

# **'PROSPECTS FOR JUSTICE: RESOLVING THE PARADOXES OF MÉTIS CONSTITUTIONAL RIGHTS'**

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## **Abstract / Résumé**

Métis rights are under theorized and poorly understood. This may be due in part to the fact that the Métis themselves are not given the attention in legal and academic circles afforded other Aboriginal peoples, First Nations and Inuit. It is also, however, because of the conflicting, confusing and paradoxical nature of Métis rights today. This paper seeks to clarify some of these paradoxes, situating them within the larger context of Aboriginal rights, but also affirming the uniqueness of the Métis situation. The paper then comments on the 'prospects for justice' — the feasibility of realizing Métis rights through legal versus political means. Finally, it concludes with some reflections on the need for 'legal pluralism'.

Les droits des Métis font l'objet d'un travail théorique insuffisant et ils sont mal compris. Cela est peut-être dû en partie au fait que les Métis eux-mêmes ne bénéficient pas dans les milieux juridiques et universitaires de l'attention accordée aux autres peuples autochtones (Premières Nations et Inuit). L'insuffisance théorique est également due à la nature conflictuelle, confuse et paradoxale des droits des Métis à notre époque. L'auteur cherche à préciser certains paradoxes en les situant dans le contexte élargi des droits des Autochtones, tout en affirmant le caractère unique de la situation des Métis. Il commente ensuite les «perspectives de justice», soit la faisabilité de la réalisation des droits des Métis en comparant les moyens juridiques et politiques. En conclusion, il propose quelques réflexions sur le besoin d'un «pluralisme juridique».

## **Métis/ Aboriginal/ Charter Rights/ Legal Pluralism**

On October 22, 1993, Steve and Roddy Powley shot a bull moose near their home north of Sault Ste Marie, ON. After killing the animal, Steve Powley attached a tag to its ear. On this tag was the date, time and location of the kill as well as a statement indicating that the animal was meat for the Powley's consumption. Finally, Steve Powley signed the tag and included his Métis card number. It was not long before Conservation Officers charged both men with hunting without a license and unlawful possession of a moose. This was not an act of desperation, or even one of accident; this was deliberate defiance.

It is particularly in this area of hunting and fishing rights that Métis organizations from British Columbia to Ontario have increasingly turned to legal challenges such as that of the Powley's to settle disputes and questions about Métis rights, to answer the question: what are the scope and nature of Métis harvesting rights? This turn towards the courts has, of course, been brought about by the massive change in Canadian law brought about by the patriation of the Canadian constitution and subsequent adoption of the *Charter of Rights and Freedoms* in 1982.

Immediately following the adoption of the new *Constitution Act, 1982*, many Aboriginal peoples were optimistic about the possible benefits that entrenching Aboriginal rights within the newly formed *Constitution* and the *Charter of Rights and Freedoms* would bring. And indeed much of the optimism was warranted. As Roger Gibbins has noted, "Indians emerged...with very significant gains. Indeed, the 1982 Constitution Act has more to say about Aboriginal issues than it has to say about Quebec, intergovernment relations or Western alienation."<sup>1</sup> Included in the constitution are sections 25, 35, and 37 which all make reference to Aboriginal peoples. The most important of these, s.25 and s.35, make specific reference to 'recognizing and affirming' Aboriginal rights, and were successfully added to the *Constitution Act* by amendment in 1983.

Perhaps the most optimistic of all Aboriginal peoples were Canada's Métis. Traditionally, the Métis people of Canada have felt displaced, somewhere in between two cultures, one Aboriginal, one European, without truly belonging to either. However, the inclusion of Métis under the definition of "Aboriginal peoples of Canada" in section 35 (2) of the *Constitution Act, 1982* finally extended constitutional recognition and protection to Métis people. This would permit, it was hoped by Métis leaders, the Métis people to emerge as a proud nation with rights on par with those of other Aboriginal peoples, First Nations and Inuit.

This year marks the twentieth anniversary of the patriation of Canada's constitution and creation of the *Charter of Rights and Freedoms*. However, Métis leaders are today still lamenting their status as

Canada's "forgotten people," "an invisible entity within the general population, an invisibility caused by shame."<sup>2</sup> Perhaps the Charter has not delivered. Confrontation with government and non-Aboriginals does not seem to be abating. From Oka to Burnt Church, examples abound of Aboriginal peoples having to resort to extreme, often violent tactics in order to defend the rights they see as theirs. Furthermore, the Supreme Court of Canada's new role as the main forum for debate and interpretation of Aboriginal rights has some leaders feeling less certain than ever about the prospect for deliverance of justice. Indeed, having nine non-Aboriginal judges determine in such a direct way the fate of Canada's Aboriginal peoples has often been challenged as problematic in and of itself. Prominent Aboriginal scholar Menno Boldt writes that "Some Indian leaders, swayed by fantasy...are inclined to take a chance in the courts on obtaining legitimation for their version of Aboriginal rights.... But, the prospects are better for finding the Holy Grail in one's lunch pail than that Indians will obtain such a judicial decision from the Supreme Court of Canada."<sup>3</sup>

