

A Colloquy on Métis Rights

Preface

The seven articles which follow are based on papers that were written for a conference entitled "The Métis People in the 21st Century," which was held in Saskatoon on the June 18-20, 2003.¹ In March 2003, the Supreme Court of Canada heard arguments in the two landmark cases of *R. v. Blais*² and *R. v. Powley*³ concerning the interpretation of two provisions of the Canadian *Constitution Act, 1982*⁴ pertaining to Métis people. Where relevant, the articles have been revised to consider the Court's written decisions in these two cases, which were released in September 2003.

The articles address a wide range of subject matter and topics, with most of them involving two basic issues. The first is concerned with the judicial approach to the construction of provisions of the written Constitution that pertain to Aboriginal people generally, and to Métis people in particular. The second issue is implicit and involves a consideration of the method of common law development of the doctrine of Aboriginal rights. One article considers a unique provincial legislative scheme pertaining to Métis lands in Alberta, and the final article analyzes the question of a pardon for Louis Riel, the Métis political leader who was hanged for treason in 1885.⁵

Riel is now widely regarded as the most enigmatic and controversial character in Canadian history. The meaning of Riel's legacy defies a contemporary reconciliation of views among Canadians. Similarly, the issue of identifying "the Métis people" for constitutional purposes, and developing a coherent constitutional and legal basis for their rights that fits within the modern evolution of the doctrine of

¹ The conference featured contributions from social scientists, historians, lawyers and legal scholars. It also featured artists and a cultural exhibition hosted by the distinguished Métis author and artist, Maria Campbell, who is now a professor at the University of Saskatchewan. The cultural exhibition was on the anniversary of the famous Battle of Seven Oaks of 1816 and featured the modern day release of the "Métis national anthem," a song composed by the Métis bard, Pierrich Falcon, in celebration of the defeat of a small British force by local Métis at a site in the present day city of Winnipeg. The Gabriel Dumont Institute will be releasing a CD collection of Falcon's songs in 2004.

The conference papers from the non-law disciplines will be published by the *Native Studies Review* under the auspices of the Department of Native Studies at the University of Saskatchewan. Readers will note some references to these papers in the articles that follow. See also *infra* note 8.

² (2003), 230 D.L.R. (4th) 22, 308 N.R. 371, 2003 SCC 44 [*Blais*].

³ (2003), 230 D.L.R. (4th) 1, 308 N.R. 201, 2003 SCC 43 [*Powley*].

⁴ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵ The conference also featured a debate regarding the topic of Louis Riel as a hero and important symbolic figure in Canadian history. Jean Teillet's article in this issue of the journal summarizes the issues canvassed during this debate.

Aboriginal rights at common law, defies a reconciliation of views amongst academic and political commentators and analysts.⁶

⁶ See e.g. Catherine Bell, "Who Are the Métis People in s. 35(2)?" (1991) 29 Alta. L. Rev. 351; Catherine Bell, "Métis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev. 180; Larry Chartrand, "Are We Métis or Are We Indians? A Commentary on *R. v. Grumbo*" (1999-2000) 31 Ottawa L. Rev. 267; John Giokas & Paul 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 Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?: Recognition, Definition and Jurisdiction* (Saskatoon: Purich, 2002) 83; Paul L.A.H. Chartrand & John Giokas, "Defining the Métis People" in Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?: Recognition, Definition and Jurisdiction* (Saskatoon: Purich, 2002) 268; Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan Native Law Centre, 1991); Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 Osgoode Hall L.J. 457; Paul L.A.H. Chartrand, "The Hard Case of Defining 'The Métis People' and Their Rights: A Comment on *R. v. Powley*" (2003) 12 Const. Forum Const. 84; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727; Bradford W. Morse & John Giokas, "Do the Métis Fall Within Section 91(24) of the *Constitution Act 1867*?" in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Canada Communication Group, 1995) 140; Donald MacMahon & Fred Martin, "The Métis and 91(24): Is Inclusion the Issue?" in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Canada Communication Group, 1995) 277; Bryan Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984* (Kingston: Institute of Intergovernmental Relations, 1985) 203; Dale Gibson, "When Is a Métis an Indian?" in Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?: Recognition, Definition and Jurisdiction* (Saskatoon: Purich, 2002) 258.

A number of historians and social scientists have added their own interpretations. See e.g. D.N. Sprague, *Canada and the Métis 1869-1885* (Waterloo: Wilfred Laurier University Press, 1988); D.N. Sprague, "The Manitoba Land Question, 1870-1882" (1972) 3 Journal of Can. Studies 158; D.N. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980) 10 Man. L.J. 415; Thomas Flanagan, "The Case Against Métis Aboriginal Rights" (1983) 9 Can. Pub. Pol'y 314; D.N. Sprague, *Métis Lands in Manitoba* (Calgary: University of Calgary Press, 1991); Joe Sawchuk & Theresa Ferguson, *Métis Land Rights in Alberta: A Political History* (Edmonton: Métis Association of Alberta, 1981).

