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Commentary

The Constitutional Status and Rights of the Métis people in Canada

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The following essay is a revised version of the above opening address for the Metis Treaties Project at the University of Ottawa in October 2015.

Introduction

In an address given at a Vancouver conference in May 1995, I wrote that "Canada has never quite known how to react to the enigmatic presence of the Metis … It is as if Canada is still embarrassed by the persistent presence of its illegitimate child, born prior to a proper union with the Aboriginal peoples of this country" (Chartrand 1995).

My goal today is to describe, in general terms, the constitutional status and rights of "the Metis people" in Canada. Constitutional evolution or development is driven by political action. The doctrine of Aboriginal rights, on the other hand, is driven mainly by judicial action—the decisions of the courts of Canada. The topic is complicated by the interaction between overtly political action on one hand and judicial decisions on the other, which necessarily reflect the political environment and circumstances in which the judicial decisions are made.

My focus will concern primarily the development of the doctrine of Aboriginal rights by the courts since the guarantee of these rights in the 1982 Constitutional amendment. It is still true that Canada does not know how to react to the enigmatic presence of the Metis people. The courts still do not know how to react. The lawyers pleading before appointed judicial civil servants do not know what to say.

I will review the standards and principles that may legitimately be called in aid to identify "the Metis people" in section 35 of the *Constitution Act 1982*. I will assert that the application of these precepts leads to the conclusion that the "Metis people" mentioned in section 35 are "Riel's people"; the "new nation" whose political resistance to the designs of Canada's national policy of western expansion gave rise to the formal recognition of this Aboriginal people, few in number, by Canada.

The surest form of recognition by agents of the state of Canada was, of course, the recognition of the Metis enemy through the rifle scopes of the Canadian-British militia on the South Saskatchewan River in the spring of 1885.

But the recognition at issue here is the formal recognition that was affirmed in the *Manitoba Act, 1870,* which is part of Canada's Constitution and which directly affirms the rights of the Metis people (Chartrand 1991a). The recognition at issue is also the formal recognition that was evident in federal laws and western policies that evolved to be administered as part of Canada's western strategy in dealing with the territorial rights of

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the "Indian" peoples. This is a historical phenomenon that was unique. It did not happen anywhere else in Canada.[1]

Only Riel's people were recognized in federal Indian policy, including in the *Dominion Lands Acts* policy that recognized the Indian title of the Metis people in the West, as well as in the *Indian Act.* That federal statute included a number of Metis provisions, including aspects of the membership code, the 1884 prohibition of public meetings of Metis or Indian people in the West (not anywhere else), and provisions about Metis persons within treaty groups.

Provincial governments also recognized the Metis people through policies such as Alberta's 1930s legislated Metis Settlement scheme and Saskatchewan's Metis farms of the 1940s. It is not irrelevant that each of the three prairie provinces, and no other province, has enacted Metis legislation.

As a matter of law, state recognition is not needed to prove Aboriginal rights, but it is obvious that governments reacted to the presence of the Metis people only in the three prairie provinces which happen to coincide with the core of the regional reach of Riel's people.

Finding a proper reaction to the enigmatic presence of the Metis in Canada today is complicated by new claimants clamouring for recognition as "Metis" people with history-based rights. These claims from elsewhere should be resisted.

If my claim that "the Metis people" in section 35 must be limited to Riel's people in the West has raised eyebrows, I propose to lower those brows in the following way.

It is my contention that historic Aboriginal communities do not have to plead a particular "ethnic" identity to make a case for the recognition of their Aboriginal rights. It is not necessary to assert an identity as a Metis, an "Indian," or an "Inuk" community.[2] The name of an Aboriginal community is not the judges' business.

The sole issue is proof of existing history-based collective rights held by an Aboriginal community. The members of those communities are entitled to act in the enjoyment of the community's collective rights by virtue of their belonging to the community—not by virtue of their personal antecedents. Membership in these communities is a necessary condition for identity as a constitutionally recognized Aboriginal person. For proof of Aboriginal rights, it is the antecedents of the community that matter, not the antecedents of individual persons who have been accepted by the community.

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1 D. N. Sprague, *Canada and the Metis, 1869*-1885 (Waterloo, ON: Wilfred Laurier University Press, 1988); Gerhard Ens and Joe Sawchuk, *From New Peoples to New Nations: Aspects of Metis History and Identity from the Eighteenth to Twenty-First Centuries* (Toronto: University of Toronto Press, 2016); Metis Association of Alberta et al., *Metis Land Rights in Alberta* (Edmonton: MAA, 1981); Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Metis," *Osgoode Hall Law Journal*, 29 (1991): 457–82; G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960); W. L. Morton, ed., *Manitoba: The Birth of a Province* (Manitoba Record Society Publications, 1965); J.K. Howard, Strange Empire: Louis Riel and the Metis People Toronto: James Lewis and Samuel, 1974, Marcel Giraud, Le metis canadien: son role dans l'histoire des provinces de l'ouest. Six tomes. Paris. Travaux et Memoires de l'Institut d'Ethnologie, 1945.