But is this a fair understanding of judicial interpretation as it relates to *Métis rights*? Returning to the Powley case, with which this paper opened, *Métis* people clearly feel the need to go to court. This paper seeks to clarify what is at stake for *Métis* people in the pursuit of justice through legal, rather than political means. The following questions are to be addressed: why should *Métis* people go to court in pursuit of the justice that they seek? What are some of the obstacles to achieving justice in this way? What are some of the advantages? What are the alternatives?

My purposes here will be mostly explanatory. The first part of this paper seeks merely to clarify in as simple and plain language as can be the nature and origin of *Métis* rights as interpreted by Canadian courts. I will, however, then go on to also argue that judicial interpretation of these rights, while it may mean removing some of the interpretive power from *Métis* peoples themselves, does not necessarily have to be corrosive to the interests of the *Métis*. In fact, contrary to Boldt's assertion above, I assert that the courts can be an effective avenue for the advancement of Aboriginal, and particularly *Métis*, rights and interests but that this will require a some significant work by *Métis* leaders both internally (in relation to their membership) and externally (with Canada's courts). This shift must be made in order to resolve the internal tension within the *Charter* in relation to Aboriginal rights. The source of the much of the conflict between government and *Métis* people is the result of certain inherent contradictions and paradoxes created by the placing of *Métis* rights within the *Constitution* and, more specifically, the *Charter*

of *Rights and Freedoms*. Much work must be done to overcome the conflict, perhaps most especially as it relates to Métis people, but we must not lose hope that this can be done. To that end, I will comment at the end of this paper on the prospects for resolution of the conflict using legal rather than political means and institutions.

### **Sections 25 & 35: Judicial Interpretation of Aboriginal and Métis Rights**

Métis people are, by legal definition, part of the Aboriginal peoples of Canada. There are, however, differences between Métis people and other groups identified as "Aboriginal". I will therefore begin by outlining the foundations of Aboriginal rights in the *Charter* and proceed later to clarify the particulars of Métis rights.

Section 25 is part of the Canadian *Charter of Rights and Freedoms*. It reads:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights and freedoms that pertain to the Aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

In understanding what s.25 actually means under judicial interpretation we must look to the two most prominent cases involved. In *Steinhauer v. R.* the Alberta Court of Queen's Bench found that s.25 acts as "a shield and does not add to Aboriginal rights."<sup>4</sup> The judges felt that s.25, by virtue of its wording in relation to Charter interpretation is not an 'active' clause. That is, it does not add anything substantive to the Charter but rather, is an interpretive clause meant to clarify how the substantive sections, which do create certain rights, should be interpreted. In this case those other clauses cannot be interpreted in a way that would "abrogate or derogate" from Aboriginal rights. The New Brunswick Court of Appeal echoed this understanding in *Augustine and Augustine v. R.; Barlow v. R.* Peter Hogg writes of this decision that section 25 should be, and has been, interpreted to "not create any new rights. It is an interpretive provision.... In the absence of s.25, it would be perhaps have been arguable that rights attaching to groups defined by race were invalidated by s.15 (the equality clause) of the Charter."<sup>5</sup> It is here we see that s.25 is important in protecting Aboriginal peoples and legislation directed specifically at Aboriginal peoples, from *Charter* scrutiny by other provisions.

Section 35 of the *Constitution Act* provides:

- (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "Aboriginal peoples of Canada" includes Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The placement of s.35 within the *Constitution Act, 1982*, but not within the *Charter* provides for several significant differences between it and s.25, which is contained within the *Charter*. Section 35 is strengthened legally by being placed outside the *Charter* for two main reasons. First, it is not subject to internal *Charter* checks such as s.1 (reasonable limits) or s.33 (legislative override). Second, being outside the *Charter*, s.35 is not limited by the *Charter*'s restricted application to only governmental action. However, s.35 is weakened by being placed outside the *Charter* as well, in that its' infringement is not open to judicial remedy as outlined in s.24.<sup>6</sup>

To understand how the Court has interpreted s.35 it is best to look directly at the predominant case in the area: *R. v. Sparrow*. The focus of the decision, and thus that of all s.35 jurisprudence, can be reduced to three main principles: the role of s.35 in recognizing Aboriginal rights, the interpretation of "existing" rights, and the justification of limitations on rights.

