'Sovereignty, liberty, and the legal order of the 'Freemen'(Otipahemsu'uk): Towards a constitutional theory of Metis self-government'

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Sovereignty, liberty, and the legal order of the 'Freemen'(Otipahemsu'uk): Towards a constitutional theory of Metis self-government'[1]

Introduction

The purpose of this paper is to begin to explore a theory of the origins of Métis rights of self government protected under s. 35 of the *Constitution Act, 1982.*[2] It is one of a wide range of papers from various disciplines being presented at this conference, and history is one of them. Métis rights are based in history. Accordingly, it is appropriate to preface our discussion with a comment on the different approaches of the legal profession and historians to historical analysis. The following extract from a recent and well-known case in the Supreme Court of Canada explains the reasons for the difference:[3]

> *'The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a 'cut and paste' version of history: G.M. Dickson and R.D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", Canadian Historical Review, LXVII (1986); R. Fisher, "Judging History:*

[1] The legal analysis in this paper is based on earlier work done by Albert Peeling.

[2] *Constitution Act, 1982,* being Schedule B of the *Canada Act (UK)1982,c.11.* Section 35(1) recognizes and affirms the aboriginal and treaty rights of the aboriginal peoples of Canada, and s. 35 (2) expressly includes the Metis people as one of the aboriginal peoples of Canada. Paul L.A.H. Chartrand and John Giokas consider the meaning of 'the Metis people' in Paul L.A.H. Chartrand, ed. *Who are Canada's Aboriginal Peoples: Recognition, Definition, Jurisdiction* (Saskatoon, Purich Publishing Ltd. 2002) chapter 8, at 268. There it is assumed that an aboriginal right of self-government exists; it is not argued. It is important to note that the analysis in that chapter is based on a number of important assumptions that do not necessarily apply here. The right of self-government was not only assumed to exist, for reasons given there (at 270-271); it was also assumed to be vested in a 'nation' on the model proposed by the Royal Commission on Aboriginal Peoples in its 1996 final report.

[3] R v. Marshall [1999]4 C.N.L.R. 161, AT 182-183.

Reflections on the Reasons for Judgment in Delgamuukw v. B.C.", B.C. Studies, XCV (1992) ; A.J. Ray, "Creating the Image of the Savage in Defense (sic) of the Crown: The Ethnohistorian in Court", Native Studies Review, VI (1990), 25.

While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do the best it can...'

In this paper, we do the best we can by applying the theory to alternative historical scenarios.

A perspective which grounds the theory developed here is one of liberty. The theory is also grounded in the common law principle of minimalism essential to the functioning of the common law as "a law of liberty" in the words of Lord Ellenborough in *Rex v. Cobbett.* [4] This means that it is fundamental that all exercises of sovereign power, while they are effective to

[4] (1804), 29 St. Tr. 1 at page 49.

achieve the purposes for which they are invoked, are not to be given any greater effect than is necessary for that purpose. So for instance Lord Reid stated the "mischief rule" as follows in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg*,[5]

> in the absence of any clear indication to the contrary, Parliament can be presumed not to have altered the common law further than was necessary to remedy the "Mischief".

Minimalism is a basic tenet of the law. It finds its way into the interpretation of section one of the Charter of Rights and Freedoms: in order for an infringement of the Charter to be justified it must be the least drastic means of achieving the legislative purpose.[6]

Minimalism also finds it way into s. 35 interpretation: a valid legislative objective must infringe aboriginal and treaty rights as little as possible in order to be justified.[7]

That minimalism holds the key to understanding the basis for self government among the Métis in Canada, as will be more fully explained below.[8]

This paper is not based upon a comprehensive review of the historical and constitutional record, so it will treat two distinct scenarios to explain its theory:

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[5] [1975] A.C. 591 at page 614.

[6] *R. v. Oakes*, [1986] 1 S.C.R. 103).

[7] *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746).

