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SCIENTIFIC EXPERIMENTS ON ANIMALS AND CONSTITUTIONAL PRINCIPLE

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INTRODUCTION

It is a well-established principle that the division of powers in the *Constitution Act, 1867*[1] sets out an exhaustive list of legislative subjects.[2] Thus, all "new" subjects of potential regulation in Canada, such as biotechnology, must fit within the established categories of authority. This article explores some of the ethical implications of this constitutional framework and approach when the subject under consideration is the welfare of animals used in research.

BACKGROUND

Animal welfare legislation was first enacted in Britain[3] and British North America[4] in 1822. In 1869, shortly after Confederation, the first national anti-cruelty prohibitions were enacted in Canada[5] and that same year the earliest Canadian humane society was founded in Montreal.[6] Despite interest in the issue at a time of social development that included the abolition of slavery, prison and asylum reform, changes to child labour and welfare rules and various health care reforms,[7] until the First World War the focus was primarily on working animals and blood sports[8] (although as early as 1876 Britain enacted legislation specifically concerned with the use of animals in scientific experiments[9]).

Interest in the specific issue of vivisection did not reach the legislative agenda in North America, however, until a second era of massive social change — the 1960s.[10] Along with the civil rights, peace, and environmental movements came a second "stream" of animal advocacy in the form of proponents of animal rights.[11] In addition, modern work on social violence has stimulated ongoing interest.[12] Despite this interest, however, animal *rights* laws have never been enacted in Canada, and even more mundane efforts to regulate animal use and welfare are uneven, inconsistent and in some cases completely lacking.[13] Long-overdue modernization of the basic anti-cruelty provisions of the *Criminal Code* is only now struggling through Parliament,[14] while, as we shall see, national "control" over research animal use remains largely voluntary, and provincial rules, if any, are disparate and unevenly enforced.[15]

EXPERIMENTS ON ANIMALS

Accurate data about the number of animals used in research, and details about what experiments are taking

1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

2 *Ibid.*, ss. 91, 92, 92A and 95. See generally *Ontario (A.G.)* v. *Canada (A.G) (Privy Council Appeals Reference)*, [1912] A.C. 571 (P.C.); *Canada (A.G.)* v. *Ontario (A.G.) (Labour Conventions Reference)*, [1937] A.C. 326 (P.C.).

3 *An Act to Prevent the Cruel and Improper Treatment of Cattle, 1822* (*Martin's Act*) (U.K.), 3 & 4 Geo., c. 70.

4 According to C.D. Niven, *History of the Humane Movement* (London: Johnson, 1967) at 108, Nova Scotia passed the first North American anti-cruelty statute in 1822.

5 *An Act Respecting Cruelty to Animals*, S.C. 1869, c. 27.

6 Canadian Federation of Humane Societies, *The Humane Movement in Canada* (Ottawa: CFHS, n.d.) at 6.

7 G. Carson, *Men, Beasts and Gods* (New York: Scribner, 1972) at c. 5; S. Brooman & D. Legge, *Law Relating to Animals* (London: Cavendish, 1997) at 40.

8 Alberta SPCA, *The Animal Welfare Movement* (Edmonton: Alberta SPCA, n.d.).

9 Brooman & Legge, *supra* note 7 at 124–28.

10 The United States passed its first *Animal Welfare Act* in 1966. Canada formed an agency called the Canadian Council on Animal Care (CCAC) to oversee a voluntary system of "regulation" in 1968. *Ibid.* at 154–61.

11 See generally A.N. Rowan, *Of Mice, Models and Men* (Albany: State University of New York Press, 1984) at 251; E. Hughes & C. Meyer, "Animal Welfare Law in Canada and Europe" (2000) 6 Animal L. 23 at 25–29.

12 Hughes & Meyer, *ibid*. at 31.

13 *Ibid.* at 35–40.

14 Bill C-10, *An Act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act*, 2d Sess., 37th Parl., 2002 (as passed by the House of Commons 4 June 2002, with expectations of Senate amendments forthcoming).

15 L. Létourneau, "The Protection of Animals Used for the Purpose of Xenotransplantation in Canada" [unpublished, 2000, translated by author].

place, is impossible to obtain in Canada.[16] In part, this is because there is no national mandatory set of controlling regulations, nor reporting requirements, regarding animal use in research. Some national statistics are collected and published by the Canadian Council on Animal Care (CCAC), an independent agency that creates voluntary guidelines for research animal care; it also oversees and inspects participating institutions.[17] Its approval is needed to obtain funding from major federal granting agencies (CIHR and NSERC) and, therefore, most university and government research complies with the CCAC system. However, in many parts of the country private laboratories are not compelled to join this system, so many do not,[18] and university–private sector funding partnerships are also increasingly common.[19]

Nevertheless, the CCAC statistics give some notion of the extent of lab animal use in Canada. According to its most recent survey,[20] the total number of animals used in 1999 (in laboratories it inspects) was 1,746,606. Of these, 922,786 were used in basic research,[21] or research on fundamental biology that consists of "knowledge without any immediate or beneficial application."[22] Another 55,267 were used for education or training, and 151,210 were used for "studies for the development of products or appliances for human or veterinary medicine."[23] A full 246,720 animals were used for "regulatory testing of products for the protection of humans, animals or the environment,"[24] a broad category which could include tests on anything from cosmetics to pulp mill effluent. Finally, 370,623 animals were used in applied research for "medical purposes, including veterinary medicine, that relate[s] to human or animal disease,"[25] *i.e.*, for medical benefits "that portend some direct application to a problem in the immediate or reasonably foreseeable future."[26] Thus, to the extent one can glean information from these reporting categories, approximately twenty-two percent of animals were being used in medical research while a much larger percentage were being used for various types of product testing, other non-medical scientific research, and for teaching.

What exactly is being done to these animals? There is no systematic way to obtain this information. Activists have reported details of a number of troubling studies over the years[27] but in general the CCAC considers all information reported to it confidential or private.[28] As Montgomery notes:

> It does not give out the names of the labs inspected, or the locations, nor does it offer any information about the kinds of research being done on animals or any violations of its standards. Despite its public funding, the CCAC is not covered by the federal access to information law.[29]

One aspect of additional information in CCAC reports is a breakdown of the main species in use, and the "category of invasiveness" of the experiments done which, *inter alia*, must be in compliance with the CCAC's ethical and other guidelines.[30] In 1999, 558,912 animals were used in category D procedures, being "experiments which cause moderate to severe distress or discomfort,"[31] while 58,828 animals were used in category E experiments "which cause severe pain near, at or above the pain threshold of unanesthetized conscious animals." Of the category E experiments, 48,095 were conducted for the "regulatory testing of products,"[32] using more than ten times as many animals as were subjected to such experiments for applied medical research (3,381).[33] Animals subjected to category E experiments (all uses) included fish, mice, rats, domestic birds, "farm animals" and rabbits.[34]

The CCAC statistics also reveal some trends in the scale of animal use for research. Older American statistics had suggested that public concerns about the use of research animals (coupled with high costs) had led to a decline in animal use over the years.[35] The CCAC numbers have reflected this general trend,

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16 See generally C. Montgomery, *Blood Relations: Animals, Humans and Politics* (Toronto: Between the Lines, 2000) c. 3.

17 Canadian Council on Animal Care (CCAC), online: CCAC Homepage <www.ccac.ca>; Létourneau, *supra* note 15 at 1.1.1.

18 Montgomery, *supra* note 16 at 83, 106.

19 *Ibid.* at 105.

20 CCAC, *Animal Use Survey — 1999*, online: CCAC Homepage <www.ccac.ca/english/facts/facframeintro.htm> [hereinafter "1999 Survey"].

21 *Ibid.* at Table 3, "Purpose of Animal Use" (PAU) 1.

22 G.L. Francione, *Animals, Property and the Law* (Philadelphia: Temple University Press, 1995) at 167.

23 "1999 Survey," *supra* note 20 at Table 3, PAU 4 and 5.

24 *Ibid.* at PAU 3.

25 *Ibid.* at PAU 2.

26 Francione, *supra* note 22 at 167.

27 See *e.g.* P. Singer, *Animal Liberation* (New York: Avon Books, 1975) c. 2; Francione, *ibid.* at 178–84; Montgomery, *supra* note 16 at c. 3.

28 Montgomery, *ibid.* at 99–103.

29 *Ibid.* at 100.

30 CCAC, *Ethics of Animal Investigation* (1991), available on the CCAC website, *supra* note 17, along with other guidelines on use, care, transgenics, endpoints and immunological procedures.

31 "1999 Survey," *supra* note 20 at Table 3. See also CCAC, *Categories of Invasiveness in Animal Experiments* (1991), available on the CCAC website, *ibid.*

32 "1999 Survey," *ibid.* at Table 3, PAU 3.

33 *Ibid.* at PAU 2.

34 *Ibid.* at Tables 4–7.

35 Francione, *supra* note 22 at 174. Official CCAC policy is to follow the three "Rs" (reduce, refine, replace) to work toward lower numbers. See the CCAC website, *supra* note 17.

showing total animal use declining from approximately 2.7 million in 1975 to 2.0 million in 1993 and 1.5 million in 1997.[36] The recent explosion in biotechnology, however, seems to be reversing this trend internationally. Although the CCAC statistics do not include perhaps 100 private biotech labs,[37] nor a number of labs that dropped out of the CCAC program during the 1990s funding cuts,[38] total animal use exceeded 1.7 million animals in 1998 and 1999, the most recent years for which data is available. In Britain, animal use was at an all time low by 1997, but by 1998 a twenty-five percent increase in transgenics research pushed the lab animal total up for the "first general increase since 1976,"[39] and there is no reason to suspect a subsequent slowdown on either side of the Atlantic.

Public attempts to get additional details about research protocols have been in vain.[40] In Ontario — the only province with specific legislation designed to licence and inspect both private and public research laboratories[41] — the practice is to release publicly only annual composite statistics similar to those compiled by the CCAC.[42] Despite actions under provincial freedom of information laws, additional details about uses, locations and funding sources have not been provided by that province.[43] Its denials of information requests have been based primarily on security concerns, or the notion that "disclosure could cause financial or scientific harm," reportedly due to fears of terrorism by animal rights extremists[44] — although some of the institutions involved do release much of the information, piecemeal, in other ways.[45]

POWER TO ACT

Could we not enact national standards on laboratory animal care, or animal welfare generally? Alternatively, is there not a more active role for the provinces? Predictably, the division of powers in the *Constitution Act, 1867*, provides the foundation for any answer to these questions, yet since animal welfare generally (and scientific, medical and consumer research in particular) is not mentioned in the *Constitution Act, 1867*, governments must try to make these issues "fit" into the listed division of powers.

In our common law tradition, animals are property,[46] so provincial jurisdiction under the property and civil rights power is an obvious source of legislative jurisdiction. Most research institutes and universities will also fall within provincial control over intra-provincial works and undertakings and "local and private matters" within the province. In some cases powers to delegate to municipalities (*e.g.* pest control), powers over public lands (*e.g.* wildlife) and shared powers over agriculture (*e.g.* veterinary services) can all be relevant to aspects of animal welfare.[47]

Welfare concerns also "fit," however, within federal heads of power. The criminal law power supports general anti-cruelty prohibitions, and there is specific federal jurisdiction over particular kinds of animals (fisheries and migratory birds) and animals on federal property. For research animals, federal powers over trade and commerce and interprovincial works and undertakings are important, since most lab animals are imported from the United States. As well, the federal "spending power," as exercised through granting agency control and the CCAC system, is also critical. The concurrent power over agriculture (*e.g.* abbatoirs) and the potential — especially where there is a link to public health — for a matter to invoke the Peace, Order and Good Government powers (*e.g.* mad cow disease) might also be relevant.[48]

As is the case with other important matters not specifically mentioned in the division of powers sections of the *Constitution Act, 1867* (such as public health and environmental protection) federal-provincial conflict is, perhaps, inevitable. A recent example is the *Oncomouse* case,[49] decided in the fall of 2002 by the Supreme Court of Canada. In that case, the majority of the Court decided that genetically modified higher life forms were not "inventions" and, therefore, could not be patented under current law. Yet, although the Court noted that patenting is a form of property ownership, it did not examine the division of powers implications of

36 "1999 Survey," *supra* note 20 at Table 10.
37 Montgomery, *supra* note 16 at 105.
38 *Ibid.* at 106.
39 *Ibid.* at 86.
40 *Ibid.* at 116–19.
41 *Animals for Research Act*, R.S.O. 1990, c. A-22.
42 Montgomery, *supra* note 16 at 117.
43 *Ibid.*
44 *Ibid.* at 117–19.
45 *Ibid.* at 119–20.

46 Domestic animals are chattels; wild animals are either Crown property (by statute) or become property upon capture. See B. Ziff, *Principles of Property Law*, 3d ed. (Toronto: Carswell, 2000) at 122.
47 For a more detailed review of the division of powers arguments, see P. Wilson, *Legal Opinion Letter Re: Legislative Jurisdiction Over Animals Used in Research, Teaching and Testing*, prepared for the CCAC (26 November 1998), available on request from the CCAC; M. Hebert, *Animal Protection: An Overview* (Ottawa: Library of Parliament Research Branch, 1984).
48 Aboriginal jurisdictions over matters covered by treaties, self-government agreements and other Aboriginal rights are also relevant to some welfare concerns (*e.g.* hunting), but not generally to the laboratory animal question.
49 *The Commissioner of Patents* v. *The President and Fellows of Harvard College*, 2002 SCC 76 [hereinafter *Oncomouse* case].

its suggestion that Parliament enact new legislation on the issue. Notwithstanding provincial control over "property," if Parliament now expands the patent rules then genetically modified plants and animals will be a special type of intellectual property *prima facie* within federal jurisdiction over "patents of invention and discovery." In addition, even as the Constitution enables government action, by outlining in broad terms who can regulate and what can be regulated (and thus, geographically to some extent it even tells us where the rules apply), it fails to provide precise limits or details. Those details must be filled in by negotiation, legislation and litigation. Finally, an obvious but often forgotten point is that the Constitution does not *require* action; nothing in it mandates that governments exercise their jurisdiction, nor does it provide guidance about when to act or how to address issues.

As we have seen in areas like environmental protection, this constitutional silence has a huge policy result.[50] At one extreme, unclear jurisdiction can result in gaps or inaction, founded on the notion that the matter is outside that level of government's jurisdiction. At the opposite extreme, all levels of government might choose to act, resulting in duplication, overlap, inconsistencies and complaints by regulated industry about "excess regulation." This has typically led to

> a wide range of adaptive techniques to avoid potential conflicts, referred to as 'cooperative' or 'executive' federalism. Examples ... include co-ordinated legislation, delegation of administrative functions, intergovernmental consultation, joint processes, and intergovernmental agreements.[51]

Recalcitrant adverse consequences of such approaches include delay, inefficiency, uncertainty, lack of uniformity, complexity, lack of transparency, unenforceability, overreliance on industry and inequity.[52] The labyrinthine decision-making that often results not only frequently lacks credibility, but generally means that politically feasible — rather than ethically-based or scientifically sound — decisions are made.[53] The lack of clear mechanisms for public participation in these processes and the associated lack of accountability for decisions are also factors in the frustration with the legal system which can lead to civil disobedience.[54]

While Canadian animal welfare law — both general anti-cruelty statutes and specific laboratory animal rules — is more rudimentary than our environmental law, it seems to suffer from the same debilitating uncertainties. Federally, the CCAC has been given a legal opinion suggesting national legislation could not be supported,[55] so they are working on "universality" via mechanisms such as negotiation with provincial governments, and voluntary accreditation systems through the Standards Council of Canada.[56] Thus, apart from rules on import and transportation,[57] the only federal measures potentially applicable to research animal welfare are the general prohibitions against cruelty contained in the *Criminal Code*.[58] Both the current *Code*[59] and its proposed replacement[60] prohibit the "unnecessary" suffering of animals. Arguably, any pain or suffering deemed necessary to achieve human goals can be justified under this rather vague standard, and critics have pointed to cases showing that practically any human use is, apparently, enough to warrant a finding of necessity.[61] Certainly there is little likelihood that scientific, medical or even product-safety research would exceed this standard unless overtly cruel.[62]

Provincially, only six provinces have any degree of regulation specific to research animals.[63] As mentioned previously, Ontario has a stand-alone statute which creates a system for licencing, inspecting and overseeing laboratories[64] — a system which is understaffed and lightly enforced.[65] Prince Edward

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50 See generally D.L. Van Nijnatten & R. Boardman, eds., *Canadian Environmental Policy: Context and Cases*, 2d ed. (Oxford: Oxford University Press, 2002); J. McKenzie, *Environmental Politics in Canada* (Oxford: Oxford University Press, 2002) c. 3.

51 M. Valiente, "Legal Foundations of Canadian Environmental Policy" in Van Nijnatten & Boardman, eds., *ibid.*, c. 1 at 8. See also A. Lucas, "Harmonization of Federal and Provincial Environmental Policies" in J.O. Saunders, ed., *Managing Natural Resources in a Federal State* (Toronto: Carswell, 1985) c. 2.

52 See McKenzie, *supra* note 50; Van Nijnatten & Boardman, *supra* note 50; E. Hughes, "Government Response to Environmental Issues: Institutional Inadequacies and Capacity for Change" (1990) 1:1 J. Env. L. & Pract. 51.