In terms of s.35's role in recognizing Aboriginal rights, it is important to note that this section does only this; it *recognizes* Aboriginal rights, not create them. S.35 is the only provision in the Canadian constitution to recognize and affirm the existence of Aboriginal rights, but this provision is not the source of those rights. The source of those Aboriginal rights that are recognized and affirmed in s.35 is, as written by Brian Slattery, "by reason of the fact that Aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada."<sup>7</sup> Thus it is important to recognize that in s.35 jurisprudence it is not understood that Aboriginal rights come from the constitutional provision, rather the provision comes from the rights.

*Sparrow* was also instrumental in outlining what it means to recognize "existing" Aboriginal rights. The Supreme Court understood in the context of this case, and thus for s.35 in general, that "existing" means "unextinguished."<sup>8</sup> Peter Hogg writes that any right "that had been validly extinguished before 1982 was not protected by s.35. In other words,

s.35 did not retroactively annul prior extinguishment of Aboriginal rights so as to restore the rights to their original unimpaired condition.”<sup>9</sup> The reference to “existing” rights, however, has not been interpreted to preclude the introduction of any new rights (specifically treaty rights, as Aboriginal rights cannot, by definition be ‘new rights’ as they stem from pre-European contact practices). As well, the Court has not understood that the word “existing” necessitates recognition of rights in their pre-European contact form. The Court wrote in *Sparrow* that rights are “affirmed in a contemporary form rather than in a primeval simplicity and vigour.”<sup>10</sup> Thus, we can see that despite a conservative wording which restricts s.35’s extension to “existing” rights, the Court has enlarged this understanding both by allowing for it to encompass new rights and by allowing existing rights to grow and adapt.

The final point to be made about judicial interpretation of s.35 is in relation to justifiable limits on Aboriginal rights. As stated earlier, s.35 stands outside the Charter and as such is not subject to limitation on the basis of s.1 or s.33. However, in *Sparrow* the Court interpreted s.35 to contain within it certain limitations. A brief overview of limitations on s.35 shows that under certain conditions legislative objectives may override s.35 rights. The Court understood in *Sparrow* that if the legislative objective was reasonable, rationally connected to the actions taken, and done by the least drastic means, then infringement on s.35 rights may be justified. Much of this is actually an extension of ‘the Oakes test’ for s.1 limitations. S.1 states that all rights held within the *Charter* are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Because s.35 cannot be restricted by this provision, an internal check quite similar to ‘the Oakes test’<sup>11</sup> has been developed. It is through this that, for example, the British Columbia Supreme Court found in *Thomas v. Norris* an Aboriginal right to spirit dancing did not extend over the legislative objective to prevent the use of force, assault, battery, and wrongful imprisonment. Even if these things were considered intricate parts of Aboriginal tradition before European contact, they would not survive limitations by English common law, would be extinguished thus, and would not be included in s.35 rights. This kind of limitation seems to be at the heart of Menno Boldt’s critique of judicial interpretation of Aboriginal rights and, more generally, the fears of Aboriginal leaders throughout Canada. They would see the decision in *Sparrow* as being one example of how Canadian values will always override Aboriginal ones and thus render them meaningless. I suggest that what is really at play is not an inherent judicial favouring of Canadian values over Aboriginal ones by judges. Rather, s.35 has been interpreted with this internal

check as a way for judges to reconcile an internal contradiction within constitutional/*Charter* recognition of Aboriginal rights and that the paradox can be overcome. This problem will be discussed later on in this paper, under the second heading.

We must now turn from a general discussion of Aboriginal rights to a more focused look at the particulars of Métis jurisprudence. There are two main items which require discussion here. The first point is a general one, something which arises in nearly any court case involving Métis people: the definition of "Métis". I return to the *Powley* case, currently before the Ontario Court of Appeal. At every stage of this case, whether at Trial, Superior, or now at Appeal Court, the definition of "Métis" has been at issue and has distinguished Métis rights as different from those of other Aboriginal peoples. Time and time again the question has arisen of how can rights be extended to an ethno-cultural group without a firm definition of that group, its' membership and distinguishing characteristics. Indian Bands have registries. Inuit people have a treaty to which there are a limited number of beneficiaries. Métis people have neither. To date, there is no one definition of Métis which is universally accepted by Métis associations, the general Canadian population, or Canada's law courts. So, how have the courts adjusted to this difficulty? To date, the best answer to the question "who is Métis?", at least in terms of its' legal application, comes from Justice O'Neil of the Ontario Superior Court, who stated in *Powley*,

Although various test have been employed over the years, for various purposes in various jurisdictions (degrees of consanguinity, bureaucratic discretion, family status, individual choice and so on), the method that has won widest acceptance in recent years is a modified self-determination approach, consisting of three elements: some ancestral family connection (not necessarily genetic) with the particular Aboriginal people; self-identification of the individual with the particular Aboriginal people; and community acceptance of the individual by the particular Aboriginal people.

