minority in relation to the other two delegates, and that Ritchot went beyond the limits of his mandate; O'Toole's research demonstrates that these are not accurate descriptions of Ritchot's position as the principle negotiator for the Métis people (O'Toole 2015, 98). For purposes of analyzing whether the negotiations led to an agreement that can be described as an international treaty, it is important to remember that "the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory," accepting the authority of the Métis to enter into negotiations at the time (O'Toole 2015, 100). Further, Macdonald acknowledged in the House of Commons that the government accepted Ritchot as the representatives of the Métis people (O'Toole 2015, 102). Macdonald stated that the Métis representatives "have the credentials of representatives from the meeting of the people ... they [the Métis] had an election, and … certain bills of rights were agreed to, and certain delegates were appointed to lay them at the foot of the Throne" (O'Toole 2015, 117). The delegates were "received under the authority they presented" and negotiations began and were undergone on the basis of "full knowledge that the commission they carried was from the Provisional Government" (O'Toole 2015, 117). The situation surrounding the negotiations confirms the authority of Ritchot and the delegates:

> This point is subtle but important because if the delegates did not come from the acting political authority in Red River at the time of the negotiations then they could hardly be accepted as proper representatives of the people. The federal government

> would have been negotiating with people who were not duly constituted to negotiate. The entirety of the discussions and the validity of the *Manitoba Act* itself would be under serious scrutiny. The very fact that the delegates carried a commission from the current acting government at Red River validated their mission and their authority to negotiate (and that was the Provisional Government). (O'Toole 2015, 117)

In other words, the authority of the three delegates to negotiate was affirmed by both parties, satisfying the international requirements.

The next consideration for treaty negotiations is the receipt and exchange of full powers, which means recognition of the authority to sign a treaty or convention on behalf of a sovereign state (Corten and Klein 2011, 47). On February 7, 1870, the Red River delegates were invited "to meet and confer with them [the Canadian government] at Ottawa ... to explain the wants and wishes of the Red River people, as well as to discuss and arrange for the representation of the country in Parliament" (Vermette 2012, 105). The Métis representatives stated that "they had never intended to rise against the Crown, that their sole intention was to come to an understanding with the Canadian authorities" (Corten and Klein 2011, 111). An official letter from the Government of Canada was sent, inviting the Métis representatives on April 26, 1870 (Corten and Klein 2011, 48). As well as establishing the mutual recognition of both parties' authority to enter into negotiations, the invitation to negotiate terms in Ottawa also fits into common norms of international treaty-making at the negotiation stage (Corten and Klein 2011, 48). International treaty negotiations often take place over successive rounds on the occasion of a meeting or summit (Hollis 2012, 181). The requirement for the written record of these negotiations ranges from informal "non-papers" to working drafts and lists to formalized submissions (Hollis 2012, 183).

B) Conclusion of the treaty text

The conclusion stage of the treaty in international law typically concerns the text of the agreement and its signature (Hollis 2012, 184). This is broken down into two stages, the first being either adoption or authentication of the final text, and a "final act," a written document of the negotiation process aimed at governing the treaty's subsequent interpretation (Hollis 2012, 184). Here we are looking at the specific terms agreed to between the parties. Much of the List of Rights presented to the Canadian government by Father Ritchot and the Métis representatives was included in the final draft of the *Manitoba Act, 1870*. The demand for political representation is reflected in sections 3 and 4 of the Act; language rights appear in section 23 of the Act; and financial concerns are largely reflected in sections 24, 27, and 29 of the Act (Vermette 2012, 121). The issue of amnesty was present in the List of Rights, but not in the Act; regardless, the Canadian government agreed to the amnesty, as we shall see, and it should be considered a term of the treaty.

