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Exoneration for Louis Riel: Mercy, Justice,
or Political Expediency?

Jean Teillet



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*[W]hat you will do in justice to me, in justice to my family,
in justice to my friends, in justice to the North-West,
will be rendered a hundred times to you in this world.¹*

- Louis Riel

I. INTRODUCTION

Louis Riel was convicted of high treason. He was hanged in Regina, Saskatchewan on November 16, 1885.² Since that day, there has been a movement to exonerate him. The method of exoneration has also been the subject of much debate. The most common presumption is that such exoneration would be accomplished by means of a pardon. Professor Bumsted sets out the case for a pardon as follows:

At the beginning of the 21st century there is little doubt that Louis Riel should receive a posthumous pardon. He should be pardoned partly so that he can take his rightful and undisputed place as the Father of Manitoba. He should be pardoned because he was badly treated by Canada throughout his entire career. But mostly he should be pardoned as a gesture to the memory of a great Canadian.³

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1. *The Queen vs. Louis Riel* (Ottawa: Queen's Printer, 1886) at 154 [R. v. Riel].

2. For more on Riel's life, the Métis, and the events that led to the hanging see Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992) at 306-18; Maggie Siggins, *Riel: A Life of Revolution* (Toronto: HarperCollins, 1994); D.N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo: Wilfred Laurier University Press, 1988); Donald Purich, *The Métis* (Toronto, James Lorimer, 1988); D. Bruce Sealey and Antoine S. Lussier, *The Métis: Canada's Forgotten People* (Winnipeg: Manitoba Métis Federation Press, 1975).

3. J.M. Bumsted, *Louis Riel v. Canada: The Making of a Rebel* (Winnipeg: Great Plains Publications, 2001) at 321.

Métis leaders and the Riel family⁴ have often stated that exoneration by means of a pardon is unacceptable. While many support the concept of exoneration, they are uncomfortable with a pardon because they understand that it implies guilt, mercy, and forgiveness. To these people, Riel was not guilty of treason and they do not want him pardoned for something he did not do. In order to achieve exoneration without a pardon, many have proposed the use of a bill in Parliament that would reverse Riel's conviction. A bill is seen to be acceptable because it is cloaked in the appearance of corrective justice.

There has been little discussion as to whether there is any substantive difference between a pardon and a bill. Both are extra-judicial exoneration, which is generally known in law as clemency.⁵ The use of clemency stems from the earliest days of Judeo-Christian history. Such powers were exercised in ancient Athens and Rome and survive in some form in almost every country of the world.⁶ Clemency has been used for a remarkable variety of reasons⁷ and history is full of names that resonate on this subject—Barabbas, Dreyfus and Nixon—to name just a few.

The primary purpose of this article is to examine the notion of exoneration for Riel. It questions why we are even discussing such an

⁴ References to the Riel family in this article refer to the descendants of the brothers and sisters of Louis Riel. Louis Riel has no direct surviving descendants. He married Marguerite Monet *dit* Bellehumeur, a métisse from White Horse Plains, Manitoba on April 27, 1881. Louis and Marguerite had two children, a son Jean born on May 9, 1882 and a daughter Marie-Angelique born on September 17, 1883. Marguerite was also pregnant during the events at Batoche and at the trial. On October 21, 1885 she gave birth to a boy, but he only lived for two hours. Marguerite herself died of tuberculosis on May 24, 1886. Marie-Angelique died of diphtheria in 1897 just before her fourteenth birthday. Jean attended St. Boniface College and in 1902 went to Montreal to study. In 1908 he married Laura Casault in Quebec and the couple returned to Manitoba. In June, Jean fractured a rib in a buggy accident. He died on July 31, 1908 from infection. He was twenty-six years old and left no children.

⁵ C.H. Rolph, *The Queen's Pardon* (London: Cassell, 1978) at 15, where he notes that the words "pardon, redress, remission, rescission, commutation, grace, mercy, exoneration, exculpation, *droit de grâce*, *Wiederaufnahme*, and a variety of others are called in aid to rescue the victims of the law's mistakes."

⁶ Leslie Sebba, "The Pardoning Power—A World Survey" (1977) 68 J. Crim. L. & Criminology 83 at 85-110, comparing laws authorizing pardons in approximately ninety countries. According to Sebba, China is the only country that does not use clemency: *ibid.* at 88.