53 *Ibid.*

54 T. Regan, *Defending Animal Rights* (Chicago: University of Illinois Press, 2001) at c. 7.

55 Wilson, *supra* note 47. Given the breadth of the criminal law power enunciated in *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213, this opinion is qualified, even by its author.

56 *Ibid.*; CCAC, "1998 Motion on universality," online: CCAC Homepage <www.ccac.ca/ english/current/lega/en.htm>.

57 *Health of Animals Act*, S.C. 1990, c. 21.

58 *Criminal Code*, R.S.C. 1985, c. C-46, ss. 444–47 (to be amended by Bill C-10, *supra* note 14).

59 *Criminal Code*, *ibid.*, s. 446(1).

60 Bill C-10, *supra* note 14, s. 182.2(1)(a).

61 Francione, *supra* note 22 at c. 1; Hughes & Meyer, *supra* note 11.

62 Francione, *ibid.* at c. 8; Montgomery, *supra* note 16.

63 See Létourneau, *supra* note 15.

64 *Animals for Research Act*, *supra* note 41.

65 Montgomery, *supra* note 16 at 104.

Island has adopted the CCAC guidelines as law,[66] and Alberta has a system that regulates universities only.[67] Nova Scotia allows its provincial humane society to prescribe standards for laboratory animal care so long as they do not conflict with CCAC guidelines,[68] while both New Brunswick[69] and Manitoba[70] make compliance with CCAC guidelines a defence to (or behaviour exempt from) cruelty charges under provincial law.

Any research outside of these partial proscriptions, and any research in other provinces or territories, is subject only to the *Criminal Code* or to general provincial anti-cruelty statutes. Not all provinces have general animal welfare legislation — for example, Quebec's statute[71] has never been proclaimed in force. Other provincial law is limited — for example Ontario's statute establishes a humane society with intervention powers, but it contains no offence provisions nor penalties.[72] Other documented weaknesses abound.[73] Given the likely inapplicability of the *Criminal Code*, and the limitations of provincial law, in many cases animals are being "used in Canada with no oversight at all" and there is little apparent political will to alter the *status quo* in such a controversial area.[74] Nothing in the division of powers in the *Constitution Act, 1867* requires that this situation be remedied.

REASON TO ACT

The Constitution not only fails to guide governments about when or how to act, it also obscures the question of why we should act. The extant terminology of the division of powers sections can lead us to frame our questions in a nearly predetermined way. Under the influence of the traditional approach, for example, we end up asking questions such as what kind of property an oncomouse will be — regular or intellectual — and in so doing, the Constitution arguably has us automatically thinking of animals in "mass terms." Adams explains the concept:

> Mass terms refer to things like water or colors; no matter how much you have of it, or what type of container it is in, water is still water. You can add a bucket of water to a pool of water without changing it at all. Objects referred to by mass terms have no individuality, no uniqueness, no specificity, no particularity.[75]

Thus, a mass term allows us to comfortably distance ourselves from thinking too deeply about the details of what we are doing, including the morality (or ethics) of our actions. Adams's example is our use of terms such as "meat" or "beef," which as she notes are literally pieces of "dead flesh of what was once a living, feeling being."[76] Yet by using a mass term that converts this unique individual into a "consumable thing," we disassociate ourselves from any difficulty we might have in accepting the "rightness" or palatability of the activity.[77] Similarly, "property" and "humanity" as mass terms may historically have obscured the ethics of human slavery, and could well be obscuring our ability to think about whether non-human animals (or other components of nature) have individual rights or interests that demand our recognition.[78]

Arguably, our society does not see the "pith and substance" of animals as mere property, having rejected the Cartesian rationalist view of animals as insensate objects centuries ago.[79] We know they differ from other chattels, like tables or cars, because they can suffer — this is the *raison d'être* for nearly 200 years of animal welfare legislation.[80] This distinction of animals from other property also serves as a foundation for the philosophical arguments that we should go beyond

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66 *Animal Health and Protection Act*, R.S.P.E.I. 1988, c. A-11.1; *Animal Protection Regulations*, P.E.I. Reg. EC71/90.

67 *Universities Act*, R.S.A. 2000, c. U-3, s. 64; *Animal Welfare Regulation*, Alta. Reg. 221/2000.

68 *Animal Cruelty Prevention Act*, S.N.S. 1996, c. 22, s. 22.

69 *Society for the Prevention of Cruelty to Animals Act*, R.S.N.B. 1997, c. S-12, s. 12; *General Regulation — Society for the Prevention of Cruelty to Animals Act*, N.B. Reg. 2000-4, s. 4(2) and Sched. A.

70 *Animal Care Act*, S.M. 1996, c. 69; *Animal Care Regulations*, Man. Reg. 126/98.

71 *Animal Health Protection Act*, R.S.Q. 1977, c. P-42 Division IV.I.I (not proclaimed).

72 *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O-36. The exception is the new s. 15.1, added in December 2002 by Bill 129, which creates offences for infractions by dog and cat breeders only.

73 Additional weaknesses of provincial anti-cruelty laws, such as exemptions and enforcement problems, are summarized in Hughes & Meyer, *supra* note 11.

74 Montgomery, *supra* note 16 at 105. On the reluctance of government to tackle the more controversial aspects of animal welfare debates, see generally Hughes & Meyer, *ibid.* at 41.

75 C. Adams, *Neither Man Nor Beast: Feminism and the Defence of Animals* (New York: Continuum, 1995) c. 1 at 27.

76 *Ibid.* at 28.

77 *Ibid.* at 28–29. See also C. Adams, *The Sexual Politics of Meat* (New York: Continuum, 1990).

78 Francione, *supra* note 22 at 27–28 and 110–12; P. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) c. 8; C. Stone, "Should Trees Have Standing?" (1972) 45 U. S. Cal. L. Rev. 450; L. Tribe, "Ten Lessons our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise" (2001) 7 Animal L. 1.

79 For a history of the philosophic and scientific views of animals see Brooman & Legge, *supra* note 7 at c. 1–2.

80 Summarized in the famous quote: "The question is not, Can they reason? nor, Can they talk? but, Can they suffer?" J. Bentham, *The Principles of Morals and Legislation* (1789) c. 17, s. 1 (see *infra* note 97 and accompanying text).

"legal welfarism" to rethink the utilitarian balance between human uses and animal interests,[81] or even to recognize animal rights, such as the right to life.[82] Our shared ability to suffer is the key factor that creates the very debate about the degree of moral and legal consideration which we might ascribe to non-human animals.[83]

Is the potential suffering of laboratory animals not then something more than scientists manipulating their property? Scientific objectification and reductionism makes it hard to tell. In research, "'[l]aboratory animals' are a collectivity, depersonalized; they are studied *en masse*"[84] as tools to generate data, or objects to be studied.[85] To many, this objectification of animals is at the foundation of animal abuse: "the attribution of deadness to what is alive, conscious, and sensitive involves a psychology of denial that conveniently facilitates the interests of the powerful."[86] We do not need to see the whole organism before us as a thinking and feeling individual — instead, the modern focus on biotechnology and genetics leads to an animal's reduction to constituent parts:

> [A]s genetic and molecular reductionism have become so dominant, the organism has largely disappeared from the discourses of biology. ... Where once the phenotype — the bodily and behavioral characteristics of the organism — was preeminent, now it is the genotype — the sum total of the genes.[87]

In this ideology, "the true essential quality, the very thing that makes a being itself"[88] lies in its DNA. The whole is nothing more than the sum of its parts, and these bits and pieces can be manipulated and controlled for human benefit, as in research with transgenic organisms.

In a recent documentary,[89] an experiment was described in which a human gene was inserted into a potato to increase its heavy metal resistence. On a reductionist level, the single gene adds function, but it is just another protein, and we eat protein all the time. However, holistically — *i.e.*, when we look at the whole integrated system — there are a host of troubling questions.[90] For a start, is this still a potato? Probably not — it could never (and did not ever) evolve in such a way. Is it even a plant, once it contains non-plant DNA? Who donated the human DNA and what degree of biological relationship now exists between the person and that potato? Are they now kin? Is the ingestion of such a potato a form of cannibalism?

Of course one of Charles Darwin's points was that we are, *literally*, kin to all other life on earth.[91] "Whatever the inhabitants of this world were before the publication of *The Origin of the Species*, they never could be anything since but a *family*."[92] This is part of the dilemma of vivisection — it is the similarity of non-human animals to human animals that is the primary reason to use them in research.[93] Yet at the same time their literal kinship and similarity must be denied; we must set ourselves apart from other animals and retain our false belief in "evolutionary discontinuity" to

> elevate our own status, and as a corollary to reduce that of the 'others'. This is, we seek constantly to find new ways of shoring up the boundaries, and of attaching ethical significance to them. This is how we can justify using animals for our own ends in science and elsewhere.[94]

Yet scientific progress itself is bringing us closer to the need to confront such questions. As the Supreme Court of Canada noted in the *Oncomouse* case, there is an "increasingly blurred line between human beings and

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81 Francione, *supra* note 22 at 6; see also Singer, *supra* note 27.

82 See generally T. Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983); S. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge: Perseus, 2000). Note that in Canadian constitutional tradition, even if animals were given some rights through the *Charter of Rights and Freedoms*, such rights would not be absolute, but could (like human rights) be subjected to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

83 It is also the impetus behind those people, such as egoists, who argue we need not bother: J. Narveson, "Animal Rights" (1977) 7:1 Can. J. Phil. 161.

84 L. Birke, "Exploring the Boundaries: Feminism, Animals and Science" in C. Adams & J. Donovan, eds., *Animals and Women: Feminist Theoretical Explorations* (Durham: Duke University Press, 1995) 32 at 41 [hereinafter Birke (1995)].

85 *Ibid.* See also Adams, *supra* note 75 at c. 2.

86 Adams & Donovan, *supra* note 84 at 7–8.

87 L. Birke, *Feminism and the Biological Body* (New Jersey: Rutgers University Press, 2000) at 147 [hereinafter Birke (2000)].

88 B. Katz Rothman, "On Order" in M. Nussbaum & C. Sunstein, eds., *Clones and Clones* (New York: W. Norton, 1998) 280 at 284.

89 *The Genetic Takeover* (National Film Board of Canada, 1999).

90 See generally G. Comstock, *On the Ethical Case Against Agricultural Biotechnology* (Norwell: Kluwer Academic, 2000); P. Thompson, "Ethics and the Genetic Engineering of Food Animals" (1997) 10 J. Ag. & Environ. Ethics 1.

91 See generally Brooman & Legge, *supra* note 7 at 15–22.

92 J.H. Moore, *The Universal Kinship*, (Sussex: Centaur Press, 1906), as reprinted in Brooman & Legge, *ibid.* at 17. See also B. Swimme, "How to Heal a Lobotomy" in I. Diamond & G.F. Orenstein, eds., *Reweaving the World* (San Francisco: Sierra Books, 1990) 15 at 21–22, who notes: "everyone, utterly everyone, is kin."

93 Brooman & Legge, *ibid.* at 18.

94 Birke (1995), *supra* note 84 at 38.

other life forms."[95] If we take an animal such as a chimpanzee, which is already about ninety-eight percent genetically identical to us, and experiment on it, or first add some human DNA to it and then experiment on it, when does it become some type of proto-human slave? How long can we maintain a boundary of "otherness" between us and them, particularly when science is showing they have such "human" traits as capacity for language and other complex cognitive functions?[96] What small differences will this boundary be based upon? Hairiness? skin color? nose width? To reiterate that which Bentham noted over 200 years ago:

> [T]he blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate ... [T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?[97]

INTO THE FUTURE

As biotechnology advances it is harder to hide from the moral quagmire under the mass term "animal." If we transplant a transgenic pig liver into a human, is that person no longer one-hundred percent human? If a transgenic chimp is ninety-nine percent genetically the same as us, but the transplant recipient is now, say, four percent pig, which chimera is "more animal"? Is our reaction to such questions to be governed simply by disgust?[98] Or perhaps we will just dismiss the issue with a "blanket condemnation of all appeals to emotion" without regard for the legitimacy of the objections involved.[99] If all lab animals are just transformable property, kinship precluded, the Constitution demands only that law-makers think about who has authority to control researchers (if they choose to think about this at all); does this constrain not only our ability to question the ethics of the actions, but whether science as practiced makes sense?

As numerous analysts have pointed out, "biologists know perfectly well that genes do not act in isolation."[100] Whole organisms are self-organizing, dynamic entities which interact (even at an embryonic and cellular level) with their environment through physiological and developmental processes, and the effects of random chance, so that not even clones are identical.[101] The "biology that loses sight of the whole organism is one that permits a view of organisms as a set of replaceable parts"[102] without intrinsic value and, perhaps dangerously, this thinking can undermine the way we conceptualize bodily integrity.[103] Yet, short of human rights abuses such as coerced transplant "donations," we are loathe to reinvestigate other less reductionist, more descriptive areas of science, such as embryology, cognitive ethology, and natural history.[104]

One consequence of such unquestioning acceptance of the dominant genetic ideology is that it is nearly impossible to think non-hierarchically about nature and animals. It is a struggle to realize that even though humans are unique, "so are dogs, ostriches, and parrots, or anything else"[105] and that difference does not equal superiority. In short, it is difficult to care about animals not just because they are like us, but to go further and care for them "because they are themselves."[106] Why can we not simply let them be?[107] Even harder is to recall that "virtually all the actual experiences of this world, expressed through the manifest and mysterious characteristics of all the different beings," are simply absent from scientific literature.[108] Hardest of all is to consider our extent of responsibility not only for the suffering of non-human animals, but for the "moral ecology" of dismissive and contemptuous attitudes toward welfare issues that some postmodern theorists suggest is one of humanity's most noticeable and unfortunate contributions to the range of all life experience.[109]

Such analyses, of course, still hover at the fringes of jurisprudential discussion, although there has been a substantial body of work amongst philosophers and

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95 *Oncomouse* case, *supra* note 49 at para. 180.

96 *Ibid.* at 46. On the abilities of great apes see Wise, *supra* note 82.

97 Bentham, *supra* note 80 at c. 17, s. 4, n. 1 [emphasis in original].

98 M. Midgley, "Biotechnology and Monstrosity" (2000) 30:5 Hastings Center Report 7. See also the *Oncomouse* case, *supra* note 49, at para. 177–83.

99 M. Nussbaum, "Secret Sewers of Vice: Disgust, Bodies and the Law" in S. Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999) c. 1 at 21. See also *ibid.*; W.I. Miller, *The Anatomy of Disgust* (Cambridge: Harvard University Press, 1997) at c. 3; Birke (1995), *supra* note 84.

100 Birke (2000), *supra* note 87 at 139; and Midgley, *supra* note 98.

101 Birke (2000), *ibid.* at 138–76; Rothman, *supra* note 88 at 282.

102 Birke (2000), *ibid.* at 170.

103 *Ibid.* at 171; Midgley, *supra* note 98.

104 Birke (2000), *ibid.* at 140; Birke (1995), *supra* note 84 at 40–41.

105 Birke (1995), *ibid.* at 38.

106 L. Vance, as quoted in S. Baker, *The Postmodern Animal* (London: Reaktion Books, 2000) at 174.

107 Baker, *ibid.* at 92–95 and 174–90.

108 K. Davis, "Thinking Like a Chicken: Farm Animals and the Feminine Connection" in Adams & Donovan, *supra* note 84, c. 8 at 208.

109 *Ibid.*; see also Midgley, *supra* note 98.

ethicists on these issues in recent decades.[110] In law, a current case[111] is illustrative of the gap between theory and practice. In 1999, the Ontario Minister of Natural Resources cancelled that province's spring bear hunt in part because the spring hunt resulted in many orphaned cubs who die of starvation. A hunting group challenged the legislation that imposed the ban, alleging the Minister had no authority to act on the basis that such hunting practices were inhumane or unethical, and also alleging that the hunters' *Charter* rights to liberty (s. 7) and freedom of expression (s. 2(b)) were infringed by the ban.[112] Given American jurisprudence on this issue — particularly in the area of legislation banning protests against hunting[113] — the hunters had brief hope, quickly dashed when the Court of Appeal held that no justiciable constitutional issue was raised as there is no "right to hunt" contained in the *Canadian Charter of Rights and Freedoms*.[114] Shortly thereafter, the Ontario legislature enacted a right-to-hunt statute,[115] which will ensure an advisory commission guides the Minister's discretion about the use (killing for sport) of the Crown's property (wildlife).

CONCLUSION

A Constitution "is a piece of paper with words written on it."[116] Many of those words, like "property," are arguably mass terms that obscure fundamental, difficult questions about what we, as a society, could fashion from that piece of paper. Other important words such as evolution, kinship, ethics and humanity, are not written on the paper at all, and perhaps can only be infused sideways into our deliberations, as water seeps toward the roots of a living tree. With the burgeoning biotechnology industry, however, these fundamental questions have a renewed urgency and currency. One can thus anticipate a challenging and controversial ongoing debate.

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[110] See generally Regan, *supra* note 54.

[111] *Ontario Federation of Anglers and Hunters* v. *Ontario (Minister of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.) [hereinafter *OFAH*].

[112] *Charter of Rights and Freedoms*, *supra* note 82.