[8] Another feature of minimalism as applied in the process of judicial law-making is the law's version of 'a slash of Occam's razor': *pluralitas non est ponenda sine necessitate*, whereby the only part of a decision that has the binding force of law are the reasons for deciding the particular facts in each case.

1. If the British did not acquire sovereignty over the people whose descendents became Métis; and
2. If the British did acquire sovereignty over those people.

1. If the British did not acquire sovereignty over the people whose descendants became Metis.

In this scenario the ancestors of the Métis did not become subjects of the British Crown in 1759 with the fall of New France.[9] The law with respect to the position of residents of newly conquered territory is that they become subjects, as set out by Lord Mansfield in *Campbell v. Hall*:[10]

> *The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.*

This principle that they are subjects once received under the King's protection is based on the doctrine of allegiance, which was discussed in *Calvin's Case*.[11] The basic doctrine is of correlative duties of protection and obedience between sovereign and subject. Lord Coke explains in the same case:[12]

> *...ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they*

[9] See generally, Mason Wade, *The French-Canadians 1760-1945* (Toronto, The Macmillan Company of Canada Limited, 1956); Stewart W. Wallace, *The Pedlars from Quebec and other papers on the Nor'Westers* (Toronto, The Ryerson Press, 1954)
[10] (1774), 1 Cowp. 204 at page 208:

[11] (1608), 7 Co. Rep. 1a at pages 4b ff.
[12] At page 5a.

are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.

The inhabitants of a conquered colony such as New France belonged to a specific class of subjects known as denizens, as Lord Coke explained:

There is found in the law four kinds of ligeances; the first is, ligeantia naturalis, absoluta, pura, et indefinita and this originally is due by nature and birth-right, and is called alta ligeantia, and he that oweth this is called subditus natus. The second is called ligeantia acquisita, not by nature but by acquisition or denization, being called a denizen, or rather donaizon, because he is subditus datus. The third is, ligeantia localis, wrought by the law; and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other. The fourth is a legal obedience, or ligeance which is called legal, because the municipal laws of this realm have prescribed the order and form of it; and this to be done upon oath at the torn of the leet.[13]

And further, he adds:[14]

denization of an alien may be effected ... by conquest, as if the King and his subjects should conquer another kingdom or dominion, as well

[13] *Ibid,* at 5b.
[14] *Ibid,* at 6a.

antenati as postnati, as well they which fought in the field, as they which remained at home, for defence of their country or employed elsewhere, are all denizens of the kingdom or dominion conquered.

For our purposes it is essential to note two things:

1. that the process of denization of the inhabitants of a conquered colony requires that those inhabitants be received into the Sovereign's protection; and
2. that the duty of allegiance only follows upon the de facto position of the subject being under the sovereign's protection.

As to the second point, in *Calvin's Case* Lord Coke says that[15] "power and protection draweth ligeance." This was explained by Chief Justice Cockburn in the case of *R. v. Keyn.*[16]

According to the doctrine of Lord Coke in Calvin's Case, protection and allegiance are correlative: it is only where protection is afforded by the law that the obligation of allegiance arises; or, as I prefer to put it, it is only for acts done when the person doing them is within the area over which the authority of British law extends, that the subject of a foreign state owes obedience to that law, or can be made amenable to its jurisdiction.

In the case of New France, two classes of people deserve special notice:

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[15] *Ibid,* at 9b.
[16] (1876)2 Ex. D.63, at 236, 237.

1. Those people who at the time of the fall of New France were in the hinterland beyond the boundaries of New France proper; and
2. Those people who at the time of the fall, instead of being received into the King's protection, headed out to the hinterland in order to remain free.