2 *Newfoundland and Labrador v. Labrador Métis Nation*, 2007 NLCA 75 (CanLII) at para 36.

A rational and defensible doctrine would be based upon one test for proof of Aboriginal rights for all the Aboriginal peoples. In the result, no Aboriginal community would be deprived of its rightful claims to history-based rights.

Having thus introduced my case for an equitable doctrine that denies no legitimate claim to an Aboriginal identity by limiting the section 35 meaning of "Metis people," I can proceed to identify my reasons for the limitation to "Riel's people."

I appreciate that I am writing for readers from various professions, and I shall do my best to make myself as clear as the subject matter permits, by using plain English, by avoiding legal jargon, and by keeping my fingers crossed.

The constitutional status of the Metis people

The identification of the "Metis people" in section 35 must be based upon identification of the purposes of section 35, which are to affirm and recognize the special rights of all the peoples indigenous to Canada. These peoples are called the "aboriginal peoples" and expressly include "the Metis people." There is no defensible basis for asserting, as is often done, that "having an Aboriginal ancestor" *ipso facto* is sufficient to establish an identity that matters for section 35 purposes.

The identification of "the Metis people" is found by applying general principles to the exceptional case of Riel's people. The courts, on the other hand, have applied exceptional principles to the unexceptional case of so-called "mixed-blood" individuals or "frontier families" (Giokas and Chartrand 2002; Chartrand 2008). In the frontier regions, the "mixed-blood" families associated themselves with the local Anisinaabe community or with the European immigrant community. They did not develop institutions to identify and defend their common interests. Only in the West did a new distinct "national" or ethnic identity emerge.[3]

International standards

The status and rights of the Metis people engage an examination of the constitutional and legal and political relationships between *a people* and the state of Canada. Framing the question simply as "Who is a Metis person?" misses the point.

Guidance for the development of the doctrine of Metis status and rights may be had from international developments that have recently provided a guide to state-Indigenous relations in the form of the *United Nations Declaration on the Rights of Indigenous Peoples*

3 I am not aware of any professional studies that concluded there was a "new nation" of Metis communities located east of the Red River region prior to the Powley case. On the other hand, see, for example, Harriet Gorham, "Families of Mixed Descent in the Western Great Lake Region," in *Native People, Native Lands, Canadian Indians, Inuit and Metis,* ed. Bruce Alden Cox, 37-55, Carleton Library Series No. 142 (Mtl & Kingston: McGill-Queen's University Press, 2002), at 50; and Jacqueline Peterson, "Red River Redux: Metis Ethnogenesis and the Great Lakes Region," in *Contours of A People: Metis Family, Mobility and History,* eds. Nicole St-Onge, Carolyn Podruchny, and Brenda Macdougall, 22–58 (Norman: University of Oklahoma Press, 2012), at 43, who concludes: "Contrary to the revolutionary transformation that occurred west of the Red River, no new economic niche or political opportunity roused the growth of a separate ethnic group consciousness and community in the Great Lakes. That history belongs to the northeastern plains."

(2007). The *Declaration* is predicated upon the recognition of the fundamental right of self-determination of all "peoples" at international law.

Canada recognized that the right of self-determination applies to the Aboriginal peoples of Canada in a statement at the United Nations in Geneva on 31 October 1996. This public declaration by Canada may be binding under international law, in accordance with the principle of good faith (Joffe 200).[4]

The right is a collective human right that applies to a people and not to individuals. The specific indicia of a "people" are not universally agreed upon, but would include the features identified by some international bodies and Canada's Royal Commission on Aboriginal Peoples (RCAP 1996, 182–84),[5] such as a shared history and territory, a communal sense of belonging, and shared cultural features such as language. UN treaty bodies have characterized the model of Aboriginal self-government proposed by Canada's RCAP as a form of self-determination.[6]

Riel's people form the only community that may fall within the ambit of the meaning of a "people" at international law. Historians have restricted their assessment of the historic emergence of the Metis people to the Western regions, the only place where the people were able to identify, assert, and defend a common interest.[7] The battles that are scattered through Metis national history are a part of the early history of British and Canadian westward expansion, including the early skirmishes at Red River with the Selkirk settlers and other British immigrants, out of which nationalist legend and a symbolic flag and national anthem emerged. Most notorious in the history books are the events in Red River in 1869–70 and the "last stand" at Batoche in 1885.