⁷ The draft South African Constitution of 1994 contained an amnesty clause, a necessary condition for forging the new regime. See Amnesty International/Human Rights Watch, *Truth and Justice: Unfinished Business in South Africa* (February 2003), online: Human Rights Watch <<http://www.hrw.org/background/africa/truthandjustice.pdf>>. For the frequent use of amnesty and pardons after the American Civil War see Daniel T. Kobil, "The Quality of Mercy Strained: Wresting the Pardoning Power from the King" (1991) 69 Tex. L. Rev. 569 at 593-95 and nn. 148-50.

idea over one hundred years after he was hanged. It examines the role of Quebec in the Riel exoneration controversy and it includes a discussion of the political and legal history of clemency. This article examines both proposed methods of exoneration for Louis Riel. It also looks at posthumous exoneration.

Exoneration is usually thought to be mercy or justice. It is the theory of this article that exoneration of Louis Riel, by whatever means, would be an exercise in political expediency, not one of mercy or justice.

II. THE MOTIVATING FORCES BEHIND THE MOVE TO EXONERATE RIEL

To this day, the name of Louis Riel invokes intense emotional debate in Canada. To some, Riel is a hero and a great Métis leader. To some, he is an enigma or a martyr. To others, Riel is a rebel and a traitor. Louis Riel is revered by the Métis, by Québécois, and by many Canadians as a great political leader, a Father of Confederation, and the Founder of Manitoba.

Recently, the movement to exonerate Riel has gathered momentum. Unanimous resolutions recognizing his contributions were passed in the Manitoba Legislative Assembly,⁸ and, as follows, in the House of Commons:

That this House recognize the unique and historic role of Louis Riel as a founder of Manitoba and his contribution in the development of Confederation; and

- ...
2. That this House support by its actions the true attainment, both in principle and practice, of the constitutional rights of the Metis people.⁹

Since 1982, private members have introduced at least twelve exoneration bills in both Houses.¹⁰ The movement has engaged the general

⁸ *Resolution to Recognize the Historic Role of Louis Riel*, Manitoba Legislative Assembly, May 1992, passed unanimously.

⁹ *House of Commons Debates*, vol. VI (10 March 1992) at 7879 (Right Hon. Joe Clark). The resolution was adopted with the unanimous consent of the House, as agreed to on the day before the reading: *House of Commons Debates*, vol. VI (9 March 1992) at 7851.

¹⁰ The following private member bills have been introduced in the House: (1) *House of Commons Debates*, vol. XXIV (23 September 1983) at 27427 (Mr. Bill Yurko, Conservative); (2) *House of Commons Debates*, vol. II (14 March 1984) at 2091 (Mr. Bill Yurko); (3) *House of Commons Debates*, vol. IV (28 June 1984) at 5258 (Mr. Les Benjamin, NDP); (4) *House of Commons Debates*, vol. I (13 December 1984) at 1204 (Mr. Les Benjamin); (5) *House of Commons Debates*, vol. VI (28 November 1985) at 8918 (Ms. Sheila Copps, Liberal); (6) *House of Commons Debates*, vol. VII (16 September 1987) at 9000 (Mr. Nelson A. Riis, NDP); (7) *House of Commons Debates*, vol. 133 (16 November 1994) at 7847 (Mrs. Suzanne Tremblay, Bloc Québécois);

public, the media,¹¹ the Riel family, Métis leaders, and elected politicians.

The motivations of the players are complex and often contradictory. The various players in this ongoing debate have different goals. Each believes that exoneration of Riel (or the withholding of that exoneration) will serve a particular purpose. For example, some believe that exoneration will restore the honour of Riel and, as a result, Canadians will recognize and commemorate Riel's contributions to Canada. Some want to exonerate Riel in order to add strength to the argument that his actions were justified (and therefore not treasonable). Québécois argue that exoneration of Riel will reconcile alienated francophones and bolster Quebec nationalism. Others believe withholding exoneration serves to remind Canada of its past injustices.¹² Finally, modern day Métis leaders would prefer to withhold exoneration temporarily as a bargaining chip in the political battle to achieve recognition of Métis rights.

Louis Riel was executed before his people, the Métis, were able to achieve the goals for which he fought and died. It is now 118 years after the fact, and little appears to have been achieved to resolve outstanding Métis issues. Métis leaders fear that exoneration of Riel would amount to tokenism. It would provide an excuse, allowing the federal government to say that it has done its duty to Riel, and then continue to ignore the Métis people. The Métis National Council has stated that it will not support a pardon or a private member's bill. However, it will consider supporting a government bill that exonerates Louis Riel, if the government agrees to a meaningful process for addressing Métis issues such as land claims, self-government, and harvesting rights.¹³

(8) *House of Commons Debates*, vol. 134 (4 June 1996) at 3386 (Mrs. Suzanne Tremblay); (9) *House of Commons Debates*, vol. 134 (5 March 1997) at 8662 (Mrs. Suzanne Tremblay); (10) *House of Commons Debates*, vol. 135 (3 June 1998) at 7534 (Mr. Reg Alcock, Liberal); (11) *House of Commons Debates*, vol. 137 (7 November 2001) at 7100 (Mr. Reg Alcock).