We note that, since in *Calvin's Case*[17] it is recognized that "ligeance is a quality of the mind" it is important to emphasize the self identification of Metis as Otipahemsu'uk or freemen.[18] In either case, the people who left in order to preserve their liberty did not necessarily become subjects of the British Crown. They settled in the hinterland, beyond the protection of the King, and were therefore not his subjects, and were free to establish their own legal order, their own laws and customs. In the space of twenty to fifty years those customs would take a form cognizable to the common law as customary laws.[19]

With respect to what we have termed the hinterland a distinction can be drawn between:

a) those lands within the boundary of Rupert's Land, the Hudson's Bay Company's territory; and

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[17] *Supra, note 10, at 9b.*

[18] Two points deserve emphasis here. The connotation of the Cree term 'otipahemsu'uk' as used here in reference to the 'freemen' from the fur trade companies does not exhaust the nuances of meanings or connotations of the term in the Cree language. The second point is that the primary purpose of this paper is to set out a theory of Metis self-government, and not to argue for any particular historical interpretation concerning the facts that are assumed to explain the two scenarios that are discussed in the text. The assistance and expertise of Maria Campbell in respect to the meaning of 'otipehemsu'uk' is gratefully acknowledged, but the authors are solely responsible for any misinterpretations that may arise from its use in the paper.

[19] It is beyond the scope of this paper to explain the law relating to custom.

b) those lands beyond the boundaries of Rupert's Land.[20]

With respect to the first distinction, it is important to note that there was nothing in the Hudson's Bay Charter, granted to the HBC by Charles II in 1670 which envisaged the governance of that territory. It merely established a monopoly of trading rights within that territory for the Company.[21]

Subsequently imperial legislation did extend the jurisdiction of the colonial Courts into that territory in a limited way, but that would be after the establishment of customs by which the Métis governed themselves.[22] The same may be said of the jurisdiction of the Company courts which were established after the amalgamation of the North West and Hudson's Bay Company into the latter, and which exercised de facto, and sometimes invalid, jurisdiction, until 1870.[23]

As to the second distinction, in territories beyond the boundaries of Rupert's Land there was not even the pretence of any kind of sovereignty in these areas until the enactments referenced above. So it is possible that at the time of the conquest of New France, some people there did not accept the protection of

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[20] See generally, Kent McNeil, *Native Rights and the boundaries of Rupert's Land and the North-Western Territory* (Saskatoon, University of Saskatchewan Native Law Centre, 1982.)

[21] Manitoba. Provincial Archives. Hudson's Bay Company Charter Search File

[22] *An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces* (43 George III, c. 138 (1803); 1821, and *An Act for regulating the Fur Trade* (1 and 2 GEO. IV c.66 (1821)see *Statutes at Large,* p. 225.),

[23] Regarding the HBC courts, see generally, Roy St. George Stubbs, *Four Recorders of Rupert's Land: A Brief Survey of the Hudson's Bay Company Courts of Rupert's Land* (Winnipeg, Peguis Publishers, 1967) and the articles cited at page 44, note 4 therein. See also Kent McNeil, *supra,* note 20.

the British Crown and become subjects bound by allegiance.[24] Those people instead placed themselves, or, in any case, were, beyond the protection of the Crown and thereby were not bound by the duty to obey the Crown. These freemen were at liberty to organize themselves into whatever political and social systems best suited their needs, and they were bound by human nature to do so if the Aristotelian principle is true that we are political animals:

> *Hence it is evident that the state is a creation of nature, and that man is by nature a political animal. And he who by nature and not by mere accident is without a state, is either a bad man or above humanity; he is like the "Tribeless, lawless, hearthless one"[25] whom Homer denounces - the natural outcast is forthwith a lover of war; he may be compared to an isolated piece at draughts.*[26]

Without the state into which they were born, and refusing the protection of the state which destroyed it, these people went out into the hinterland and, mingling with the Indian populations there, formed their own political entitles.

If, however, we cannot establish that these people were able to free themselves of the sovereignty of the British Crown after 1759, there is still the possibility that in the circumstances, the ancestors of the Métis were in the circumstances free to establish their own political structures which can ground a claim to self government. We have stated earlier that the common

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[24] For an historical account, see Devine, Marina. "The First Northern Métis" In *Picking Up the Threads: Métis History in the MacKenzie Basin.* (Ottawa, Métis Heritage Association of the Northwest Territories and Parks Canada, Canadian Heritage, 1998) at 5-28.