The compact theory and consent

This well-known theory has a solid history in Canada, having been applied first to French-English or Quebec-Rest-of -Canada relations, and more recently to Aboriginal peoples and the state. I applied it to my analysis of section 31 of the *Manitoba Act, 1870* (Chartrand 1991), and RCAP applied it to the case of all Aboriginal peoples in its 1996 final report (RCAP 1996, 197). I have argued that the agreement of Riel's people at Red River with the proposals of the federal representatives in the 1870 negotiations was a "bargain of confederation," which fits within the compact theory. No similar evidence exists for any other "Metis people."

Deschamps recently restated the compact theory in a vigorous dissenting opinion in

4 See the text accompanying this article and the authorities cited in footnote 106 therein.

5 RCAP adopted the term "nation" as a synonym for "people" in section 35. The intent was to simplify things.

6 United Nations, *Convention on Civil and Political Rights* (Human Rights Committee, Sixty-Fifth Session CCPR/C/79/Add.105, 7 April 1999), para. 8.

7 Ante, note 1.

the Supreme Court of Canada in the *Beckman* case.[8]

> In Reference re. Secession of Quebec, 1998 CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217, at paras. 48 82, this Court identified four principles that underlie the whole of our constitution and of its evolution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a "federal compact" between the provinces. The compact that is of particular interest in the instant case is the second one, which, as we will see, actually incorporates a fifth principle underlying our Constitution: the honour of the Crown.

A section 35 people is a people within the compact theory, the consent of whom matters for constitutional legitimacy. Like the provinces, Aboriginal peoples are constitutionally relevant entities whose consent matters for Canadian constitutional legitimacy.[9]

In the compact theory, the consent may be a fiction to ground political argument. It is arguable, however, that the consent of Aboriginal peoples legitimizes constitutional authority in Canada. *De facto* constitutional authority becomes *de jure* authority with the practical consent of an Aboriginal people (Chartrand 2011). An Aboriginal "people," legitimately constituted and represented, is a constituent unit of Canada, the consent of whom matters for constitutional legitimacy.

It is only Riel's people that has a history of negotiations in a context where the people's consent mattered for the creation of Canada. Riel's people, if and when legitimately constituted and represented, is a constituting and constituent entity of Canada. Arguably, the courts can compel governments today to negotiate the constitutional terms under which the Metis people are willing to live (Chartrand 2011).

Constitutional interpretation

Section 35 expressly recognizes two kinds of rights: Treaty rights and Aboriginal rights. It is a problem of justice that conflicts in state-Indigenous relations have to be decided in the state's own courts and not via neutral adjudication of the sort that applies to agreements between states. Domestic courts have limited capacity to force the state to take remedial action. Should they stray too far from the safe shore of public opinion or government policy, they will tend to lose their legitimacy, with significant damage to democratic governance in a country such as Canada, one that is already labelled the least-democratic of the modern states.

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8 *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53 (CanLII) at [97].

9 The proposition was created by the Supreme Court of Canada in the *Quebec Secession Reference. See Chartrand (2011).*

Aboriginal rights and "Metis" people

The social and political character of the "Metis nation" can only be a result of the political action of the people, by the exercise of the free will of individuals. The norm of self-determination implies the existence of the included right of the people to decide who belongs: the right of self-definition. That role cannot be legitimately arrogated to itself by an outside entity such as a domestic court.

Because the courts have the authority to decide questions about interpreting the law of the Constitution, the courts of Canada are creating a "Metis" people for the purposes of section 35. Present purposes invite only the briefest general commentary on the development of the doctrine of "Metis rights" to date.

According to the courts, the purpose of Aboriginal rights is to reconcile the pre-existing presence of Aboriginal peoples prior to imposition of state control and authority with the state's control and authority. This approach demands the creation of a date for a legal beginning. Popular rhetoric refers to "time immemorial." The judicial treatment of Metis rights has resulted in the establishment, without textual or principled warrant, of three different dates for proof of different categories of section 35 Aboriginal rights: Aboriginal rights generally; Aboriginal title as a category of Aboriginal rights; and Metis rights.

The doctrine could be rationalized by adopting one date for proof of all Aboriginal rights for all Aboriginal peoples. That date seems to be the one that emerges from long-established imperial constitutional experience and law. It is the date at which an Aboriginal people exchanged loyalty to the state for protection, which is the historical origin of the fiduciary relationship that is implicit in section 35.

