INTRODUCTION

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Unless one is deeply immersed in the legalities of Aboriginal hunting and trapping rights on the Prairies, the 1930 *Natural Resources Transfer Agreement* (*NRTA*)[1] appears to be an obscure chapter in Canadian constitutional history of very little relevance today. Indeed, as many who have studied the *NRTA* have observed, these agreements have been sorely overlooked in Canadian history books.[2] However neglected it has been, the *NRTA* was a substantial juncture in the evolution of Canada.

First and foremost, the *NRTA* — in actuality, a set of three agreements between Canada and Alberta, Saskatchewan, and Manitoba — was intended to create equality between the prairie provinces and the other Canadian provinces by giving them control over their lands and natural resources. As certain historians have noted, the extended negotiations required to accomplish this objective were an early iteration of the precarious balancing of federal and provincial interests that still characterizes Canadian constitutional law and politics.[3] If not a milestone in the expression of western dissatisfaction within Confederation, the *NRTA* was, by any standard, an important episode in a longer, deeply Canadian story.

More notoriously, the *NRTA* has been interpreted as having unilaterally altered the treaty hunting rights that Prairie Indians insisted upon during treaty negotiations to secure their land-based livelihoods into the future. Paragraph 12 of the *NRTA* committed the provinces to continue to respect Indian livelihood rights after the transfer of natural resources to provincial control.[4] The courts have interpreted this provision as having created a

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1 *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26.

2 See, *e.g.*, Jim Mochoruk, "Manitoba and the (Long and Winding) Road to the *Natural Resources Transfer Agreement*" (2007) 12 Rev. of Constitutional Studies/Rev. d'études constitutionnelles 255; and Thomas Flanagan & Mark Milke, "Alberta's Real Constitution: The Natural Resources Transfer Agreement" in Richard Connors & John M. Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: University of Alberta Press, 2005) 165.

3 See Flanagan & Milke, *ibid.*, for an enumeration of the similarities.

4 *Supra* note 1. The text of para. 12 (13 in the Manitoba agreement), which is the same in all of the agreements, is as follows:

geographically expanded subsistence hunting right while extinguishing the commercial aspect of the livelihood rights that was protected by the treaties.[5] This transformation of the treaty rights through the *NRTA* was infamously described as a "*quid pro quo*" by Justice Cory in *Horseman*, the leading case. The *quid pro quo* was that the Indians received an enlarged subsistence right in compensation for the loss of their commercial one.[6] Both lawyers and historians have found fault with this interpretation, arguing that the courts' findings are not supported by law or history.[7]

The controversy on this issue has overshadowed the fact that the *NRTA* constitutionalized an Aboriginal (if not treaty) hunting right well before constitutional protection for Aboriginal and treaty rights was generally established through section 35 of the *Constitution Act, 1982*.[8] The controversy also overshadows the fact that, just as the *NRTA* was an early contribution to the unsolvable puzzle of federal-provincial relations, the Indian provisions of the *NRTA* are also part of a longer, deeply Canadian story. The legal history of British North America is marked by many small steps through which the Imperial Parliament transferred land and authority to its colonies. Such transfers of land and power often included a contemporaneous transfer of obligations to respect the land rights of the native populations of the colony, obligations that the British viewed as "just and reasonable, and essential to our Interest, and the Security of our Colonies."[9] Viewed as part of this longer

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> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

5 *R. v. Horseman*, [1990] 1 S.C.R. 901.

6 *Ibid.* at paras. 60-62. For a discussion of this point, see Kerry Wilkins, "Unseating *Horseman*: Commercial Hunting Rights and the *Natural Resources Transfer Agreements*" (2007) 12 Rev. of Constitutional Studies/Rev. d'études constitutionnelles 135.

7 For a critique based on law, see Wilkins, *ibid.* For critiques based on history, see Brian Calliou, "*Natural Resources Transfer Agreements*, the Transfer of Authority, and the Promise to Protect the First Nations' Right to a Traditional Livelihood: A Critical Legal History" (2007) 12 Rev. of Constitutional Studies/Rev. d'études constitutionnelles 173; and Frank J. Tough, "The Forgotten Constitution: The *Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933" (2004) 41 Alberta Law Rev. 999.

8 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See Tough, *ibid.* at 1001.