The adoption/authentication stage usually occurs through a written text; however, there are exceptions (Hollis 2012, 23). The phrase in the VCLT that treaties are usually completed "in written form or otherwise recorded" may suggest that oral agreements do not constitute treaties (Hollis 2012, 19). However, the VCLT excluded them "for practical

reasons and without prejudice to their legal force" (Hollis 2012, 23). This was clarified by the International Law Commission as being "in the interests of clarity and simplicity," and was "not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may not have relevance in regard to oral agreements" (Hollis 2012, 24). Article 3 of the VCLT clarifies its position on oral agreements as such: "The fact that the present Convention does not apply … to agreements not in written form, shall not affect: … (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention." Indeed, Special Rapporteur James Brierly suggested that "typewriting and printing and, indeed, any other permanent method of recording" may constitute an agreement (Hollis 2012, 23). Lauterpacht has taken this to mean that "what matters is the existence of a record of an agreement" (Hollis 2012, 24). In its determination of the Legal Status of Eastern Greenland, the Permanent Court of International Justice upheld that oral declarations will be binding if concluded between authorized agents (Boczek 2005, 347). In other words, a lack of written text will not determine whether an agreement is a treaty under international law.

Returning to the adoption of a treaty text, then, it is possible that the assurances of amnesty on behalf of the Canadian government constituted part of an international treaty. Though Ritchot initially met resistance from the Canadian government on the issue of amnesty, he eventually received the oral concession from Macdonald and Cartier after stressing that it was essential to the negotiation's continuation that this one request be granted (O'Toole 2015, 124). Sprague elaborates on the expression, during the negotiations, of the Métis' desire for amnesty, wherein Ritchot demanded "a general amnesty for all occurrences before the transfer. Ritchot stressed that such a pardon was the indispensable starting point, it was the 'sine qua non of any settlement'" (Vermette 2012, 124). During the negotiations, it was agreed that "none of the members of the Provisional Government, or any of those acting under them, be in any way held liable or responsible with regard to the movement or any of the actions which led to the present negotiations" (Vermette 2012, 124). Macdonald assured the negotiators that he would seek a "guarantee of safety from persecution from the Queen," and that it would be easy to settle the matter, after which there was no more debate (Vermette 2012, 124). A series of letters followed indicating that the assurance for amnesty was concluded, including that "civil amnesty would be full and proceed from Canada" and that "it was substantially admitted that the English Government would alone be responsible for criminal proceedings—and everything now confirms the opinion expressed in former communications, that long before the expedition reaches Red River, the Queen's proclamation of complete amnesty will be issued" (Vermette 2012, 125). Though Ritchot originally insisted upon written record of these assurances, which he did not receive, they were repeated orally, as has been seen, on many an occasion (Vermette 2012, 125–27). In response to the amnesty issue, "Her Majesty's government desired only one thing, which was to re-establish peace and to pass the sponge over all the facts and illegal acts which had taken place in the North West and its territories" (Vermette 2012, 126). Ritchot continued to express concern for the amnesty:

> His Excellency told us that the Proclamation of December 8 is enough to assure us that a general amnesty is going to be proclaimed immediately, that it is not necessary to give another guarantee in writing. I remarked to him again that that proclamation was dated December 6, 1869, and it could happen that it would not be sufficient and not include events that had taken place since. His Excellency assured me that it would suffice, that, moreover, Her Majesty was going to proclaim a general amnesty immediately, that we could set out for Manitoba, that the amnesty would arrive before us. (Vermette 2012, 126)

The amnesty was never fully granted. Several arrests of Métis representatives were made afterward, and Riel himself was only granted amnesty upon the fulfillment of additional conditions not included in the treaty (Vermette 2012, 288–89). The delay in the amnesty proved it completely useless, as many within the Métis ranks were targeted in incidents of violence (Vermette 2012, 138). The oral representations made by the Canadian government can be seen as constituting internationally binding agreements based on the text of the written letters promising the arrangement of amnesty, and on the written record, which shows that without those assurances, the whole of the negotiations themselves might easily not have come to pass.