The doctrine of Aboriginal rights should not apply distinct tests for proof of Aboriginal rights in the case of Metis claims. The current test for Metis rights was created in the 2003 *Powley* case in Ontario, far from the region with a history of Canada-Metis relations.[10] The *Powley* test is unworkable. It is also unfair to First Nations that have to prove Aboriginal rights back to a much more ancient date than do their Metis neighbours (Chartrand 2008).

Distinguishing s.35 peoples from s.15 of the Charter ("racial origin")

Section 35 recognizes group rights in Part II of the *Constitution Act 1982*. Part II is carefully and purposefully separated from the individual-rights recognition in the Charter in Part I of the Act. Regrettably, some professional writers, commentators, and even judges ignore this important constitutional fact.[11]

The members of the "peoples" recognized in section 35 must be distinguished from the individual persons in section 15 of the Charter who are protected from adverse discrimination based upon their "race." A person who is discriminated against because of societal ascription of a difference based upon the odious and debunked notion of "race"

10 *R v Powley,* [2003] 2 SCR 207.

11 *R v Daniels,* 2014 FCA 101 at para 146, where the court refers to s.35 in the Charter.

may complain about that discrimination because of the Charter. It is an entirely different matter to inquire about who belongs to an Aboriginal people in section 35, which affirms group rights.

A "people" emerges from political action, not from biological action. The atavistic notion that the Metis people consist of non-related "mixed-blood" families must be consigned to the dust bin of history.

The facts relating to particular claimants to a Metis identity will reveal whether they comprise a disadvantaged group of persons who are biological descendants of Metis or Indian people and, being discriminated against, may plead for the assistance of state remedial programs. The "mixed-blood" myth of Metis identity is based upon biologically deterministic notions that are appropriate for animal husbandry and ought not to form any part of the history of state-Metis relations, nor any part of contemporary state-Aboriginal relations. It is time to ditch the Dracula factor.[12]

Treaties

It is a well-known historical fact that the Anishinaabeg communities in present-day Ontario that entered into treaties in the nineteenth century included "mixed-blood" individuals (Morris [1880] 2000, 19, 20). The issue was considered in the treaty negotiations, and the government representatives made it plain that they dealt with Anishinaabe chiefs who represented their communities, and it was up to them to decide who belonged. The biological antecedents of an individual were never determinative.

Some academic attention has been given to the question of whether to characterize the adhesion by a group of "mixed-blood" individuals from the Fort Frances area to Treaty Three as a "Metis" or (as it was called then) a "Halfbreed" adhesion. The fact that many individuals in an Aboriginal community may have been of "mixed-blood" was not a bar to admission into treaty, as illustrated by the facts pertaining to many Prairie-region treaties of the 1870s, and later adhesions. The issue lacks practical relevance.

The constitutional status of an Aboriginal people does not depend upon the terminology used to refer to individuals who belong to an "Indian" treaty community. In principle, there should be no consequence to self-naming or outside-naming. We know that there are many "bands" created under the *Indian Act* that harbour members of Metis or "Halfbreed" families that joined the treaty group. One of the wrongs to Indian bands or First Nations worked by *Powley* is to bless, in theory, the black sheep of First Nations bands who decide, after a long time of enjoying Indian community life, to disrupt their community ties with a claim to distinct "Metis" rights (Chartrand 2003, 87).

Starting in 1870, federal law, policy, and administration of the Western Treaties recognized two legal categories: "Halfbreed" and "Indian" persons, based upon the choice of individuals to accept "Metis" or "Indian" legal status. The statuses of "Indian" and "Halfbreed" were legally mutually exclusive, although their administration was fraught with

12 For an analysis showing that a biological descent test does not work, see De Plevitz and Croft (2003).

difficulties and individuals were able to move back and forth between the two categories. These government policies have had a significant influence on the self-identification practices of individuals and of political organizations (Ens and Sawchuk 2016, 380 ff.).

The Manitoba Treaty and section 31

The political action of our Metis ancestors in 1869–70 directly generated the creation of the province of Manitoba. This well-known history included an agreement between the federal government and Red River representatives. Riel called that agreement "the Manitoba Treaty." The agreement included three guarantees in the *Manitoba Act, 1870* for the protection of local interests against Dominion interests: for religion, schools, and lands. The agreement included an amnesty for the Metis political actors, who were mostly the Franco-Catholic Michif people, supported by some of the Anglo-Protestant "Halfbreed" population (Chartrand 1991b, 461).