9 The Royal Proclamation of 1763, reprinted in R.S.C. 1985, App. 11, No. 1. See also, *The Rupert's Land and North-Western Territory Order*, 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9, s. 14. For a review of legal and historical origins of these obligations, see Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America" in John McLaren, A.R. Buck & Nancy E. Wright, *Despotic Dominion: Property Rights in British Settler*

story, the Indian provisions of the *NRTA* were there to protect the Indians as the control and beneficial ownership of the land and resources once again changed colonial hands. It is a story with many recurring themes, one of which is a remarkable amount of confusion surrounding the nature and scope of the Crown's obligations to Aboriginal peoples. Confusion, however, is just part of a story in which neglect and avoidance are also central characters. In the context of the *NRTA*, all three are reflected in the negotiations between federal and provincial officials, and their eagerness to see these Crown obligations taken up by the other level of government.

This special issue of *Review of Constitutional Studies* reconsidering the *NRTA* is permeated with these deeply Canadian themes. It began as a conversation with Frank Tough, who noted that 2005 was not just Alberta's hundredth anniversary, but also the seventy-fifth anniversary of the agreement. Tough has led a resurgence of interest in the *NRTA* with publications that shed new light on the negotiations behind paragraph 12.[10] Based on his historical work, Tough argues that the courts' extinguishment hypothesis is historically untenable. Even allowing for a margin of debate around Tough's interpretation of the historical documents, he convincingly demonstrates that the *NRTA*'s negotiators did not intend to derogate from treaty rights, contrary to what Justice's Cory finding of a *quid pro quo* implies. Nevertheless, it is a historical argument aimed at the law and therefore raises a difficult question: Should a legal finding stand when it is historically "wrong"?

This question raises a second question: what, historically speaking, does it mean to be "wrong"? There are now numerous examples of courts confronting revision and conflict in historical interpretation when relying on historical evidence in the course of determining Aboriginal and treaty rights.[11] And if the shifting nature of historical knowledge was not enough of a problem for courts, the discipline of history is itself a site of change. The challenges

Societies (Vancouver: University of British Columbia Press, 2005) 50.

10 Tough, *supra* note 7. See also Frank Tough, "Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions From the Department of Justice" (1995) 10 Native Studies Rev. 121.

11 See, *e.g.*, *R v. Marshall*, [1999] 3 S.C.R. 456, in which Justice Binnie remarked, "The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigation parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can" (at para. 37). Regarding the role of the expert historian in these cases, see Arthur J. Ray "Native History on Trial: Confessions of an Expert Witness" (2003) 84 Canadian Historical Rev. 253; and Frank Tough, "*Prof v. Prof* in the Trial of the Benoit Treaty Eight Tax Case: Some Thoughts on Academics as Expert Witnesses" (2004) 15 Native Studies Rev. 53.

to objectivity and positivism issued by post-structuralists have filtered into the field of history,[12] emphasizing the interpretive nature of historical knowledge that many historians already acknowledged.[13] Downstream from these theoretical upheavals, social historians and post-colonialists have moved academic history away from official political histories to embrace previously ignored actors, notably women, indigenous, and colonized peoples. Embracing the historical perspectives of these actors in turn leads to diversity in historical methodologies, including oral history and ethnohistorical methods.[14]

The judiciary has been accused of being what Lawrence Stone has called "positivist troglodytes" when it comes to history.[15] Specifically, courts have been criticized for failing to acknowledge the problematic nature of historical knowledge and, relatedly, failing to recognize the legitimacy of oral history and the notions about history that lie behind such methodologies.[16] The failing related to history that is at stake in the interpretation of paragraph 12, however, is much simpler. It is a matter of disagreement between the present historical consensus and a legal finding that implicates history. This disagreement challenges the authors of both law and history to consider the significance of narratives emerging from the other field in constructing their own, particularly when constitutional events are in issue.

The discrepancy between history and law in the interpretation of paragraph 12 has interesting parallels to the Australian experience. There, the doctrine of *terra nullius* justified and secured the legitimacy of the settler society and the land rights of its members while figuratively erasing those of the indigenous peoples because of their "backwardness." It was a theory that was implemented by the colonial government even as settlers discovered that the land was not as

12 For an overview of these influences, see Gabrielle Spiegel, "History and Post-modernism, IV" (1992) 135 Past and Present 194.

13 See, *e.g.*, Lawrence Stone, "History and Post-modernism, III" (1992) 135 Past and Present 189, who mentions Edward Carr's well-known *What is History* (New York: Vintage Books, 1961) to argue that earlier academic historians were not all the "positivist troglodytes" that post-modern theorists have made them out to be (at 190). However, as Spiegel explains, the linguistic conception of reality in post-structuralism "has disrupted traditional literary and historical modes of interpretation by its denial of a referential and material world, a material reality we once believed could be known and written about scientifically" (*ibid.* at 195). Post-structuralism thus challenges historians to, at a minimum, define their subject differently.

