"A RATHER VEXED QUESTION . . .": THE FEDERAL-PROVINCIAL DEBATE OVER THE CONSTITUTIONAL RESPONSIBILITY FOR MÉTIS SCRIP

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The British North America Act, 1930 *(the* Natural Resources Transfer Agreements*) marked the end of lengthy battle between the provincial governments of Saskatchewan, Alberta, and Manitoba and the federal government of Canada. Prior to 1930, the provincial governments did not have administrative control over their natural resources and were not constitutionally equal to the other Canadian provinces. One of the terms of the constitutionalized agreements provided that after the transfer, the provincial governments would undertake all of the federal governments' continuing obligations to third parties. One of these obligations was the redemption of Métis scrip issued by the federal government to extinguish the Métis interest in the lands. The provinces initially refused to accept this obligation, which led to an extensive debate over the constitutional responsibility for Métis scrip. The author examines this debate in order to shed light on the nature and extent of the constitutional obligations that were owed to the Métis prior to their inclusion in section 35 of the* Constitution Act, 1982.

L'Acte de l'Amérique du Nord britannique, 1930 (*les* Conventions sur le transfert des ressources naturelles) *marqua la fin d'une longue lutte entre les gouvernements provinciaux de la Saskatchewan, de l'Alberta et du Manitoba et le gouvernement fédéral du Canada. Avant 1930, les gouvernements provinciaux n'avaient aucun contrôle administratif sur leurs ressources naturelles et n'étaient pas égaux, sur le plan constitutionnel, aux autres provinces canadiennes. Une des conditions de ces accords de transfert était l'obligation, pour les gouvernements provinciaux, de respecter les engagements du gouvernement fédéral envers les tiers. Une de ces obligations était le rachat des certificats des Métis émis par le gouvernement fédéral dans le but de mettre fin aux intérêts des Métis sur les terres. Les provinces refusèrent d'abord cette obligation qui mena à un vaste débat sur la responsabilité constitutionnelle des certificats des Métis. L'auteur examine ce débat afin de jeter de la lumière sur la nature et la portée des obligations constitutionnelles envers les Métis avant leur inclusion dans l'article 35 de* la Loi constitutionnelle de 1982.

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This matter of half-breed scrip is a rather vexed question and goes back to the beginning of things in Manitoba.[1]

I. INTRODUCTION

During the 1920s, the provincial governments of Manitoba, Saskatchewan, Alberta, and British Columbia negotiated a series of *Natural Resources Transfer Agreements* (*NRTAs*) with the federal government of Canada.[2] The *British North America Act, 1930*,[3] in which these agreements were made part of the Canadian constitution, provided the answer to a lengthy and contentious debate known as the "Natural Resources Question."[4] Before the *NRTAs*, the three prairie provinces did not have administrative control over their public domain lands, and they did not receive revenue directly from their natural resources.[5] Most significantly, these provinces did not share equal constitutional status with the other Canadian provinces, all of which held title to their public lands (including the natural resources) from the date of their entry into Confederation. The purpose of the *NRTAs* was to redress the constitutional imbalance and place each province "in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entrance into Confederation."[6] The terms of the *NRTAs* addressed the practical matters involved in the recognition of the prairie provinces' constitutional equality. Many issues such

1 National Archives of Canada (NAC), RG 15, Vol. 1171, File #5590730, John Allen, Deputy Attorney-General of Manitoba, to lawyers at the Ottawa firm of Chrysler and Chrysler, 16 July 1934. The use of the words "Half-breed," "Indian," and "Indian title" in this article reflects their historical usage only. Historically, Métis scrip was referred to as "Half-breed scrip."

2 All of the provincial agreements are items in the Schedule to the *British North America Act, 1930*, renamed the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26 [*BNA Act, 1930*]. Provincial legislation also incorporates the agreements: the *Manitoba Natural Resources Act*, 20 & 21 Geo. V., c. 29, R.S.M. 1987, c. N30 (Man.); the *Alberta Natural Resources Act*, 20 & 21 Geo. V., c. 21 as am. (Alta.); the *Saskatchewan Natural Resources Act*, 20 & 21 Geo. V., c. 87 (Sask.); and *Railway Belt Re-transfer Agreement Act*, S.B.C. 1930, c. 60 (B.C.).

3 *BNA Act, 1930, ibid.*

4 See Chester Martin, *"The Natural Resources Question": The Historical Basis of Provincial Claims* (Winnipeg: King's Printer, 1920). See also the article by Jim Mochoruk in this issue, "Manitoba and the (Long and Winding) Road to the *Natural Resources Transfer Agreement* of 1930" (2007) 12 Rev. of Constitutional Studies/Rev. d'études constitutionnelles 255.

5 British Columbia had transferred title to the Peace River block and the railway belt in order to facilitate railway construction. No Métis scrip was ever issued in British Columbia.

6 See Appendix I below for the text of paras. 1 and 2 of the *NRTAs*. See *Saskatchewan Natural Resources Act, supra* note 2, Schedule, "Memorandum of Agreement" between the Dominion of Canada and the Province of Saskatchewan, 20 March 1930. The wording is identical in the Manitoba and Alberta *NRTAs*.

as national parks, Indian reserves, and fisheries were explicitly mentioned in particular paragraphs of the *NRTAs*. There were, however, other unspecified outstanding federal obligations implicated by the transfer that were included inferentially in two "catch-all" paragraphs. These paragraphs specified that the provincial governments agreed to undertake federal obligations pertaining to all existing trusts, contracts, and other arrangements with third parties in relation to the public lands and resources that were being transferred.

One of the federal government's outstanding obligations that was not explicitly mentioned in the *NRTAs* was Métis scrip. Scrip was a form of currency issued to Métis people by the federal government that could be used to purchase Crown land. In the years following the transfer, there was much federal-provincial debate over whether the provincial governments had agreed to undertake the obligation to redeem outstanding Métis scrip. The major issue was whether Métis scrip could be characterized as a pre-existing trust or contractual arrangement with respect to land such that the provinces would be solely responsible for its redemption after the transfer. Prior to the *NRTAs*, the federal government had alienated millions of acres of provincial Crown lands in order fulfill its own obligations to third parties such as the Hudson's Bay Company and various railway companies. The provinces' position was that the *NRTAs* were supposed to end such arrangements. Thus, they were reluctant to assume any further obligations than had been originally incurred by the federal government prior to 1930.[7] After much debate, however, the prairie provinces eventually accepted the obligation to redeem outstanding scrip. Nevertheless, each province passed legislation that limited the rights of scrip-holders. Even though it was aware of the effect of the legislation, the federal government did nothing to protect those rights. The federal government neither challenged the constitutionality of the legislation nor did it seek to enforce the terms of the *NRTAs*.

The outcome of the federal-provincial debate about the obligation to redeem outstanding Métis scrip is only one aspect of this article. More importantly, the debate itself sheds light on the nature of the legal and constitutional obligations that informed the federal government's scrip policy and its constitutional obligation to the Métis.[8] The obligation to issue Métis scrip arose from

7 See Nicole C. O'Byrne, *The Answer to the 'Natural Resources Question': A Historical Analysis of the Natural Resources Transfer Agreements* (LL.M. Thesis, McGill University, 2006) [unpublished].

8 Much has been written on the Métis scrip policy and its implementation in Manitoba. See, *e.g.*, D.N. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980) 10 Manitoba Law J. 415; and Thomas Flanagan, "The Market for Métis Lands in Manitoba: An Exploratory Study" (1991) 16 Prairie Forum 1. Much less has been written about

undertakings the federal government had made in 1870, the year Canada admitted Rupert's Land and the North-Western Territory into Confederation.[9] At this time, the federal government accepted the fact that in order to enjoy clear title to the newly acquired territories, it would have to recognize and extinguish the Indian title held by the Aboriginal peoples, including Métis, who had traditionally occupied the lands.[10] The federal government used two different legal instruments to extinguish Indian title: Indian treaties and Métis scrip. The main difference between these instruments was that Indian treaties included continuing obligations such as annuities and education, while Métis scrip was a one-time land grant after which the recipients would be treated on the same basis as any other Canadian citizen.

The historical record indicates that the federal government issued scrip by exercising its jurisdiction over "Indians and lands reserved for the Indians" pursuant to section 91(24) of the *British North America Act, 1867*.[11] This means that for the purpose of extinguishing the Métis share of Indian title to the lands of the North-West Territories, the federal government categorized the Métis as "Indians" for the purposes of exercising its jurisdiction under section 91(24).[12] Furthermore, the federal government recognized the fact that it had a constitutional obligation to extinguish the Métis share of Indian title.[13] The inclusion of the Métis as an "aboriginal peoples of Canada" in

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scrip issued in the North-West Territories. The North-West Territories refers to the present-day boundaries of Saskatchewan and Alberta. It also includes the area outside the borders of "postage-stamp" Manitoba prior to its boundary extension in 1912. See, *e.g.*, D.J. Hall, "The Half-Breed Claims Commission" 25:2 (Spring 1977) Alberta History 1 [Hall, "Half-Breed"]; and Ken Hatt, "The Northwest Scrip Commissions as Federal Policy – Some Initial Findings" (1983) 3 Canadian J. of Native Studies 117.

9 *The Rupert's Land and North-Western Territory Order*, 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9 [*Rupert's Land Order*], Schedule 'A': Address to her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada. Rupert's Land was the land granted by Charles II to the Hudson's Bay Company in 1670. The North-Western Territory refers to the land that had been licenced to the Hudson's Bay Company in 1821. See Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982) [McNeil].

10 Historically, Indian title referred to an interest in land held by Aboriginal people that arose from their use and occupation of the lands prior to assertion of Crown sovereignty. It was thought that this title had to be extinguished by treaty or scrip in order for the government to have full and unencumbered use of the land.

11 Renamed the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*BNA Act, 1867*].

12 See Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867" (1978/1979) 43 Saskatchewan Law Rev. 37. The North-West Territories includes all of present-day Alberta, Saskatchewan and all lands that were located outside the boundaries of "postage-stamp" Manitoba as it existed in 1870.

13 *Rupert's Land Order*, *supra* note 9.

section 35 of the *Constitution Act, 1982*[14] is generally regarded as the first time in Canadian history that the Métis were included in the Canadian constitution. This is not so. Nearly a century earlier, the federal government undertook to fulfill a constitutional obligation to the Métis people — to recognize and extinguish their share of the Indian title to the lands that would eventually comprise Manitoba, Alberta, and Saskatchewan. It is beyond the scope of this article to draw out all of the legal and fiduciary implications of the federal-provincial debate over the constitutional responsibility for Métis scrip. Nevertheless, an examination of the historical debate illustrates the nature of the constitutionalized obligations that were in existence prior to their confirmation in section 35 of the *Constitution Act, 1982*.[15]

Part I: The Origins of Métis Scrip

> *[T]he main reason for making this arrangement is to pacify and keep pacified the North-west Territories, to settle a claim which must be settled before the people of Canada can make a treaty with the Indians of that district – and the Indians of that district must have a treaty made with them, otherwise we shall be in danger of having an Indian trouble on our hands, the very slightest of which would cost us two or three times the amount of the scrip we issue.*[16]

In order to understand the debate over Métis scrip and whether it is included in the outstanding obligations transferred to the prairie provinces through the *NRTA*s, it is necessary to first examine what scrip is and its legislative history in north-western Canada. As a legal instrument, scrip has been defined as "paper money issued by a government for a specific purpose or issued by a merchant or other body for local circulation. It is not legal tender."[17] Scrip has been issued by governments in order to fulfill various obligations. Since Confederation, for example, the federal government has issued scrip for the purposes of rewarding military service, promoting settlement, and settling Métis land rights.[18] Métis scrip was issued in two varieties: land and money.