It is sometimes suggested that a fourth element is also required: a rational connection, consisting of sufficient objectively determinable points of contact between the individual and the particular Aboriginal people, including residence, past and present family connections, cultural ties, language, religion and so on, to ensure that the association is genuine and justified. The more common view, however, appears to be that while these criteria can be used to determine whether an individual should be accepted as a member,

they are not the primary components of the test.<sup>12</sup>

This has been the courts' best and most recent attempt to define Métis people, under the heading of "Aboriginal peoples of Canada" within the context of s.35. However, given that this definition formed, at least in part, the basis on which the Superior Court's ruling was appealed, it is difficult to be optimistic that even this definition will survive without further modifications. Indeed, one cannot help but begin to agree with the findings in the *Report of the Royal Commission on Aboriginal Peoples*, which stated: "The legal definition of Métis cannot be resolved without a Supreme Court of Canada ruling."<sup>13</sup>

The second way in which Métis rights have been found to differ from those of other Aboriginal peoples mentioned in s.35 is best described by the Supreme Court's decision in *R. v. Van der Peet*<sup>14</sup> where it was stated,

Although s.35 includes the Métis within its definition of "Aboriginal peoples of Canada", and thus seems to link their claims to those of other Aboriginal peoples under the general heading of "Aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s.35, are quite distinct from those of other Aboriginal peoples in Canada. As such, the manner in which the Aboriginal rights of other Aboriginal peoples are defined is not necessarily determinative of the manner in which the Aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s.35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s.35's protection of the Aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s.35(1)'s scope when the claimants are Métis. The fact that, for other Aboriginal peoples, the protection granted by s.35 goes to the practices, customs and traditions of Aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their Aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.<sup>15</sup>

The Court had to recognize that the traditional test for determining

the period of contact, and thus the state of Aboriginal rights upon contact, established in the *Adams*<sup>16</sup> case, was not applicable in the case of Métis people, despite their being included under the term "Aboriginal" for the purposes of constitutional law. Establishing the nature of Aboriginal rights prior to contact with Europeans is obviously not possible in the case of the Métis. Métis people themselves did not exist prior to contact between Aboriginals and Europeans; they are the result of that contact. However, what the exact nature and scope of Métis rights are the Court declined to indicate. Thus, Métis people are left in a jurisprudential vacuum in which no firm understanding of how the tests in *Van der Peet* and *Adams* apply to them can be reached until a Court case reaches the Supreme Court. Hence the dilemma of Métis rights, found both in the problem of a "contact test" and in that of defining "Métis": the very thing which was to bring justice and reconciliation between Métis and the non-Aboriginal governments that govern them, constitutional rights (s.25 and 35), has instead left the Métis in a position where direct confrontation with government, through a court of law, appears to be the only way in which a firm definition of those rights can be established.

I will now turn to a discussion of how this situation has arisen and why the inclusion of Métis rights within the Constitution is inherently problematic.

### **The Paradox of 'Aboriginal Charter Rights'**

It is perhaps most useful, now that we have seen how Métis constitutional rights have been worked out, to look at the foundation of the problems in judicial interpretation of Aboriginal *Charter* and constitutional rights. As I have said, these problems are not necessarily insurmountable and judicial interpretation has not been entirely negative. However, it is important to see why it has been so difficult to acquire those goals that Métis leaders such as Tony Belcourt seek within the current Canadian constitutional framework.

The *Canadian Charter of Rights and Freedoms* is indeed the product of a historical and cultural process very different than traditional Indigenous ones. The paradox of containing Aboriginal rights within such a document is then, of course, that the *Charter* is trying to guard something that it may be simultaneously undermining. The spirit of the document as a whole is, at times, in contradiction with particular provisions within it. To clarify this it is helpful to lay down some of what makes the *Charter* different from Aboriginal understandings of legal structure. It is not helpful to oversimplify the issue by pretending that there exists a clear cut definition of what constitutes a 'western' or a 'Aboriginal' un-

derstanding of justice and how that would look in legal-constitutional form, nor would this be possible. However, we can look to a few main points on which the paradox of Métis *Charter* rights (and thus, I believe Aboriginal rights more generally) is most clear. The three main points on which the *Charter* and Métis rights are at odds lay in the divisions based on individualism vs. collectivity, abstract legalism vs. applied politics, and equality vs. plurality.