An additional term of the treaty is the "reservation of 1.4 million acres to the children of the 'half-breeds.'" Essentially this was comprised of two parts: the land itself, and mechanisms to maintain the land in the hands of the Métis. Negotiations were conducted from late April into May, and while the figure of 1.4 million acres was not reached during this time, it was apparent that both sides agreed on the method by and purpose for which the land was to be distributed. The parcels of land were to be distributed to the heads of families according to the number of their children, in order to secure the protection of Métis lands from the oncoming influx of immigrants and prospectors (Vermette 2012, 142). It was also understood that the grants of land would be collective, not given in fee simple but distributed for the collective community in order to extinguish its title (Vermette 2012, 133; Chartrand 1991, 139; O'Toole 2015, 74, 86).

While the language is clear enough in the Act, the implementation of this scheme was based once again on written assurances. Once again, as we will see, their delivery was incomplete and delayed (Vermette 2012, 313; Chartrand 1991, 138). Among the assurances provided to Ritchot were that despite changes in the wording of the Act describing the process by which the lands would be distributed, their agreements would amount to the same thing they had agreed on in their discussions—that is, Métis choice in the land rather than a random distribution (Vermette 2012, 140; Chartrand 1991, 140).

The authentication of the 1870 treaty can be seen as accomplished by the "final act," referring in this case to Ritchot's recordings. Under international law, the final act is a document that contains a summary of the negotiations, generally including dates, places, and participants, and a description of the negotiations (Hollis 2012, 195). The final act "is often signed separately from the treaty text, but doing so has no effect on whether or not a State signs or joins the treaty itself" (Hollis 2012, 195).

Ritchot's journal, in which he recorded the agreements, arguably accomplishes the aims of the final act. If the aim of the final act is to function as an additional document that reflects the authenticity of the agreement, both Ritchot's journal as well as the letters received from him concerning the assurances (regarding land settlement and amnesty) accomplish this aim. They at the very least establish the requisite for informal treaty-making, and must be analyzed on a case-by-case basis as to whether they suffice for the final act, specifically determining whether they include precise legal commitments deriving from the treaty (Hollis 2012, 195). The final act can also be used for interpretation of the treaty (Hollis 2012, 195); however, treaty interpretation is beyond the scope of this article.

C) Expression of consent to be bound

The next factor for a treaty under international law is an expression of consent by the parties to be bound by the treaty (Hollis 2012, 195). There are many mechanisms by which a party may express its consent to be bound, including a signature, an exchange of instruments constituting a treaty, ratification, acceptance or approval, formal confirmation, or accession (Hollis 2012, 196). As we will see in the case of the Métis, more than one of these mechanisms was used to express the consent of both parties to be bound. It should be noted that even in the "absence of any clause, the assumption is that signature also expresses the consent to be bound by the treaty and consequently triggers its entry into force" (Hollis 2012, 197).

It is worth reiterating that we are considering the agreement reached between the Métis provisional government and the Canadian government, much of which is reflected in the *Manitoba Act, 1870.* The use here of the *Manitoba Act, 1870* serves only to establish that the parties intended to be bound by the agreement and by Canada's actions to adopt the treaty into domestic law. The argument has been advanced domestically that the Métis never entered into a treaty with the Canadian government on the basis that the passing of the *Manitoba Act, 1870* was a political expedient that rendered it a unilateral act of Parliament.[20] Under international law, however, expediency does not deny the existence of a treaty, but instead is a general goal of treaty-making. Indeed, at the time of the negotiations and the agreement, treaty-making was a highly expedient means of resolving conflict—"the necessity for peace and the means to keep it" (Germain 2001). Expediency can generally be seen to be advantageous to treating parties, and thus simplified procedures exist within the international treaty process to eliminate unnecessarily "cumbersome and lengthy" processes (Hollis 2012, 196). One of these processes is that of ratification. Signature, in place of such lengthy processes, may be sufficient to recognize the consent to be bound if the parties "agreed on that effect for signature (Article 12(1)(b)), or that intention … was expressed during the negotiation (Article 12(1)(c))" (Hollis 2012, 196).

