CANADA'S 'FOUNDING PEOPLES' AND THE SUPREME COURT

SEBASTIEN GRAMMOND

Sébastien Grammond is professor at the Civil Law Section of the University of Ottawa, of which he was Dean from 2008-2014. Since 2004, he has taught contract law, civil procedure, indigenous peoples' law and constitutional law. He is the author of the books *Terms of Coexistence: Indigenous Peoples and Canadian Law* (2013), *Identity Captured by Law* (2009) and *Quebec Contract Law* (2011), as well as numerous articles.

In the recent Supreme Court decision for *Caron v. Alberta*, in which the Supreme Court ruled that Alberta does not have the constitutional obligation to enact its laws in English and in French, the three dissenting judges stated that "[t]he Constitution of Canada emerged from negotiations and compromises between the founding peoples."[1] The majority judges did not disagree with them. Although they did not use the expression "founding peoples," they also agreed that the constitutional provisions in question were the product of an agreement; however, they disagreed as to the scope of that agreement.

This may seem surprising, especially for a Supreme Court decision, because the constitution makes no mention of the concept of founding peoples and dominant federal ideology of the last half-century stands in opposition to it. In fact, "demotic" issues are one of the Canadian constitution's main "silences"[2] and they illustrate what Jeremy Webber calls the constitution's "agonistic" character—how it allows Canadians to collaborate despite sharp disagreements over the very nature of the country.[3]

This reference to the founding peoples, however, is fully in line with a theory that the Supreme Court has been patiently crafting for about 15 years. When the Court is faced with new issues requiring constitutional interpretation, it relies more and more on what is traditionally known as the "com-

1 *Caron v. Alberta*, 2015 SCC 56, at para 235, Wagner and Côté J

2 Dave Guénette, « Le silence des textes constitutionnels canadiens – expression d'une constitution encore inachevée », (2015) 56 Cahiers de droit 411.

3 Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford : Hart, 2015) pp. 6-8, 259-265.

pact theory of Confederation,"[4] which states that Canada is the result of an agreement (or compact) between its pre-existing political entities. Even if the Court does not usually employ the term "compact," it is what we could call a "contractual" vision of the constitution.

The normative consequences that stem from a contractual vision are not unequivocal. For example, during a certain era many provinces based themselves on the compact theory to assert that the constitution could not be modified without their unanimous consent. However, that is not how the Supreme Court uses the compact theory: it does not view the constitution as a directly enforceable contract. Rather, it takes into account the constitution's consensual nature in its interpretation; that is to say that certain provisions were enacted to protect the commitments made by the compact's various parties towards each other. The *Reference re Senate Reform*[5] provides an example. The Supreme Court had to decide, among other things, whether Parliament could provide for "consultative elections" to select senators without obtaining the provinces' consent and without amending the constitution. The Court recognized that the constitution's amending formula is the result of the provinces' demands to protect their interests with regard to the federal structure (the Senate in particular), which the federal government agreed upon in November 1981. To fulfil this commitment, the constitution had to be interpreted in a manner that would protect the provinces against any federal desire to unilaterally make significant changes to the Senate. The federal government was then prevented from trying to proceed unilaterally; rather, it had to obtain consent from the provinces.

If, then, the Canadian constitution is the product of a compact, who are the stakeholders? This is where things get tricky. There are many versions of the compact theory. There is the compact among the four original provinces—and which the other provinces later joined—and another "binational" compact between Anglophones and Francophones, which is the one generally referenced when speaking about the "founding peoples." The constitution's amending formula reflects a further understanding of the compact that recognizes the federal state's role as a fully fledged player, which would suggest that the Canadian population as a whole also constitutes "a people." Furthermore, these versions of the compact have neglected the participation of Aboriginal peoples, not so much in the negotiations that led to Confederation, but rather through treaties that, from their point of view, enshrined the terms of their free adhesion to Canada. And so, multiple compacts could be superimposed (maybe involving multiple nested "peoples"), as implied by two Supreme Court judges in an Aboriginal rights case.

These four organizing principles are interwoven in three basic compacts: *1)* one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; *2)* one between the non-Aboriginal population and Aboriginal

4 For a more in-depth analysis of this issue, see Sébastien Grammond's article *Compact is Back: The Revival of the Compact Theory of Confederation by the Supreme Court*, submitted to a peer-reviewed journal (2016).