14 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

15 *Ibid.*, s. 35(1) provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

16 *House of Commons Debates* (*HCD*) (14 July 1899) at 7513 (Clifford Sifton).

17 Canadian Paper Money Society, *Official Terminology Dictionary and Grading Guide* (Toronto: Canadian Paper Money Society, 1971) at 4.

18 *An Act to authorize Free Grants of land to certain Original Settlers and their descendants, in the territory now forming the Province of Manitoba*, 36 Vict., c. 37; and *An Act respecting the appropriation of certain Dominion Lands in Manitoba*, 37 Vict., c. 20. In 1872, the *Dominion Lands Act*, 35 Vict., c. 23, reprinted in R.S.C. 1927, c. 113, included ss. 23-28 whereby soldiers who had served in the Canadian militia during the Red River Resistance could receive scrip redeemable in homestead land. The federal government also provided scrip for veterans of the

Land scrip was denominated in a fixed number of acres of available Crown land. Money scrip consisted of a stated value in dollars that was acceptable towards the purchase of available Crown land.[19]

Section 31 of the *Manitoba Act, 1870*[20] provided for the first issue of scrip in western Canada:

> And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

Initially limited to Métis who resided in Manitoba at the time of the transfer of land from the Hudson's Bay Company to Canada, the federal government later expanded the scrip issue to include the original Lord Selkirk settlers and the heads of Métis families, regardless of residence.

The next legislative step was the federal government's recognition of the claims of Métis who had been living in the North-West Territories through the *Dominion Lands Act, 1879.*[21] Section 125(e) of this *Act* set out the terms of this recognition as follows:

> The following powers are hereby delegated to the Governor in Council: --
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> . . .
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> e. To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and

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1885 North-West Rebellion and the Boer War. See *An Act to authorize grants of land to members of the Militia Force lately on active service in the North-West*, 48 & 49 Vict., c. 73; *An Act to make further provision respecting grants of land to members of the Militia Force on active service in the North-West*, 49 Vict., c. 29; and the *Volunteer Bounty Act, 1908*, 7 & 8 Edw., VII, c. 67.

19 Donald M. Stewart, "The Land Scrip Issues of Canada – Part I" (1979) 15 Canadian Paper Money J. at 6 [Stewart].

20 33 Vict., c. 3, s. 31 [*Manitoba Act*].

21 42 Vict., c. 31, s. 125(e).

> conditions, as may be deemed expedient;[22]

It was not until 1885, when the federal government appointed a commission to inquire into Métis claims in the North-West Territories, that this legislative machinery began to be implemented.[23] In March 1885, an Order in Council clarified the terms by which the commissioners could examine Métis claims. The commissioners were authorized to summon witnesses by subpoena and examine them under oath. If the claims were deemed to be legitimate, they would be forwarded to the Minister of the Interior, who would then issue a scrip certificate or deny the claim for want of sufficient evidence.[24] If the claim was deemed successful, the heads of Métis families resident in the North-Western Territory since 15 July 1870 — the date Rupert's Land and the North-Western Territory had been admitted into the Dominion of Canada — received land scrip entitling them to 160 acres of land or money scrip valued at $160 redeemable for the purchase of land.[25] The child of each Métis family residing in the North-Western Territory prior to 15 July 1870 and born before that date received land scrip for 240 acres or money scrip for $240 toward the purchase of land.[26]

In the following years, the federal government authorized several "Half-breed Commissions" to hear claims throughout the North-West Territories. The commissioners often accompanied the federal government's treaty negotiators. By 1892, the commissioners had examined a total of 4775 claims for Métis scrip. Deeming that enough time had been granted for potential claimants to come forth, the federal government introduced a time limit to the claims process at this point.[27] The federal government later reversed this decision and once again began issuing scrip in 1899. Compelled by the Yukon gold rush of the late 1890s, the Minister of the Interior and Superintendent of Indian Affairs, Clifford Sifton, began to negotiate a treaty with the Indians of the Athabasca district and thought it expedient to settle claims with the Métis of the district at the same time.[28] However, Sifton believed the birthdate and

22 This section was re-enacted in the *Dominion Lands Act, 1883*, 46 Vict., c. 17, s. 81(e).

23 P.C. 135/1885, 28 January 1885.

24 Provincial Archives of Alberta (PAA), 75.9, Box 1/3d, A.A. Cohoon, "Memo re: half-breed scrip," 11 May 1934.

25 *Rupert's Land Order*, *supra* note 9. See McNeil, *supra* note 9.

26 In this period, the federal government granted 160 acre homesteads under the *Dominion Lands Act, 1872*, 35 Vict. c. 23. These land grants differed from military bounty grants and Métis scrip because in order to perfect a claim a settler had to perform required homestead duties, including clearing land and building a residence within three years. See Kirk N. Lambrecht, *The Administration of Dominion Lands, 1870-1930* (Regina: Canadian Plains Research Centre, 1991).

27 P.C. 630/1892, 12 March 1892.

28 Hall, "Half-Breed," *supra* note 8 at 3.

residency limitations would "tend rather to disturb than to satisfy the Half-Breeds, and would certainly cause them to so use their great influence with the Indians as to make it extremely difficult, if not impossible, to negotiate a Treaty."[29] A pragmatist by nature, Sifton recognized that the assertion of Crown sovereignty had little or nothing to do with Métis interests in the land of the North-West: "Whatever rights they have, they have in virtue of their Indian blood; and the first interference with such rights will be when a surrender is effected of the territorial rights of the Indians. It is obvious that while differing in degree Indian and Half-Breed rights in an unceded territory must be co-existent, and should properly be extinguished at the same time."[30] The recognition that Métis and Indian claims to Aboriginal title were co-existent provided the rationale for the federal government's scrip policy for the next two decades.[31]

The subsequent amendment to the *Dominion Lands Act, 1899*[32] reflected Sifton's decision to eliminate residency in the North-West at the date of the assertion of Canadian sovereignty as determinative of scrip eligibility:

> The Governor in Council may -
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> 90(f.) grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of Indian title.[33]

The discretionary language used in this amendment ought to have made it easier for scrip claimants to establish their entitlement. This intention was clearly stated in a subsequent Order in Council:

> the issue of scrip is a measure of public policy for the purpose of satisfying a class of the community who have certain aboriginal rights which it is in the general interest that that class should recognize as having been properly and fully extinguished it is the part of wisdom to do beyond the letter of the obligation of the State towards them in order to ensure the entire satisfaction of all the Half Breeds rather than to leave any room for agitation through a strict adherence to the letter of the obligation.[34]

In the two decades following this amendment of the *Dominion Lands Act, 1899*, various scrip commissions sat throughout the North-West, usually

29 P.C. 918.1899, 6 May 1899.

30 *Ibid.* See also D.J. Hall, *Clifford Sifton – The Young Napoleon* (Vancouver: University of British Columbia Press, 1981).

31 NAC, RG 15, Vol. 1171, File #5590730, A.A. Cohoon, "Memo re: Half-Breed Scrip," 9 December 1935.

32 62-63 Vict., c. 16, s. 4.

33 Re-enacted in the *Dominion Lands Act*, R.S.C. 1906, c. 55, s. 90(f).

34 P.C. 438/1900, 2 March 1900.

in areas where treaty adhesions were being negotiated and the Métis claims had not yet been investigated. However, by 1923, the federal government had finished negotiating treaties, and the Department of the Interior simultaneously quit issuing land and money scrip.[35] From this time onward, claims could still be filed, but successful claimants were issued a cash grant of $240 rather than scrip that could be redeemed for land.[36] Thus, at the time the *NRTA*s were signed in 1929 and 1930, the federal government no longer issued scrip. There were, however, many outstanding Métis scrip notes in circulation that had not yet been redeemed.

Prior to the transfer, the Department of the Interior issued a bulletin in which the regulations regarding scrip redemption were summarized for reference by its land agents.[37] These regulations are important because they define the legal character of Métis scrip as it existed immediately before the transfer of the natural resources to the prairie provinces. They formed the core of the obligations for the redemption of Métis scrip that the federal government intended to transfer to the provinces through the *NRTA*s. According to this bulletin, the Métis scrip was defined by the following characteristics: it could be redeemed for "Dominion lands of the class open to homestead entry," it could be inherited, and, money scrip could be kept in an account at the Department of the Interior and used as payment for grazing, timber, and mining leases. The bulletin further explained that no settlement duties were required to secure title to the land and letters patent were issued immediately in the name of the scrip grantee.[38]

Prior to 1900, the federal government had not permitted scrip to be assigned. This meant that entry for land could only be made by the person to whom the scrip had been issued. The limitation was an attempt to discourage the activities of unscrupulous land speculators. However, due to pressure from the

35 During the six decades that the federal government administered the lands of Alberta, Saskatchewan, and Manitoba, more than 24,000 Métis claims had been recognized. Over 2.6 million acres of land had been issued and over $2.8 million worth of money scrip had been granted. PAA, 75.9, Natural Resources Commission Records, Box 6/32a, "N.O. Côté, Dominion Lands Branch Report, Department of the Interior, "Half-Breed Claims?" 3 December 1929.

36 *An Act to amend The Dominion Lands Act*, 13 & 14 Geo. V., c. 44, s. 8, re-enacted in the *Dominion Lands Act*, R.S.C. 1927, c. 113, s. 74(b). The federal government also passed an amendment to the *Criminal Code* that provided that any offence arising out of location of land that had been paid for by Métis scrip was barred by a three-year limitation period. See the *Criminal Code*, 11 & 12 Geo. V., c. 25, s. 20, reprinted in R.S.C. 1927, c. 36, s. 1140 (a) (vi).

37 NAC, RG 15, Vol. 1171, File #5590730, "Excerpt from Bulletin No. 21, Summary of Department of the Interior Regulations and Departmental Rulings relating to Dominion Lands for the Guidance of Agents, Sub-agents, and other Officials," 2 January 1930.

38 *Ibid.*

Métis themselves, the federal government changed its policy and introduced a process of endorsement known as "red-backing."[39] Red-backing entailed endorsing the scrip certificate on the back in red ink, which allowed the holder of this scrip to locate land in the name of the original grantee. As anticipated, assignability led to a marked increase in land speculation, and many Métis did not receive full market value for their scrip.[40] Assignability would later prove to be a focus of the federal-provincial debate concerning the responsibility for redeeming outstanding Métis scrip. The provinces would vigorously object to granting provincial lands to scrip-holders who had obtained their scrip from original Métis grantees.