We can look to the exchange of instruments to fulfill the requirements of signature and ratification. On June 23, 1870, Canada passed an Order stating that

20 *Manitoba Métis Federation v Canada (Attorney General) and Manitoba (Attorney General)* (2007), 2007 MBQB 293, 223 Man R (2d) 42, paragraph 464.

> from and after the fifteenth day of July, 18th, the ... North-Western Territory shall be admitted into and become part of the Dominion of Canada ... and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory. (Vermette 2012, 141)

Following this, the Métis ratified the agreement. A letter from Thomas Bunn on behalf of the Métis provisional government confirmed this:

> In view, however, of the liberal policy adopted in the interest of the people of the North-West by the Canadian Ministry, and recommended by the Imperial Government, a policy necessarily based on the principles for which they have fought, the Provisional Government and the Legislative Assembly, in the name of the people of the North-West, do accept the "Manitoba Act," and consent to enter into Confederation on the terms entered into with our delegates.
>
> I have further the honour to inform you that the Provisional Government and the Legislative Assembly have consented to enter into Confederation in the belief, and on the understanding, that in the above-mentioned terms a general amnesty is contemplated to all the parties who had to meet the difficulties with which the Provisional Government had to deal, without which amnesty the people of the North-West could not consider themselves treated as a peaceable and a loyal people ought to be, but would feel themselves unjustly forced into Confederation. (Vermette 2012, 141)

This letter expresses the Métis peoples' intention to be bound by the negotiations and agreement they reached with the federal government. While the Manitoba courts found that the legislative enshrinement of the agreement in the Constitution undermines the agreement's ability to be a treaty,[21] according to international law this enshrinement is an indicator of consent to be bound at the international level (O'Toole 2015, 196). Further, as discussed below, transforming international treaties into domestic law, via ratification or otherwise, is a means to accomplish a treaty's entry into force in international law (Hollis 2012, 201–2).

D) Entry into force

This communication between the Métis and the Canadian government also accomplishes the entry into force of the treaty. Consenting to be bound by a treaty is not enough for a treaty to enter into force. The parties generally also agree to when the agreement will enter into force (Hollis 2012, 201). This may be accomplished by the "completion of the formalities required for ratification and the exchange of diplomatic notes or notifications informing the other party about such a completion. Usually, bilateral treaties stipulate that they enter into force on the date (or after a certain period of time following this date) of receipt

21 *Manitoba Métis Federation v Canada (Attorney General) and Manitoba (Attorney General)*, paragraph 464.

of the last of any notifications" (Hollis 2012, 201). In Canada, legislation is required to incorporate the treaty into domestic law. This was certainly true as shown by the Order, shown above, passed on June 23, 1870.

"Other Constructive Arrangements"

Previous sections have examined the agreement reached between the Métis and Canada to determine whether it is a valid treaty in international law. This required establishment of the historical standing of the Métis to treat, as well as demonstrating that the terms of the agreement constituted a valid treaty. This final section provides an alternative argument about the status of the agreement. The section discusses whether the agreement would be considered an "other constructive arrangement." This category of international agreements was first discussed in the Study on Treaties, Agreements, and Other Constructive Arrangements between States and Indigenous Populations, conducted by Special Rapporteur Miguel Alfonso Martinez (Martinez 1998). The government of Canada requested this additional category be added to his mandate on "treaties and agreements," in order to account for modern treaties such as comprehensive land claims settlement agreements in Canada (Schulte-Tenckhoff 1997, 289). The Special Rapporteur described "other constructive agreements" as "any legal text or other documents that are evidence of consensual participation by all parties to a legal or quasi-legal relationship" (Martinez 1998, 16). The need for this new category arises from a failure of the Canadian legal system, which declared that Indigenous peoples did not have standing to enter into treaties. The Special Rapporteur was concerned about "the efficacy of treaty negotiations in situations of economic, environmental and political duress resulting from one-sided Government policies," and instead leaned toward "a new, more equitable future relationship between the Indigenous and non-Indigenous sectors of society" (Martinez 1998, 17–18).