Much of the older and, exceptionally, some recent literature on the Métis, reflects the bigotry which has characterized Canadian popular and scholarly views about the Métis since the nineteenth century. Some of the leading modern works which have contributed thoughtful scholarly analyses include: Jacqueline Peterson & Jennifer S.H. Brown, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1984); Jennifer S.H. Brown & Theresa Shenck, "Métis, Mestizo and Mixed-Blood" in Phillip J. Deloria & Neal Salisbury, eds., *A Companion to American Indian History* (Malden: Blackwell, 2002) 57; Heather Devine, "Les Desjarlais: The Development and Dispersion of a Proto-Métis Hunting Band, 1785-1870" in Theodore Binnema, Gerhard J. Ens, & R.C. Macleod, eds., *From Rupert's Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 129; John Foster, "Wintering, the Outsider Adult Male and the Ethnogenesis of the Western Plains Métis" in Theodore Binnema, Gerhard J. Ens, & R.C. Macleod, eds., *From Rupert's Land to Canada: Essays in Honour of John E. Foster* (Edmonton: University of Alberta Press, 2001) 179. A recent bibliography is L. Barkwell, L. Dorion & D. Prefontaine, *Resources*

The articles which follow begin with a consideration of the two landmark cases of *Powley* and *Blais*. In the first article, Métis professor Larry Chartrand considers the definition of “the Métis people” within the meaning of s. 35 of the *Constitution Act, 1982*. Reacting to the Court’s statements in the *Powley* case, he assesses the application of the Court’s broad pronouncements to various communities, mainly in the Prairie Region of Canada. In the second article, Lionel Chartrand, who was counsel for the defendant in the *Blais* case, outlines the political and legal context of the case and analyzes the Court’s treatment of the legal issues. The question at issue was whether *Blais*, as a Métis, was included within the scope of the term “Indians in the province” in the game laws paragraph of the *Natural Resources Transfer Agreement* (which is part of the *Constitution Act, 1930*).⁷

The next article by Robert Groves and Bradford Morse, two of the leading Canadian authors on Aboriginal policy, focuses its detailed analysis of recent legal, political and social developments with the goal of articulating a workable policy framework for the official recognition of all the Aboriginal peoples recognized in the Constitution. The analysis is based upon principles that are developed by the authors.⁸ The fourth article, by Métis lawyer Mark Stevenson, reviews alternative approaches to the interpretation of constitutional provisions pertaining to Aboriginal people. This article focuses on the legislative authority derived from s. 91(24) of the *Constitution Act, 1867*⁹ in respect to “Indians and Lands reserved for the Indians,” and the contention that this head of power includes Métis people recognized in s. 35 of the *Constitution Act, 1982*.

Lisa Weber, the author of the next article, is a member of one of the eight Métis Settlements that remain of the reserves set aside for Métis people in the province of Alberta during the Depression era. Emphasizing her personal experience, she pursues the object of explaining the relationship between the political and legal aspects of the unique situation of Métis people in Alberta and its significance for future political development.

In the next article, Albert Peeling and Paul Chartrand explore a theory of the origins of Métis rights of self-government under s. 35 of

for *Métis Researchers* (Winnipeg and Saskatoon: Louis Riel Institute & Gabriel Dumont Institute, 1999).

⁷ (U.K.), 20-21 Geo. V, c. 26, reprinted in R.S.C. 1985, App. II, s. 12.

⁸ The conference, *supra* note 1, featured a panel debate on government policies pertaining to the Métis people. The participants included senior federal and provincial officials, Métis political leaders, lawyers and scholars. Materials relating to this policy panel will be published in the *Native Studies Review*.

⁹ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985 App. II, No. 5.

the *Constitution Act, 1982*. The authors rely upon doctrinal principles, the rule of law, and the values underlying the Canadian constitutional framework. In the final article in the series, Jean Teillet examines the notion of exoneration for Louis Riel with respect to his conviction on a charge of high treason. The analysis considers the role of Québec in the controversy and includes a discussion of the political and legal history of clemency. The theory advanced is that exoneration, by whatever means, would be an exercise in political expediency; not one of justice or mercy.

The recent cases and the following articles engage important questions of constitutional interpretation and of common law development of Aboriginal rights. They also examine the related field of policy and contribute to a long-awaited debate on a topic that has previously received relatively little judicial and policy attention.