[113] M. Comninou, "Speech, Pornography and Hunting" in Adams & Donovan, *supra* note 84, c. 5.

[114] *OFAH*, *supra* note 111.

[115] Bill 135, *Heritage Hunting and Fishing Act, 2002* (37th Leg., 3d Sess., Ont.), received royal assent on 27 June 2002; for a comment on the Bill see D. McLaren, "Angling for Control" (2002) 28:2 Alternatives 8.

[116] C. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 206.

BEYOND THE FLIGHT FROM CONSTITUTIONAL LEGALISM: RETHINKING THE POLITICS OF SOCIAL POLICY POST-CHARLOTTETOWN

Sujit Choudhry

INTRODUCTION: THE FLIGHT FROM CONSTITUTIONAL LEGALISM

A decade after the demise of the Charlottetown Accord in 1992,[1] one of the most visible features of federal-provincial relations is the replacement of constitutional with non-constitutional policy instruments to secure many of the same ends — what I term the "flight from constitutional legalism." Instead of constitutional amendments, the instrument of choice is the non-legal, intergovernmental accord. The leading examples are the *Social Union Framework Agreement*[2] and the *Agreement on Internal Trade*,[3] which in differing levels of detail set out both a normative framework and an institutional architecture to manage the Social Union and the Economic Union, respectively.

Although this description is accurate, I argue, focusing on the Social Union, that it is radically incomplete in two respects. I suggest that the politics of social policy in the post-Charlottetown era are now somewhat broader in scope than they were before 1992, and encompass not just issues of substance, but issues of process as well, with the latter arguably assuming central importance. Moreover, I demonstrate that the shift to non-constitutional means should not obscure two facts. First, the law of the Constitution and constitutional litigation have played a limited role in the politics of social policy. Second, constitutional discourse outside the courts has been the primary vehicle for constitutional evolution. Indeed, the *SUFA* should, in this light, be interpreted as a constitutional policy instrument. Finally, I propose that, going forward, the courts should regard the shift from substance to process as a constitutional cue to play a limited but important role in the management of the Social Union.

The flight from constitutional legalism is a narrative that proceeds in a number of stages. First, it is a story of *attempted constitutional amendment*. On the social policy side, the central provision in both the Meech Lake[4] and Charlottetown[5] Accords was the proposed section 106A. That provision was designed to set up some constitutional restraints, presumably enforceable by the courts, on exercises of the federal spending power in areas of provincial jurisdiction. If adopted, section 106A would have given provinces the right to opt out with "reasonable compensation" from shared cost programs. However, the right to opt out only applied to those programs established after the provision came into force, and required provinces to operate a program that was "compatible with national objectives."

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1 Canada, *Charlottetown Accord: Draft Legal Text* (Ottawa: Queen's Printer, 1992).

2 Canada, *A Framework to Improve the Social Union for Canadians — An Agreement between the Government of Canada and the Governments of the Provinces and Territories* (4 February 1999), online: Government of Canada <socialunion.gc.ca/news/020499_e.html> [hereinafter *SUFA*].

3 Canada, *Agreement on Internal Trade* (Ottawa: Industry Canada, 1994).

4 Canada, *Constitutional Accord 1987* (Ottawa: Queen's Printer, 1987) at c. 7.

5 *Supra* note 1 at s. 16. The proposed language for s. 106A in the Accords was not entirely identical. Both Accords would have inserted the following provision into the *Constitution Act, 1867*:

> 106A (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.
>
> (2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

In addition, the Charlottetown Accord would have added the following sub-section:

> (3) For greater certainty, nothing in this section affects the commitments of the Parliament and government of Canada set out in section 36 of the Constitution Act, 1982.

Section 106A was attacked both by advocates and opponents of a strong federal presence in social policy, who fundamentally disagreed over how stringent the constraints it contained would be. To English Canadian nationalists like Deborah Coyne, section 106A would have opened the door to "checkerboard Canada," because it would have undermined both the national reach and uniform content of new federal social policy initiatives. To Quebec nationalists, however, section 106A did not go nearly far enough, not only because of the conditions attached to opting out, but also because it did not apply to direct federal transfers to individuals and institutions, either through direct grants or the tax system.[6]

This debate on the effects of the provision was never resolved, because neither the Meech Lake nor Charlottetown Accords were adopted. Thus, the second piece of the flight from constitutional legalism is *constitutional failure* — the failed attempts at constitutional reform in both the Quebec and Canada rounds. No doubt, the Accords failed because of disputes over their substance. However, another important cause of failure was the unforeseen interaction between the character of constitutional politics and the legal rules governing constitutional amendment. As Peter Russell has famously observed, the late 1980s and early 1990s marked the emergence of "mega-constitutional politics," whereby constitutional reform had to address either an extremely wide range of issues simultaneously, or none at all.[7] As a consequence, both the Meech and Charlottetown Accords were packages that contained a large number of individual constitutional amendments which politically stood or fell together. The constitutional complication this created was that the various amendments triggered different amending formulas, whose requirements accordingly had to be met simultaneously. As a result, both Accords necessitated unanimous consent within three years of their introduction.[8] In both cases, this was fatal.[9] Moreover, the legal implications of mega-constitutional politics have effectively shut the door on comprehensive constitutional change in Canada.

Federal and provincial governments have accordingly searched for ways to achieve some of the goals set out in the Accords, but without recourse to constitutional amendment. This is the third component of the flight from constitutional legalism — the shift in *instrument choice* from constitutional amendments to other policy instruments. Harvey Lazar captures this change through the term "non-constitutional renewal."[10] Interestingly, governments have eschewed legal means entirely, foregoing even statutes that could have given rise to legally enforceable obligations subject to the normal process of statutory amendment. The instrument of choice has been the intergovernmental agreement, which, as the Supreme Court of Canada held in the *Reference re Canada Assistance Plan*[11] in 1991, is legally unenforceable. The most law-like of these agreements is the *Agreement on Internal Trade*, which both sets out substantive norms and creates institutional machinery for their enforcement with respect to the Economic Union.[12] In the social policy context, nine provinces, the territories and the federal government signed the *SUFA* in 1999, with Quebec declining to participate.

SHIFTING FROM SUBSTANCE TO PROCESS

This picture provides a reasonably good account of some of the salient features of federal-provincial

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6 See generally K. Banting, "Political Meaning and Social Reform" in K.E. Swinton & C.J. Rogerson, eds., *Competing Constitutional Visions: the Meech Lake Accord* (Toronto: Carswell, 1988) 163; R.W. Boadway, J.M. Mintz & D.D. Purvis, "Economic Policy Implications of the Meech Lake Accord" in Swinton & Rogerson, *ibid.*, 225 at 229–32; D. Coyne, "The Meech Lake Accord and the Spending Power Proposals: Fundamentally Flawed" in M.D. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989) 245; and P. Fortin, "The Meech Lake Accord and The Federal Spending Power: A Good Maximin Solution" in Swinton & Rogerson, *ibid.*, 213.

7 P.H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2d ed. (Toronto: University of Toronto Press, 1993).

8 This was the result of the simultaneous operation of ss. 38 and 39 (requiring the passage of resolutions by Parliament and the legislative assemblies of two-thirds of the provinces representing at least fifty percent of the population within three years of the adoption of the resolution initiating the amending procedure) and s. 41 (requiring unanimous consent) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

9 K. Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42 U.T.L.J. 139.

10 H. Lazar, "Non-Constitutional Renewal: Toward a New Equilibrium in the Federation" in H. Lazar, ed., *Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1998) 3.

11 *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525 [hereinafter *CAP Reference*]. The judgment is capable of alternative interpretations. For a lengthier discussion see S. Choudhry, "The Enforcement of the *Canada Health Act*" (1996) 41 McGill L.J. 461 at 503–505.

12 For a more detailed discussion of the *Agreement on Internal Trade*, see M.J. Trebilcock & R. Behboodi, "The Canadian Agreement on Internal Trade: Retrospects and Prospects" in M.J. Trebilcock & D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: C.D. Howe Institute, 1995) 20.

relations over the past decade. However, it is incomplete in two respects. First, it does not give sufficient emphasis to important changes in the content of the norms contained in federal-provincial initiatives since the demise of the Charlottetown Accord. To illustrate this shift, let us compare section 106A and the *SUFA*. The key provision in section 106A is the provincial right to exit with compensation. At the time that section 106A was proposed, neither of the statutes creating the legal framework for the principal federal shared-cost programs — the *Canada Assistance Plan Act*,[13] covering social assistance, and the *Canada Health Act*,[14] covering health care — granted provinces such a right. The effect of section 106A would have been to insert into each federal shared program a new condition that bound the federal government, and would have prevented it from operating as it had before. As such, section 106A would have constituted a substantive limit on federal jurisdiction. To be sure, there was considerable disagreement over how much of a constraint section 106A really would have been. This disagreement in large part turned on important textual ambiguities in the provision that likely made negotiated agreement possible, and implicitly but deliberately deferred important issues to subsequent constitutional litigation. For example, it was unclear whether changes to existing programs would make those programs "new," and hence trigger the right to opt out with compensation. Moreover, the extent to which a provincial program had to be "compatible with the national objectives" was also ambiguous. However, putting those points to one side, the goal behind section 106A was clear.

The *SUFA* also contains provisions, found in article 5, governing the creation of shared cost programs. Like section 106A, article 5 creates a right to opt out with compensation, permitting provinces and territories that satisfy "Canada-wide objectives" to reinvest funds. That being said, article 5 differs from section 106A in several respects. Canada-wide objectives must be set by the federal government in collaboration with the provinces and territories, whereas section 106A would have permitted them to be set by the federal government unilaterally. Moreover, even though article 5 requires provinces to adhere to an "accountability framework," presumably to comply with national objectives, that framework is to be agreed to by both levels of government. Section 106A made no reference to an accountability framework, but it is a reasonable reading of the provision that the terms of such a framework would have been a matter for the federal government alone to determine. Most significantly, unlike section 106A, article 5 requires the consent of the majority of provincial governments for the introduction of new shared cost programs.

What unites these provisions of article 5 is that they speak to issues of process. This theme runs throughout the *SUFA*. For example, article 5 also deals with direct federal spending, and prior to the introduction of new programs, requires the federal government to give provincial and territorial governments three months notice and to offer to consult with them. Article 4, entitled "Working in Partnership for Canadians," is also of considerable interest. Governments commit to "[u]ndertake joint planning," and to "[c]ollaborate on implementation of joint priorities" when appropriate. Moreover, recognizing that changes to social programs at one level of government often have spillover effects on programs operated by the other level of government (consider for instance, changes to eligibility rules and benefit levels for social assistance and unemployment insurance), governments agree to give notice prior to, and to consult regarding, such changes.

Finally, there is article 6, which deals with "Dispute Resolution and Avoidance." Presumably, this provision applies if consultation and collaboration have failed. Signatories commit themselves to "working collaboratively to avoid and resolve intergovernmental disputes." It appears that article 6 contemplates three types of processes: dispute avoidance, negotiation, and mediation. Dispute avoidance is encouraged "through information-sharing, joint planning, collaboration, advance notice and early consultation, and flexibility in implementation." Negotiation proceeds on the basis of joint fact-finding, which may be conducted by a third party, and which will be made public if one party so requests. In addition, negotiation may be accompanied by mediation. Again, mediation reports will be made public if one party so requests. Mechanisms for dispute resolution must respect a list of general principles: they have to be "simple, timely, efficient, effective and transparent," allow for the possibility of non-adversarial solutions, be appropriate for the specific sectors in which the disputes arise, and provide for the expert assistance of third parties.

I see at least two causes for this dramatic shift in the norms governing the Social Union from substantive to procedural. The first is deep provincial frustration over the circumstances surrounding the introduction in 1995 of the Canada Health and Social Transfer,[15] which altered both the federal funding formula and levels of federal support for health care and social assistance. At

[13] R.S.C. 1985, c. C-1 [hereinafter *CAP*].
[14] R.S.C. 1985, c. C-6 [hereinafter *CHA*].

[15] The Canada Health and Social Transfer [hereinafter CHST] was introduced through the *Budget Implementation Act, 1995*, S.C. 1995, c. 17.

that time, provinces accused the federal government of having acted without prior notice or consultation, let alone provincial consent, effectively shifting both the financial and political costs of federal deficit reduction onto provincial governments. Although the provinces did receive a *quid pro quo*, in the form of the elimination of all national standards for social assistance except the prohibition on minimum residency requirements, provincial bitterness remained, and placed in jeopardy the success of future federal policy activism. Moreover, by reducing the level of federal transfers, the CHST reduced the federal government's financial leverage and political capital, thereby diminishing its capacity for unilateralism going forward. The resistance of several provincial governments toward federal proposals for increased accountability for health care transfers is a recent and highly visible reflection of this legacy.

The second cause for this shift is ongoing provincial frustration with the enforcement of the national standards in the *CHA*. In many ways, this is puzzling, given that the *CHA* is largely an unenforced statute. As I have argued in detail elsewhere, although monies have been withheld from provinces that permit user fees and extra-billing, the net amounts of such withheld funds are extremely small, and the federal government has never found a province to be in breach of the "big five" conditions of universality, comprehensiveness, accessibility, portability, and public administration, despite actual and alleged non-compliance with several of these criteria.[16] However, in those few cases in which the *CHA* was enforced, the provinces complained of federal unilateralism. The Gimbel Eye Clinic dispute — in which Alberta complained that the federal government determined that the "facility fee" charged by a privately owned clinic providing publicly insured services was a user charge prohibited by the *CHA* — is a good example.[17] In the face of diminished federal financial contributions, provinces were unwilling to let the old rules of the game continue. Article 6, by promoting dispute resolution and avoidance, speaks directly to that concern. Whereas the *CHA* locates the legal responsibility for interpreting and enforcing national standards with the federal government,[18] article 6 seeks to shift at least political responsibility to intergovernmental institutions that are not under the control of one level of government.

THE IRRELEVANCE OF THE LEGAL CONSTITUTION AND CONSTITUTIONAL LITIGATION

The idea of the flight from constitutional legalism implicitly suggests that the legal Constitution was an important factor in the politics of social policy prior to the Quebec and Canada rounds, and that the Meech Lake and Charlottetown Accords responded directly to dissatisfaction with the constitutional text and its interpretation by the courts. This is certainly how to read the various proposals to strengthen the Canadian Economic Union over the past two decades, particularly during the Patriation round. Those proposals responded to a profound sense of constitutional failure, attributable to both the text of the *Constitution Act, 1867* and judicial interpretation of that document.[19] However, it would be a serious misreading of our constitutional history to translate the politics of economic policy to the social policy context. In the growth and evolution of the Social Union, the legal Constitution has played a comparatively minor role, as have the courts.

The first thing to note is that notwithstanding the centrality of social policy to federal-provincial relations since the Second World War, the Constitution is largely silent on critical jurisdictional questions. Neither sections 91 nor 92 of the *Constitution Act, 1867* contain explicit references to social assistance or health insurance. There is a good reason for this — as the Rowell-Sirois Commission noted, the welfare state was not within the contemplation of the framers of the Constitution in 1867.[20] To be sure, as the welfare state has developed, the Constitution has been amended to assign jurisdiction over unemployment insurance,[21] old age pensions,[22] and supplementary and disability

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16 For a review of the enforcement history of the *CHA*, see S. Choudhry, "Bill 11, The *Canada Health Act* and the Social Union: The Need for Institutions" (2000) 38 Osgoode Hall L.J. 39 at 51–59. A recent newspaper report, based on a review of internal Health Canada documents, cites many instances of potential non-compliance: L. Priest, "List reveals provinces violated health act" Globe & Mail (13 December 2002) A1.

17 Discussed in Choudhry, *ibid*. at 54.

18 *CHA*, *supra* note 14 at ss. 13–17 (governing national standards for which the decision to withhold funds is discretionary, not mandatory).

19 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. I make this point in S. Choudhry, "Strengthening the Economic Union: the *Charter* and the Agreement on Internal Trade" (2002) 12 Constitutional Forum 112.

20 Canada, *Report of the Royal Commission on Dominion-Provincial Relations* (Canada: Queen's Printer, 1940) (Chairs: N. Rowell & J. Sirois).

21 *Supra* note 19 at s. 91(2A), conferring power over unemployment insurance, was added by the *Constitution Act, 1940* (U.K.), R.S.C. 1985, App. II, No. 28 following the Privy Council's decision in *Canada (A.G.)*. v. *Ontario (A.G.). (Unemployment Insurance)*, [1937] A.C. 355 [hereinafter *Unemployment Insurance Reference*].

22 *Ibid.*, s. 94A, conferring power over old age pensions, was added by the *Constitution Act, 1951* (U.K.), R.S.C. 1985, App. II, No. 35.

benefits.[23] However, none of these amendments textually entrenched jurisdiction over social assistance and health insurance, two of the principal areas of federal-provincial interaction. Nor did the Meech Lake and Charlottetown Accords expressly address the jurisdictional issue, even if only to clarify it.