5 Reference re Senate Reform, 2014 SCC 32, particularly at para 77.

peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and *3)* a "federal compact" between the provinces.[6]

This demonstrates that the founding peoples, or at least the parties to the compact, are not only those who were present at the Charlottetown and Quebec City discussions in 1864. The comments found in the recent *Caron* decision imply that a group that negotiated the terms of its admission into Canada, regardless of when that happened, could be considered a founding people. For example, in the *Caron* case, the Supreme Court states that an agreement was reached in 1870 between the federal government and the "people of Rupert's Land and the North-Western Territory,"[7] which it also describes as "a party with a strong interest in protecting the French language"[8] or simply "the territories' inhabitants"[9] and as belonging to the "Métis community."[10] Under the agreement, territories formerly owned by the Hudson's Bay Company were annexed to Canada. As a matter of fact, most, if not all provinces negotiated the terms of their admission to Canada in one way or another. According to the Supreme Court's approach, each province's population could constitute a founding people.

Is extending the concept of founding peoples the price of its reinstatement within constitutional discourse? Will the Court's approach allow unexpected groups to claim founding people status? It seems unlikely. In fact, the Court's approach seems to be primarily focused on founding acts rather than founding peoples. What the Court looks for is an agreement that serves as the basis of a constitutional text and sanctions the admission of a "people" into Canada.[11] The Court then interprets the document on the basis of the interests of the parties. The identity of that people then becomes a secondary issue, which explains, for example, the ambiguity displayed by the Court in the *Caron* case (were they "Métis" or the "territories' inhabitants," including non-Aboriginals?).

The approach based on founding acts is also compatible with a vision in which a person can belong to many peoples simultaneously.[12] For example, a Prince Edward Island resident can certainly identify with his province while also identifying with Canada as a whole. In most cases, an analysis of the Canadian constitution does not take into account the specificity of that province and it would not be necessary to specify that its population is a found-

6 *Beckman v. Little Salmon/Carmacks*, 2010 SCC 53, at para 97.

7 *Caron*, para 207.

8 *Caron*, para 238.

9 *Caron*, para 222, 240.

10 *Caron*, para 207-212.

11 This would exclude groups who immigrated to Canada following an explicit agreement with the government (like the Ismailis in the 1970s) that isn't incorporated into the Constitution.

12 In the Canadian context, this idea has been explored by many people, most notably by Jean Leclair who has explored it in depth. See particularly *Legality, Legitimacy, Decisionism and Federalism: An Analysis of the Supreme Court of Canada's Reasoning* in Reference re Secession of Quebec, 1998, presented at the *Claims for Secession and Federalism : The Spanish Case in the Light of Federal Experience*, Bilbao, Spain, 25-25 November, 2015.

ing people. However, when interpreting the *Prince Edward Island Terms of Union*, which is part of the constitution, we could take into account that the province negotiated the terms of its union to Canada and that it was protecting a certain number of specific interests that found their way into the constitutional text.

This approach also allows us to avoid the thorny issue of distinguishing a people in its sociological sense (people with a shared language, culture, history, etc.) and a people in its political sense (the population of a given territory). By emphasizing founding acts, the Supreme Court avoids having to make a statement on the nature of founding peoples. To revisit the *Caron* case, the Court did not think it useful to specify whether the founding people in question was composed only of Métis or if it also included the non-Aboriginal people living in Western Canada in 1870. In the same vein, it is not necessary to determine if, during the negotiations leading up to the Confederation, a politician like George-Étienne Cartier protected the interests of the French-Canadians only or those of all the residents of Canada East. It does not prevent the Court from recognizing, in appropriate cases, the specific interests of the underlying "sociological" people. Thus, in a decision rendered in 2013, the Court declared that the Métis' territorial rights stemming from the 1870 agreement and guaranteed by the *Manitoba Act* had been violated.[13] Furthermore, several recent rulings demonstrate that Quebec specificity does get taken into consideration in the interpretation of certain constitutional provisions that apply specifically to Quebec.[14]

In conclusion, recognizing that the constitution is the product of agreements between pre-existing political entities allows us to better respect the mutual commitments that shaped Canada. The "founding peoples" still count on those promises being fulfilled.

13 *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14

14 Sébastien Grammond, « Louis LeBel et la société distincte », article to be published in *Cahiers de Droit* (2016).