Part II: Early Interpretations of the *NRTA*s

> *It is characteristic of lawyers that as soon as they conclude an agreement, they begin to find the need of discovering what its terms mean.*[41]

In the early 1920s, Prime Minister King recognized the validity of the prairie provinces' arguments for constitutional equality.[42] Wishing to bolster his political support in the western provinces, King agreed in principle to transfer the administration and control of the natural resources to the governments of Saskatchewan, Alberta, and Manitoba.[43] The adoption of the "equality principle" marked a major shift in the federal government's policy and laid the foundation for the *NRTA*s. The drafters of the agreements, however, were confronted with a series of practical questions about the process by which the transfer could be brought about in a manner that would reflect the constitutional principles at stake. During a 1921 debate in the House of Commons, Prime Minister Arthur Meighen had described the problems associated with the transfer in the following way: "It is not a hard matter to scramble an egg but it is a very hard matter to unscramble it. It was not a hard matter to retain the resources, but once you have retained them for fifteen to twenty years and adjusted every phase of public policy to the fact that there was that retention, then it becomes a matter of very great complexity."[44] Thus, the drafters were faced with the seemingly insurmountable task of unscrambling a scrambled egg.

39 P.C. 596/1900, 13 March 1900.

40 Hall, "Half-breed," *supra* note 8 at 5; and Stewart, *supra* note 19 at 88.

41 NAC, MG 26-J13, Mackenzie King Diary, 2 November 1928. King was specifically referring to the Manitoba *NRTA*.

42 See Robert A. Wardhaugh, *Mackenzie King and the Prairie West* (Toronto: University of Toronto Press, 2000).

43 NAC, Mackenzie King papers, Vol. 86, 69600-69602, King to J.R. Boyle, 18 December 1922.

44 *HCD* (25 April 1921) at 2544-45.

After decades of unsuccessful negotiations and continued federal administration of their natural resources, the provinces were determined to ensure that they undertake no more than an equitable share of pre-existing obligations connected with the transfer. Since 1870, the federal government had alienated millions of acres to third parties such as railway companies, and the provinces wanted to guarantee that the terms of the *NRTAs* did not include any additional alienation of lands other than those that were legally and constitutionally required.[45] Métis scrip was one of the federal commitments that the provinces were not interested in assuming, and consequently they put their effort into arguing that scrip fell outside of their legal and constitutional obligations under the *NRTAs*.

In a meeting held in August 1929, the Provincial Secretary of Manitoba specifically asked what pre-existing trusts owing to third parties would have to be satisfied by the provinces under the two "catch-all" paragraphs included in the terms of the *NRTA*. The Deputy Minister of the Interior, W.W. Cory, replied that two types of commitments would have to be included — those arising out of the administration of the *Dominion Lands Act* and those arising out of Orders in Council relating to various third parties. Cory listed unredeemed Métis land and money scrip as one of the federal obligations that would have to be assumed by the provinces. Specifically, Cory included scrip as one of the "arrangements" that the federal government had with third parties who held an interest in Crown land.[46] Thus, it is apparent that the federal government intended scrip be included in paragraph 2 of the *NRTAs* as "an arrangement whereby any person has become entitled to any interest therein as against the Crown" rather than as a trust as provided in paragraph 1, the two general categories of interest assumed by the provinces upon the transfer of land.[47]

The interpretive question of whether Métis scrip should be characterized as a trust or as a type of contractual arrangement creating an interest in land quickly became a matter of contention between the federal and provincial governments after the conclusion of the *NRTAs*. Although the federal government insisted that the obligation had been included in the agreements, the uncertainty with respect to its legal categorization compelled the provincial governments to challenge the federal position. In February 1931, the Minister of the Interior, Thomas G. Murphy, advised provincial officials that outstanding scrip would

45 *Supra* note 7.

46 Provincial Archives of Manitoba (PAM), G-1060, NR0001, Cory to McKenzie, Transfer of Natural Resources to the Provinces, 11 October 1929.

47 See Appendix I below for the text of paras. 1 and 2 of the *NRTAs*.

have to be honoured because it constituted an arrangement under paragraph 2. J.T.M. Anderson, Saskatchewan's Premier and Minister of Natural Resources, disagreed. Anderson's position was based on the advice he had received from his lawyers who were of the opinion that Métis scrip could not legally be characterized as an arrangement under paragraph 2 because the scrip-holder was merely entitled to a contingent right, not an actual right, in the land. The scrip-holders therefore had rights against the federal government (in legal terms, a right *in personam*), but no rights to the land itself (no rights *in rem*). As a result of this legal opinion, Anderson advised Murphy that no provision had been made in the recently drafted provincial lands legislation to redeem Métis scrip.[48] Thus, there was no mechanism through which a scrip-holder could select land in Saskatchewan.[49]

Prompted by Saskatchewan's recalcitrance, the Acting Deputy Minister of the Interior, Roy A. Gibson, requested a legal opinion from W. Stuart Edwards, the Deputy Minister of Justice. The opinion, delivered by Edwards on 28 February 1931, would provide the foundation for the federal government's position on the issue for the next fifteen years and is, therefore, worth quoting at length:

> There may, however, perhaps be some doubt whether such a scrip note come within the description of the words "every other arrangement whereby any person has become entitled to any interest therein (i.e., Crown lands, mines, or minerals) as against the Crown" of clause 2 of the Natural Resources Agreement, seeing that it may be said that the scrip merely entitled the holder to obtain an interest in such lands in either Province. But under the terms of clause 1 of the said Agreement, the interest of the Crown in all the Crown lands, mines, minerals and royalties transferred were so transferred "subject to any trusts existing in respect thereof" and I am of the opinion that the obligation of the Crown to redeem the scrip notes which have been issued may properly be held to constitute a "trust" existing in respect of the lands, mines, minerals and royalties so transferred.[50]

Edwards thus confirmed the advice that Premier Anderson had been given with respect to the scope of the "arrangements" provision. However, his advice did not confirm Anderson's contention that the responsibility for outstanding scrip remained with the federal government. Instead, Edwards categorized scrip as a trust, thereby providing the federal government with a credible legal

48 NAC, RG 13, Vol. 2422, File #460/1931, Anderson to Murphy, Department of Justice, 20 February 1931. In Saskatchewan at this time there was $3,049.70 in outstanding money scrip and 13,100 acres in land scrip.

49 A similar situation existed in Alberta during this period. Only Manitoba had passed legislation by which scrip could be redeemed: *Provincial Lands Act*, S.M. vol. I & II, 20 Geo., V., c. 32, s. 18(4).

50 NAC, RG 13, Vol. 2422, File #460/1931, Edwards to Gibson, 28 February 1931.

argument for compelling the provincial governments to redeem outstanding scrip under paragraph 1 of the *NRTAs*.

In categorizing Métis scrip as a trust, Edwards relied on Lord Watson's definition of a trust under section 109 of the *BNA Act, 1867*[51] in an 1897 judgment concerning the responsibility for the payment of treaty annuities.[52] The treaty in question had been negotiated prior to Confederation, and, in a close parallel to the issue of whether Métis scrip falls under paragraph 2, Ontario questioned whether the annuities constituted a trust under section 109 of the *BNA Act, 1867* such that the province would be responsible for the payments. Section 109 provided that the control and administration of each province's natural resources would be maintained after Confederation, "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." This meant that each province's control of its natural resources was dependant upon any pre-existing trusts or third party interests. In the course of delivering the Privy Council's judgment on the issue, Lord Watson defined a section 109 trust as the following:

> The expressions "subject to any trusts existing in respect thereof," and "subject to any interest other than that of the province," appear to their Lordships to be intended to refer to different classes of right. Their Lordships are not prepared to hold that the word "trust" was meant by the Legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor to whom that duty ought to be fulfillled.[53]

The drafters of the *NRTAs* had copied the exact wording of section 109 in paragraph 1, attempting to ensure that the prairie provinces would be constitutionally equal to the original provinces of Confederation. Consequently, there was a strong historical parallel to support Edwards' use of Lord Watson's broadly worded definition of a trust as the basis for a credible legal argument for the inclusion of Métis scrip in paragraph 1.

In the following years, federal officials at the Department of the Interior followed Edwards' advice and repeatedly informed the provincial land departments that the responsibility for redeeming scrip had transferred under

51 *Supra* note 11.

52 *Canada (Attorney General) v. Ontario (Attorney General)*, [1897] A.C. 199 (P.C.) [*Annuities*].

53 *Ibid.* at 210.

paragraph 1.[54] For example, in a reply to an inquiry from a scrip-holder, H.E. Hume, Chairman of the Dominion Lands Board, stated that the *NRTA*s transferred legislative authority for scrip redemption to the provinces and "that since the transfer of the natural resources to the Western Provinces[,] any trust existing and any responsibility as to the recognition and location of outstanding scrip devolves wholly upon the Provincial Authorities."[55] With both the federal and provincial governments insisting the scrip was not their responsibility, scrip-holders were left with no means of recourse.

In December 1932, lawyers with the Regina law firm of MacPherson, Leslie & Paul sent a letter to J. Lorne Turner, Assistant Chairman of the Dominion Lands Board, on behalf of several holders of Métis scrip as assignees from the original grantees. They advised Turner: "The Department of Natural Resources for the Province of Saskatchewan has refused to allow location of this scrip on provincial lands and have denied all liability in connection therewith." The lawyers presumed that the federal government would be willing to pay compensation to scrip-holders in view of the fact that scrip could not be redeemed in the province. Turner replied that the Department of the Interior's position was that scrip was now a provincial responsibility and that the department was "not in a position to offer advice as to the manner in which the scrip in your possession may be used."[56]

Nearly a year later, MacPherson, Leslie & Paul sent another letter to the Department of the Interior reporting that they had been unable to make any progress with the Saskatchewan Department of Natural Resources. They also warned that they had advised their clients that a remedy must be forthcoming from the federal government due to the rules surrounding privity of contract.[57] The lawyers insisted that the federal government must take responsibility because it had originally issued the notes. They also advised the federal government that it "may have a claim against the Provinces for failure to carry out the terms of the natural resources agreement."[58] In response, Hume reiterated the federal position. He did not, however, seek out legal redress in an attempt to compel the Saskatchewan government to undertake their

54 See, *e.g.*, NAC, RG 15, Vol. 1170, File #5569173, H.E. Hume, Deputy Commissioner of Dominion Lands to L.P.O. Noel, Assistant Director of Lands, Department of Mines and Natural Resources, Manitoba, 12 August 1931.

55 *Ibid.*, H.E. Hume, Chairman, Dominion Lands Board to Oliver Hyssop, 23 August 1932.

56 *Ibid.*, MacPherson, Leslie & Paul to Turner, Assistant Chairman, Dominion Lands Board, 17 December 1932; and *ibid.*, Turner to MacPherson, Leslie & Paul, 23 December 1932.

57 *Ibid.*, MacPherson, Leslie & Paul to H.E. Hume, Commissioner of Dominion Lands, 20 October 1933.

58 *Ibid.*, 22 November 1933.

obligations under paragraph 1. Instead, he sent the land departments in each of the prairie provinces a list of outstanding scrip and informed the ministers that it was up to the provinces to redeem outstanding scrip notes. This marked the first time that the federal government provided the provinces with detailed lists of the outstanding scrip.[59] This lack of information may have contributed to the province's reluctance to redeem it.