In the absence of any clear direction in the constitutional text, it fell to the courts to assign jurisdiction through interpretation. In 1937, the Privy Council held in the *Unemployment Insurance Reference*[24] that the provinces had jurisdiction over all forms of social insurance, including health insurance. The following year, the Supreme Court held in the *Adoption Reference*[25] that direct social service provision also lies within provincial jurisdiction. But in the *Unemployment Insurance Reference*, the Privy Council announced the existence of the federal spending power, and expressly referred to the power of the federal government to make its grants subject to conditions. Thus, notwithstanding its holding on jurisdiction, that judgment created the constitutional space for federal involvement, and set the stage for the centrality of shared cost statutes during the growth and expansion of the Social Union.

I think these rulings are highly questionable, both on the constitutional case law as it stood at the time, and even more so today.[26] Yet notwithstanding my serious misgivings, it is undeniable that those judgments laid down the legal framework within which the politics of social policy have taken place. But interestingly, since the 1930s, the courts have largely been non-participants in federal-provincial disputes in the social policy arena. This stands in marked contrast to the many areas of federal-provincial conflict in which the courts have been centrally involved — for example, natural resources,[27] environmental policy,[28] and broadcasting,[29] just to name a few. The absence of social policy disputes from the courts is all the more striking when one considers that fundamental questions regarding the Canadian constitutional order, such as the patriation of the Constitution[30] and the potential secession of Quebec,[31] have come before the Supreme Court. Social policy is conspicuous by its absence from the list, a point that the literature on judicial activism has surprisingly ignored.

The non-participation of the courts can be traced to the reluctance of governments to litigate social policy disputes, on the view that the potential risks of judicial intervention outweighed the potential benefits. The federal government was likely fearful that the courts would impose some limits on the conditions that could attach to grants, a point gestured to by the Privy Council[32] (albeit now seemingly abandoned by the Supreme Court).[33] Conversely, the provinces other than Quebec wanted federal transfers to be unconditional, but feared that a Supreme Court ruling could legitimize intrusive conditions. Furthermore, Quebec's consistent demand — not for unconditional transfers, but rather for the right to opt out with compensation, for example through a tax point transfer to redress vertical fiscal imbalance — was unlikely to succeed in constitutional litigation.[34]

Those few cases in which the courts did become involved stemmed from litigation launched by private parties. Some of these cases involved unsuccessful challenges to the *Family Allowances Act*,[35] the precursor to the Canada Pension Plan,[36] the Canada Home and Mortgage Corporation,[37] and the whole edifice of shared cost programs in *Winterhaven Stables* v. *Canada (A.G.)*.[38] Two cases, which reached the Supreme Court, turned on the enforcement of the national standards spelled out in the Canada Assistance Plan, with the Court ruling that the CAP had not been breached.[39] The one intergovernmental dispute that came before the courts was the constitutional challenge to the "cap on CAP" (the *CAP Reference*) in which the Supreme Court held that the federal government had

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23 *Ibid.*, s. 94A was expanded to cover supplementary benefits including survivors' and disability benefits by the *Constitution Act, 1964* (U.K.), R.S.C. 1985 App. II, No. 38.

24 *Unemployment Insurance Reference*, *supra* note 21.

25 *Reference Re Adoption Act (Ontario)*, [1938] S.C.R. 398.

26 For an extended discussion, see S. Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52 U.T.L.J. 163 at 166–98 [hereinafter "Recasting Social Canada"].

27 *Central Canada Potash* v. *Saskatchewan*, [1979] 1 S.C.R. 42; *Canadian Industrial Gas & Oil* v. *Saskatchewan*, [1978] 2 S.C.R. 545; *Reference Re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004.

28 *R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401; *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213.

29 *Capital Cities Communications* v. *Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Quebec (Public Service Board)* v. *Dionne*, [1978] 2 S.C.R. 191; *Quebec (A.G.)* v. *Kellogg's Co.*, [1978] 2 S.C.R. 211.

30 *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

31 *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Secession Reference*].

32 *Unemployment Insurance Reference*, *supra* note 21 at 367.

33 *CAP Reference*, *supra* note 11 at 567.

34 For a lengthier discussion, see "Recasting Social Canada," *supra* note 26 at 199.

35 S.C. 1944–45, c. 40, as am. by S.C. 1946, c. 50, in *Angers* v. *M.N.R.*, [1957] Ex. C.R. 83.

36 *Porter* v. *Canada*, [1965] 1 Ex. C.R. 200.

37 *Central Mortgage and Housing Corp.* v. *Co-op College Residences* (1975), 13 O.R. (2d) 384 (C.A.).

38 (1988), 53 D.L.R. (4th) 413 (Alta. C.A.).

39 *Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (standing); and *Finlay* v. *Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080 (merits).

not breached its agreements with the provinces, and that even if it had, it had the legislative power to do so, since such agreements could not fetter parliamentary sovereignty.

However, the non-involvement of the courts and the legal Constitution does not mean that ideas associated with the Constitution did not matter. Indeed, provincial claims have often been framed in the language of jurisdiction, with federal initiatives often opposed by provinces not merely as being unwise on public policy grounds, but also as representing unconstitutional intrusions into spheres of exclusive provincial competence. Moreover, if one examines in detail the House of Commons debates surrounding the introduction of the *Medical Care Act*[40] and the CHST, one sees Members of Parliament on both sides of these debates making a mixture of policy and constitutional arguments.[41]

The presence of constitutional discourse in political arenas, along with the absence of court challenges to resolve jurisdictional disputes, invites differing explanations. From the vantage point of traditional, court-centered constitutional scholarship, the natural interpretation of this pattern of constitutional practice would be that political actors were grappling with the constitutional limits of their jurisdiction as laid down by the courts, as one would expect in a liberal democracy. In those areas where the legal position is unclear, political actors would rely on conflicting pieces of constitutional doctrine, engaging in what I term *doctrinal politics*.

To be sure, a lot of this has gone on. Political actors have explored the real tensions between different aspects of the legal framework governing federal involvement in the social policy arena — for example, the fact that the federal government lacks regulatory jurisdiction over social policy but may nonetheless lay down conditions that provinces must comply with to qualify for federal funding. However, I think there is more going on here, which students of constitutional theory would do well to study more closely. Rather than merely operating in the shadow of judicial doctrine, political actors have engaged in a process of constitutional interpretation. In the absence of judicial elaboration of the Constitution, the site for constitutional evolution of the legal framework governing social policy has been in politics. The politics of social policy, in other words, has been an arena for constitutional politics, and is an excellent example of constitutional discourse occurring outside of the courts.

At one level, recognizing the ability of political actors to achieve constitutional change without recourse to constitutional litigation and the courts is hardly an earth-shattering observation. Indeed, this is the whole idea behind the rules governing constitutional amendment, which, under the Canadian Constitution, do not explicitly assign any role to the courts.[42] But given the non-viability of constitutional amendment over the past decade due to the rise of mega-constitutional politics, the mechanisms through which political actors have attempted to achieve constitutional change have, by necessity, shifted. In this light, it is overly simplistic to regard the *SUFA* as simply a non-constitutional policy instrument. Rather, it could be seen as an incremental change to the constitutional framework governing federal-provincial relations in the social policy arena.

THE FUTURE: SOME PROPOSALS

Where do we go from here? In my view, the shift from substance to process in the politics of social policy post-Charlottetown is extremely valuable, because it promises to establish a framework for intergovernmental co-operation. Although I think that the federal government enjoys significant amounts of jurisdiction over social policy, and posseses the constitutional authority to act unilaterally in many areas, federal unilateralism is not a viable option in the current political climate. The challenge is to further the project of process, which remains incomplete. An additional move is required — the creation of an institutional architecture to manage intergovernmental relations in the social policy arena. To illustrate how this could happen, consider federal-provincial relations in health care. Joint federal and provincial involvement in health care necessitates institutions to manage that relationship. Indeed, in health care, institutions are absolutely necessary in order to respond to what has become a largely dysfunctional relationship between the federal government and the provinces, by providing a framework within which both sets of governments can manage the system.

In a discussion paper Colleen Flood and I prepared for the Romanow Commission, we proposed the creation of two new institutions.[43] First, we proposed

[40] S.C. 1966–67, c. 64.

[41] As detailed in "Recasting Social Canada," *supra* note 26 at 205–12.

[42] See Part V of the *Constitution Act, 1982*, *supra* note 8. Of course, the courts would be involved in sorting out which amending rule governed a particular proposed amendment.

[43] Canada, Royal Commission on the Future of Health Care in Canada, *Discussion Paper No. 13 — Strengthening the Foundations: Modernizing the Canada Health Act*, by C. Flood

the establishment of a jointly appointed, non-partisan, and expert Medicare Commission to work with the provinces to establish processes to better satisfy the criteria of comprehensiveness, accessibility, and public governance and accountability (our proposed reworking of public administration). The Commission would reward provinces that meet objective performance indicators or that undertake those reforms that the Commission identifies as worthwhile. To effect real change in the system, the Commission would have to receive a significant sum of federal funds above and beyond existing transfer payments.

Second, we proposed the creation of permanent procedures under the *SUFA* to deal with disputes over the interpretation of the *CHA*. Such disputes would be heard by specialist panels. Moreover, in addition to being triggered by government complaints, the machinery could also be invoked directly by citizens. Although the federal government would retain the final authority for determining whether to withhold cash payments, dispute settlement machinery would add considerable legitimacy to those decisions, should the federal government abide by panel rulings. The federal government and the provinces apparently agreed on the details of dispute settlement machinery regarding the *CHA* earlier this year, but those details have not been released to the public.

The Romanow Report, *Building on Values*, builds on our report by proposing the creation of the Health Council of Canada, and the establishment of a dispute resolution process under the *CHA*.[44] Unfortunately, though, the recent *First Ministers' Accord on Health Renewal*[45] does not take the institutional agenda seriously enough. Moreover, although it creates a Health Council, it limits the role of that body to monitoring and making annual reports on compliance with the various provisions of the Accord, particularly those that require provincial reporting with respect to performance indicators regarding timely access, quality, sustainability (*i.e.* health system efficiency and effectiveness), and health status and wellness. On its face, the Accord does not make the Council the forum for federal-provincial co-operation that we had envisioned in our report.

Moreover, the shift to process suggests a way to bring the courts back into the governance of the Social Union. The key here would be for the courts to acknowledge the constitutional cue contained in the *SUFA*, and to ratify it, analogously to how the courts would enforce amendments to the Constitution achieved through the procedures in Part V of the *Constitution Act, 1982*. This would entail the courts supervising the procedural norms of the Social Union, while leaving the determination of policy outcomes to governments. An example of how this would work is provided by the *CAP Reference*. In that case, provinces alleged that the federal government had failed to comply with the terms of agreements signed by each province and the federal government.[46] Two terms were relevant — that the agreement could only be changed by mutual consent, and that either party could terminate the agreement with one year's notice. Had the Supreme Court enforced either the consent provision or the notice provision, it would not have been setting social policy. Rather, it would have been enforcing terms that encouraged federal-provincial discussions, thereby vindicating the value of process.

The *CAP Reference* has not been overruled by the Supreme Court. However, it may be time for the Court to revisit that judgment. In addition to the *SUFA*, another cue for change is the Court's judgment in the *Secession Reference*,[47] which crafted new constitutional rules governing secession that left the resolution of the terms of secession to the political process, and mandated that parties engage in good faith negotiations to achieve that end. The concern of the Court was with process. And the question that must be asked is whether that concern can be extended beyond the extraordinary context of secession to the everyday, yet vital, aspects of federal-provincial relations that are the lifeblood of the federation.

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& S. Choudhry (Ottawa: Queen's Printer, 2002).

44 Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada — Final Report* (Ottawa: Queen's Printer, 2002) (Chair: R. Romanow) at 52–59 (Health Council of Canada) and 60 (dispute resolution process).

45 Canada, *2003 First Ministers' Accord on Health Care Renewal* (5 February 2003), online: Canadian Intergovernmental Conference Secretariat <www.scics.gc.ca/pdf/800039004_e.pdf>.

46 The text of the agreement is reproduced in *CAP Reference*, *supra* note 11 at 537–39.

47 *Secession Reference*, *supra* note 31.

THE HARD CASE OF DEFINING "THE MÉTIS PEOPLE" AND THEIR RIGHTS: A COMMENT ON *R.* V. *POWLEY*

Paul L.A.H. Chartrand

INTRODUCTION

Section 35(2) of the *Constitution Act, 1982* refers to "the Métis people" as one of the Aboriginal peoples of Canada whose existing Aboriginal and treaty rights are guaranteed by section 35(1).[1] The subsequent First Ministers Conference on Aboriginal Constitutional Reform in the 1980s and the Charlottetown Accord in 1992 proved inadequate to the task of addressing the substantive content of these constitutional provisions. The unenviable task of defining a people and their rights has now fallen to the courts. The challenge facing them is the hard case of Canadian Aboriginal law.

In March 2003, the Supreme Court of Canada will hear appeals in two cases in which individuals have asserted Métis identity and membership in a modern Métis Nation: *R.* v. *Blais* and *R.* v. *Powley*.[2] *Blais* involves a claim by a descendant of the Red River Métis Nation to exercise hunting rights pursuant to the *Constitution Act, 1930*. Neither Blais' identity as Métis nor his membership in the modern Métis Nation is truly at issue.

Powley is quite different, for here the heart of the issue is whether the two accused individuals are Métis capable of exercising section 35 rights. The Ontario Court of Appeal expressed general views about who the Métis people are, and applied exceptional principles to the task of defining them for the purposes of section 35.

Powley illustrates the general case of many of the mixed-blood inhabitants of Canada. In my view, the application of exceptional principles to the general case as the Ontario Court of Appeal has done will lead ultimately to an irrational and unworkable doctrine of Aboriginal and treaty rights and produce inequitable results for all the Aboriginal peoples mentioned in section 35. In addition, applying exceptional principles to the unexceptional presence of mixed-blood individuals and families also risks introducing arguments into the section 35 context that will be based on racial rather than rational grounds.

A better approach would be to apply general principles of constitutional interpretation. Identification of a rights-bearing Aboriginal collectivity or nation rather than the particular genetic makeup of individuals should be of primary importance. Thus, I argue that the term "the Métis people" in section 35, properly construed by applying the general principles applicable to the interpretation of Aboriginal rights in the Constitution, leads to the exceptional case of the descendants of "Riel's people" — the well-known "Métis Nation" of western Canada — rather than to the general case of groups of people distinguished only by their mixed Aboriginal and non-Aboriginal ancestry.

Powley is important because it reflects the current contention surrounding the identity of the Métis people in Canada. The etymology of the term "Métis" has associated it with "persons of Aboriginal ancestry," meaning individuals with personal antecedents that include an Aboriginal ancestor, from any group, from coast to coast. This may be called a "pan-Indian" approach, reflecting the wishes of individuals and groups to identify with their Aboriginal, rather than with their non-Aboriginal ancestors.

In many cases, the courts' approach reflects a tendency to identify as "Métis" individuals who are at

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1 Section 35 of the *Constitution Act, 1982* recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." The focus of this note is s. 35(2), which provides that "[i]n this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada": *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

2 *R.* v. *Blais*, [2001] 3 C.N.L.R. 187 (Man. C.A.), leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 294 [hereinafter *Blais*]; *R.* v. *Powley*, [2001] 2 C.N.L.R. 291 (Ont. C.A.), leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 256 [hereinafter *Powley*]. The issue in *Blais* involves the construction of the game laws paragraph to decide whether Métis people are included within the term "Indians," to whom the paragraph guarantees hunting rights in the province.

the definitional boundary of "Indians" as defined in the *Indian Act*.[3] Such persons have been excluded from, or re-included within, the "Indian" definitional fold at the whim of policy-makers and law-makers over the past 125 years. Bill C-31 of 1985 was simply a large-scale boundary shift that included some, but not all, of those mixed ancestry persons with Indian antecedents.

The broadly criticized failure of the federal government to include in the Bill C-31 exercise all those of Indian ancestry who likely ought to have found constitutional shelter as "Indians" highlights the irrationality of federal Indian definition.[4] Moving away from the irrational boundary of Indian definition[5] towards the positive core of Métis identity in western Canadian history not only accords with the approach to the interpretation of Aboriginal rights that the Supreme Court of Canada has taken to date, but also is more likely to produce workable results.

In sum, it is my view that the special constitutional category of "Métis" must be construed in accordance with the purposes of section 35 and constitutional values and principles. While notions based on race may legitimately lie behind the recognition of individuals disadvantaged on account of race or ethnic origin in section 15 of the *Canadian Charter of Rights and Freedoms*,[6] they must not be permitted to inform the construction of section 35. Sections 15 and 35 perform distinctly different constitutional functions that must not be confused.

Importantly, it is also my view that the approach taken by the Ontario Court of Appeal in *Powley*, if taken to its logical conclusion, will infringe on the section 35 rights of Indians by threatening the integrity of their communities. The true construction of section 35 suggests that persons closely associated with "Indians" ought to frame their claims in Indian terms rather than attempt to squeeze themselves into the ill-fitting constitutional clothes worn by the historic Métis Nation and its modern counterpart.

The following analysis is based on the view that "the Métis people" in section 35 refers to the historic nation that fought for its rights in western Canada and that was recognized, in military and political terms, in nineteenth-century legislation and policy, and, through the *Manitoba Act, 1870*, in the Canadian Constitution itself.[7]

POWLEY IN THE ONTARIO COURT OF APPEAL

In October 1993, two residents of the City of Sault Ste. Marie, Ontario, were charged under the provincial *Game and Fish Act*[8] with unlawfully killing a bull moose and being in possession of it in their city home. The Powleys admitted to killing and possessing the moose, but asserted that the provincial legislation infringed their section 35 right to hunt for food.