14 See, generally, Dipesh Chakrabarty, "Reconciliation and Its Historiography: Some Preliminary Thoughts" (2001) 7 The UTS Rev. 6.

15 *Supra* note 13.

16 See, *e.g.*, Joel R. Fortune, "Construing *Delgamuukw*: Legal Arguments, Historical Arguments, and the Philosophy of History" (1993) 51 Univ. of Toronto Faculty of Law Rev. 80; and Ray, *supra* note 11.

empty as they had expected it to be.[17] *Terra nullius* remained the law until the *Mabo* decision, in which the High Court of Australia finally acknowledged the historical fallacy, not to mention the injustice, perpetuated by this doctrine.[18] Fortunately, the interpretation of paragraph 12 of the *NRTA* does not require a "judicial revolution" on the scale of *Mabo* to correct the divergence between law and history.[19] It is an issue of much narrower scope and with implications that do not threaten the legitimacy of the Canadian state. Nevertheless, both contexts involve courts articulating history and contributing to constitutional narratives in a manner that either conflicts or accords with historical scholarship. From *Mabo*, it seems obvious that it is preferable to bring law in line with history when dealing with a country's formative events. However, in light of the different purposes served by the past in law and history, the degree of concordance required — or desired — is much less obvious.[20]

The articles in this issue take up the nexus of law, history, and constitutional narrative from a variety of disciplinary perspectives. Two take aim at the Indian hunting rights provisions directly, while two situate the *NRTA*, including Aboriginal rights issues, as a stage in the constitutional evolution of Canada. None suggests a formula by which to combine law and history for the "best" constitutional results. Instead, the mix of approaches and arguments presented here provides a singular opportunity to reflect on how law, history, and politics clash and converge to simultaneously guide constitutional interpretation and constitute constitutional narratives.

Kerry Wilkins and Brian Calliou take up the debate over the courts' interpretation of paragraph 12 of the *NRTA*, but take very different approaches to the issue. Wilkins leaves the history for the historians and argues that on legal grounds alone, the conclusion in *Horseman* is wrong. His argument demonstrates that if the Supreme Court of Canada were to follow its own

17 Stuart Banner, "Why *Terra Nullius*? Anthropology and Property Law in Early Australia" (2005) 23 Law and History Rev. 95.

18 *Mabo v. Queensland* (1992), 175 C.L.R. 1.

19 *Mabo* was hailed as a "judicial revolution" by commentators: see generally M. A. Stephenson & Suri Ratnapala, eds., *Mabo: A Judicial Revolution* (St. Lucia: University of Queensland Press, 1993) and *Essays on the Mabo Decision* (Sydney: Law Book Company, 1993).

20 For example, *Mabo* overturned *terra nullius* to allow recognition of Aboriginal land rights but left issues regarding sovereignty aside regardless of what historians have had to say on this matter. See Henry Reynolds, "After Mabo, What About Aboriginal Sovereignty?" (April 1996) Australian Humanities Rev., online: <http://www.lib.latrobe.edu.au/AHR/archive/Issue-April-1996/Reynolds.html>. For helpful discussions of the differences between law and history and their uses of "the past," see Bain Attwood, "*The Law of the Land* or the Law of the Land?: History, Law and Narrative in a Settler Society" (2004) 2 History Compass 1; and Martin Krygier, "Law as Tradition" (1986) 5 Law and Philosophy 237.

doctrinal stipulations regarding the extinguishment of Aboriginal and treaty rights, it would have to repudiate its conclusion that the *NRTA* extinguished commercial hunting rights. It is a compelling argument that complements the historical one, but does not demand that the courts decide the intent of the *NRTA*'s negotiators as a matter of historical — and constitutional — fact. Instead, Wilkins urges the Court to reconsider its course based on the enduring and always present concern for the integrity of its own Aboriginal rights jurisprudence.