Prior to sending the letters, Hume asked the Department of Justice to review his drafts to ensure that they accurately represented the federal government's legal position. In a departmental memo, the lawyer responsible for the file mentioned that he had delayed giving his opinion to Hume until the Supreme Court handed down its ruling in *Reference re Timber Regulations*.[60] In this case, the prairie provinces had challenged the federal government's refusal to remit timber dues that had been collected from homesteaders prior to 1930. This left the provinces in the position of having to refund the fees that had been collected by the federal government. In the three years leading up to a patent on homesteading lands, homesteaders had to pay dues on timber that was cut on their lands and sold commercially. These dues were normally refunded after the homesteader obtained the land patent. After the *NRTAs*, the federal government refused to refund any of the dues it had received, arguing that the provinces had assumed this responsibility as an arrangement under paragraph 2. The Supreme Court agreed with the federal government's position and held that, under paragraph 2 of the *NRTAs*, the provinces had agreed to undertake all outstanding obligations owed by the federal government prior to the *NRTAs*. The Supreme Court's rationale supported the federal government's argument with respect to Métis scrip. Even though the case dealt with obligations under paragraph 2 of the *NRTAs*, it stood for the proposition that the provinces were responsible for undertaking all federal obligations as of 1930, when the natural resources were transferred. The case supported the federal government's position that as of 1930 the provinces were responsible for satisfying all outstanding federal obligations owing to third parties, including timber dues and Métis scrip.

The federal-provincial disagreements with respect to Métis scrip in the years following the signing of the *NRTAs* proved Arthur Meighen prescient. Unscrambling the scrambled egg of natural resources control and administration was not an easy task. In the years following the transfer,

59 *Ibid.*, 8 December 1933. The lists were sent to the provinces on 8 November 1933.

60 *Reference re Refunds of Dues re Timbre Permits*, [1933] S.C.R. 616, aff'd *In re Refund of Dues Paid Under s. 47(f) of the Timber Regulations in Manitoba, British Columbia, Saskatchewan and Alberta*, [1935] A.C. 184 (P.C.).

the provincial governments harboured resentment at what they considered to be decades of mismanagement of their resources by the Department of the Interior.[61] The provinces did not want to transfer any more land to third parties than was specified by the terms of the *NRTAs*. Further complicating matters was the fact that the federal government's records had not been fully transferred to the newly created provincial land departments. In many cases, the officials in the provincial land departments did not have the information they required to make determinations about granting lands to fulfill pre-existing federal obligations.[62] The uncertainty in the legal categorization Métis scrip gave the provinces a basis for refusing to grant provincial lands to scrip-holders. The issue of whether scrip was a trust or contractual arrangement would be debated at length at subsequent Royal Commissions, the subject of the next section.

Part III: The Royal Commissions on the Natural Resources of Saskatchewan and Alberta (the Dysart Commissions)

In a 1932 memo, W. Stuart Edwards had predicted the outcome in *Reference re Timber Regulations*,[63] in which the transfer of obligations under the *NRTAs* was strictly demarcated.[64] The *NRTA* negotiators had also anticipated this and had agreed that the transfer of all of the federal obligations on the date of transfer would cause undue hardship to the provinces and that an equitable financial settlement should be reached by an inquiry into the economic aspects of the natural resources transfer.[65] In the discussions leading up to the *NRTAs*, the federal and provincial governments had agreed to establish a

61 For example, the government of Saskatchewan pursued redress in the courts after the *NRTAs* had been signed in 1930. See *Reference re Transfer of Natural Resources to Saskatchewan*, [1931] S.C.R. 263; and *In re Transfer of Natural Resources to the Province of Saskatchewan*, [1932] A.C. 28 (P.C.). The province argued that it had been unconstitutional for the federal government to administer the natural resources and control the revenue derived therefrom.

62 PAM, GR 1600, G4515, 33.1.1, "Transfer of Natural Resources, 1930-1938, Department of Mines and Natural Resources" (Deputy Minister's File).

63 *Supra* note 60.

64 NAC, M 1111, 295169, Edwards to A. Blackwood, Bennett Papers, 8 April 1932.

65 The Alberta and Saskatchewan Commissions were appointed under Part I of the *Inquiries Act*, R.S.C. 1927, c. 99. See Canada, *Report of the Royal Commission on the Natural Resources of Saskatchewan* (Ottawa: J.O. Patenaude, 1935) at 16 [Saskatchewan Royal Commission Report]. R.B. Bennett appointed Justice Andrew K. Dysart of the Court of King's Bench of Manitoba, who served as the chair for both Commissions. Justice Henry V. Bigelow of the Court of King's Bench of Saskatchewan sat on the Saskatchewan Commission, and Justice Thomas M. Tweedie of the Supreme Court of Alberta sat on the Alberta Commission. The third commissioner was George C. McDonald, a chartered accountant. The secretary for both Commissions was Oliver Master, Chief of the Economics Division, Department of Trade and Commerce.

series of Royal Commissions that would:

> enquire and report whether any, and if any, what consideration in addition to the sums provided in paragraph 21 of the said Agreement shall be paid to the Province of Saskatchewan [and Alberta] in order that the province may be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources from the first day of September, 1905, or as from such earlier date, if any, as may appear to be proper . . . .[66]

During the lengthy hearings, counsel for the federal and provincial governments debated the nature and extent of the federal obligations that had passed to the provinces under the *NRTA*s.

The Saskatchewan Commission hearings began in February 1934. The issue of Métis scrip was first raised at these hearings by James McGregor Stewart, a prominent lawyer from Halifax who acted as lead counsel for the federal government at both Dysart Commissions.[67] Stewart argued that the wording of section 109 of the *BNA Act, 1867*[68] had been reproduced in paragraph 1 of the *NRTA*s in order to place the prairie provinces into a position of constitutional equality. This equality, Stewart insisted, came with the same obligations that the original provinces of Confederation undertook in 1867 — to honour all pre-existing obligations owing to third parties.

Relying heavily on W. Stuart Edwards's 1931 memo on the subject, Stewart contended that Lord Watson's broad definition of section 109 trusts could be construed to encompass Métis scrip.[69] He added that the expression "subject to any trust" included any contractual obligation with respect to land that the federal government had been party to prior to Confederation in 1867 as well as prior to the creation of Alberta and Saskatchewan in 1905.[70] Stewart argued that "once such a pre-existing commitment has been established in one of the jurisdictions carved out of the Dominion lands when the commitment was made, that jurisdiction may be called upon to perform or carry out the commitment."[71] In support of this argument, Stewart relied on number of cases in which railway companies had been given the right to select land in partial consideration for construction costs. While this right was given to them prior

66 *Saskatchewan Natural Resources Act*, 20 & 21 Geo. V, c. 87, s. 24.

67 See Barry Cahill, *The Thousandth Man: A Biography of James McGregor Stewart* (Toronto: Osgoode Society for Canadian Legal History by University of Toronto Press, 2000).

68 *Supra* note 11.

69 PAA, 75.9, "Saskatchewan Proceedings" at 1397 [Saskatchewan Proceedings].

70 *Ibid.* at 526.

71 *Ibid.* at 1398.

to Confederation, the companies did not exercise it until afterwards. In these cases, the courts accepted that section 109 of the *BNA Act, 1867* required the provinces to fulfill pre-existing Crown commitments to the railway companies. Emphasizing that it was the right to select land that constituted the pre-existing obligation, Stewart drew a direct parallel between the railways' right to select Crown lands in payment for construction costs and a Métis scrip-holder's right to select land in consideration of the extinguishment of Aboriginal title. Stewart added that if there was any difficulty as to which province owed the duty to provide the land, the provinces were obligated to sort it out among themselves.[72] Finally, Stewart conceded that if scrip had been issued after 1905, the provincial government had a valid claim against the federal government for the lands selected after this date.[73]

After making this concession, Stewart nevertheless proceeded to argue that the province should not receive any financial compensation for the 96,740 acres of Métis scrip that had been distributed by the federal government since 1905. He based this argument on an assertion that the province had suffered no damage because it would have had to issue scrip in order to extinguish the Métis share to the Indian title, and:

> that from the commencement of Canada and by the agreement between the Hudson's Bay Company and Canada, the rights of the aboriginal population were regarded as existing. It was considered that they had rights in the Western country. Canada proceeded to treat with the aboriginal population on principles of decency and justice. The policy was to procure the surrender of their nomadic rights or their floating rights, by the acceptance of definite reservations, and as regards half-breeds by the allocation of scrip giving them the right to a farm or to a part purchase price on a farm. By so doing the Dominion extinguished the floating charge on the Territories. If the Dominion had not retained the control and administration of these lands in 1905 the problem would have been one for the province to deal with. The provinces would have to face this Indian claim. They would have to make their reservations. They would have to provide for half-breed scrip or compensate the half-breed in some way.[74]

According to Stewart, the federal government's purpose for negotiating Indian treaties and its purpose for issuing Métis scrip were identical. The treaties and scrip each served as a means of extinguishing the "floating charge," or Indian title, which was charged upon Rupert's Land and the North-Western Territory. Stewart found support for this proposition in the

72 *Ibid.* at 526, 533. The railway cases relied upon by Stewart are *Booth* v. *McIntyre* (1880-81), 31 U.C.C.P. 183; and *Canada Central Railway Co.* v. *The Queen* (1873), Gr./U.C.Ch. 273.

73 Saskatchewan Proceedings, *ibid.* at 1047.

74 *Ibid.* at 1171.

fact that the province of Ontario had recognized the existence of Indian title during the negotiations leading up to Treaty 3.[75] Therefore, Stewart argued that a provincial government in control of its natural resources would have recognized a moral obligation to make provision for the Métis. As proof of this proposition, Stewart produced Sir Frederick Haultain's correspondence with the federal government concerning the acquisition of provincial status for the North-West Territories. In this correspondence, Haultain, who was territorial premier from 1897 to 1905, called for the transfer of the natural resources and the return of all lands used for federal purposes. Haultain's claims, however, excluded "any lands granted by the Dominion for homesteads or pre-emptions or in settlement of half-breed claims."[76] On this basis, Stewart insisted that had the provinces been granted control of their natural resources in 1905, they would have implemented similar homesteading and scrip policies. Thus, Stewart claimed that Saskatchewan had failed to prove a compensable loss because the province would have granted homestead and scrip land.[77] When Chairman Dysart questioned Stewart as to why the federal government had not specifically included Métis scrip in the *Saskatchewan Act*, as had been done in the *Manitoba Act, 1870*,[78] Stewart replied that the federal government's continuing administration of the lands would have made such a provision redundant.[79]

Stewart's legal argument about Métis scrip caught Saskatchewan's lead counsel, Percival H. Gordon, somewhat unprepared.[80] In the materials that had been prepared by Saskatchewan's Department of Natural Resources, the section on Métis scrip had been left blank. However, Saskatchewan's premier had instructed Gordon to construct "as large a claim as possible against the Dominion."[81] Gordon, therefore, argued that all Métis scrip that had ever been issued should be included in a separate category of alienation claims, a category defined by the federal government granting land to third parties in pursuit of its own policy objectives with little or no regard for provincial interests. While

75 *Ibid.* at 1176. Treaty 3, also known as the NorthWest Angle Treaty, was signed in 1873.

76 Saskatchewan Proceedings, *ibid.* at 891. See *North-West Territories Legislative Assembly Journals*, 1899-1904, Vol. 17, App. at 26.

77 Saskatchewan Proceedings, *ibid.* at 1175.

78 *Saskatchewan Act*, 4 & 5 Edw. VII, c. 42, reprinted in R.S.C. 1985, App. II, No. 21, s. 3; and *Manitoba Act, supra* note 20.