Since the mid-nineteenth century, the Powleys' ancestors had lived on the local Indian reserve as members of the Batchewana Band of Indians. However, as a result of the marriage of a grandmother to a non-Indian in 1918 and by operation of the *Indian Act*, their near ancestors had lost Indian status.[9] The Powleys were therefore non-Indians within the meaning of the *Indian Act*, but not necessarily within the meaning of section 35.[10]

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3 R.S.C. 1985, c. I-5 [hereinafter *Indian Act*].

4 This is concluded in the comprehensive analysis by J. Giokas & P.L.A.H. Chartrand, "Who Are the Métis in Section 35?: A Review of the Law and Policy Relating to Métis and 'Mixed-Blood' People in Canada" in P.L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?: Definition, Recognition, and Jurisdiction* (Saskatoon: Purich, 2002) 83 [hereinafter *Who Are Canada's Aboriginal Peoples?*].

5 Whenever there is a group with rights that are not vested in all members of the public, there is a need for a status definition system. The usual factors that are used for defining human groups through generations, and the various models, are discussed in D.E. Sanders, "The Bill of Rights and Indian Status" (1972) 7 U.B.C. L. Rev. 81 at 83–87. The administration of the *Indian Act* has had an irrational result because it has eliminated the possible application of these factors in defining Indians.

6 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, *supra* note 1 [hereinafter *Charter*].

7 The *Manitoba Act, 1870* is part of the Constitution of Canada by the operation of the *Constitution Act, 1982*, *supra* note 1 at s. 52(1)–(2) and Schedule 2.

8 R.S.O. 1990, c. G-1, ss. 46–47(1).

9 Federally recognized Indians are descendants of members of Indian communities that were politically recognized as Indians by being included in treaties or being provided with lands set aside as reserves for their exclusive occupation. The membership code has developed from the 1876 *Indian Act*, *supra* note 3, which operates so that status Indians today are those persons descended in the male line from the members of those original groups. All the usual factors, including lifestyle, "blood quantum," and kinship, are present in this membership scheme, which seems to have been designed to maintain the nineteenth-century model of the nuclear family. Those related to the male head of a family retain status. By way of example, then, daughters who leave the household to marry a non-Indian according to the *Act*, lose status, or are "enfranchised." The *Act* was substantially revised in 1985, purportedly to comply with the sexual equality guarantees of the *Charter*.

10 The s. 35 category of Indians is broader than the federal legislated definition, which was unilaterally imposed upon Indian people. See P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2002) at 579–80.

Be that as it may, the Powleys did not challenge the constitutional validity of the *Indian Act* in disentitling their grandmother from Indian status and membership in the Batchewana Band, even though it was precisely this disentitlement that made them ineligible to claim treaty rights under the 1850 Robinson Huron Treaty with the Batchewana Band. They nevertheless claimed Indian treaty rights in section 35, but not as section 35 Indians. Instead, they asserted a Métis identity. They argued that they had all along been members of a distinct Métis community, even though their ancestors had been (the defendants never in fact were registered nor could they be under the *Act* as it stands now) until the enfranchisement of their grandmother, legally recognized as Indians, and had lived among Indians on an Indian reserve.

The Powleys, who did not testify on their own behalf at the trial,[11] pinned their hopes for judicial recognition as Métis on their membership in two competing Aboriginal political organizations,[12] and on a remote ancestor, Eustache Lesage, who had left Sault Ste. Marie in the 1850s and joined the Batchewana Band.[13] By this action he gave himself and his descendants the benefits of Ojibway community life and treaty entitlements.

Justice Sharpe, speaking for the court, accepted the conclusion of the trial judge: "On the basis of the historical evidence, he found that the Métis were the 'forgotten people' and that although their community became 'invisible' it did not disappear."[14]

So, by adopting what amounts to a legal fiction in order to recreate history, the judicial imagination would appear to make some Indian bands "harbours" for hitherto invisible Métis identities. The basis for this reasoning appears to have been little more than judicial sympathy for "Métis" people, openly conceived by the Court as members of a disadvantaged racial minority.

"THE MÉTIS PEOPLE"[15] IN SECTION 35 IS NOT A "RACIAL GROUP"

This view of the purpose of section 35 is ill-founded. Section 35 was not entrenched to protect racial minorities. That is the task of section 15. Section 35 protects the rights of peoples, or historic nations, that have come under Crown sovereignty. Aboriginal peoples, including the Métis people, are social and political entities, not racial groups. Were the ancestors of the Powleys members of such a social and political entity prior to joining the Batchewana Band? On the evidence, it is difficult to conclude that they were.

Eustache Lesage, the mixed-blood ancestor of the Powleys, is described by Sharpe J.A. as one of many "Métis" who joined the local Indian bands in the 1850s, but who nevertheless retained their distinct individual identity as "Métis."[16] It is difficult to know exactly what this might have meant to Lesage in practice, but some judicial comments suggest that Métis identity is biologically determined. This notion is evident in Sharpe J.A.'s statement that "[u]nions between Scottish

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[11] The comments of the Court on this point include, "it might have been preferable to have direct evidence from the respondents as to their membership in and acceptance by the local Métis community." See *Powley*, *supra* note 2 at paras. 143, 149.

[12] *Ibid.* at para. 12. Both organizations, the Ontario Métis and Aboriginal Association (OMAA) and the Métis Nation of Ontario (MNO) are political organizations that are supported by federal funding under the federal Aboriginal Representative Organizations Program.

[13] *Ibid.* at para. 138. A recent New Brunswick case, also alleging a defence to unlawful possession of moose meat, illustrates the kind of factual background found in cases outside the Western regions — where the Métis people have a well-established history as Métis and do not rely upon descent from Indians. The defendant produced evidence of membership in three Aboriginal political organizations, one called the Acadian Métis-Indian Nation, and claimed both an Indian and, in the alternative, a Métis, identity. Both claims were based on an allegation of an unknown Indian ancestor dating back eight generations. The court rejected the claim, citing lack of any evidence of any "treaty, pact, convention or agreement" in the Maritimes, as is found in the west. See *R.* v. *Chiasson*, [2002] 2 C.N.L.R. 220 (N.B. Prov. Ct.).

[14] *Powley*, *ibid.* at para. 135. The law's reasoning is not always capable of being tested against reality. See *e.g.* F.S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum. L. Rev. 809.

[15] The Court asserted the view, which is clearly incorrect, that the text of s. 35 recognizes "Métis peoples"; *supra* note 2 at para. 74. The assertion is repeated at paras. 94 and 105. On this view, the Court did not feel constrained in assuming that there could be more than one historic nation recognized in the Constitution. Although mixed-blood individuals and families are an unexceptional phenomenon at the boundary of European settlement in the territories of Aboriginal peoples, an examination of constitutional and legislative historical enactments would have shown that only in the west did the federal Crown expressly recognize the existence of a Métis people with Aboriginal rights. On the recognition of the Métis Aboriginal title in s. 31 of the *Manitoba Act*, see P.L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan Native Law Centre, 1991) [hereinafter *Manitoba's Métis Settlement*]. For a comprehensive review of the legislation and orders in council recognizing the Aboriginal title and Aboriginal rights of the Métis in the west, see P.C. Hodges & E.D. Noonan, "Saskatchewan Métis: Brief on Investigation Into the Legal, Equitable and Moral [Claims] of the Métis People of Saskatchewan in Relation to the Extinguishment of the Indian Title" (Regina: Saskatchewan Archives Board, Premier's Office, R-191, Box 1, P-M2, 28 July 1943).

[16] *Powley*, *ibid.* at para. 138.

employees of the Hudson's Bay Company and Native women *produced another strain of Métis children*."[17]

The term "strain" has a definite biological meaning.[18] This idea is based on notions of race and is not viable. The concept of "race" is the archaic and impoverished legacy of earlier times, with little or no scientific basis.[19] It belongs to the history of ideas, not to science, and has largely been abandoned as a credible way of accurately differentiating between members of the human race. Today, it is used to denote groups of persons that have been singled out for political purposes.[20]

The *Charter* itself adopts the concept of "race" to single out persons for the political consideration of benevolent liberal attention. The concept has been used, for example, to attack the legislation authorizing federal administration of the affairs of recognized Indians on reserves.[21] While zoic conceptions of human identity may be a proper judicial foundation for *Charter* interpretation, they are not applicable to the construction of section 35.

On its true construction, section 35 recognizes that Aboriginal peoples are historic groups that have endured for a long time, in specific places. The significance of their collective interests is recognized and affirmed in the form of Aboriginal and treaty rights. The concepts of place and time, and not of biology, are of fundamental significance. Aboriginal peoples are people "from long ago," people whose identity is derived from place or from the land.

Aboriginal peoples, like all peoples, have maintained genetic diversity within their societies. Aboriginal peoples are not united by biological destiny alone. They are historic nations consisting of communities of persons freely united by choice, and characterized by their distinct social and political institutions. Mixed ancestry, far from being the exception, is the norm in many Aboriginal communities and is rarely a bar to membership. None of this should be controversial; it lies at the heart of the analysis and recommendations of the Royal Commission on Aboriginal Peoples.[22] Section 35 must be allowed to fulfill its noble purpose of promoting negotiations between the representatives of these pre-existing nations and those of the modern Canadian state.

The view of Métis identity adopted by the Court of Appeal led it to inquire into the personal antecedents of the defendants. This route of inquiry will lead to a swamp of confusion, out of which there is no return to solid constitutional ground. Genealogical descent may be useful as one objective factor among many to identify contemporary Métis communities that are descended from the historic Métis Nation. Once such communities have been identified, whether by political or judicial process, their membership is to be decided by the laws or social conventions of the section 35 "people."

THE DEFINITION OF MÉTIS MUST NOT INFRINGE INDIAN RIGHTS

In *Powley*, the Crown argued that the Powleys' ancestors had ruptured their legal continuity with the ancestral "Métis" community by accepting membership in a local Indian band.[23] This argument seems to be supported by the weight of Supreme Court authority. The principle that group rights are enjoyable by members of the group by virtue of their membership in the group, and not on the basis of their personal antecedents, has been applied in Aboriginal rights cases,[24] and to *Indian Act* bands.[25]

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17 *Ibid.* at para. 17 [emphasis added].

18 *The Concise Oxford Dictionary of Current English*, 8th ed., *s.v.* "strain," defines it as a "[b]reed or stock of animals, plants, etc." *The Gage Canadian Dictionary*, *s.v.* "strain," defines it as "a line of descent; race, stock; breed."

19 This is a well-known point. See generally A. Montagu, *Man's Most Dangerous Myth*: *The Fallacy of Race*, 6th ed. (Walnut Creek: Altamira, 1997).

20 See *e.g.* J.R. Feagin & C.B. Faegin, "Racial and Ethnic Relations" in J.F. Perea *et al.*, eds., *Race and Races: Cases and Resources for a Diverse America* (St. Paul: West Group, 2000) at 57.

21 *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. The court and scholars have described the category of "Indians" in s. 91(24) and the people defined by the *Indian Act* in racial terms, but this view can not apply to the Aboriginal peoples in s. 35, who are historic "peoples" on homelands, and are in their nature social and political communities. For a discussion of the former view, see Hogg, *supra* note 10 at 582–83, and compare the explanation of the Royal Commission on Aboriginal Peoples that the Aboriginal peoples in s. 35 are political groups and not racial minorities: Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 176.

22 *Ibid.* at 177.

23 *Powley*, *supra* note 2 at para. 139.

24 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.

25 See *Blueberry River Indian Band* v. *Canada*, [1999] F.C.J. No. 452 at paras. 25–26 (T.D.), online: QL (FCJ), where Hugessen J., referring to lands belonging to Indian bands said, "since those rights were collective and not individual rights, they could neither be exercised by nor transmitted to individuals. … It is membership and not ancestry which determines entitlement to reserve lands." In an appeal of a separate order concerning the same case, the Federal Court of Appeal stated, "The entitlement to the judgment … arising from the breach of the Crown's fiduciary duty in respect of [the Indian reserve lands] belongs to the two collectivities that are successors to the

Nonetheless, in delivering the judgment of the Court, Sharpe J.A. rejected the Crown's argument, stating that "it was legally open to the Métis to accept treaty benefits without thereby surrendering their Aboriginal rights."[26] With respect, that is beside the point. Métis rights under section 35 are vested in the Métis community and enjoyed by Métis community members as a function of that membership. Similarly, Indian rights under section 35 are vested in the Indian community, and enjoyed by Indian members as a function of that membership.

While actual descent from the historic Métis people may well be an important feature of the contemporary Métis community, it may or may not be a factor in determining individual membership in that community. That decision belongs to the community. Thus, the response to such a question warrants an inquiry less into the personal antecedents of the claimants than into the continuity of their community with the historic "Métis people."

If the Powleys had, in fact, abandoned their Indian links and acquired membership in a Métis community that is part of the Métis people, they would be able to enjoy the benefits of Métis group rights. But this entitlement would not flow from their personal genealogical descent from a remote mixed-blood ancestor: it would derive from their current membership in the Métis community. In short, one starts with the fact of membership in a relevant community, not by looking into the bloodlines of the individual claimants.

This can be illustrated further by reference to Eustace Lesage's acquisition of an Indian identity and entitlement to Indian treaty benefits. It was through acceptance as members of the Batchewana Band of the Ojibway people, not by virtue of their personal antecedents, that his descendants acquired entitlements to treaty benefits. In fact, according to their own argument, their ancestors were not Indians. Rather, they were mixed-blood people or self-styled "Métis" at the time of joining the Batchewana Band.

The Court's reasoning on the membership issue has the clear potential to rupture the communal bonds of many Indian bands by making them incubators of nascent Métis identities. At their election, or by virtue of fluctuating federal Indian definitional criteria, newly reborn Métis persons may then abandon the Indian community and insist on their "Métis" rights. The potential impact on present Indian bands is highlighted by reference to statistics from the 1996 census, in which over 25,000 registered Indians identified themselves as "Métis."[27] Until more precise figures are available, it is impossible to say how many Indian bands could be disrupted by "mixed-blood" members opting to identify themselves as Métis.[28]

Judicial interpretation of Métis rights ought not to undermine the integrity of Indian communities or whittle down Indian rights. If section 35 is not to become another source of Aboriginal grievances regarding actions by the Canadian state, it must be interpreted by Canadian judges in a manner that yields equitable results for all Aboriginal peoples. In an earlier case, the Ontario Court of Appeal showed its awareness of this issue: "Although it is not possible to remedy all of what we now perceive as past wrongs…it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of past events, new grievances."[29]

Fundamental fairness for all Aboriginal peoples is more likely to be achieved if Métis rights are construed as being collectively vested in the descendants of historical Métis communities. Similarly, Indian rights should be seen as being collectively vested in the descendants of historical Indian communities. Ancestral rights devolve upon descendants of a distinct group, society, or nation; they do not leap sideways for the benefit of other distinct groups.

[bands]. The present descendants who are not members of either Band have no right to share in the proceeds of the judgment." *Blueberry River Indian Band* v. *Canada*, [2001] F.C.J. No. 457 (C.A.), online: QL (FCJ), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 272.

[26] *Powley*, *supra* note 2 at para. 139.

[27] A. Siggner *et al.*, "Understanding Aboriginal Definitions: Implications for Counts and Socio-Economic Characteristics" (Paper presented at the Canadian Population Society Annual Meetings at Laval University, Quebec City, Quebec, Canada) (1 June 2001) [unpublished].

[28] Membership in a s. 35 Aboriginal community is subject to the application of some fundamental constitutional principles, including the principle that the law ought not to foist Aboriginal status upon an unwilling person. The current *Indian Act*, *supra* note 3, appears to run afoul of the constitutional guarantee of the fundamental freedom of association because it does not include an opting-out provision, and it forces all status Indians to remain so without regard to their individual choice. Furthermore, given the great weight that Aboriginal societies generally place upon personal autonomy, it may be that s. 35 protects liberties vested in individual members of rights-bearing communities, including the liberty to leave the group, particularly if that is part of the social values of their community.

[29] *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 at para. 5 (C.A.), online: QL (OJ).

THE HISTORY OF CROWN-ABORIGINAL POLITICAL RELATIONS IS THE SOURCE OF ABORIGINAL RIGHTS

Emerging case law and academic opinion support the view that Aboriginal rights are derived from the contemporary judicial recognition of interests that were the subject of historical political relations between Aboriginal peoples and the Crown.[30] In *Powley*, the Court approved a novel basis for the judicial recognition of new Aboriginal communities that had not been recognized by the Crown:[31] "The trial judge was entitled to conclude that the Sault Ste. Marie Métis community had suffered as a result of what was at best governmental indifference, and to take the historically disadvantaged situation of the Métis into account when assessing the continuity of their community."[32]

This approach, which appears to be based on notions of morality rather than general principles, seems bound to lead to doctrinal confusion. In theory, legal rights arise from the identification of interests that, for reasons of law and justice, the courts will recognize as deserving of legal protection.[33] Aboriginal rights are based in history. Their present purpose is to protect the interests of Aboriginal peoples that were at stake upon the assertion of Crown sovereignty.[34]

Unlike ordinary statutes, the Constitution represents the culmination of a long history of political struggles and compromises, and the process of judicial interpretation "ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded."[35] The Constitution legitimizes the exercise of sovereignty over the Aboriginal peoples and ought to be interpreted in light of domestic historical experience and of constitutional principles that recognize that Aboriginal peoples enjoyed a particular kind of relationship with the Crown at the time that sovereignty was asserted.