The *Charter* sees the base unit of legal and political discourse as being the individual. Coming out of the tradition of political philosophers such as Locke and Hobbes who saw society as a collection of autonomous individuals, the *Charter* too sees people in isolation from each other. Rights held within the *Charter* are therefore invested within the individual person, to be used in protection against government. This must be juxtaposed with the idea of Métis and Aboriginal rights which are inherently collective or group rights. This is based on the fact that Aboriginal rights, in order for them to mean anything, must of course protect a culture and society, not merely protect the 'Métisness' of individual people. These are rights that are directly invested in the group itself. Judge O'Neill writes,

Aboriginal rights are collective rights although each member of the collectivity has a personal right to exercise them. They are rights held by a collective and are in keeping with the culture and existence of that group. The Aboriginal rights claimant must be a member of that Aboriginal community, but each individual within that community does not have to meet an individual cultural means test. Such a test would be arbitrary and inconsistent with a purposive analysis of an Aboriginal right protected within the meaning of s.35.<sup>17</sup>

However, this creates, given the nature of the *Charter*, a problem in interpretation. Group rights do in a sense undermine the individual rights regime that exists in the rest of the *Charter*, creating a paradox in Aboriginal rights interpretation. Furthermore, the question of group rights raises another problem, that of membership.

If *Charter* or Constitutional rights are invested in a group of people, then the membership of that group becomes of paramount importance when the exercise of those rights is debated. However, as I have eluded to above, there is no one definition of "Métis." This is not merely the result of disorganization or disagreement amongst Métis peoples and organizations. The fact may be that no one definition of Métis is possible given the fluid and adaptive nature of the Métis culture. The product of a blending between two cultures, Métis traditions and history have no one defining characteristic. Métis may be part Scottish, English,

French, Cree, or Ojibway. Further complicating the issue is the fact that changes to the *Indian Act* in 1985 meant that large numbers of people who once identified as Métis regained Indian status. So what does this all mean? It means that the definition of Métis may be inherently difficult to pin down. It eludes definition based solely on geography, language, genetics, culture, and history. But the law requires a definition. One definition. One definition that does not change in its application from place to place, time to time, person to person. Hence, a paradox. "Métis" is already used in the *Constitution*. Justice Vaillancourt boldly reminds us that "Section 35 of the Constitution Act, 1982 did not have to acknowledge the Aboriginal rights of a group of people referred to as Métis. However, the Parliament of Canada has clearly proclaimed the Métis existence." The Justice also notes that "As long as the divisiveness remains a reality in the Métis equation, the question as to who is a Métis will remain unanswered. Without an identifiable group, government can continue to pose the question who is Métis."<sup>18</sup> This is an issue which goes to the heart of the collective identity of the Métis people, and to the conflict between the collectivity and the inherent individualistic philosophy of the Canadian *Charter*.

The second point on which Métis rights and the *Charter* within which they reside conflict is that of abstract legalism and applied politics. The *Charter* has very carefully been interpreted by the judicial to be a decidedly 'legal' document; that is, it is not merely a 'political' statement. This distinction, dubious at best, is one of the foundational elements of *Charter* and Constitutional interpretation. The judiciary must, even if this may not be the case, try to interpret conflict arising from the *Charter* in a purely 'legal' manner. This means that there should be a clear statement of legal vs. illegal, of constitutional vs. unconstitutional. What this also means is that statements of what may be political salient in any given case are not to be considered. However, in the case of Aboriginal rights, the framing of things in purely legal terms has often been the very thing from which Native communities must be guarded. The legal regime is Canadian, not Indigenous, and Aboriginal *Charter* rights are a way to protect Indigenous culture and society from being eroded by that very regime. However, if judges are trained to look purely at abstract legal principles this may paradoxically render Aboriginal constitutional rights meaningless. An example of this can be seen in the lower court decision on *Delgamuukw v. British Columbia*. The majority of the British Columbia Court of Appeal found that traditional Native oral history could not be used to establish the existence of legal title. The judges ruled that in law this kind of testimony was inadmissible. However, by ruling only on the abstract legal principle of admissibility, the Court effectively ren-

dered the protection of Aboriginal culture as a constitutional right meaningless. The inherent paradox was that in order to rule on legally recognized Aboriginal rights in a *legal* way, it meant eroding those very rights. With Métis rights this is particularly true. Judge Swail of the Manitoba Provincial Court in *R. v. Blais* stated that although things such as the definition of membership of the Métis people is "essentially a political question, it must be given serious consideration by the courts."<sup>19</sup> Judge Vaillancourt echoes these sentiments when he wrote,

the definition debate has a significant political component linked to it. I would agree with this characterization. The *Constitution Act, 1982* is an expression of Canada's political essence. Accordingly, when s.35 refers to a group identified as Métis, it would seem appropriate that the elected representatives of this nation dialogue with the key participants in the arena and arrive at a workable definition of who is Métis...I am of the view that a court is not the ideal forum to deal with political matters. The definition question would best be addressed through negotiation and consensus building rather than an adversarial process.... The criminal process is not a particularly effective or efficient tool to arrive at the required solutions. It is a blunt instrument. It is also expensive, time consuming, and cumbersome process.... I have attempted to provide a workable definition of Métis to meet the needs of the case before me. However, the definition game of who is a Métis can be continued on an issue to issue basis and site to site basis and an individual to individual basis."<sup>20</sup>

Clearly the judges charged with ruling on Métis constitutional rights cases find themselves with conflicting objectives. On one hand, the *Charter* demands legal certainty. It is law and they are judges whose task it is to interpret and define that law. However, "Métis" is not merely a legal category. It is also a nation of people who have ideas of their own about who they are and what they want to be. And that makes it political. And that makes it, at least for the time being, impossible to decide in a court of law except, as Judge Vaillancourt writes, on a case by case basis.