79 Saskatchewan Proceedings, *supra* note 69 at 1173.

80 Shortly after arguing on behalf of the Saskatchewan government, Gordon was appointed to the Saskatchewan Court of Appeal. He charged $31,838.11 for his services at the Commission (nearly $500,000 in current funds). See SAB, R-43, File #13, "Statement of Account in Connection with the Natural Resources Commission."

81 SAB, R190.1, File #17, "Saskatchewan Deputy Minister of Natural Resources, Statement of Provincial Case for Compensation in lieu of Natural Resources," 10 January 1933.

he generally accepted the Department of the Interior's estimates of the acreage granted to third parties since 1905 under this category of alienations, Gordon contested the federal government's claim that this acreage had been granted due to pre-existing trusts or charges on the land.[82] The province thus sought to exclude these grants from the reach of paragraphs 1 and 2 of the *NRTA*, and it claimed instead that the federal government owed it compensation for railway land grants (6,090,962 acres) and Métis scrip (118,000 acres).[83]

Gordon's ignorance of the issues surrounding Métis scrip was demonstrated by the brief he submitted in which he mistakenly asserted that the reason for granting scrip was to compensate Métis people who had been dispossessed of lands surrendered by treaty Indians. He added, disdainfully, that the federal government's policy to issue scrip had been given a wide interpretation such that "every Half-breed who could ever show that he had been on a reserve got scrip."[84] He further commented that the federal government had been a "fairy godmother" to the Métis in issuing scrip and, rejecting Stewart's argument, asserted that the province would not have been under any obligation to do the same if it had had control of its natural resources. He added that the obligation to extinguish the Métis share in the Indian title was solely the constitutional responsibility of the federal government.[85] With respect to Stewart's legal argument that Métis scrip constituted a trust under section 109, Gordon submitted that the right to select federal lands anywhere in the North-West Territories could not be a trust because there was no degree of certainty as to where the land would be selected.[86] Relying upon this basic tenet of trust law, Gordon neither offered case law in support of this position nor did he challenge Stewart's interpretation of the case law.

At one point during Gordon's ill-considered argument, John Barnett, Saskatchewan's Deputy Minister of Natural Resources, interceded with an explanation of the province's refusal to redeem scrip since the transfer. Barnett explained that immediately prior to the transfer, the Saskatchewan government had requested that all remaining public lands be reclassified as not open for

82 *Ibid.*

83 PAA, 75.9, Exhibit 120S. The province's calculation was based on roughly half of the scrip acreage that had been distributed in Alberta and Saskatchewan since 1905 — 225,569 acres.

84 NAC, RG 33/50, Vol. 3, misc. docs A-L. Gordon's personal views about Métis claims were generally negative. During his retirement years, he publicly opposed any commemoration of Louis Riel, whom he called a "bloody murderer," and gave speeches bemoaning what he referred to as the "Louis Riel cult." See SAB, R-43, File #20, "Notes for an address on Louis Riel," approx. 1970.

85 Saskatchewan Proceedings, *supra* note 69 at 1318-19.

86 NAC, RG 33/50, *supra* note 84.

homestead entry.[87] The Saskatchewan government wanted to assert complete control over its land policy and stop the federal government from making any further alienation to third parties. Under the mistaken impression that scrip could only be redeemed on homestead lands, Barnett concluded that the province could not redeem scrip because it simply had no more lands suitable for homesteading.[88]

Practically abandoning his legal argument, Gordon concluded by saying that he wanted to get away from a "legal point of view" on the matter of scrip. Gordon appealed to the commissioners to make their decision on the principles of the "widest natural justice — what is fair, in view of the circumstances, as between the Dominion and the province."[89] Gordon argued that it was unfair that provincial lands be alienated in order to satisfy a federal obligation, an injustice that was aggravated by the notorious problems associated with the administration of scrip. Referring to fraudulent practices that had plagued the distribution of scrip, he stated: "We are all aware, though perhaps not officially, of the subterfuge that had to be gone through in order to get it applied to land that was good."[90] He also claimed that it was common knowledge that Métis scrip-holders had often traded their interest "for a ten gallon hat."[91] Gordon did not provide any detail about the fraudulent practices, but Gordon clearly believed that it was inequitable for the province to continue to be held to account for a federal policy that had been clouded by fraud.

In many respects, the legal argument about Métis scrip at the Saskatchewan Commission was merely a dress rehearsal for the debate that would be waged at the Alberta Commission in the fall of 1934. This time, Stewart and his provincial counterpart, Marshall M. Porter, engaged in a far more sophisticated debate over the legal nature of Métis scrip.[92] Early in the proceedings, Stewart and Porter had agreed to submit a joint requisition to the Department of the Interior for information about Métis scrip.[93] The joint

87 This request had been sparked by the recommendations of the Saskatchewan Commission on Immigration and Settlement. See Saskatchewan, *Report of the Saskatchewan Royal Commission on Immigration and Settlement* (Regina: Roland S. Garrett, 1930). The commissioners found that the federal government's land alienations had nearly depleted the province of available homesteading lands.

88 Saskatchewan Proceedings, *supra* note 69 at 893.

89 *Ibid.* at 1320.

90 *Ibid.* at 1319.

91 *Ibid.*

92 Marshall Menzies Porter was appointed to the Bench in 1954. He retired from the Alberta Court of Appeal in 1969.

93 PAA, 75.9, Box 6/35, 270, "Proceedings of the Royal Commission on the Natural Resources of Alberta" [Alberta Proceedings].

requisition included a request for a statement "showing, first, the treaties under which the Indian title was extinguished, the commissions which sat to determine the claims, and, as far as possible, the entries made after 1905 on scrip prior to 1905, and lastly, as far as possible, the residence of the half-breed, although that is rather an elusive and illusory inquiry perhaps."[94] Indeed, the residency element could not be gleaned from the Department of the Interior's records for the simple reason that the Métis claims commissioners had kept no records regarding the provincial residency of each claimant. Counsel for Alberta was eager to have these figures in order to separate the Métis scrip that had been distributed for the benefit of Alberta residents from that provided to residents of other parts of the North-West Territories. This distinction formed the basis for one of Porter's key arguments. Only grantees who had acquired their right to scrip by being residents of Alberta or, more accurately, of the area of the North-West Territories that would become Alberta, could be counted towards the province's account. Porter argued that all other land that had been granted in fulfillment of scrip notes should be compensated by the federal government.[95] However, given the fact that treaty areas were not commensurate with provincial boundaries and that the grants of Métis scrip were not always directly linked to treaty negotiations, Porter was unable to establish the evidentiary basis necessary to link Alberta's scrip obligation to residency within Alberta's boundaries.

In addition to evidentiary hurdles, Porter faced an uphill battle for another reason: Stewart had arrived at the Alberta Commission much better prepared. While he essentially repeated the arguments that he made at the Saskatchewan Commission with respect to whether Métis scrip constituted a trust under paragraph 1, his constitutional arguments represented a significant departure. During the recess between the two Dysart Commissions, Stewart had commissioned a brief on Métis scrip from the Department of the Interior. The resulting memo and data were introduced by Stewart as an exhibit at the Alberta Commission.

The Report, prepared by A.A. Cohoon, set out the legislative history and policy framework that had guided the federal government's decision to issue scrip. Cohoon's Report is worth quoting at length because it forms the basis of Stewart's argument:

> The policy of issuing scrip to half-breeds was adopted in consideration of the interference with the aboriginal rights of this class by the extension of trade and

94 *Ibid.* at 291.
95 *Ibid.* at 270.

> settlement into the territories, and it was felt that an obligation devolved upon the State to properly and fully extinguish these rights to the entire satisfaction of the half-breeds. The rights of the half-breeds were recognized by the Government by reason of their Indian blood. Indian and half-breed rights differed in degree, but they were obviously co-existent. The general policy was to extinguish the half-breed rights in any territory at the same time the Indian rights were extinguished.[96]

Essentially, Cohoon reiterated the rationale for scrip that had been fashioned by Clifford Sifton nearly thirty-five years earlier. Cohoon also examined the origin of the federal government's constitutional obligation to issue scrip and claimed that its source could be found in the *Rupert's Land Order*:

> And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[97]

> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.[98]

In addition to acting upon these constitutional imperatives, the federal government had issued scrip in response to repeated resolutions that had been made by the Legislative Assembly of the North-West Territories. These pre-1905 resolutions called for scrip to be issued to Métis residents of the territories who had been born prior to 1885. Cohoon concluded his memo by reiterating W. Stuart Edwards' 1931 legal opinion: "The Dominion had taken the stand that the obligation of the Crown to redeem the notes may properly be held to constitute a 'Trust' existing in respect of lands, mines, minerals, and royalties transferred to the respective Provinces under Clause 1 of each of the Natural Resources Agreements." He calculated that there were outstanding land scrip notes for 12,900 acres and money scrip for $3081.72 in Alberta.[99]

Greatly influenced by Cohoon's work, Stewart retooled his arguments

96 PAA, 75.9, Box 6/31, Exhibit 124-D, "Memorandum re Half-Breed Scrip," 4 October 1934.

97 *Rupert's Land Order*, *supra* note 9.

98 *Ibid.*, cl. 14. Passed under the authority of s. 146 of the *BNA Act, 1867*, *supra* note 11, the Order in Council provided for the admission of new territories subject to various conditions such as the payment of £300,000 to the Hudson's Bay Company in consideration of its relinquishment of its 1670 Charter.

99 *Supra* note 96. These figures were taken from the Department of the Interior records. Gordon and Barnett did not have access to this information prior to the commission proceedings.

about the constitutional foundations of Métis scrip. He based his argument on the fundamental assumption that the federal government's constitutional obligation to issue scrip derived from the *Rupert's Land Order*. Based on this assumption, Stewart submitted that "[t]he Dominion Government has, throughout, recognized the Half Breed as an Indian within the meaning of these obligations and has consequently treated him as entitled to some share or interest in the lands."[100] Stewart's assertions concerning the extent of the constitutional obligation owed to the Métis under section 91(24) of the *BNA Act, 1930* were debated at length during the Commission proceedings. Seeking to clarify the issue, Justice Tweedie asked Stewart directly if "[t]he rights of the half-breeds arise by reason of the fact that the term 'Indians' is construed to include, and has always been construed to include, a half-breed?"[101] In reply, Stewart reiterated the nature of the federal government's constitutional obligation to the Métis adding that "it was never a part of the deal that the establishment of the reserves in extinguishment of the title settled the Dominion's obligation. The Dominion always recognized that it had to deal separately with the half-breed."[102] Stewart contended that the federal government had the obligation to extinguish the Métis share in the Indian title by granting them an interest in the lands. For this purpose, the federal government issued Métis land and money scrip under the authority of section 91(24) of the *BNA Act, 1930*.[103] However, since Métis scrip entailed no continuing obligations such as the payment of treaty annuities, the federal government considered its constitutional obligation and jurisdiction with respect to the Métis under section 91(24) to be exhausted once the scrip had been distributed to the claimants.

Thus, the federal position was that the Métis were legally categorized as Indians for the sole purpose of extinguishing their claim to a share in the Indian title that existed on the lands of the North-West. Once scrip had been issued, the federal government deemed the Métis to share equal status with any other citizens. Stewart strongly advocated for this construction of the federal government's constitutional obligation, an argument that reflected the federal government's general policy during the 1930s. This policy was evidenced by the federal government's refusal to appoint a representative to the Ewing Commission, formed by the Alberta government in 1934 to inquire into the socio-economic status of Métis living in Alberta.[104] Thomas G. Murphy,

100 NAC, RG 33/51, Vol. 2, Box 32, "Brief on Behalf of the Dominion."

101 Alberta Proceedings, *supra* note 93 at 1069.

102 *Ibid.* at 1070.