¹¹ For a discussion of the continuing and contradictory representations of Riel in art and the media see Albert Braz, *The False Traitor: Louis Riel in Canadian Culture* (Toronto: University of Toronto Press, 2003). In October of 2002, the Canadian Broadcasting Corporation aired a three part series on Riel. Part One was a replay of the Riel segment from *Canada: A People's History*. Part Two was a staged retrial of Riel. Part Three was a town hall meeting with Métis audience members. The retrial was the subject of a public call-in vote. A majority vote found Riel not guilty.

¹² Professor Paul L.A.H. Chartrand stated that "the hanging of Riel is a stain on the honour of Canada...let the stain remain": "Address" (Presented to the Indigenous Bar Association of Canada and the Indigenous Peoples' Justice Initiative, "The Métis People in the 21st Century," Saskatoon, June 2003) [unpublished]. Professor Chartrand is a Métis lawyer, professor, and a former Commissioner on the Royal Commission on Aboriginal Peoples.

¹³ This position, however, has not been consistent. See Association of Métis and Non-Status Indians of Saskatchewan, *Louis Riel: Justice Must be Done* (Winnipeg: Manitoba Métis Federation Press, 1979).

In April of 1998 the Riel family, at a press conference in Winnipeg, read out a statement of its wishes with respect to exoneration. The statement read as follows:

It is the wish of the Riel Family that Parliament pass a Bill to give Louis Riel his rightful place in history. Any Bill should recognize his contributions to the Métis people, the creation of the Province of Manitoba and Manitoba's place in the Canadian confederation. Any such Bill, within the Bill itself, must state that Louis Riel was wrongfully accused, convicted and executed. The conviction must be reversed and his innocence must be proclaimed. We will not support any Bill which pardons Louis Riel. Any Bill must proclaim Louis Riel as a Father of Confederation and the Founder of the Province of Manitoba. A day should be named in his honor. Further, that the Riel Family be consulted throughout the drafting process of any Bill which addresses Louis Riel.¹⁴

The Riel family statement went on to say that an exoneration of Riel would not relieve the government of its outstanding obligations towards the Métis people. The Riel family position on the exoneration of Riel is very personal. Older members of the family have long experienced the effects of bearing the Riel name, a name which most of the country has seen as synonymous with "traitor." The family's wish to have the "criminal brand" removed from the Riel reputation is understandable. After all, they are not a government. The Riels are a family who gave their best and brightest son to the Métis cause. They simply want the Riel family name and honour restored.

Hypothetically, we might ask what Riel himself would have wanted, but we can only look at his life's work spent in service of the needs and aspirations of the Métis people to find our answer. At his trial, he said the following:

For fifteen years I have been neglecting myself, even one of the most hard witnesses on me said that with all my vanity I never was particular to my clothing; yes, because I never had much to buy any clothing. The reverend Father André has often had the kindness to feed my family with a sack of flour and Father Fourmond; my wife and children are without means, while I am working more than any representative in the North-West....I work to better the condition of the people of the Saskatchewan, at the risk of

¹⁴ Riel Family Press Statement, Winnipeg, April 1988 [unpublished, archived with author].

my life, to better the condition of the people of the North-West. I have never had any pay. It has always been my hope to have a fair living one day. It will be for you to pronounce. If you say I was right, you can conscientiously acquit me, as I hope through the help of God, you will. You will console those who have been fifteen years around me, only partaking in my sufferings.¹⁵

Some say that since Riel himself did not act in his own self-interest, he would never agree to exoneration that did not include the following: first, exoneration of the other Métis and Indians who died, were imprisoned, or suffered other losses for fighting the same battles; and second, meaningful redress for the outstanding claims of the Métis people.¹⁶

III. WHY EXONERATE RIEL NOW AND WHAT DOES QUEBEC HAVE TO DO WITH IT?

Why has the movement to exonerate Riel recently gathered so much momentum? There are two reasons. The first springs from the historic relationship between the government and Aboriginal peoples in Canada. The second has to do with the historic relationship between Quebec and the rest of Canada.