[25] Homer, Odyssey, IX 114-15.
[26] Aristotle, The Politics, ed., S. Everson, trans. B. Jowett (Cambridge: Cambridge UP, 1988) 3.

law is a "law of liberty"[27] Liberty is again the central tenet of this analysis. The subject is free to do whatever is not forbidden by law, and, as we have noted, the Hudson's Bay Charter did nothing to create or impose a legal order over the territory of Rupert's Land. Rupert's Land, furthermore, does not seem to have been covered by the Royal Proclamation of 1763 according to *R. v. Sikyea*,[28] to the extent that the Métis' ancestors were not in that territory prior to the Proclamation. So even in the event that these people became subjects of the British Crown in 1759, they would by common law have the freedom to do whatever was not forbidden to them by the law.

They would have carried their allegiance with them out into the hinterland. In *Calvin's Case*,[29] Lord Coke asserts:

> *Now seeing power and protection draweth ligeance, it followeth, that seeing the King's power, command, and protection extendeth out of England, by ligeance cannot be local, or confined within the bounds thereof. He that is abjured the realm, Qui abjurat regnum amittit regnum, sed non Regem, amittit patriam, sed non patrem patrice: for notwithstanding the abjuration, he oweth the King his ligeance, and he remaineth within the King's protection; for the King may pardon and restore him to his country again.*

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[27] *(Rex v. Cobbett* (1804), 29 St. Tr. 1 at page 49).

[28] 43 D.L.R. (2d) 150 at p. 152; approved [1964] S.C.R. 642. This could be important since it might be the French ancestors of the Métis could not have acquired land rights capable of recognition by the common law courts in territory to which the Proclamation applied, since customs which were established contrary to law will not be recognized by the courts (*The Case of Tanistry* (1608), Davis 28, 80 E.R. 516), and any rights they acquired could not be recognized. Arguably, however, they could have acquired land in Rupert's Land. Their descendants who became Métis could then have acquired rights in lands beyond Rupert's Land whether or not those lands were covered by the Proclamation.

[29] *Supra,* note 10, at 9b.

> *So seeing that ligeance is a quality of the mind, and not confined within any place; it followeth, that the plea that doth confine the ligeance of the plaintiff to the kingdom of Scotland, infra ligeantiam Regis regni sui Scotice, et extra ligeantiam Regis regni sui Anglice whereby the defendants do make one local ligeance for the natural subjects of England, and another local ligeance for the natural subjects of Scotland, is utterly insufficient, and against the nature and quality of natural lineage, as often it hath been said.*

In the hinterland, as they established their own communities, beyond the power and protection of the King, they would have need to establish a legal order suitable for those communities. This is recognized again in *Calvin's Case:*[30]

> *Aristotle 1. Politicorum proveth, that to command and to obey is of nature, and that magistracy is of nature: for whatsoever is necessary and profitable for the preservation of the society of man is due by the law of nature: but magistracy and government are necessary and profitable for the preservation of the society of man; therefore magistracy and government are of nature.*

Thus, in the situation where a subject has placed himself or herself beyond the protection of the Crown, that subject has the right to establish order and maintain it. This is parallel to the duty of a subject to act by whatever means

[30] *Ibid, at* 13b.

necessary to maintain public order in time of riot. Chief Justice Tindal stated that duty in 1832 in *Charge to the Bristol Grand Jury*[31]:

> *But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty pf every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law.*

Willes J. expanded upon that duty in *Phillips v. Eyre*[32] as follows:

> *'It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the governor may be compelled, unless he shrinks from the discharge of paramount duty, to exercise de facto powers which the legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the state will be ratified by an Act of indemnity and oblivion. There may not be time to appeal to the legislature for special powers.*

[31] (1832), 5 C. & P. 261
[32] (1870), L.R.6 Q.B.1, at 16,17.