It is disingenuous to avoid the recognition of the Manitoba Treaty by asserting, as has been done, that the *Manitoba Act* was a unilateral act of the federal Parliament. The *Manitoba Act* only contained some of the terms of the Manitoba Treaty. The due recognition of the Manitoba Treaty and a return to a proper political relationship with the historic Metis people is an outstanding obligation of Canada.

The Metis lands provision, section 31, reads:

> 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.[13] (Emphasis added.)

In my analysis in my 1991 book on the subject, I argue that the facts and constitutional analysis lead to the conclusion that s.31 described a *gradual settlement scheme* to provide lands to the Metis families for the purpose of keeping these lands out of the public market until such time as the families had adjusted to the new agricultural economy and were competent to defend their individual titles in the public market. This was a *fast-track version of the Indian enfranchisement* legislation of the day (Chartrand 1991a),[14] which was part of

13 *The Manitoba Act,* 1870, S.C.1870, c.3 (R.S.C. 1985, App. II, No.8). The Act is part of the Constitution of Canada within s.52 of the *Constitution Act 1982.*

14 I have seen no reference to these authoritative sources for interpretation in the factum of the *MMF Inc.* or in the decision of the SCC. The enfranchisement policy approach would not have supported the MMF Inc.'s contention that section 31 was a design for a permanent land base, an argument without foundation in law or history.

the protection function exercised by the state in the original state-Indigenous compact. The lands were meant for the families, including the heads of families, and not only for the children of the first generation.

In the *MMF Inc.* case,[15] the MMF Inc. argued that section 31 intended to establish a permanent land base. The SCC rightly rejected that contention, which is not supported by either the text or the social and political context of section 31.

The Court described the gradual settlement scheme in section 31 of the *Manitoba Act, 1870* as a scheme to give lands *only to first-generation children* for the purpose of giving them a "head-start" in the face of a flood of land-hungry English Protestant immigrants from Ontario. This judicial view, unwarranted by the facts and the law, is a gross offence against history and against the nationalist spirit of the Metis people.[16]

The SCC's approach to constitutional interpretation is open to challenge. In the recent *Daniels* case,[17] the SCC explained that the meaning of s.91(24) of the *Constitution Act 1867* is linked to the meaning of section 35 of the *Constitution Act 1982*. The text of s.31 of the *Manitoba Act* and its context are also linked with section 35 just as surely as is section 91(24). The term "Metis" in section 35 appears previously only in the French version of the Act of 1870, and links the two provisions, linking the purposes of both provisions and identifying Riel's people as the "Metis people" in s.35. The *compact* with the Metis in 1870 is Canada's first "land claim" provision within the meaning of section 35(3).

Conclusion

The historic Metis nation emerged in the Western regions out of its political action in resisting the waves of immigrants to the homelands that the Michif people shared with the "Indian" peoples. Allied with the Cree, Anishinaabe, and Nakoda, the Michif were part of the great Nehiyapwat Confederacy of Aboriginal peoples in the nineteenth century (Vrooman 2012). The Constitution of Canada affirmed the constitutional status and rights of the Metis people in 1870, and again in 1982.

My conclusion that there is only one Metis nation cannot operate to deny state recognition of any Aboriginal rights that may be held by any Aboriginal people or community.

The reasons are, first, my contention that it is not the courts' business to inquire, in Aboriginal rights cases, into the self-naming practices of Aboriginal people, and second,

15 *Manitoba Metis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme and Earl Henderson v AG Canada and AG Manitoba 2013* SCC 14 (CanLII).

16 The SCC granted the declaration that the MMF Inc. requested pertaining to constitutional invalidity. A declaration has no legal consequence. The courts had denied the declaration based on their view of the facts as argued by several experts called by the government parties. Counsel for the MMF Inc. did not call any experts. Moldaver and Rothstein dissented, thereby affirming their view that for Metis in the diaspora, there is no justice to be found in the homeland.

17 *Daniels v R,* 2016 SCC 12.

my argument that the rights, and the people in section 35 who have these rights, must be determined by applying the same general principles and tests to all Aboriginal peoples. All Aboriginal communities, however they call themselves, should have access to the courts to assert and defend their constitutionally protected rights.

It may be worth emphasizing that nothing that I have proposed has anything to do with the terms that people and communities use to describe themselves. My comments are concerned only with matters of constitutional interpretation and doctrinal development.

It is not possible to predict how the emerging judicial doctrine will develop. Even if the courts arrogate to themselves the authority to decide that for purposes of the Constitution there are "Metis" communities all across Canada, the Metis nationalist movement, conceived as "Riel's people," the people that was deceived by the broken bargain of the *Manitoba Treaty*, may continue to assert its identity outside Canada's constitutional framework. Rebels again…

Ekosi

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