For centuries Canada has denied, stalled, or stifled the legitimate grievances of Aboriginal peoples. This, indeed, is the root of the events that led to the Métis resistance in 1870 in Manitoba and again in 1885 in Saskatchewan. Riel and Indian leaders began with legitimate petitions and peaceful processes.¹⁷ However, their claims were ignored and Indian agents, in order to punish the Indians for their protests, cut rations.¹⁸ On the point of starvation and watching the loss of

¹⁵ *R. v. Riel*, *supra* note 1 at 154. Note that the trial was conducted in English. Riel, a francophone, was at a disadvantage and told the Court, *ibid.* at 147, that "I cannot speak English very well, but I am trying to do so, because most of those here speak English."

¹⁶ Bumsted, *supra* note 3 at 305-10, presents the following statistics: Seventy-one other men were charged with treason-felony for partaking in the uprising in 1885, including Big Bear, Wandering Spirit and Poundmaker. In the end, nine Indians were hanged and fifty were sentenced to penitentiary terms for participating in the uprising. Eleven Métis councilors were sentenced to prison and received sentences of seven years. Three others were sentenced to three years in prison, four got one year sentences and seven prisoners were discharged conditionally. The cases of some of the Métis participants were not litigated. For different statistics see Dickason, *supra* note 2 at 311.

¹⁷ Beginning in 1845, the Red River Métis sent the first of many petitions seeking to have their concerns addressed. See Dickason, *supra* note 2 at 264.

¹⁸ Isabel Andrews, "Indian Protest Against Starvation: The Yellow Calf Incident of 1884" (1975) XXVIII *Saskatchewan History* 41.

my life, to better the condition of the people of the North-West. I have never had any pay. It has always been my hope to have a fair living one day. It will be for you to pronounce. If you say I was right, you can conscientiously acquit me, as I hope through the help of God, you will. You will console those who have been fifteen years around me, only partaking in my sufferings.¹⁵

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their lands and livelihood, they resorted to violence. As Olive Dickason notes, "Riel himself repeatedly stressed his pacific intentions even as he maintained that the North-West Territories should be a self-governing province and that Amerindians should be better treated."¹⁹ This cycle of peaceful protest, government denial, and eventual violence has a long history throughout Canada. Names like Batoche, Restigouche, James Bay, Bear Island, Lubicon, Temagami, Oka, Ipperwash and Burnt Church each contain a story of Aboriginal resistance.²⁰

Centuries of injustice, persecution and neglect have bred a new generation of activist Aboriginal peoples and have also created a reactionary movement in governments. The recent Riel exoneration movement is part and parcel of this cycle of Aboriginal action and government reaction, which began when Aboriginal leaders lobbied to include Aboriginal and treaty rights in the new *Constitution Act, 1982*.²¹ As a result of such lobbying efforts, Métis leader Harry Daniels was successful in having the definition of Aboriginal peoples in the Constitution specifically include Métis peoples. In seeking to entrench Aboriginal and treaty rights in the Constitution, all Aboriginal leaders were trying to make a fundamental shift in the basic relationship between government and Aboriginal peoples. They thought that entrenching Aboriginal peoples and their rights in the Constitution would mean that the government would stop ignoring Aboriginal peoples and begin to make meaningful changes in the power relationship.

The hopes of 1982 were short-lived,²² however, and in 1986, Canada's first ministers negotiated and signed the Meech Lake Accord²³ without Aboriginal participation. The Accord granted Quebec the recognition denied to Aboriginal peoples.²⁴ Aboriginal concerns were

¹⁹ Dickason, *supra* note 2 at 307. She also notes Riel's continued use of petitions as a means of political protest.

²⁰ See Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (London: Vintage U.K., 1990); Bruce W. Hodgins, Ute Lischke & David T. McNab, eds. *Blockades & Resistance: Studies in Actions of Peace and the Temagami Blockades of 1988-89* (Waterloo: Wilfred Laurier University Press, 2003) [*Blockades & Resistance*].

²¹ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. On November 5, 1982, the Prime Minister and nine provinces, without Quebec, signed a constitutional accord calling for patriation of Canada's Constitution. The *Constitution Act, 1982* was enacted by the British Parliament and came into force on April 17, 1982.

²² In 1986, the government rejected the recommendations contained in what was known as the "Coolican Report": Canada, *Living Treaties: Lasting Agreements—Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) (Chair: Murray Coolican). The report recommended a broader and more fair set of criteria for determining whether land claims should be accepted.