The issue of 'point of contact' arises here too. A strict text-bound reading of s.35 could paradoxically serve to undermine the rights of the Métis as Aboriginal peoples given jurisprudence in the area of "point of contact" between Aboriginal peoples and Europeans as the benchmark for defining rights. For example, the Crown's submission in *Powley* when it went before the Ontario Court of Appeal (a submission we do not yet

know has been accepted) is that

It is the close nexus between the Métis and their Aboriginal ancestors which warranted the inclusion of the Métis in s.35.... As a corollary, the practices and customs of the Métis that developed post-contact as a result of interaction with Europeans are not the concern of s.35. The Indians also developed practices—both commercial and cultural—as a result of interaction with Europeans, but these are not protected under s.35 according to *Van der Peet*. In order to build on the principles and requirements set out in the s.35(1) jurisprudence, it is submitted that the purpose of Métis rights must be to protect the Aboriginality of the Métis; namely their Indian origin and characteristics.... As with Indian Aboriginal rights, s.35 is the means by which Métis use of land for *Aboriginal purposes* [emphasis unedited] is reconciled with Crown sovereignty over Canadian territory.<sup>21</sup>

The Crown, I would submit, is technically correct on a few points here. First, Métis rights are included in s.35 solely because of the connection between the Métis and their Indian ancestors. It is also true that the purpose of those rights are to guard the unique character of the Métis people, as an Aboriginal group. If the Métis survive and flourish, but not as *Métis* then their rights are empty. Finally, jurisprudence, particularly coming from *Van der Peet*, does indicate that Aboriginal rights do not include practices of Aboriginal peoples after the date of effective sovereignty by the Crown. However, the Crown's submission is flawed in that it does not resolve the paradox of Métis rights to which I have been alluding throughout; it exacerbates it. Following strict legal reasoning, Métis rights defined in this way do not truly exist at all. At least not in any meaningful way, and certainly not on par with those rights held by other Aboriginal peoples mentioned in s.35. A more politically sensitive reading of s.35 is required in the case of Métis rights. In law, in s.35, no distinction is made between the Métis, Indians and the Inuit. However, in history, in reality, the differences between other Aboriginal peoples and the Métis are of utmost importance and they are important not simply for the self-identification of Métis people, but also for the defining of Métis rights. The reality of the Métis past and present must be taken into account when understanding Métis rights, otherwise, left merely to a confusing and at times contradictory legal text, no such rights exist.

Finally, there exists a paradox between the principles of equality within the *Charter* and those of plurality in Métis, indeed any Aboriginal, rights. The *Charter* is essentially about laying out a legal framework within

which people can be treated justly. In liberal democratic nations like Canada justly has come to mean equally, and equally very often means "in the same way". A central obstacle to be overcome historically for liberal rights philosophies from which the *Charter* comes is discrimination. The *Charter* is an attempt to set out certain inalienable rights that are invested equally in all people so that they may be free from unjust discrimination. However, Métis rights necessitate discrimination. They are premised on a kind of positive discrimination, that which discriminates between Native and non-Native, between Métis and First Nations. What Aboriginal rights bring to the constitution is the notion of positive discrimination. Even s.15, in allowing for discrimination through programs such as "equal opportunity employment", does so in the name of equality. This is a markedly different goal than that sought through Aboriginal rights—the preservation of difference. This creates a problem for liberalism, the dominant philosophy behind a document such as the *Charter*. However well intentioned it may be, liberalism in this form tends to erode cultural differentiation. The 1969 White Paper on Indian Affairs has by now become the classic example of this well-intentioned liberalism taken to its' natural conclusions. It is not necessary to retrace the well-worn story of how the Liberal government under Prime Minister Trudeau, and then Indian Affairs Minister Chrétien, intended to do good. They honestly believed that the end to race-based legislation was a good and laudable goal. However, it would have also served to end the kind of positive discrimination that is required to acknowledge the existence of diverse cultures such as the Métis. Sections 25 and 35 of the Constitution represent the Canadian government's second major attempt to apply this philosophy to Canada's relationship with its' Aboriginal peoples. This attempt, while far more nuanced and complex, still contains the same base tension between equality and pluralism.