Calliou takes a longer route, tracing the regulation of the Indians' traditional livelihood activities from early settlement through the treaties and afterwards, before reaching his critique of paragraph 12 of the *NRTA*. He describes the early clash of values between indigenous and settler societies in understanding the nature and meaning of hunting, demonstrating that this clash was never resolved. Instead, game regulations took up the concerns of settler society. Calliou follows the evolution of game regulation in the northwest by way of the numbered treaties, highlighting the complications posed by the intersection of federal and provincial jurisdictions in regulating wildlife harvesting by First Nations. He thus adds insight into how the responsibility for protecting treaty and Aboriginal rights has always been a jurisdictional hot potato. Ultimately, Calliou aims this history at the courts. Like Tough, he argues that the courts are wrong because history does not support their conclusions. But he takes a broader view than Tough, discussing events and attitudes that long precede the *NRTA* and that are unlikely to be entered into court as evidence about the *NRTA*. His argument is aimed at the broader constitutional narrative. It attempts to call more attention to First Nations' perspectives and argues that if the courts' history included these perspectives, they could not have reached the conclusions about the *NRTA* that they have.

Nicole C. O'Byrne's article tackles the transfer of obligations regarding Métis scrip, an aspect of the *NRTA* that scholars have previously overlooked. She begins with an overview of Métis scrip and then reviews the tactics taken by provinces to avoid the obligation to redeem scrip that they inherited as part of the *NRTA* package. Much of this story played out in federal-provincial arguments around the implementation of the *NRTA* shortly after the agreements were concluded. O'Byrne describes how the federal and provincial governments debated whether scrip was an arrangement under paragraph 2 of the *NRTA* or a trust under paragraph 1, and reminds us that while these debates dragged on, Métis scrip-holders were left without remedy. It is a story that starkly demonstrates how poorly Métis rights were understood by most of the provinces through the negotiation of the *NRTA*s.

O'Byrne's approach to the subject is one of legal history: a query into the legislative and constitutional development of scrip and the positions taken by historical legal and political actors. In contrast to Calliou, O'Byrne's approach is aimed less at the legal questions of today and more at unearthing the historical legal arguments and attitudes that defined the *NRTA* and its interpretation. It is nevertheless an inquiry that is informed by unanswered legal issues; O'Byrne's most basic argument is framed against the current lack of recognition of the long history of constitutional protection for and awareness of Crown obligations towards the Métis. And by providing this framework, O'Byrne's history complements Calliou's by positioning the *NRTA* in terms of its place in the longer history of Crown-Aboriginal relations.

The final article, on Manitoba's journey to the *NRTA*, injects an historian's scepticism about the importance of legal principle. Jim Mochoruk offers a correction to the focus on the Aboriginal rights aspects of the *NRTA* in the first three articles. Not only does Mochoruk argue that Aboriginal livelihood rights were a small side issue in the overall negotiation of the *NRTA*, he also maintains that constitutional principles were a distant concern in a process dominated by intergovernmental squabbling and political positioning. While none of this issue's other authors would likely disagree with this argument, Mochoruk highlights the *NRTA* as a forum that channelled western Canadian discontent and was fundamentally motivated by Manitoba's quest for a better financial arrangement with the Dominion. From his perspective, the primary significance of the *NRTA* is as an important constitutional moment with continued resonance in contemporary Canadian politics.

For Mochoruk, history puts law in its place, as the aftermath of the political and economic concerns that motivated the negotiation of the *NRTA* and shaped its final form. The Aboriginal rights aspects of the *NRTA* were, according to Mochoruk, more remarkable in their absence during the negotiations, particularly since it was First Nations who were likely to suffer the greatest impacts from the increased development and settlement pressure the transfer promised for the northern regions in which First Nations lived. Nevertheless, Mochoruk acknowledges the contemporary import of the *NRTA* in regard to the determination of Aboriginal livelihood rights in the Prairies, urging those who interpret and apply the agreements today to consider them in their full historical context.

This issue brings fresh research and arguments to bear on the *NRTA*. It presents a range of arguments from legal to historical, with a mix of law and history and histories of law in-between. What the authors share, regardless of

approach, is that they explicitly seek to influence how the *NRTA* is understood and interpreted today. This commonality demonstrates the common ground between law and history: although different in method and argument, the questions and concerns they address are formed in the present.[21] Nowhere is this point of convergence more obvious than with respect to constitutional narratives. The collective point made by these articles is that there is much room for improvement in the comprehension and interpretation of the *NRTA* by framing the agreements "properly" in terms of both law and history. The precise combination of law and history that adds up to "proper" eludes easy definition and consensus. Instead, it is an alchemy that courts, as primary authors of the legal version of constitutional narratives such as that of the *NRTA*, must master to satisfy the need for historical accuracy in constitutional storytelling while maintaining the integrity of the law.

This issue has come together through the hard work and persistence of many people. My thanks are owed to the authors, and especially to Kerry Wilkins for graciously offering much needed advice and support along the way.

21 The role of the present in history is, of course, much more controversial. See Attwood, *ibid.*