103 *Ibid.* at 988.

104 PAA, 72.242/6SE, *Report of the Royal Commission on the condition of the Halfbreed Population of*

Superintendent of Indian Affairs, refused to appoint a representative to the Commission because he considered it "wholly a matter for the Province to deal with; as all half-breeds are citizens and do not come under the Department of Indian Affairs or any other federal Department."[105]

At first instance, the positions taken by the federal government with respect to the constitutional status of the Métis during this period seem inconsistent. In the fall of 1934, Thomas Murphy refused to participate in the Ewing Commission because Métis were not included in the *Indian Act*.[106] However, during the same period, Stewart was arguing that the Métis had always been considered to be Indians under section 91(24). The apparently antithetical positions put forward by Murphy and Stewart can be reconciled by the fact that the federal government admitted responsibility for the Métis only to the extent of extinguishing their share in Indian title. For all other purposes, including the provision of health care, relief payments, and education, the federal government did not consider Métis to be part of their jurisdiction. With respect to the Ewing Commission, the federal government considered the Métis to be a federal obligation for the limited purpose of extinguishing title by issuing scrip and it took the position that any involvement beyond this would constitute an encroachment into provincial areas of constitutional competence. Thus, for all other purposes besides scrip, the federal government refused to accept any responsibility whatsoever for the Métis, even for those who were living on Indian reserves.[107] Only the existence of outstanding scrip compelled the federal government to push for its inclusion in paragraph 1 of the *NRTAs*, intending the transfer of the obligation to the provincial governments in order to satisfy the remaining obligation it owed the Métis under section 91(24). The federal government clearly had no intention of expanding its constitutional responsibility by making an appointment to the Ewing Commission or admitting that it had any other responsibility for the Métis.

The financial realities facing governments of all levels during the Great Depression of the 1930s provides context for Stewart's arguments at the Dysart Commission. Reluctant to undertake any unnecessary expenses, both

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the Province of Alberta. Sessional Paper No. 72, 1936.

105 PAA, 69.289, Roll 78, File #769, "Re Half-breed Problem, George Hoadley, Minister of Railways and Telephones, to R.G. Reid, Premier," 7 September 1934.

106 R.S.C. 1927, c. 98, s. 2(d). See also PAA, 75.75, Box 1/3c, Thomas G. Murphy to George Hoadley, 10 October 1934.

107 The federal government refused to distribute relief to Métis people who were living on reserve because they were not included in the definition of Indian provided in *Indian Act*, *ibid.*, ss. 2(d), 16. See NAC, RG 13, Vol. 2563, File #136583, 9 May 1936.

the provincial and federal governments tried to shift financial responsibilities to each other. On behalf of the federal government, Stewart argued that Alberta should not be compensated for scrip because it would have followed the same policy if it had been granted control of its natural resources in 1905. If the province had refused to do so, Stewart submitted that "the Dominion could have taken the necessary steps under Section 91(24) of the *British North America Act* to compel equitable treatment to Indians and Half Breeds."[108] Thus, for the purposes of extinguishing the Indian title, Stewart's opinion was that the federal government would have had the constitutional jurisdiction under section 91(24) to protect the Métis interest in the lands of the North-West.

Perhaps learning from Percival Gordon's missteps, Alberta's counsel formulated more cogent arguments about the constitutional and legal issues surrounding Métis scrip. Porter directly challenged the source of the federal government's obligation to provide Métis scrip: "[The federal government] chose to deal with the Indians by giving them land. But there was no obligation to give the Indians land and still less to give the half-breed land."[109] Because the decision to give Indians and Métis land had not been explicitly prescribed in the *Rupert's Land Order* or in any other constitutional document, Porter asserted that the federal government's decision to issue scrip had been purely discretionary. Alternatively, Porter argued that if the specific constitutional obligation to grant lands to the Métis existed, then provincial lands should not have been used to fulfill a federal obligation without due compensation being paid to the province. Porter stated that while he had no objection to the principle behind the federal government's scrip policy, Alberta deserved to be compensated for the lands that had been alienated for this purpose.[110] Thus, the constitutional issue was not as much of a concern as the fact that the provincial lands had been used without financial compensation. In the context of the Great Depression, the province's financial concerns are understandable.

In order to bolster the amount of Alberta's claim for scrip lands, Porter argued that no trust had attached to the lands prior to 1905. Therefore, the

108 *Supra* note 100 at 33b. See also Alberta Proceedings, *supra* note 93 at 993; during his oral argument, Stewart was a bit more circumspect: "[The federal government] would have felt itself bound to honour the floating charge, and I am not at all sure that under its jurisdiction as contained in section 91, subsection 24, the Dominion could not have compelled a recognition of the half-breed claim."

109 Alberta Proceedings, *ibid.* at 1286.

110 *Ibid.* at 1287-88, 1305. The total area of scrip issued and patented in Alberta since 1905 was 69,976 acres. Approximately 58,000 acres of scrip had been issued prior to 1905 and located after that date. See also PAA, 75.9, Box 6/35, Exhibit 124-D(1).

province had no obligation to provide lands in order to fulfill any pre-existing agreements that had been arranged by the federal government. Porter tried to distinguish the railway cases by arguing that the right of selection had been granted to a specific company over a particular area of land. Conversely, Porter argued, Métis scrip was a right that could be exercised by an unknown number of claimants over the whole of the North-West. This, he argued, did not constitute a trust even within the broad definition that had been set out by Lord Watson.[111] Porter further argued that the 1.4 million acres that had been set aside for the purpose of issuing scrip in Manitoba constituted a defined area by which the right of land selection could be exercised by the Métis. This land allocation, confirmed in the *Manitoba Act*, met the condition of certainty required by trust law. However, since there was no parallel provision in the *Alberta Act*, the province had no such obligation to meet.[112] He contended that had the federal government acknowledged its land entitlement owing to the Métis, it would have specifically provided for it in the *NRTAs*.[113]

Porter further suggested that by extinguishing the Métis claim by issuing land or money scrip (and cash grants in the later years), the federal government had tacitly acknowledged that it did not have to provide land to the Métis in order to fulfill its constitutional obligation. He suggested that it was unfair for the province to be required to grant land when the obligation could be satisfied by other means, such as a cash payment, and that if land were specifically required to fulfill the obligation, grants should be made from federally administered lands in the Yukon and North-West Territories.[114] This argument was unfounded because money scrip could be redeemed only for the purchase of land or as payment for grazing, timber, and mining leases.

Although the commissioners did not pick up on the false premise behind Porter's argument, they were nevertheless unsympathetic to the argument that the federal government's obligation to the Métis could have been satisfied by anything other than a grant of land. Chair Dysart challenged Porter directly on this point: "You cannot deprive a whole native race of the right to live somewhere on earth. And the only place for them to live is in their native haunts. You cannot deport them to other regions, for that would not be consistent with the British practice of dealing with aborigines."[115]

111 Alberta Proceedings, *ibid.* at 1290-91.

112 *Ibid.* at 1291. See also *Manitoba Act*, *supra* note 20; and *Alberta Act*, 4 & 5 Edw. VII, c. 3, reprinted in R.S.C. 1985, App. II, no, 20, s.8.

113 Alberta Proceedings, *ibid.* at 1292.

114 *Ibid.* at 1286, 1293.

115 *Ibid.* at 1294.

Justice Tweedie also challenged Porter's suggestion that the federal government could have met its constitutional obligations by removing the Métis from their traditional lands. After a lengthy exchange, Porter admitted that he was only pressing the issue because Stewart had admitted during the Saskatchewan case that the federal government was responsible for compensating the province for scrip issued after 1905. In spite of the fact that Stewart's admission was not binding at the Alberta Commission, Porter wanted the same admission to be made regarding scrip issued in Alberta.[116]

Porter's legal arguments may have been more sophisticated than Gordon's had been at the Saskatchewan Commission, but he shared Gordon's opinion on the prevalence of fraudulent practices surrounding the distribution of scrip and the implications that this fraudulent taint had with respect to the provinces' obligations. His views on the issue were clearly stated during his rebuttal to Stewart's argument that the province should not receive compensation because it would have issued scrip had it control of its natural resources:

> Those of us who have lived in the West have a good deal of difficulty in approaching this subject from the standpoint of what the province would have done, because we know something of the way in which the half-breed scrip was used, of just how it failed to serve the purpose for which it was intended – the settling of the half-breed's problem, and of the abuses into which it fell and led him, to the extent that to-day in our province the half-breed remains a problem with which we ultimately shall have to deal in some way. His property rights and his position have not been improved by the use of the scrip as they might have been . . . . These scrip were used in such a way that not long since the Criminal Code was amended so as to set up a special limitation feature in prosecutions for perjury arising out of false declarations made in connection with the filing of these scrip. And so applying the problem from the standpoint of whether the province would or would not have done certain things, we must say that, knowing what was known to everyone in the West, the province would not have continued that method of dealing with the half-breed, even assuming it was its duty to deal with those people.[117]

He concluded his argument by alleging that the scrip policy had benefited only the interests of the "scrip dealer." Like Gordon, Porter did not think that it was equitable to hold provincial lands accountable for a federal policy that had failed to meet its objectives and had been subject to fraudulent practices.[118]

After several months of hearings, the introduction of hundreds of exhibits,

116 *Ibid.* at 1295.
117 *Ibid.* at 1311-12.
118 *Ibid.* at 1315.

the testimony of dozens of witnesses, the Dysart commissioners retired to write their reports. Issued in March 1935, the two Reports were practically verbatim copies of one another.[119] Despite the lengthy debate about Métis scrip during the proceedings, the commissioners failed to make any decisions about the constitutional issues that had been raised; instead, they merely confirmed the fact that scrip had been issued in order to fulfill the federal government's constitutional obligation to extinguish Indian title to the lands of the North-West. The commissioners also found that:

> [m]ost of this half-breed scrip was sold by the half-breed recipients and so passed into the hands of speculators and others, thus depriving the alienation of some part of the intended settlement element. The question is raised as to whether or not Saskatchewan [or Alberta] was bound to provide lands for all the half-breeds who later secured scrip. The question is one of difficulty, and we do not pass upon it in the sense of deciding legal rights. It seems, on the whole, that had the province been in control, a substantial part of these half-breed alienations would never have been made, and the land so saved from such alienation would have been saved to the province as assets with revenue potentialities.[120]

Thus, the authors of the majority report avoided making a determination on the complex issue of whether Métis scrip could be considered a trust under section 1 of the *NRTAs*. Rather, they focused on the policy aspects of Métis scrip by finding that it failed to produce the results that had been intended by the federal government. They found that the provinces would not have issued scrip had they control of their resources, and they credited the provincial account as such in their findings.[121]

It was, however, a pyrrhic victory for the provinces. In their final financial recommendation, the authors of the majority Report did not break down the heads of recovery in any meaningful way. Instead, they awarded each province a lump sum payment of 5 million plus interest from the date of the transfer of administration in 1930.[122] Seemingly overwhelmed by the complexities

119 Saskatchewan Royal Commission Report, *supra* note 65; and Canada, *Report of the Royal Commission on the Natural Resources of Alberta* (Ottawa: J.O. Patenaude, 1935) [Alberta Royal Commission Report].