Another excellent example of how these two principles come into conflict can be found in subsection 4 of section 35: gender equality. Section 35(4) reads:

(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Anyone familiar with Aboriginal rights does not need to be reminded of the enormous impact that subsection 4 has had on Aboriginal rights, most significantly in the drafting of Bill C-31 which re-registered thousands of Indians who had lost their status through discriminatory marriage legislation. What all this highlights is the tension inherent in Aboriginal rights; the tension between a desire for blanket equality and cultural pluralism. Aboriginal rights were added to the *Charter* to

strengthen it. However, paradoxically, by placing them within the *Charter* the very same differential treatment on which Aboriginal rights are premised becomes a point of contention between it and the rest of the *Charter*. Protecting Métis peoples from differential treatment therefore means removing the idea of Métis rights altogether.

### **Legal Plurality: Making Space for Métis Rights in the Canadian Constitution**

We have seen now how the Court has understood Aboriginal rights within the *Constitution Act, 1982* and what central problems judicial interpretation has had to deal with. Given these problems, and given the seemingly contradictory nature inherent in the constitutional protection of Aboriginal rights, it is easy to see why Métis leaders have been suspicious about the prospects of the full realization of justice through Canada's constitution. I contend however, that as long we consider the full participation of Aboriginal peoples in Canada to be important, constitutional recognition of their central importance to this country is necessary. This means, to put it simply, that Métis people must be included *somewhere* and though Boldt's concerns may be somewhat warranted, they do not mean that a formal recognition of Aboriginal rights should not or could not be effectively included. As Judge Vaillancourt wrote in his decision at trial in *Powley* "Is it not time to find answers regarding the issues affecting the Métis?"<sup>22</sup>

This being said, we must recognize that resolving the paradox of Aboriginal rights will not be easy. The best way to help begin the shift toward this goal is not presuming to set out fully and specifically what needs to be done in order to achieve it. Instead I think that it is more useful to look to solutions and lines of thinking that are *already* contained within the Canadian legal and political context. The ability to make room for Aboriginal peoples and Aboriginal rights will require building on *existing* strengths and changing the prevailing weaknesses of the legal and political structures to create a kind of 'legal pluralism'; it will not mean simply adding to what already exists.

James Tully defines 'legal pluralism' as 'the study of the variety of ways contemporary constitutions recognize and accommodate cultural diversity.'<sup>23</sup> To this definition, I would like to add the notion that legal pluralism is also a *practice*; it is an act, not merely a comparative study. In the construction of a legal pluralism in Canadian constitutional matters what is first required is a shift from the notion that there exists two entirely separate ways of thinking—one Native or Métis and one White, the two of which do not converge. As we have seen, there are significant points of divergence and this has caused difficulty in the inclusion of

Aboriginal rights to the *Charter*. However, this is useful primarily for juxtaposing the two traditions, not for building lines between them. We must look to commonalities if we can hope to find room for both. As Mary Ellen Turpel writes: "Convergence is as important as difference."<sup>24</sup> It is with this in mind that we can look to the Supreme Court's decision in *Delgamuukw*. Despite the pessimism of some Aboriginal leaders, Métis included, it does appear that the Court is able to draw links between Aboriginal and European style legal systems. In *Delgamuukw*, this meant the eventual inclusion of traditional oral historical accounts where they would otherwise be inadmissible, as was alluded to before. The Court chose to overrule the British Columbia Court of Appeal because it was necessary, for the future of Aboriginal rights, to change some of the premises that make up traditional Canadian-European legalities.<sup>25</sup> It was, in other words, necessary to make room for a *new kind* of rights, to speak legal pluralism into being.

Another way to emphasize the commonalities between the two systems is to point to the precedent for communal rights found in both the provisions for religious instruction and language. In fact, it has been seen as a decidedly 'Canadian characteristic' that *Charter* provisions like s.1 and s.16 make direct reference to the collective rights of either society as a whole versus the individuals within (s.1) or the collective rights of groups within society (s.16). A full move away from the emphasis on difference between Aboriginal and European legal traditions would, of course, require a long and difficult adjustment. However, any shift in legal interpretation that would recognize the convergence of Aboriginal and European traditions would be helpful and make progress possible.

It is also important here to note more generally that diversity between groups does not, if it is bound together by other bonds, mean the disintegration of the larger society. The idea of legal plurality sees a Canada in which several groups can live under the larger concept of a Canadian nation. I suggest that this is not only possible, it is desirable, and with a strong historical precedent in this country. Take, for example, James (Sakej) Youngblood Henderson's understanding of "treaty federalism"<sup>26</sup>, in which a view of Canada is developed—indeed premised upon—the coexistence of several groups bound together by territory and law, but unique and distinct nevertheless.

Prominent Canadian political philosopher Charles Taylor has written considerably on exactly this. His view of Canada, or at least what potentially could become Canada, relies on what he calls "deep diversity, where plurality of ways of belonging would also be acknowledged and accepted."<sup>27</sup> It is an understanding of a legal and political world in which various ways of existing are recognized and affirmed in meaning-

ful ways that allow for their survival and flourishing.

