Métis Treaty Project – Research Proposal

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I want to study the role of consent in the establishment of constitutional relations between peoples or groups.

Recent political theory has emphasized that respectful relations between states and indigenous peoples must be based on consent (e.g., Tully 1995). Indeed, the UN Declaration on the rights of indigenous peoples supports the idea of consensual relations being the norm. In Canada, the *Senate Reform Reference* and the *Supreme Court Act Reference*, among other recent constitutional decisions, place heavy reliance on agreements as the source of certain constitutional norms, in an apparent return to what was once called the "compact theory" of Confederation.

This raises the issues: What kind of agreements are "constitutional compromises"? How do we identify them? How is that concept linked to that of "treaty"? How do we link them to existing constitutional provisions (such as section 35)? How do we interpret them? Answering these questions requires an examination of the apparent tension between the generally accepted "living-tree" approach to constitutional interpretation in Canada and the focus on "original-intent" that appears to be mandated when the focus turns to historic agreements as the source of the constitution.

Moreover, recent Supreme Court decisions appear to deploy certain "compact-mending" techniques in cases where consent was not given. In other words, the Court tries to reconstruct what would have been agreed to by the parties, and that becomes the constitutional norm. This may be likened to the suggestion made by the Royal Commission on Aboriginal Peoples to the effect that flaws in the treaty-making process did not lead to the invalidation of the treaties, but called for their renegotiation on just terms.

More generally, a "compact" approach to the constitution requires the identification of the groups whose consent is required for the creation of constitutional norms. This issue has normative and practical dimensions. From a normative perspective, social contract theories would militate for the widest application of the requirement of consent. However, in practice, groups will act through their political representatives and the development of political institutions is a historical phenomenon that follows a certain path. Hence, practice may determine who is considered a relevant group whose consent is required. Nevertheless, this practice may lead to exclusions and new political groupings may arise in response to those exclusions. The question then becomes, how does constitutional law respond to the evolution of the indigenous peoples' political organization, especially where equality is considered as an underlying norm (Grammond 2009).

Lastly, a specific question is that of the legal definition of the concept of treaty. In earlier work (Grammond 1995, 2013), I proposed that a treaty is an agreement between the state and the indigenous peoples which deals with the latter's collective rights. This definition may need to be revisited, especially in light of the governments' practice of concluding a

variety of agreements with the indigenous peoples and devising strategies to avoid characterizing these agreements as treaties, to avoid the protection flowing from section 35.