The task of section 35 is to permit that particular relationship to flourish in a contemporary context. Through section 35 it should be possible to restore Aboriginal peoples to a position in which they will be able to maintain those aspects of that relationship that are appropriate to the modern Canadian state. This means more than protecting racial minorities made up of individuals linked mainly by their genetic make-up and the fact that they may have lived in physical proximity to one another at one time. It also means leaving tests based on the historical disadvantage suffered by racial minorities to the more appropriate forum offered by section 15. Furthermore, as between Aboriginal peoples, section 35 must be construed in accordance with the principle of constitutional equality of all historic peoples whose collective interests were at stake in creating the constitutional foundations of Canada.

The recognition and affirmation of the rights of Aboriginal peoples in section 35 is a matter of national significance. This supports the idea that the Métis people in section 35 must be identified by reference to a history of Crown-Métis relations that was relevant to national interests when the Crown asserted sovereignty.

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30 See especially *R.* v. *Van der Peet,* [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 177 at 545–46 [hereinafter *Van der Peet* cited to S.C.R.]; *Kruger and Manuel* v. *The Queen* (1977), 75 D.L.R. (3d) 434 at 437 (S.C.C.); and B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall L.J. 101 at 111–12.

31 *Powley*, *supra* note 2 at para. 136.

32 This view hardly seems to fit the facts in the case. The Powleys' ancestors were enjoying the treaty and other rights of the local Ojibway from the 1850s into the twentieth century because the Crown had deferred to Ojibway decisions on the question of who would be part of the treaty group. The mixed-bloods of the region who did not associate with the Ojibway community were recognized in their possessory interests in their individual lands, and compensated with settler pre-emption rights. Those who were Ojibway by Ojibway standards were recognized as Ojibway, and others who lived apart from the Ojibway were compensated for their individual occupation of lands with pre-emption rights. Compare the situation of the Métis people in Manitoba in 1870, who were compensated in respect of their individual land holdings, as well as for their Indian title arising from their group use and occupation of the common spaces of the western regions. See *Manitoba's Métis Settlement, supra* note 15.

33 Jeremy Webber discusses the function of common law Aboriginal rights in protecting the interests of indigenous peoples in D. Ivison, P. Patton & W. Sanders, eds., *Political Theory and The Rights of Indigenous Peoples* (Cambridge: Cambridge University, 2000) 60.

34 *Van der Peet, supra* note 30 at 548, 550. In *Oyekan v. Adele,* [1957] 2 All E.R. 785 at 788, Denning M.R. stated that "the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, [but] it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law."

35 *Re The Regulation and Control of Aeronautics in Canada,* [1932] A.C. 54 at 70 (J.C.P.C.), rev'g [1930] S.C.R. 663. The Royal Commission on Aboriginal Peoples relied on this judicial authority in its interpretation of s. 35. See *supra* note 21 at 194.

"RIEL'S PEOPLE" AND EMERGING CASE LAW

The Supreme Court of Canada has held that section 35 represents "the culmination of a long and difficult struggle."[36] This is an accurate description of the well-known history of "the Métis people" in western Canada. The emerging case law on section 35 suggests that the meaning of "the Métis people" in section 35 is to be found in this history.[37]

What this history reveals is the emergence of a small indigenous nation in western Canada in the unique circumstances of the imperial fur trade system of the nineteenth century.[38] The people making up this nation were forced by circumstances to be fighters.

They fought the first Europeans brought by Lord Selkirk to the Red River area in the early 1800s.[39] They also skirmished with Indian people[40] with whom they shared the "western commons"[41] and its resources. Two famous fights waged by this nation in the nineteenth century stand out in Canadian history books. The third, waged more recently, was an attempt to vindicate the historical meaning and continuing significance of the first two.

The first of these fights, in 1869–1870, led to the negotiations by which the province of Manitoba was created in 1870.[42] In the *Manitoba Language Reference*, the Supreme Court interpreted the *Manitoba Act* as "the culmination of many years of co-existence and struggle between the English, the French and the Métis in Red River Colony."[43] In an earlier case, the Métis in Red River during this period were described by the court as "apprehensive about the transfer of their homeland to Canada, and [they] viewed the prospects of massive immigration from Ontario as a threat to their culture and way of life ... indeed to their very survival as a people."[44] This early struggle under the leadership of Louis Riel established the important place of the Métis people in Canada's history and wove the strand of their collective rights into the Canadian constitutional fabric.

The creation of Manitoba was based on negotiations that led to a "basic compact of Confederation"[45] that Riel called "the Manitoba Treaty." It contained the terms under which the people agreed to join Canada. The bargain, containing land guarantees for the Métis people,[46] did not withstand the pressures of Canadian western agricultural expansion. Within a decade, the Métis had lost all effective political power in Manitoba, land speculators were reaping riches in the market for their alienated lands, and many had moved west.[47]

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36 *Sparrow*, *supra* note 24 at 1105.

37 The law is reviewed in P.L.A.H. Chartrand & J. Giokas, "Defining 'The Métis People': The Hard Case of Canadian Aboriginal Law," in *Who Are Canada's Aboriginal Peoples?*, *supra* note 4 at 268.

38 Historians have concluded that, although the rise of communities of "mixed-blood" families at the frontier of European settlement was an unexceptional feature of Canadian history in the eighteenth and nineteenth centuries, only in the west were the conditions appropriate for the rise of a new national consciousness, a new "people" distinct from the ancient Indian nations and from the Europeans who did not establish their own communities and institutions into which to absorb mixed-blood individuals for a very long time following European settlement of eastern colonies. See J. Peterson & J.S. Brown, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1984); T. Binnema, G.J. Ens & R.C. Macleod, *From Rupert's Land to Canada* (Edmonton: University of Alberta Press, 2001). See also D. Sanders, "Métis Rights in the Prairie Provinces and the Northwest Territories: A Legal Perspective" in H.W. Daniels, ed., *The Forgotten People: Métis and Non-Status Indian Land Claims* (Ottawa: Native Council of Canada, 1979) 3. Generally, individuals join and identify with one or the other of their parents' communities. "Mestizos" in the Spanish-speaking colonial regions are not regarded as part of the indigenous peoples. See J. Brown & T. Schenck, "Métis, Mestizo and Mixed-Blood" in P.J. Deloria & N. Salisbury, eds., *A Companion to American Indian History* (Malden: Blackwell, 2002) at 57.

39 The many sources on the early relations between the British intruders and the Métis include A. Ross, *The Red River Settlement: Its Rise, Progress and Present State* (London: Smith, Elder, 1856).

40 See *e.g.* W.L. Morton, "The Battle at the Grand Coteau" in A.S. Lussier & D.B. Sealey, eds., *The Other Natives: the Métis* (Winnipeg: Métis Federation, 1978) 47.

41 I.M. Spry, "The Tragedy of the Loss of the Commons in Western Canada" in I.A.L.Getty & A.S.Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 203.

42 W.L. Morton, ed., *Manitoba: The Birth of a Province*, (Winnipeg: Manitoba Record Society, 1965); *Manitoba's Métis Settlement*, *supra* note 15.

43 *Reference re Language Rights Under the Manitoba Act, 1870*, [1985] 1 S.C.R. 721 at 731.

44 *R.* v. *Forest*, [1977] 1 W.W.R. 363 at 374–75, (Man. Co. Ct.).

45 *Manitoba's Métis Settlement*, *supra* note 15 at 5, and authorities cited in n. 18.

46 Section 31 recognized the group rights of the Métis derived from their collective use of the "western commons," principally in the buffalo hunt. This Aboriginal title, recognized at common law, is called "the Indian title" of the Métis in s. 31, the term used prior to the introduction of the modern term "Aboriginal" in the *Constitution Act, 1982*. Another provision, s. 32, recognized and provided for the possessory interests of all settlers, whether Métis or not, who occupied river lots in the area of Red River settlement, which had been established by Selkirk and the Hudson's Bay Company following the initial early resistance of the Métis. See *Manitoba's Métis Settlement*, *ibid.*

47 P.L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 Osgoode Hall L.J. 457.

Louis Riel also led a second famous fight in May 1885, at Batoche on the banks of the South Saskatchewan River near present-day Saskatoon. The defeat of the Métis and their Indian allies marked the end of Aboriginal political and military authority in the west, and the triumph of westward Canadian political and economic ambition, symbolized by the completion in the same year of the trans-Canada railroad.[48]

The third famous fight was waged in the political arena. It was led by Harry W. Daniels who, as president of the Native Council of Canada, ensured that the term "the Métis people" was included among the Aboriginal peoples whose rights were guaranteed in the patriation amendment of 1982.[49]

These fights, although separated in time and reflected in different constitutional instruments, are linked and cannot be viewed in isolation from each other. The Constitution of Canada, although made up of different documents created at different times and in response to different pressures and aspirations, is to be read as a whole. Thus, the recognition of the Métis people in section 35 of the *Constitution Act, 1982* is linked to the earlier recognition in the *Manitoba Act, 1870*, the history of which informs the meaning of section 35.[50]

In short, the emerging case law suggests that the source of Aboriginal rights lies in the history of Crown-Aboriginal relations, no better example of which can be found than in the struggles described above. The history of Riel's people leads the move away from the boundary of Indian definition to the positive core of Métis identity in western Canada.

THE MÉTIS AS AN "ABORIGINAL" PEOPLE

Some commentators have criticized the express inclusion of the Métis people as an Aboriginal people within the meaning of section 35. They argue that the Métis people emerged from Indian ancestors and newly arrived non-Indians and were therefore not here from the very beginning, that is, the "aboriginal" time that might be judicially adopted to define Indians.[51] However, it is obvious that the Métis people are indigenous to Canada: the emergence of the Métis Nation happened on the northern half of this continent before there was a Dominion of Canada.

Thus, the interpretive framework for section 35 rights must be based on a date that establishes a relevant "aboriginal" beginning that includes the Métis people.[52] On the basis of ordinary principles of constitutional interpretation, the "original date" ought to be adopted as the date for proof of all Métis Aboriginal rights. Unfortunately, the identification of a relevant date for proof of Métis rights is complicated by the results of the *Van der Peet* decision, where the Court asserted there are two different dates for proof of different kinds of Aboriginal rights. Aboriginal rights generally must be proved to have existed at the date of first contact with Europeans. Aboriginal title, however, a subset of Aboriginal rights, must be proved to have existed at the date the Crown asserted sovereignty.

Scholars have criticized the conclusion of the Court on this point, showing that it is supported by neither precedent nor principle.[53] In *Van der Peet*, the Court recognized that the date it proposed for proof of Aboriginal rights would deny Aboriginal rights to Métis people. It therefore took pains to leave open the question whether the rights of the Métis people in section 35 could be defined by applying the "pre-contact" date for proof of Aboriginal rights that the Court adopted in that case.[54] In *Powley*, the parties agreed that the date established for proof of Aboriginal rights in Indian cases, that is, the date of first European contact, had to be modified to accommodate the later emergence of the Métis people.[55]

It will be interesting to see how the Supreme Court deals with this issue when it decides the appeal. The "transition date" proposed by Slattery as the common

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48 J.K. Howard, *Strange Empire: Louis Riel and the Métis People* (Toronto: Lewis & Samuel, 1952); G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960).

49 See H.W. Daniels, "Foreword," in *Who Are Canada's Aboriginal Peoples?*, *supra* note 4 at 11.

50 See *supra* note 7.

51 For example, Bryan Schwartz states that "[t]he Métis are certainly indigenous to North America — they came into being as a distinct people on this continent. But they are not Aboriginal in the same sense as the Indian and Inuit; they were not here from the beginning." B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982–1984* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985) 188 at 228. See also C. Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev. 180.

52 In the French version, which is equally authoritative to the English, the term "ancestral" rights is used to characterize the s. 35 rights. The French version does not carry the connotation relied upon by the critics cited *ibid.*

53 See especially B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at 215–20.

54 *Van der Peet*, *supra* note 30 at 207 [cited to C.N.L.R].

55 *Powley*, *supra* note 2 at para. 31.

date for proof of Aboriginal title and Aboriginal rights, if adopted, would contribute to a rational and principled development of the law of Aboriginal rights generally, and as it pertains to the Métis people in particular.[56] Here, the "transition" date is called the "original date" to emphasize the function of the word in defining the Métis as an "Aboriginal" people.

Prima facie, the selection of one "original date" as one common date for proof of all Aboriginal rights may be linked with the doctrine of the fiduciary relationship that the Crown undertakes with Aboriginal peoples upon the assertion of sovereignty. This date is that which the law establishes as the time when the Crown assumed governmental responsibility for the particular Aboriginal people in question, and a fiduciary relationship was established.[57] On this view, the Crown assumed a fiduciary duty to protect the group interests of the Aboriginal people, that is, those group interests that the self-governing Aboriginal nation had previously protected by itself.[58] On this view, the Métis people are an "ab-original" people because they are descended from a distinct indigenous people that existed at the "original date." The Métis people at Red River and in western Canada existed when Indian treaties were signed in western Canada. Métis Aboriginal rights can be identified at the time that the Crown-Aboriginal fiduciary relationship was established, with the Crown undertaking to protect the interests of all the Aboriginal peoples in a particular geographic region. There is therefore no reason to twist the logic of Indian cases to suit a "later arrival," as the court thought fit in *Powley*.[59] In fact, the Métis were expressly recognized and dealt with separately in respect to their Indian title from 1870 until the 1920s as the Crown negotiated treaties with Indians and recognized the rights of the Métis,[60] so it is not necessary to look for a reason to establish a different date for proof of Métis rights.

Thus, the history of the Métis of western Canada not only identifies the group that struggled for its rights in the context of Crown-Métis relations, which were quite distinct from Crown-Indian relations, but also suggests how the doctrine of Métis rights might fit within the broader conceptual framework of Aboriginal and treaty rights.

CONCLUSION

In March 2003, the Supreme Court of Canada is scheduled to hear the appeal in *Powley*, the first case to come before it alleging Métis Aboriginal rights within the meaning of section 35 of the *Constitution Act, 1982*.[61] The reasoning that the Court will adopt in the *Powley* case has the potential of setting the judicial approach in subsequent Métis cases. The facts in the case would seem to support a non-status Indian claim based in a small place in Ontario far removed from the regions where the Métis nation made its mark in western Canadian history. That makes it a particularly difficult case that is, at best, at the periphery rather than at the core of Métis history and experience.

In this comment, I have suggested that the reasoning in the Ontario Court of Appeal contains pitfalls that may infringe on Indian rights. Some of this is a result of the conception of the term "Métis" as denoting, not a distinct historic nation, but rather communities of individuals identified as racial groups existing at the boundary of official Indian definition in the *Indian Act*.

An alternative approach has been proposed. It is based upon general constitutional principles and values. This approach espouses the application of general principles to the exceptional case of the Métis people of western Canada. It eschews the more common notion, which seeks to apply exceptional principles to the unexceptional case of mixed-blood individuals and communities found at the boundary of Indian communities. The recognition of a category of Aboriginal peoples distinct from Indians requires an explanation based upon applicable constitutional values and principles. Such an explanation has been explored, and it suggests that the rights of the Métis people have their source in Crown-Métis political relations that are quite distinct from Crown-Indian relations.

The values that the courts adopt to interpret the meaning of section 15 of the *Charter* are not applicable to the interpretation of the rights and the identity of the historic Aboriginal nations that have now been recognized, in section 35.1, as having a distinct political role in the future development of the fundamental laws of Canada.[62] Accordingly, the true construction of

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[56] *Supra* note 53.

[57] *Ibid*. at 218.

[58] *Ibid*. Those group interests are judicially recognized as Aboriginal rights for Aboriginal peoples. Individual rights as Canadian citizens are in a different category: Aboriginal persons have citizenship rights as individual Canadians, and they enjoy Aboriginal rights by virtue of their membership in an Aboriginal group with Aboriginal rights. Citizenship rights and Aboriginal rights are distinct.

[59] *Powley*, *supra* note 2.

[60] Hodges & Noonan, *supra* note 15.

[61] See also *Blais*, *supra* note 1.

[62] Section 35.1: "The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the

section 35 can only be discerned in the history of political struggles and compromises that lie behind the crafting of constitutional history and meaning.

Métis Aboriginal rights are vested in communities descended from the unique, historic Métis nation that fought for its rights and its identity. Indian rights are vested in communities descended from historic Indian communities in their homelands across Canada. *Powley* illustrates some of the difficulties that might emerge if Métis rights and identities are judicially recognized within Indian bands and upon Indian ancestral lands across Canada. The interpretation of section 35 must be based upon general principles selected to do equal justice to all the Aboriginal peoples of Canada. This can be done by moving away from the irrational boundary of federal Indian definition, and towards the positive core of Métis identity. Hard cases make bad law, and it is better to start at the core of certainty than at the boundaries of uncertainty.

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Constitution Act, 1982, to section 25 of this Act or to this Part,

a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."