We may also look to traditional Aboriginal governance models for guidance here. Taiaiake Alfred writes that

traditional [Native] systems are predicated on the ideal of harmony and the promotion of an egalitarian consensus through persuasion and debate, leaders must work through the diverse opinions and ideas that exist in any community; because there is both an inherent respect for the autonomy of the individual and a demand for general agreement, leadership is an exercise in patient persuasion."<sup>28</sup>

The groundwork for a kind of legal pluralism may in fact seem stronger yet when considered in the case of Métis people specifically. What society better exemplifies the valuing of diversity and pluralism than the Métis, a people born from the mixing of numerous races and languages? A legal rights regime, even a well intentioned one, which sees people as essentially the same or sees all rights as the same, is a rights regime which denies the core of what makes the Métis nation so unique: its' ability to accommodate differences harmoniously. Plurality, not equality, is a defining characteristic of the Métis people, and it is a characteristic that could lead to creative and positive jurisprudential innovation when applied to law.

The Métis example is a model that could be used to help larger Canadian society bridge the difficult gap between equality and diversity. What currently exists in the Canadian constitution is only a partial move in this direction because it is not always accompanied by a judicial interpretation that allows space for Aboriginal rights to exist in a meaningful way. But this does not mean it is not possible. The fact is that Aboriginal peoples need constitutional recognition as long as they hope to play a significant role in the country's future. Abandoning Canadian constitutionalism because of the problems of placing Métis rights within a *Charter* context is not the answer. Nor is the repeated confrontations of legal battles. Working to build the foundation for the real understanding of those rights is. And this can only be accomplished in the case of the Métis if certain work is done to lay a path for judicial adoption of a legal pluralism.

As Menno Boldt indicates above, the prospects for Aboriginals achieving any real justice or rights through the Canadian *Charter* and *Constitution* seem slim. The Supreme Court of Canada has interpreted the two main provisions (s.25 and s.35) in a way which does not seem to immediately deliver what was hoped for by Aboriginal leaders. However, the Court has not denied outright the justice that those leaders hoped for either. Instead, we have seen that the jurisprudence in the area of

Aboriginal constitutional rights has been more a kind of public working out of a seemingly contradictory position. The Court has been faced with the task of reconciling the paradox of Métis *Charter* rights. This paradox is founded on the tension between individualism and collectivism, abstract legalism and applied politics, and equality and plurality. What is required then is to try and open up the dialogue surrounding Aboriginal rights, to make space for the inclusion of *all* Aboriginal peoples, perhaps Métis people most especially, in a meaningful way. This has, at a very general and preliminary stage, been suggested to be founded on looking to already existing lines of commonality to facilitate communication and accepting the diversity and plurality of views on governance that will come from including Aboriginal peoples as positive.

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### Notes

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2. Tony Belcourt, Métis Nation of Ontario President, as quoted in "The Métis Hunt for Justice", *The Globe and Mail*, Wednesday, January 26, 2000.
3. Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), p. 31.
4. *Steinhauer v. R.*, [1985] 3 C.N.L.R. 191 (Atla. Q.B.).
5. Peter Hogg, *Constitutional Law in Canada*, 3rd Ed. (Toronto: Carswell Thomson Professional Publishing, 1992), p. 694.
6. Hogg, p. 688.
7. Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *Queen's Law Journal*, 8 (1983): 232, p. 242.
8. *R. v. Sparrow* [1990] 1 S.C.R. 1075, p. 1091.
9. Hogg, p. 690.

10. R. v. Sparrow, p. 1093.
11. 'The Oakes Test' refers to R. v. Oakes, the case in which the Court developed the standards by which s.1 may be used to limit other rights within the Charter. The limit must be reasonable, rationally connected to method and done by the least drastic means available. See R. v. Oakes [1986] 1 S.C.R. 103.
12. R. v. Powley, para 49-50.
13. *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, (Ottawa: Minister of Supply and Services, 1996), p. 208.
14. R. v. Van der Peet, [1996] 2 S.C.R., p. 507.
15. R. v. Van der Peet, p. 206.
16. R. v. Adams [1996] 4 C.N.L.R. 1.
17. R. v. Powley, para 66.
18. R. v. Steve Powley and Roddy Powley (No. 2).
19. R. v. Blais, [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.).
20. R. v. Steve Powley and Roddy Powley (No. 2).
21. Factum of the Appellant, Her Majesty the Queen; R. v. Powley; Heard before the Court of Appeal for Ontario.
22. R. v. Steve Powley and Roddy Powley (No. 2), p. 34.
23. James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge UP, 1995), p. 101.
24. Mary Ellen Turpel "Reflections on Thinking Concretely About Criminal Justice Reform", in Richard Gosse, et al., (eds.) *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishers 1994), p. 208.
25. Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010.
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