The test to meet the qualification of such an arrangement is broader than that of the treaty analysis we have conducted. It is useful to consider this alternative because it considers the agreement to be one that still has an international character and is of international concern.[22] Further, it would be simple to meet the criteria, especially since Canadian courts have already accepted the *Manitoba Act, 1870* as having a "treaty-like character":

> Section 31 sets out solemn promises—promises which are no less fundamental than treaty promises. Section 31, like a treaty, was adopted with "the intention to create obligations ... and a certain measure of solemnity": *Sioui*, at p. 1044; *Sundown*. It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived.[23]

The agreement seems to satisfy the definition put forward by the Special Rapporteur in terms of a "legal text or other document" evidencing "consensual participation" in a "legal or quasi-legal relationship."

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22 UN General Assembly, *United Nations Declaration*, Article 37.

23 *MMF v Canada* (2013), paragraph 92.

If the agreement is a constructive arrangement, it may still be an agreement of international concern. As is noted by Special Rapporteur Martinez, it remains to be seen how the enforcement and implementation of constructive arrangements can be ensured (Martinez 1998, 23). While Special Rapporteur Martinez's study did conclude that constructive arrangements may be dealt with in the municipal setting (Martinez 1998, 23), this may not represent the current state of international law. The UN *Declaration on the Rights of Indigenous Peoples* recognizes that "treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character."[24]

Another notion tied to the designation of "other constructive arrangement" is that of the autonomy regime, that is, the adoption of "measures to recognize a distinct legal status for Indigenous peoples, whether these are to be decreed by law or to be enshrined in the national constitution" (Martinez 1998, 17). This can yield practical changes in the autonomous choices of an Indigenous nation. For instance, adopting such a status in Panama has led to "the recognition, by the State, of the traditional political authorities of the Kuna Indians, especially the Kuna General Congress, and some control over development policies within the Indigenous territory" (Martinez 1998, 17).

While the Supreme Court of Canada has declared the relationship between the Crown and Aboriginal peoples in Canada to be of a *sui generis* nature—a term first used in *Guerin* meaning "in their own class"[25]—this has often resulted in the limitation of Aboriginal rights, and certainly not in the recognition of sovereignty (Coyle 2009). Acknowledging the agreement as a constructive arrangement could lead to a legitimate mechanism with which the Métis could exercise their right to self-government, which has been denied domestically but has been overwhelmingly endorsed in other arenas.[26]

While the most useful application of this designation in Canada has yet to be explored in depth, it could provide an alternative route to the recognition of the Métis people, and a step toward practically recognizing the international character of this relationship if Canada and its domestic legal regime continue to refuse to recognize the international character of the agreement.

Conclusion

We have demonstrated the international character of the agreement concluded between the Métis and the Canadian government that led to the *Manitoba Act, 1870*. The international character of this agreement is apparent, and is consistent with international practices leading up to its conclusion. The recognition of the international status of the agreement does lead to the need for discussions on the significance of the role of international law going forward, which is briefly highlighted below.

24 UN General Assembly, *United Nations Declaration*, 3.

25 *Guerin v. The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC).

26 General Assembly of the Organization of American States, *American Declaration;* UN General Assembly, *United Nations Declaration.*

One consideration here is the role of the Canadian courts in hearing and resolving disputes. An international dispute mechanism may be a necessary step to ensure meaningful implementation of the terms of the agreement. The second consideration is that if Canadian courts continue to hear disputes, they should be guided by international treaty rules of interpretation, and face consequences for failing to fulfill their obligations. Finally, there may be a need to consider the role of Métis law in interpreting the agreement and the subsequent relationship between Métis people and Canada. This includes the meaningful acknowledgement that each party viewed the agreement differently, and results in both perspectives being given equal weight. Recognizing the international character of the agreement is critical to reestablishing the nation-to-nation relationship between Canada and Métis peoples.

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