Section 35.1 was added by the *Constitution Amendment Proclamation*, 1983 SI/84-102, which also substituted new s. 25(b), adding new ss. 35.1, 37.1, 54.1, and 62 of the *Constitution Act, 1982*.

BLACK V. *CHRÉTIEN* AND THE CONTROL OF THE ROYAL PREROGATIVE

Noel Cox

INTRODUCTION

Conrad Black, a prominent publisher and businessman in both Canada and the United Kingdom, submitted his name for one of the peerages to be created for the new-model House of Lords following the *House of Lords Act 1999*.[1] The rights and duties of peers depend entirely upon custom.[2] The principal legal distinction of British peers is — or was — their right to sit and vote in Parliament.[3] Not all peers however were Lords of Parliament (principally the Irish peers not also possessing another peerage entitling them to a seat), and some Lords of Parliament, the bishops, are not peers.[4] Essentially, Black was seeking, and had been promised, a seat in the upper house of the British Parliament.[5]

His ennoblement received the endorsement of William Hague, then Leader of the Opposition, and obtained the necessary approvals in the United Kingdom.[6] The British Prime Minister had sought the approval of the Canadian government for Black's honour, which was given.[7] Tony Blair, the Prime Minister, advised the Queen to confer the title upon Black. However, Jean Chrétien, Prime Minister of Canada, intervened, and advised the Queen to not confer the peerage on Black.[8] The reasons given for the subsequent adverse advice to the Queen from Chrétien included the claimed long-standing Canadian opposition to titular honours, said to have been encapsulated in the Nickle Declaration of 1919.[9]

Black consequently sued the Prime Minister and the Attorney General of Canada. Although the Ontario Court of Appeal rejected Black's argument, the litigation has raised important constitutional questions. In particular, what happens when conflict occurs between the Crown's advisors, and to what extent can the British and Canadian Crowns be disentangled, given the commonality of person and the historic legal continuity of the two constitutions? This paper will begin with a review of the *Black* case, and will then examine these questions.

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1 This Act excluded hereditary peers and peeresses from the House of Lords, subject to a temporary stay for a nominal group of representative peers; *House of Lords Act 1999* (U.K.), 1999, c. 34, ss. 1, 2.

2 *Berkeley Peerage Case* (1861), 8 L.R. H.L. Cas. 21; 11 E.R. 333.

3 *Norfolk Earldom Case*, [1907] A.C. 10, 17, per Lord Davey.

4 Ecclesiastical dignitaries have formed part of the House of Lords from the earliest times, though they were excluded from 1640 to 1661: *Clergy Act 1640* (Eng.), 16 Chas. II, c. 27; *Clergy Act 1661* (Eng.), 13 Chas. II, c. 2.

5 Life peers are appointed by letters patent of the Sovereign, sealed with the Great Seal, under the authority of the *Appellate Jurisdiction Acts 1876–1947* (U.K.). Despite the *Life Peerages Act 1958* (U.K.), 6 & 7 Eliz. II, c. 21, the Crown of the United Kingdom still does not have the power to confer peerages for life. Creations must be in accordance with one or other of the statutory measures. See *Wensleydale Peerage Case* (1856), 5 H.L.C. 958; 10 E.R. 1181. See also the *Report as to the Dignity of a Peer of the Realm*, vol. 5 (London: Her Majesty's Stationary Office, 1829) at 81.

6 S. Barwick, "Canadian Prime Minister block's Blacks life peerage" *Daily Telegraph (London)* (19 June 2001). The standard procedure for the creation of "working" peers to perform regular parliamentary duties — rather than as an honour — calls for the creation to be endorsed by the leader of one of the three principal political parties. It will not, however, proceed unless and until it receives the approval of the Political Honours Scrutiny Committee, and of the Prime Minister, who advises the Queen to confer the title; House of Lords' Briefing Paper, "The Membership of the House of Lords," online: <www.publications.parliament.uk/pa/ld/hlmems.pdf>. There is now a House of Lords Appointments Commission, responsible for advising the Queen on the appointment of non-political members of the House of Lords, and for scrutinizing all nominations; online: <www.houseoflordsappointments commission.gov.uk/members.htm>.

7 By letter dated 9 June 1999; cited in *Black* v. *Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 at para. 9 [hereinafter *Black*].

8 Barwick, *supra* note 6. It was the standard practice to seek the approval of the Canadian government when a Canadian citizen was to be honoured.

9 Canada, *House of Commons Debates* (22 May 1919). As a resolution of the House of Commons it was not binding on the Crown nor on Parliament, nor was it actually followed by all successive Canadian governments. For one example of many, R.B. Bennett, Prime Minister of Canada from 1930 to 1935, was created a viscount in 1941. There are numerous examples of lesser honours both before and since.

CIRCUMSTANCES OF THE LITIGATION

The appellant alleged that the Canadian Prime Minister intervened with the Queen to oppose his appointment and that, but for the Prime Minister's intervention, he would have received the peerage. Black sued the Prime Minister for abuse of power, misfeasance in public office and negligence. He also sued the Government of Canada, represented by the Attorney General of Canada, for negligent misrepresentation. He sought declaratory relief and damages of $25,000.[10]

Black sought three declarations at the Ontario Court of Appeal. First, that the Prime Minister and the Government of Canada had no right to advise the Queen not to confer an honour on a British citizen or a dual citizen. Second, that the Prime Minister committed an abuse of power by intervening to prevent him from receiving a peerage. Third, that the Government of Canada negligently misrepresented to Black that he would be entitled to receive a peerage if he became a dual citizen and refrained from using his title in Canada. The respondents acknowledged that the negligent misrepresentation claim against the Government of Canada could proceed to trial. However, they moved to dismiss all other claims against the Government of Canada and all claims against the Prime Minister.[11]

THE QUESTIONS ASKED BY THE COURT OF APPEAL

There were essentially three questions for the Court to determine. In the words of Laskin J.A., giving the principal judgment of the Court, the broad question raised by Black's pleading was whether it disclosed a justiciable cause of action against the Prime Minister. Was it plain and obvious that, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising a prerogative power of the Crown?[12] If so, was it plain and obvious that this exercise of the prerogative is not reviewable by the courts?[13] If the Prime Minister's exercise of the prerogative was reviewable, does the Superior Court have jurisdiction to grant declaratory relief?[14]

There was an important question of justiciability of the royal prerogative at stake. The royal prerogative has spread throughout the Commonwealth.[15] It consists of the Crown's privileges and powers recognized or accorded by the common law.[16] The prerogative can be regarded as a branch of the common law because decisions of courts determine both its existence and its extent. However, as some parts of the prerogative remain non-justiciable, it is perhaps better to regard the prerogative as not being part of the common law as such. The common law courts have been limiting the prerogative since Coke J. in the *Case of Proclamations* in 1611.[17] But they are reluctant to interfere with the prerogative in certain areas. These include those parts of the prerogative which concern national security, the conduct of foreign policy, and the honours prerogative. These areas are non-justiciable.[18]

THE FINDINGS OF THE COURT

Black submitted that in Canada, only the Governor General can exercise the prerogative.[19] The Court of Appeal could find no support for this proposition in theory or in practice.[20]

The Court noted that the 1947 *Letters Patent Constituting the Office of the Governor General*[21] empowers the Governor General "to exercise all powers and authorities lawfully belonging to Us in respect of Canada."[22] By convention, the Governor General exercises her powers on the advice of the Prime Minister or Cabinet.[23] Although the Governor General retains discretion to refuse to follow this advice, in Canada that discretion has been exercised only in the most exceptional of circumstances.[24] This was an unexceptional review of the constitutional position.

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10 *Black*, *supra* note 7 at para. 1.
11 *Ibid.* at para. 16.
12 *Ibid.* at para. 4.
13 *Ibid.*
14 *Ibid.*
15 N. Cox, "The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity" (1998) 14 Aust. J. L. Soc. 15 at 19 [hereinafter "The Dichotomy of Legal Theory"].
16 P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1995) at 1.9. See also *Case of Proclamations* (1611), 77 E.R. 1352 (K.B.) [hereinafter *Case of Proclamations*].
17 *Case of Proclamations*, *ibid.*
18 *Council of Civil Service Unions* v. *Minister for the Civil Service*, [1985] 1 A.C. 374 at 418 per Lord Roskill [hereinafter *Council of Civil Service Unions*]; *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, [1989] 1 All E.R. 655 at 660 per Taylor L.J.
19 *Black*, *supra* note 7 at paras. 24, 31.
20 *Ibid.* at paras. 31–33.
21 Letters Patent, C. Gaz. 1947.I.3104 (Constituting the Office of Governor General of Canada).
22 *Ibid.*
23 See *e.g.* N. Cox, "The Control of Advice to the Crown and the Development of Executive Independence in New Zealand" (2001) 13 Bond L. Rev. 166 [hereinafter "Control of Advice"].
24 Relying on P. Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 70; *Black*, *supra* note 7 at para. 31.

The Court continued: "As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative."[25] This conclusion was based upon the judgment of Wilson J. in *Operation Dismantle* that the prerogative power may be exercised by cabinet ministers and therefore does not lie exclusively with the Governor General.[26] This is perhaps an unfortunate choice of words. It does not mean that a minister can exercise a prerogative power, but rather that the exercise of the prerogative is based on the advice of these ministers.

In a brief analysis of the prerogative, the Court observed how in England the prerogative was gradually relocated from the sovereign personally to their advisors or ministers. For this reason it became normal to refer to those powers as belonging to the Crown.[27] This gradual relocation of the prerogative is consistent with Professor Wade's general view of the Crown prerogative as an "instrument of government."[28] The conduct of foreign affairs, for example, "is an executive act of government in which neither the Queen nor Parliament has any part."[29]

Although this was a point on which the Court did not comment, it is suggested that this contention is not quite correct. It is true that Parliament has no inherent role in foreign affairs — in that it is ultimately the responsibility of the executive (though legislation may regulate certain aspects of foreign affairs, and Parliament has assumed some functions),[30] — but the Queen and the Governor General do have a role, both legally and practically.[31] The Crown must be seen as a corporation, in which several parts share in the authority of the whole, with the Queen as the person at the centre of the constitutional construct.[32]

Statutes have tended to use the terms "Her Majesty the Queen" and "the Crown" interchangeably and apparently arbitrarily.[33] There appears to have been no intention to draw any theoretical or conceptual distinction. This may simply be a reflection of a certain looseness of drafting, but it may have its foundation in a certain lack of certainty felt by legal draftsmen as much as by the general public.[34] This may perhaps be explained by briefly reviewing the evolution of the concept of the Crown. In essence, the difficulties highlighted by *Black* are those resulting from the evolution of the Crown, both as a post-imperial legacy, and as an abstract institution of government.

"The Crown" itself is a comparatively modern concept. As Maitland said, the king was merely a man, though one who did many things.[35] For historical reasons the king or queen came to be recognized in law as not merely the chief source of the executive power, but also as the sole legal representative of the state or organized community.[36]

According to Maitland, the crumbling of the feudal state threatened to break down the identification of the king and state, and as a consequence Coke recast the king as the legal representative of the state. It was Coke who first attributed legal personality to the Crown.[37] He recast the king as a corporation sole, permanent and metaphysical.[38] The king's corporate identity[39] drew

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25 *Black*, *ibid.* at para. 32.

26 *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441 [hereinafter *Operation Dismantle*].

27 B. Hadfield, "Judicial Review and the Prerogative Power" in M. Sunkin & S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 199.

28 E.C.S. Wade, ed., *Commentary on Dicey's Introduction to the Study of the Law of the Constitution*, 9th ed (London: Macmillan, 1950).

29 F.A. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986) at 2. See also *Barton* v. *Commonwealth of Australia* (1974), 48 A.L.J.R. 161 at 172, cited in *Black*, *supra* note 7 at para. 32.

30 *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22.

31 The legal role of the sovereign and Governor General includes approving the appointment of diplomatic envoys, and (in rare cases) the signing of treaties and the proclamation of war. The conduct of foreign affairs is in the name of the sovereign; *R* v. *Hampden* (1637), 3 State Tr. 826. A practical consequence of this latter role can be seen in P. Hasluck, *The Government and the People* (Canberra: Australian War Memorial, 1970) at 4–12 The practical role of both include receiving state visitors and embarking upon state and official visits, and exercising the usual functions of a head of state in international law and practise; Ministry of Foreign Affairs and Trade, *Presentation of Credentials in New Zealand* (Wellington: Ministry of Foreign Affairs and Trade, 1997); V. Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995).

32 See N. Cox, "The Theory of Sovereignty and the Importance of the Crown in the Realms of The Queen" (2002) 2 Oxford U. Commonwealth L.J. 237.

33 For example, the word "sovereign" appears in New Zealand statutes only in the *Sovereign's Birthday Observance Act 1952*. In the *Constitution Act 1986*, s. 2, "Crown" is defined as "Her Majesty the Queen in right of New Zealand; and includes all Ministers of the Crown and all departments."

34 For this conceptual uncertainty, see J. Hayward, *In Search of a Treaty Partner* (Ph.D. Thesis, Victoria University of Wellington 1995) [unpublished]; interview with Sir Douglas Graham (24 November 1999).

35 F. Maitland, "The Crown as a Corporation" (1901) 17 L.Q. Rev. 131.

36 W. Stubbs, *The Constitutional History of England*, vol. 2, 4th ed. (Oxford: Clarendon Press, 1906) at 107.

37 Maitland, *supra* note 35. This can be seen in the *Case of Proclamations*, *supra* note 16.

38 It was as late as 1861 that the House of Lords accepted that the Crown was a corporation sole, having "perpetual continuance"; *Attorney General* v. *Kohler* (1861), 9 H.L. Cas. 654 at 671.

39 A corporation is "[a] number of persons united and consolidated together so as to be considered as one person in law, possessing the character of perpetuity, its existence being

support from the doctrine of succession — that the king never dies.[40] It was also supported by the common law doctrine of seisin, where the heir was possessed at all times of a right to an estate even before succession.[41]

Blackstone explained that the king is made a corporation to prevent in general the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the Crown entire.[42] Thus the role of the Crown was eminently practical. In the tradition of the common law, constitutional theory was subsequently developed which rationalized and explained the existing practice.

Generally, and in order to better conduct the business of government, the Crown was accorded certain privileges and immunities not available to any other legal entity.[43] Blackstone observed that "[t]he King is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing, in him is no folly or weakness."[44]

Mathieson has proffered the notion that the Crown may do whatever statute or the royal prerogative expressly or by implication authorizes, but that it lacks any natural capacities such as those an individual or juridical entity may possess.[45]

However, more recently, in *M*. v. *Home Office*,[46] the English Court of Appeal held that the Crown lacked legal personality and was therefore not amenable to contempt of court proceedings.[47] But it is precisely because in the Westminster-style political system there is not the continental notion of a state, nor (at least originally — and still in the United Kingdom) an entrenched constitution,[48] that the concept of the Crown as a legal entity with full powers in its own right arose.

Although the House of Lords in 1977, in *Town Investments* v. *Department of the Environment*,[49] accepted that the Crown did have a legal personality, it also adopted the potentially confusing practice of speaking of actions of the executive as being performed by "the government" rather than by "the Crown."[50] The practical need for this distinction is avoided if one recognizes the aggregate nature of the Crown.[51] "The government" is something which, unlike the Crown, has no corporate or juridical existence known to the constitution. Further, the legal definition of "the government" is both legally and practically unnecessary because the Crown provides a sufficient identity.

In *Re Mason*[52] Romer J. in the High Court of England and Wales stated that it was established law that the Crown was a corporation, but whether a corporation sole (as generally accepted) or a corporation aggregate (as Maitland argued) was uncertain.

In *Town Investments*[53] Lord Simon, with little argument, accepted that the Crown was a corporation aggregate, as Maitland maintained. This appears to be in accordance with the realities of the modern state, although it was contrary to the traditional view of the

constantly maintained by the succession of new individuals in the place of those who die, or are removed. Corporations are either *aggregate* or *sole*. Corporations aggregate consist of many persons, several of whom are contemporaneously members of it. Corporations sole are such as consist, at any given time, of one person only"; E.R. Hardy-Ivamy, *Mozley and Whiteley's Law Dictionary*, 10th ed. (London: Butterworths, 1988) at 109.

40 The theory that the king never dies was accepted during the reign of Edward II, that the demise of the Crown at once transfers it from the last wearer to the heir, and that no vacancy, no interregnum, occurs at all. See Stubbs, *supra* note 36 at 107.

41 H. Nenner, *The Right to be King: The Succession to the Crown of England, 1603–1714* (Chapel Hill: University of North Carolina Press, 1995) at 32.

42 W. Blackstone, *Commentaries on the Laws of England*, ed. by E. Christian, vol. 1 (New York: Garland Publishing, 1978) at 470. That Blackstone was at least partly incorrect can be seen in the development of a concept of succession to the Crown without interregnum of the heir apparent. Since this concept had been fully developed by the reign of Edward IV, it cannot have been the principal reason for the development of the concept of the Crown as a corporation sole.