If there is a duty to act on one's own authority to maintain order in society, it is submitted that there must also be a duty to establish a legal order in the absence of one. That legal order would become customary law over the span of years, and could ground a Métis right of self government.

Before concluding it is instructive to refer to the descriptions of professional historians about the process of community formation that gave rise to Métis communities in the 'hinterland'. Using an interdisciplinary approach grounded in anthropology and history, the late Dr John Foster built upon the work of Jacqueline Petersen, Jennifer Brown and Sylvia van Kirk, and explained the process that gave rise to the Métis as distinct political and social communities in the West. In this explanation, which is here slightly paraphrased, certain 'groups emerged as a result of a few "immigrant" men responding successfully to opportunities offered by particular niches in various fur trading systems. In the process of adapting to these opportunities, these men established households that successfully enculturated children to further exploit the household's particular trading niche. In time, the historical actors in the region came to view these households as communities distinct from the trading post and indigenous bands yet tied to each through kinship. On the Great Plains this occurred in the last decades of the eighteenth century when the provisioning niche in the … fur trade opened the door for the development of freemen bands composed of former servants of the various fur trading companies on the St.Lawrence and Great Lakes tradition. These freemen, who had married into the surrounding Indian bands, ended their Company contracts in the North West and formed separate households that formed the basis for a distinct community. Organized as buffalo hunting and trapping bands these freemen bands were sufficiently stable in membership to permit the parents to

influence their boys to emulate their fathers in exploiting this provisioning and trapping niche" [33]

The theory which has been advanced in brief and outline form in this paper draws support from the discussion of the Supreme Court of Canada concerning the proper interpretation of the law of the constitution in Canada, and in particular, concerning the application of the unwritten principles of the constitution to the task.[34] One of these well established unwritten principles is 'constitutionalism and the rule of law'. Just as in *Sinclair v. Mulligan*[35] the principle may be seen as the motivating force behind the court's decision to uphold the validity of the Hudson's Bay courts' de facto authority within the Red River Settlement, the principle would seem to support the theory that the Métis people had the constitutional authority if not duty to establish a legal order where they lived as a distinct political entity beyond the effective protection of the Crown or the de facto control of the Hudson's Bay Company.

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[33] T. Binnema, G.J.Ens, and R.C. Macleod, ed., 'John Elgin Foster: Western Canadian Historian' in *From Rupert's Land to Canada* (Edmonton, The University of Alberta Press, 2001) at xvii. Heather Devine considers the factors that have to be in place for this process to occur in "Les Desjarlais: The Development and Dispersion of a Proto-Metis Hunting Band, 1785-1870", in *ibid* at 129-158. In the *Powley* case that is currently before the Supreme Court of Canada, the existence of an historic Metis community in the Sault Ste.Marie area of the Great Lakes region is a central issue. The Ontario Court of Appeal decision is reported in *R v. Powley* [2001]2 C.N.L.R. 291.

[34] *Reference Re Secession of Quebec,* [1998] 2 S.C.R.217. See also, Paul Joffe, "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec", (2000) 45 *McGill Law Journal* 155.

[35] (1886), 3 Man.L.R.481, upheld on appeal (1888),5 Man.L.R.17 (Manitoba Q.B. *en banc*)In this case, the court dealt with the issue of the date of reception of English law in the Red River Settlement, and concluded that the laws in force prior to its admission in Canada were the laws of England, so far as applicable, on May 2, 1670. The judge expressly left open the question of the validity of the Company's judicial authority, stating that 'it is sufficient that we must recognize the *de facto* authority of the company and the courts established by it, and adopt as the laws of the country those which the company and the courts, assuming their authority as valid, and to the extent to which that assumed authority would warrant, undertook to enforce and did enforce.'[at p 490] This issue was not addressed by the court in the appeal.

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