120 Saskatchewan Royal Commission Report, *ibid.* at 29; and Alberta Royal Commission Report, *ibid.* at 30.

121 In understanding their conclusions, it is also worth noting that the terms of reference for the Royal Commissions precluded the commissioners from making any determinations with respect to legal rights. The constitutional and legal issues had been previously referred to the courts. See *Reference re s.17 of the Alberta Act*, [1927] S.C.R. 364; *Reference Re Saskatchewan Natural Resources*, *supra* note 61; and *In re Transfer of Natural Resources to the Province of Saskatchewan*, *supra* note 61.

122 Saskatchewan Royal Commission Report, *supra* note 65 at 36; and Alberta Royal Commission

involved in "unscrambling the egg," the commissioners recommended a payment that was not based on any discernable formula. Justice Bigelow, one of the Saskatchewan commissioners, registered his objection to this approach by submitting a minority Report in which he found that scrip issued after 1905 did not constitute a trust under section 109 of the *BNA Act, 1867.* Bigelow had not been convinced by Stewart's argument that the province would have issued scrip had it controlled its natural resources. With respect to the constitutional obligations underlying Métis scrip, Bigelow found that "the answer to that it seems to me, is that by section 91 of The British North America Act the Dominion assumed the jurisdiction and obligation to look after the Indians."[123] At a minimum, Bigelow believed that the Métis were equivalent to Indians with respect to their interest in the land and that the federal government had the jurisdiction to administer this interest under section 91(24) of the *BNA Act, 1867.* Furthermore, he found that that province had never incurred any obligation toward the Métis due to an absence of such a provision in the *Saskatchewan Act.*[124]

Part IV: After the Dysart Commissions

Unfortunately for the scrip-holders, the Dysart Commission Reports provided no guidance on the issue of scrip redemption. The commissioners had sidestepped the important question of whether the constitutional obligation to redeem scrip had passed to the provinces as either a trust under paragraph 1 or an arrangement under paragraph 2 of the *NRTAs.* Given the lack of direction this conclusion provided with respect to the redemption of outstanding scrip certificates, it is not surprising that the issue remained a source of contention between the provinces and the federal government.

Shortly before the release of the Dysart Reports, Manitoba's Deputy Attorney General, John Allen, sent a letter to the Department of the Interior inquiring about the implications for his province of the arguments made by Alberta and Saskatchewan at the resources Commissions:

> [A]s I understand it the province of Saskatchewan now takes the stand that it is not called upon to honour any of the outstanding scrip issued under legislation enacted by the Parliament of Canada. As you can see if the position taken by Saskatchewan is sustained it means as I understand it that Alberta and Manitoba will be called upon

Report, *supra* note 119 at 38.

123 Saskatchewan Royal Commission Report, *supra* note 65 at 53.

124 *Ibid.* Using the formula that had been applied in the Manitoba Commission, Bigelow found that the federal government owed Saskatchewan more than $58 million.

> to honour all the outstanding scrip.[125]

A couple of weeks later, Allen reiterated his concerns that Manitoba and Alberta would be responsible for redeeming outstanding scrip beacause Saskatchewan no longer had any lands open for homestead entry.[126] In response, Roy A. Gibson, the Assistant Deputy Minister of the Interior, assured Allen that Saskatchewan would not be able to avoid the obligation it had assumed under the *NRTAs*:

> The view held here is that this withdrawal of the privileges of obtaining homestead entry a few weeks before the transfer did not operate to prevent the acceptance of scrip by the Department as any lands so withdrawn. We are of the opinion that the words "open for ordinary homestead entry" appearing on the face of a scrip were used in a general sense to designate a class of lands and did not restrict the lands upon which scrip might be located to those actually open for entry.[127]

Subsequently, he advised Allen that the Saskatchewan government had once again decided to grant homesteads. Thus, Gibson assured Allen, Saskatchewan would no longer be able to hide behind the specious argument that it could not redeem scrip because it did not have any homestead lands.[128]

In the 1935 federal election, the defeat of R.B. Bennett by the Liberals led by Mackenzie King, prompted Saskatchewan's recently elected Liberal government to re-evaluate its policy on outstanding Métis scrip. Hoping to come to a amicable settlement with respect to the 13,000 acres of outstanding land scrip, Saskatchewan Attorney General Thomas C. Davis, proposed a compromise to the federal Minister of Mines and Resources, Thomas A. Crerar:

> With the return of the natural resources to the provinces the rights of the holders of this scrip have been materially restricted and there is inevitably going to be a dispute between the Dominion and the Provinces and the holders of the scrip as to responsibility by way of compensation for scrip.
>
> It seems to me that it would be well if the three Prairie Provinces and the Dominion Government could get together and agree that this scrip should be redeemed in case at a certain amount per acre and that the funds necessary be provided for by the four governmental bodies on a basis to be arranged. It would not cost very much and would be the simplest and cleanest way to clear this matter up.[129]

125 NAC, RG 15, Vol. 1171, File #5590730, John Allen to R.A. Gibson, 14 March 1935.

126 *Ibid.*

127 *Ibid.*, 8 April 1935.

128 *Ibid.*, 15 April 1935. Gibson referred to an article published in *The Financial Post* on 23 March 1935: "Saskatchewan to dispose of public lands by free grants."

129 NAC, RG 15, Vol. 1171, File #5590730, Davis to Crerar, 30 November 1935.

Prompted by this proposal from Davis, Crerar asked his department's officials for advice on how to proceed. In the resulting memo, A.A. Cohoon restated W. Stuart Edwards' 1931 legal opinion that scrip constituted a trust under paragraph 1 of the *NRTAs* and that the provinces were under the obligation to redeem any outstanding amounts. With respect to the compromise that had been suggested, Cohoon counselled that:

> there seems to be but one logical stand for the Department to take regarding Mr. Davis' proposal that the Dominion should assist in providing funds for redeeming the outstanding scrip in cash on a basis to be arranged, namely, that as the whole question of half-breed scrip, both redeemed and unredeemed, was one of the matters which came before the Resources Commissions any liability of the Provinces with respect to redeeming the scrip was taken into account by the Commissions in determining the financial adjustments which they recommended should be made in favour of the Province. Therefore, when the financial adjustments so recommended have been made, the Provinces will in effect have received any compensation to which they may be entitled from the Dominion on account of the outstanding scrip. There seems to be no more justification for now reviewing the question of outstanding half-breed scrip than for re-opening any other question which came before the Resources Commissions.[130]

Cohoon concluded that "the Prairie Provinces are unduly concerned with respect to the obligation attaching to outstanding half-breed land scrip notes."[131] According to Cohoon, there were only 106 scrip notes outstanding, many of which were more than thirty years old and presumed to be lost.[132]

Cohoon's analysis, although well reasoned and consistent with the federal government's position advocated at the Dysart Commissions, failed to address one important aspect of the situation. The Saskatchewan government had rejected the recommendations contained in the majority Report and had refused to accept the $5 million plus interest from the federal government.[133] Davis's suggested compromise with respect to scrip represented an attempt to settle at least one outstanding issue — of which there were many — between the federal and provincial governments. Crerar, however, chose to follow

130 *Supra* note 31.

131 *Ibid.*

132 *Ibid.*

133 See Saskatchewan, *A Submission by the government of Saskatchewan to the Royal Commission on Dominion-Provincial Relations prepared under the direction of Hon. T.C. Davis, Attorney General for Saskatchewan* (Regina: King's Printer, 1937). Mackenzie King set up the Royal Commission on Dominion-Provincial Relations (the Rowell-Sirois Commission) in order to inquire into the fiscal imbalances that existed between the federal and provincial governments. Refusing to accept the findings of the Dysart Commission, Saskatchewan treated its submission to the Rowell-Sirois Commission as a rehearing of the entire issue.

Cohoon's advice and refused to entertain any compromise on the issue.

In light of the federal government's unyielding stance, all three prairie provinces slowly accepted the fact that it was their responsibility to redeem scrip. In Manitoba, for example, the first step was taken in 1930 when the province amended its lands legislation to allow the location of scrip on lands that had been designated as "open for ordinary homestead entry."[134] However, despite enacting the necessary legislation, Manitoba remained reticent to fulfill outstanding scrip. Manitoba's attorney general excused the province's reluctance on its lack of familiarity with federal policies regarding Indian treaties and Métis scrip.[135] After much consultation with federal officials, Manitoba passed regulations under the authority of the *Crown Lands Act* that limited the redemption of scrip to "any person who, as at the date of its issue, was actually resident within the territory now lying within the boundaries of the province of Manitoba."[136] Somewhat surprisingly, the preamble to the regulations provided that outstanding Métis scrip was deemed to be the province's responsibility because it constituted "an arrangement whereby any person has become entitled to any interest therein against the Crown" under paragraph 2 of the Manitoba *NRTA*. Clearly, the federal government's arguments that Métis scrip constituted a trust under paragraph 1 had not convinced the government of Manitoba. A little more than a decade later, Manitoba set 30 April 1948 as the deadline for redeeming scrip.[137]

For their part, Alberta and Saskatchewan also eventually passed the legislation required for the redemption of scrip. Under its provincial lands legislation, Alberta passed a series of regulations in 1935, affirming that "[p]ermission to locate land scrip will be granted to the half-breed to whom such scrip was issued, providing the claim to the scrip was based on birth within the territory now comprising the province of Alberta."[138] Saskatchewan followed suit by amending the *Provincial Lands Act* to require that claimants be born in the province and present their claims prior to 1 May 1940 for lands open for homesteading.[139]

134 *Supra* note 49.

135 NAC, RG 15, Vol. 1171, File #5590730, Allen to Gibson, 22 April 1935.

136 The regulations were passed under the authority of the *Crown Lands Act*, S.M., vol. I & II, 24 Geo, V., c. 7, s. 7(l); and Man. Reg. 1267/1937.

137 *The Crown Lands Act*, vol. I & II, 11 Geo., VI, s. 45.

138 NAC, RG 15, Vol. 1171, File #5590730, "Government of the Province of Alberta, Department of Lands and Mines, Regulations respecting the Location of Half-breed land scrip in the Province."

139 *An Act to Amend the Provincial Lands Act, 1931*, S.S. 1937, c. 11, s. 24a, re-enacted in *Provincial Lands Act*, R.S.S. 1940, c. 37, s. 26. Shortly after the *NRTA*s, the Saskatchewan government had opened more lands for homesteading.