43 B.V. Harris, "The 'Third Source' of Authority for Government Action" (1992) 109 L.Q. Rev. 626.

44 Blackstone, *supra* note 42 at 254.

45 D.L. Mathieson, "Does the Crown Have Human Powers?" (1992) 15 N.Z. U. L. Rev. 118. Contrary case law includes *Sutton's Hospital Case* (1613), 10 Co. Rep. 23a; *Clough* v. *Leahy* (1905), 2 C.L.R. 139 at 156–57; *New South Wales* v. *Bardolph* (1934), 52 C.L.R. 455 at 474–75; *R.* v. *Criminal Injuries Compensation Board*, [1967] 2 Q.B. 864 at 886; *Malone* v. *Metropolitan Police Commissioner*, [1979] Ch. 344 at 366; *Quebec (A.G.)* v. *Labrecque*, [1980] 2 S.C.R. 1057 at 1082; *Davis* v. *Commonwealth* (1988), 166 C.L.R. 79 (H.C.A.).

46 [1992] 1 Q.B. 270.

47 However, in the House of Lords, Lord Templeman spoke of the Crown as consisting of the monarch and the executive, and Lord Woolf observed that the Crown had a legal personality at least for some purposes; *M*. v. *Home Office*, [1993] 3 All E.R. 537.

48 That is, one which claims for itself legal paramountcy, and which limits executive and legislative powers in such a way that the constitution itself, rather than any institution of government, becomes the focus of critical attention.

49 [1978] A.C. 359 at 400 per Lord Simon of Glaisdale (H.L.) [hereinafter *Town Investments*].

50 *Ibid*.

51 Some writers, following *Town Investments*, *ibid.*, have preferred the expression "government" rather than "Crown" or "state." See *e.g.* Harris, *supra* note 43 at 634–35. The government has never been a juristic entity, so in trying to abandon one legal fiction in *Town Investments*, their Lordships adopted a new one; P. Joseph, "Crown as a Legal Concept (I)" [1993] N.Z. L.J. 126 at 129 [hereinafter "Legal Concept (I)"].

52 [1928] 1 Ch. 385 at 401.

53 *Town Investments*, *supra* note 49 at 400.

Crown. Thus, the Crown is now seen, legally, as a nexus of rights and privileges, exercised by a number of individuals, officials and departments.

Maitland believed that the Crown, as distinct from the king, was anciently not known to the law but in modern usage had become the head of a "complex and highly organised 'corporation aggregate of many' — of very many."[54] In *Adams* v. *Naylor*,[55] the House of Lords adopted Maitland's legal conception of the Crown.[56] In the course of the twentieth century the concept of the Crown succeeded the king as the essential core of the corporation, which is now regarded as a corporation aggregate rather than a corporation sole.[57]

The development of the concept of the aggregate Crown from the corporate Crown provides sufficient flexibility to accommodate the reality of government, without the need for abandoning an essential legal principle or *grundnorm*[58] in favour of a very undeveloped and inherently vague concept of "the government."[59] Thus, for reasons principally of convenience, the Crown became an umbrella beneath which the business of government was conducted.

The Crown has always operated through a series of servants and agents, some more permanent than others. The law recognizes the Crown as the body in whom the executive authority of the country is vested, and through which the business of executive government is exercised.

Whether we have a Crown aggregate or corporate, the government is that of the sovereign,[60] and the Crown has the place in administration held by the state in other legal traditions. The Crown, whether or not there is a resident sovereign, acts as the legal umbrella under which the various activities of government are conducted. Indeed, the very absence of the sovereign has encouraged a modern tendency for the Crown to be regarded as a concept of government quite distinct from the person of the sovereign.

The separation of the Crown and its development in different countries — whilst retaining the same person as sovereign of each — has led to difficulties with respect to the exercise of the prerogative.[61] It is not always clear which prerogative is being exercised, or who has the right to advise the Crown on the exercise of that prerogative.[62]

It must be asked whether the right to advise the Crown is the same as the actual exercise of that prerogative. The Court of Appeal for Ontario has perhaps gone too far in saying, as Laskin J.A. did, that "I conclude that the Prime Minister and the Government of Canada can exercise the Crown prerogative as well."[63] The royal prerogative remains with the Queen and the Governor General, though the right to advise the Crown is diffused.

In giving the judgment of the Court of Appeal, Laskin J.A. continued: "In my view, however, whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on Mr. Black's peerage, or opposing Mr. Black's appointment, he was exercising the prerogative power of the Crown relating to honours."[64]

Strictly, the Prime Minister was advising the Crown in the exercise of the prerogative, for it is the Crown, and not the Prime Minister, to which the honours prerogative belongs. It was equally non-justiciable however. Holding that the exercise of the honours prerogative is always beyond the review of courts is not a departure from the subject-matter test espoused by the House of Lords in the *Civil Service Unions* case.[65] Rather, as has been written elsewhere, it is faithful to that test.[66]

The basis for the continued non-justiciability of the honours prerogative appears to be founded in the absence of any legitimate expectation. As Laskin J.A. observed:

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54 Maitland, *supra* note 35.

55 [1946] A.C. 543 at 555 (H.L.).

56 It has also been accepted by the Supreme Court of Canada: *Verreault* v. *Quebec (A.G.)*, [1977] 1 S.C.R. 41 at 47; *Quebec (A.G.)* v. *Labrecque*, *supra* note 45 at 1082.

57 P. Joseph, "Suspending Statutes Without Parliament's Consent" (1991) 14 N.Z. U. L. Rev. 282 at 287.

58 In Kelsen's philosophy of law, a *grundnorm* is the basic, fundamental postulate, which justifies all principles and rules of the legal system and from which all inferior rules of the system may be deduced; M. Hayback, *Carl Schmitt and Hans Kelsen in the crisis of Democracy between World Wars I and II* (DrIur Thesis, Universitaet Salzburg 1990).

59 For a critique of these propositions generally see "Legal Concept (I)," *supra* note 51; P. Joseph, "The Crown as a Legal Concept (II)" [1993] N.Z. L.J. 179; F.M. Brookfield, "The Monarchy and the Constitution Today: A New Zealand Perspective" [1992] N.Z. L.J. 438.

60 This concept is alive today, in part as a substitute for a more advanced concept of the constitution; interview with Sir Douglas Graham (24 November 1999).

61 "The Dichotomy of Legal Theory," *supra* note 15 at 19.

62 "Control of Advice," *supra* note 23.

63 *Black*, *supra* note 7 at para. 33.

64 *Ibid.* at para. 35.

65 *Council of Civil Service Unions*, *supra* note 18.

66 "The Dichotomy of Legal Theory," *supra* note 15 at 19, cited with approval in *Black*, *supra* note 7 at para. 58.

> The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour.[67]

However, it would perhaps be more accurate to note that the surviving prerogatives which have been held to be non-justiciable have, in the approach adopted by the House of Lords in the *Civil Service Unions* case,[68] a nature which is not amenable to judicial scrutiny. Honours are clearly of that nature, for the granting of honours involves "oral and political considerations which it is not within the province of the courts to assess."[69]

QUESTIONS REMAINING

The foregoing discussion may be taken to show that the honours prerogative, and by extension the other "political" prerogatives of the Crown (such as treaty-making, defence, mercy, dissolution of Parliament, appointment of ministers[70]) is non-justiciable. But the royal prerogative is exercised by the Queen or Governor General (in some instances the Lieutenant-Governors) on the advice of responsible ministers, and are not the exclusive preserve of ministers — though they may sometimes appear to be.[71]

The major question which is raised by *Black*, and which was not addressed by the Court, was what happens when conflict occurs between the Crown's advisors. British honours are principally the concern of British ministers, and likewise Canadian ministers can advise the Queen with respect to Canadian honours. Whether Canadian ministers can advise the Queen with respect to Canadian citizens receiving British honours raises important constitutional questions. Whilst there may be no important individual interests at stake, the identification of the proper sources of advice to the Crown is critical.[72]

Monarchy concentrates legal authority and power in one person, even where symbolic concentration alone remains.[73] In the eighteenth and nineteenth centuries, this was the logic underpinning the belief in the unity of the Crown. The Imperial Crown was indivisible. "The colonies formed one realm with the United Kingdom," the whole being under the sovereignty of the Crown.[74] This sovereignty was exercised on the advice of imperial ministers.

In his seminal work on the royal prerogative, Herbert Evatt showed how the unity of the Crown was the very means through which separateness of the Dominions was achieved. The indivisibility of the Crown meant the existence of royal prerogatives throughout the empire. The identity of those who could give formal advice to the Crown changed from imperial to dominion ministers — and little or no formal legal changes were needed for countries to change from colonies to fully independent nations.[75]

By 1919 most of the powers of the Crown abroad were exercised on the advice of local ministries in all the dominions and self-governing colonies.[76] That this was not yet a complete transference can be seen by the argument of the New Zealand Prime Minister, William Massey, at the Imperial Conference of 1921. He maintained the principle that "when the King, the Head of State, declares war the whole of his subjects are at war."[77] Dominions might sign commercial treaties, but not those concluding a war. Some aspects of external affairs were still a matter for the imperial authorities.[78]

The right to advise the Crown in the exercise of the war prerogative was kept in the hands of British ministers, and the right to advise the Crown excluded imperial concerns such as nationality, shipping, and

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67 *Black*, *ibid.* at para. 60.

68 *Council of Civil Service Unions*, *supra* note 18.

69 *Operation Dismantle*, *supra* note 26 at 465, cited with approval in *Black*, *supra* note 7 at para. 62.

70 *Council of Civil Service Unions*, *supra* note 18 at 418.

71 When a Prime Minister calls an election, he or she is advising the Governor General to call an election, not doing so him- or herself.

72 "Control of Advice," *supra* note 23.

73 "The attraction of monarchy for the Fathers of Confederation lay in the powerful counterweight it posed to the potential for federalism to fracture"; D. Smith, *The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) at 8, relying on W.L. Morton. Provincial powers grew as the provincial ministers were accepted as responsible advisers of the Crown in their own right.

74 *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1982] Q.B. 892 at 911 per Denning M.R.

75 H. Evatt, *The Royal Prerogative* (Sydney: The Law Book Company, 1987).

76 See the "Borden Memorandum 1919," in A.B. Keith, *Speeches and Documents on the British Dominions 1918–1931* (London: Oxford University Press, 1932) at 13 [hereinafter *Speeches and Documents*]. The position that a Canadian Lieutenant Governor was as much a representative of Her Majesty as was the Governor General was firmly established by the late-nineteenth century; see *Maritime Bank of Canada* v. *Receiver-General of British Columbia*, [1892] A.C. 437 at 443.

77 W. Massey (20 June 1921), in *Speeches and Documents*, *ibid.* at 59–62.

78 Report of the Inter-Imperial Relations Committee, *Imperial Conference* (1926) Parliamentary Papers, vol. xi 1926 cmd 2768 at 5.

defence.[79] This was to change however, as the dominions had been given membership in the League of Nations after the First World War, and came to be regarded in international law as independent countries.[80]

The problem of the remaining limitations on dominion independence was examined at the Imperial Conference of 1926. The Report of the Inter-Imperial Relations Committee to the Conference included the famous declaration that the dominions

> are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[81]

There had been uncertainty as to what precisely had been agreed in 1926, though initially most commentators simply assumed that British ministers would continue to provide the King's only source of constitutional advice.[82] The former Australian Prime Minister, William Hughes, distinguished between sources of formal and informal advice, with the British government providing the former, the dominion governments the latter.[83] Arthur Berridale Keith thought, however, that the suggestion that the King can act directly on the advice of dominion ministers was a constitutional monstrosity which would be fatal to the security of the position of the Crown.[84]

However, the Irish government thought there was only a personal union of the Crown.[85] If this were so, then imperial ministers could have no role in advising the king with respect to any matter internal to a dominion. The Irish may not have reflected the majority view, but theirs made more sense than that, for example, of Hughes.

Once the principle was established that the dominions were equal with the United Kingdom, it was inevitable that the dominions should acquire the exclusive right to advise the Crown on matters which related exclusively to those dominions. This was to be gained in the course of the 1920s and 1930s, and finally settled in the 1940s. This was the only possible outcome of the doctrine of equality.

It was the Second World War that finally settled the question of whether there was a complete transfer to dominion ministers of the right to advise the Crown on matters which concerned the dominions, and therefore complete executive or political independence.[86] It would follow that in all matters with respect to British honours and British subjects, the Queen relies upon the advice of British ministers, and similarly upon the advice of Canadian ministers for Canadian subjects and Canadian honours. Keith's feared conundrum has come to pass. The Queen should act solely upon the advice of British ministers when awarding a British peerage.[87] If her Canadian Prime Minister offers her advice, it is to her as Queen of Canada. As Queen of Canada she is powerless to prevent the conferring of a British title, although she could consult with herself, wearing her other hat as it were.

In reality, the Queen would not be placed in the intolerable position which was narrowly avoided if her respective ministers — Canadian and British — were always able to reconcile their differences. Doubtless, the British Prime Minister did not insist on the conferral of Black's peerage.

But it may not always be possible to reconcile potential differences. Had Blair insisted upon advising the Queen to confer a peerage upon Black, the Queen would have had little choice but to accede to his wishes.

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79 *Ibid.*

80 At the Peace Conference after the end of the First World War, the dominions (and India) were represented by delegates; *Rules of Representation at the Peace Conference of Paris*, 1919, cited in *Speeches and Documents*, *supra* note 76 at 13. The Annex to the Covenant of the League of Nations, 1919, listed the British Empire as an Original Member of the League of Nations. This was described as including Canada, Australia, South Africa, New Zealand, and India (*Speeches and Documents*, *ibid.* at 30). Both of these indicated a transitional status for the dominions. By 1928, and the signing of the *Treaty for the Renunciation of War* (the Paris Pact), the independence of the dominions was clearer, as separate plenipotentiaries signed on behalf of the dominions (*Speeches and Documents*, *ibid.* at 407).

81 *Imperial Conference* (1926) Parliamentary Papers, vol. 11 1926 cmd 2768 at 2.

82 E. Jenks, "Imperial Conference and the Constitution" (1927) 3 Cambridge L.J. 13 at 21; A.B. Keith, *Responsible Government in the Dominions*, vol. 1, 2d ed. (Oxford: Clarendon Press, 1928) at xviii [hereinafter *Responsible Government*].

83 Australia, H.R., *Commonwealth Parliamentary Debates*, vol.115 at 863 (22 March 1927). Compare Jenks, *ibid.* at 21.

84 *Responsible Government*, *supra* note 82 at xviii.

85 Some support for this view can be found in *Roach* v. *Canada*, [1992] 2 F.C. 173 at 177 (T.D.).

86 Canada and South Africa chose to make separate proclamations of war. Both were able to do so because in those dominions there had clearly been a delegation by the King to the Governor General of the prerogative to declare war and make peace, in Canada under the *Seals Act 1939*, R.S. 1985, c. S-6, and in South Africa, under the *Royal Executive Functions and Seals Act 1934* and the *Status of the Union Act 1934*. After some uncertainty, both Australia and New Zealand followed these precedents. See Hasluck, *supra* note 31 at 149–51; New Zealand, *Gazette* (9 December 1941) at 3877.

87 As she did when conferring a peerage on the distinguished New Zealand judge Sir Robin Cooke in 1996. See N. Cox, "Lord Cooke of Thorndon" [1996] N.Z. L.J. 123.

The peerage was in effect a British office, and as such wholly within the field of the British prerogative, exercisable on the advice of the British Prime Minister. Had a foreign sovereign sought to appoint Black to an office, the Canadian Prime Minister would have been equally unable to intervene. The Queen of Canada has no role in the creation of United Kingdom peers, and so could not prevent Black from being ennobled on the advice of Blair.

Unfortunately, it also partook of the nature of a titular honour, and as such was subject to the rules which govern the acceptance of Commonwealth and foreign honours.[88]

It is probably not coincidental that the 2001 Queen's Birthday honours list in the United Kingdom included two knighthoods for Canadians, both long resident in the United Kingdom.[89] Perhaps it was a message to Jean Chrétien that he ought not to interfere with the British honours system. Perhaps it would be desirable to rewrite the Canadian policy and regulations on the acceptance of Commonwealth and foreign orders, decorations and medals[90] to address this particular situation.

Ultimately, however, the difficulty arose because of a lack of clear understanding of the difference between the Queen's position as Queen of Canada and Queen of the United Kingdom. It would be as inappropriate for the Prime Minister of Canada to advise the Queen of the United Kingdom (on any matter), as it would be for the Prime Minister of the United Kingdom to advise the Queen of Canada.

Ultimately, Conrad Black did become a peer. In 2001 he was raised to the peerage of the United Kingdom[91] after he renounced his Canadian citizenship.[92]

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[88] *Policy Respecting the Awarding of an Order, Decoration and Medal by a Commonwealth or a Foreign Government*, P.C. 1998; *Regulation Respecting the Acceptance and Wearing by Canadians of Commonwealth and Foreign Orders, Decorations and Medals*, Secretary of State 1968.

[89] Professor George Bain, Vice-Chancellor of The Queen's University Belfast, and Terence Matthews, for services to industry and to Wales. See *London Gazette* (16 June 2001) No. 56237, supp.1.

[90] *Supra* note 88.

[91] G. Jones, "Conrad Black finally made a life peer" *Daily Telegraph (London)* (12 September 2001).

[92] "Conrad Black to give up Canadian citizenship" *Daily Telegraph (London)* (19 May 2001).