Thus, even though the provinces had accepted their responsibility for redeeming scrip, the legislative measures they passed demonstrated that their acceptance of responsibility was qualified. Not surprisingly, the time limits and place of birth restrictions imposed by the provinces contributed to additional federal-provincial wrangling and even more confusion for scrip-holders. For instance, in 1939, a scrip-holder, G.M. Newton, wrote a letter to Saskatchewan's Minister of Natural Resources, William F. Kerr, inquiring about the process by which he could redeem a number of scrip notes that he had in his possession.[140] Officials in the department had previously refused to redeem Newton's notes because originally they had been issued to Métis who had been born in Manitoba. When Newton contacted the federal government about the province's refusal to recognize his scrip, he had been informed that Saskatchewan's position was not sustainable due to its unconstitutionality. Newton told Kerr about the federal government's position, which prompted Kerr to request a legal opinion from Saskatchewan's Department of Justice on whether Saskatchewan's approach to redeeming scrip, as set out in the amended *Provincial Lands Act*, was *intra vires*.[141] While researching this constitutional question, Deputy Attorney General Alex Blackwood asked Alberta's Attorney General, W.S. Gray, whether the question had ever been raised in Alberta. Gray informed Blackwood that the Alberta regulation limiting the redemption of Métis scrip had never been challenged. However, Gray proffered the following opinion: "It is possibly arguable that the restriction of the right to locate land scrip to persons born in the Province of Alberta may be in contravention of the Transfer of Natural Resources Agreement, but I doubt if such an argument would be given effect to."[142] Unfortunately, Gray provided no reasons in his letter for his opinion.

Concerned by the implications of Gray's unsupported assertion, Blackwood developed legal arguments to support the constitutionality of the provincial legislation. Remarkably, Blackwood agreed with the federal government's case, as presented at the Dysart Commissions, with respect to the categorization of Métis scrip as a trust under paragraph 1 of the *NRTAs*. Given this starting point, he had to struggle to find ways to exempt the applicability of scrip as a trust to Saskatchewan land. For example, Blackwood argued that it was "not clear that such trust is impressed upon provincial lands which constitute only a fractional part of the Dominion

140 SAB, M11, Kerr Papers I.54, Half-breeds, 1940-41, G.M. Newton to W.F. Kerr, 8 February 1939.
141 *Ibid.*, J.W. Estey, Attorney-General, 10 April 1940.
142 *Ibid.*, Gray to Blackwood, 16 April 1940.

lands."[143] He questioned the fairness of Saskatchewan having to fulfill an obligation that arose in another province and suggested that the trust was applicable only to federal lands while they were under the control and administration of the federal government prior to 1930. In the alternative, Blackwood argued that the province would be required only to fulfill the terms of the trust on a reasonable basis. He submitted that the courts would likely find that the place of birth requirement to be reasonable. However, he admitted that the constitutional point raised by Newton was "a novel one" and that it was hard to predict what would happen if the issue was brought up in litigation.[144]

Bolstered by Blackwood's opinion on the constitutionality of the *Provincial Lands Act*, W.F. Kerr authorized the denial of scrip-holders' rights to those individuals currently in possession of scrip that had originally been issued to persons not born in Saskatchewan. In response to a later inquiry about a deadline extension for scrip redemption beyond 1 May 1940, Kerr asserted that an extension could be made as a legislative amendment only. This amendment was never introduced. As a result, the section of the *Provincial Lands Act* that provided for scrip redemption was omitted from the Revised Statutes of Saskatchewan in 1953.[145] Once 1 May 1940 had passed, there was no procedure by which a scrip-holder could redeem a scrip note in Saskatchewan, regardless of their place of birth. Thus, after first limiting the right to redeem scrip to those who could satisfy the residency requirement and applied before 1 May 1940, Saskatchewan eliminated the right to redeem scrip altogether.

Throughout the 1940s, the federal government continued to receive inquiries from scrip-holders who were being refused the right to locate land by provincial land departments in Saskatchewan, Alberta, and Manitoba. In December 1945, the Register of Lands for the Department of Mines and Resources received a request to look into the status of scrip notes that had been issued in Manitoba but were currently being held by a scrip-holder in Alberta. The scrip-holder had been informed by Alberta's Department of Lands and Mines that it would allow location for scrip only if the grantee had been born in the territory currently comprising Alberta. That same month, A.A. Cohoon was once again asked for his opinion. Relying on the memo that he had written ten years earlier, Cohoon outlined the legislation

143 *Ibid.*, Memorandum re: Half-breed Scrip by A. Blackwood, 19 April 1940.

144 *Ibid.*

145 R.S.S. 1953, vol. 1, s. 26 was omitted from *The Provincial Lands Act*, *supra* note 139.

that provided for the redemption of scrip in each of the prairie provinces and noted that Saskatchewan no longer made legislative provision for scrip redemption. With respect to the legal rights of scrip-holders after the *NRTAs*, Cohoon opined that:

> it is scarcely necessary to point out that the legal holder or grantee of a half-breed land scrip is in a less favourable position to a considerable degree with administration of the resources resting with the respective Prairie Provinces then he was during the time the lands were controlled by the Dominion . . . . When the resources were with the Dominion it was open to him to locate this scrip on 240 acres of any Dominion land open for homestead entry in Manitoba, Saskatchewan, Alberta or the Northwest Territories, and with special permission and under certain circumstances it was possible to arrange for the location of the scrip on a homestead, pre-emption, or purchased homestead, after abandonment, or on land relinquished from a grazing lease.[146]

In his opinion, the imposition of time limits and place of birth requirements represented unconstitutional limits on the rights of scrip-holders. Cohoon encouraged his Minister to approach each of the prairie governments in order to obtain "a better deal for the holders or grantees of half-breed scrip notes."[147] Cohoon pointed out both that, prior to the *NRTAs*, scrip could be redeemed on all public lands and not just those open for homestead entry and that the birthplace of the scrip grantee had no relevance in establishing a claim to land. Cohoon proposed that the federal government had an obligation to remind the provincial governments of the nature and extent of the responsibilities that they had assumed under the terms of the *NRTAs*.[148]

In the end, Cohoon's superiors ignored his argument that the federal government was obliged to defend the rights of the scrip-holders against the prairie governments. It was an issue that had come up earlier that year, when federal Minister of Trade and Commerce James A. McKinnon received an inquiry about scrip from William Aylwin of Edmonton, who held two land scrip notes issued in Manitoba. Aylwin wished to locate the land in Alberta but the province had refused to locate scrip that had been originally granted to a Manitoba resident. When McKinnon asked the Minister of Mines and Resources, James A. Glen, for his advice about Alberta's refusal, he was informed that the federal government would hold fast to its position but that it would not "become involved in any controversy with the Provincial Authorities in connection with the matter."[149] By 1945, the cultivation of harmonious

146 NAC, RG 15, Vol. 1171, File #5590730, Memorandum by A.A. Cohoon, 15 December 1945.
147 *Ibid.*
148 *Ibid.* at 5.
149 NAC, RG 15, Vol. 1171, File #5590730, W.J.F. Pratt, Private Secretary, Minister of Mines and

federal-provincial relations had trumped the enforcement of scrip-holders' legal rights. After fifteen years of federal-provincial squabbling over the issue of Métis scrip, it is ironic that the Minister of Mines and Resources invoked the spectre of good relations as a rationale for failing to act in the interest of the scrip-holders.

II. CONCLUSION

The historic federal-provincial debates prompted by the negotiation and implementation of the *NRTAs* raised a number of constitutional issues about the Métis and the settlement of their land interests through scrip. In the end, the legal debate over whether Métis scrip constituted a trust under paragraph 1 or a contractual arrangement under paragraph 2 the *NRTAs* remained unresolved. Many conflicting opinions were proffered about the legal character of Métis scrip and the nature of the obligations incurred by the various governments. Early on, the debate had centred on whether scrip was a contractual arrangement. This had been the intention of W.W. Cory, the Deputy Minister of the Interior who had been involved in the *NRTA* negotiations and who originally characterized scrip as an arrangement under paragraph 2. Upon this understanding, Cory had informed Saskatchewan's premier that scrip was an arrangement that the province was bound to honour. However, when Premier Anderson's legal counsel assured him that the contingent nature of the interest rendered this characterization unlikely to withstand scrutiny, a recalcitrant Anderson refused to include provision for the redemption of scrip in his province's newly drafted lands legislation. Later, the debate refocused on paragraph 1 when W. Stuart Edwards and James McGregor Stewart relied on Lord Watson's definition of a section 109 constitutional trust to support the federal government's position that the obligation to redeem outstanding scrip had transferred to the provinces. In both Dysart Commission Reports, commissioners avoided the question completely, and no court has ever ruled on the issue. The political and legal wrangling over the constitutional responsibility for Métis scrip illustrates that it does not fit easily into legal categorizations such as trust or contract. However, the historical debate clearly demonstrates that the dynamics of federal-provincial relations took precedence over the recognition of the constitutional obligations to the Métis. As third parties to the *NRTAs*, the Métis and their interest in the lands of the North-West Territories slipped through the cracks of Canadian federalism.

Resources to D.W. Thomson, Secretary, Minister of Trade and Commerce, 19 December 1945.

While the historical record provides no conclusive resolution to the "rather vexed question" of the responsibility for Métis scrip, the debate sheds light on a number of constitutional issues of contemporary relevance. Under the terms of the *Rupert's Land Order*, the federal government recognized that it had an obligation to settle claims to land "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."[150] The federal government undertook to fulfill this obligation by negotiating Indian treaties and issuing Métis scrip by means of the legislative authority found under section 91(24) of the *BNA Act, 1930*.[151] Thus, the federal government implicitly recognized that it had at least some degree of constitutional responsibility for the Métis. The essential question that remains today is whether or not the federal government fulfillled its constitutional obligation by issuing Métis scrip.

An examination of the historical record allows at least two conclusions to be drawn. First, by refusing to challenge the constitutionality of the provincial legislation, the federal government failed to protect the rights of scrip-holders regardless of whether scrip should have been characterized as falling under paragraph 1 or 2 of the *NRTAs*. The limitations imposed by the provincial legislatures on scrip redemption were likely *ultra vires*. Thus, by refusing to fully exercise the legal rights embodied by scrip, the federal government breached a constitutional obligation it owed to the Métis. The contemporary consequences of this failure to act may, however, be limited. By 1945, most of the outstanding scrip had been acquired by institutions such as the Royal Bank of Canada. By this date, very few, if any, scrip notes were still in the possession of the original Métis grantees or their descendants. Nonetheless, the federal government's refusal to protect the scrip-holders' rights by challenging the constitutionality of provincial legislation points represents a breach of the federal government's constitutional obligation to the Métis. For once it had decided to issue scrip in fulfillment of its constitutional obligation under section 91(24), the federal government had a fiduciary duty to ensure that the scrip-holders would be able to fully exercise the rights guaranteed by scrip. Second, the federal government's assumption of constitutional responsibility for the Métis also raises questions about the implementation of the scrip program. If the program was poorly administered, or subject to the fraudulent practices that were alleged by provincial counsel at the Dysart Commissions, the various issues of Métis scrip may have failed to fully extinguish the Métis share in Indian title to the lands of Alberta, Saskatchewan, and Manitoba.

150 *Rupert's Land Order, supra* note 9.

151 *Supra* note 2.

APPENDIX I: PARAGRAPHS 1 AND 2 OF THE *NRTAs*

See The Memorandum of Agreement attached to *The Saskatchewan Natural Resources Act*, 20 & 21 Geo. V., c. 41 (Sask.); *The Alberta Natural Resources Act*, 20 & 21 Geo. V., c.3 (Alta.); and *The Manitoba Natural Resources Act*, 20 & 21 Geo. V., c. 29 (Man.) [emphasis added].

TRANSFER OF PUBLIC LANDS GENERALLY

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, *subject to any trust existing in respect thereof, and to any interest other than that of the Crown in the same*, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals, or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specifically provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals *and every other arrangement whereby any person has become entitled to any interest therein as against the Crown*, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines, or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.