²³ The Meech Lake Constitutional Accord, *Constitution Amendment, 1987* (Ottawa: Government of Canada, 1987). See Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988).

²⁴ *Ibid.* On May 9, 1986, Quebec's Minister responsible for Canadian Intergovernmental Affairs outlined five conditions to achieve constitutional reconciliation with Quebec.

treated as trivial and Aboriginals were told that they could and should wait. In so doing, Canada's first ministers significantly underestimated the anger and frustration of Aboriginal leaders and when it came time to petition Aboriginal support for the Accord, Aboriginal leaders withheld their support. They were not persuaded that the Accord gave their people any advantages and they found it easy to resist the pressure tactics and threats, such as Quebec separatism and instability of financial markets, which had successfully garnered the signatures of most of the provinces. In the end, Canada paid dearly for its return to its pre-1982 callous disregard of Aboriginal peoples as it was the Aboriginal leaders in Manitoba who helped to defeat the Accord in June of 1990.²⁵ The cost to Canada was the loss of the carefully engineered appeasement of Quebec and a substantial increase in the progressive alienation of the Aboriginal peoples of Canada.

The process and defeat of the Meech Lake Accord fueled the anger and resistance of both Quebec and Aboriginal peoples. Quebec felt rejected by English Canada and these feelings led to the creation of the Bloc Québécois, a party devoted to Quebec nationalism and separatism. Aboriginal people similarly felt rejected by all Canadians and the Oka crisis was one of the results.

Oka soon became a name recognized by all people in Canada when the Mohawks set up barricades to prevent the expansion of a golf course onto their ancestral lands. The violence at Oka provoked a reaction from non-Aboriginal people and the press. Most of the press ignored the real issue: Canada's failure to resolve Mohawk land claims. After decades of peaceful agitation by the Mohawks to stop the continual erosion of their lands, Canada still refused to consider negotiation or a peaceful resolution to the issue. In closing off legitimate avenues of resolution, the federal government created the perfect setting for the violence that erupted in the summer of 1990. Only after Oka was resolved, and in response to the violence, did the government begin to address the land issues the Mohawks had long been raising.²⁶ Also in response to the events at Oka, the government set up the Royal Commission on Aboriginal Peoples.

Faced with what seemed to be a disintegrating social fabric on two fronts—Quebec and Aboriginal peoples—provincial and federal ministers took steps to appease the two groups. Few actions could be seen to appease both at the same time, but recognition of Louis Riel, a francophone Aboriginal leader, was the exception. In 1992, the

²⁵ For the story of the Manitoba Chiefs' strategy to defeat the Meech Lake Accord and the role played by Elijah Harper, see York, *supra* note 20 at 272-77. The Newfoundland Legislative Assembly also failed to ratify the Accord by the June 22, 1990 deadline.

²⁶ Commentators have often remarked on the fact that violence has produced positive action from the Canadian government. See *Blockades & Resistance*, *supra* note 20.

Manitoba Legislative Assembly passed a unanimous resolution to honour the role of Louis Riel in the founding of Manitoba. Later the same year, the House of Commons and the Senate also passed unanimous resolutions to recognize and honour the role of Louis Riel. At the same time, in yet another attempt to appease Quebec, the Charlottetown²⁷ round of constitutional discussions began. This time Aboriginal leaders were included in the discussions. However, despite the attempts to appease Aboriginal peoples and Quebec, the Canadian people defeated the Charlottetown Accord in a Canada-wide referendum on October 26, 1992.²⁸

In 1993, the Bloc Québécois became the official opposition in Canada's Parliament, and shortly afterwards, a Bloc member introduced a Riel Bill in Parliament.²⁹ The Parti Québécois was elected in Quebec³⁰ and held a separation referendum, which was narrowly defeated.³¹ Shortly afterwards, the House of Commons passed a resolution recognizing Quebec as a distinct society within Canada.³² Meanwhile, violence continued to simmer in native communities and once again erupted at Ipperwash, when Dudley George was shot and killed by an Ontario Provincial Police officer.³³ When the Royal Commission on Aboriginal Peoples delivered its monumental report³⁴ in November of 1996, the response was a deafening silence from Ottawa.

In 1996 and again in 1997, two more Riel exoneration bills were introduced in Parliament. The debate in the House of Commons tied together the issues of reconciliation for Quebecers, francophones, and possible exoneration of Riel:

Louis Riel was led before a jury of six anglophones and tried by an anglophone judge in Regina, as Donald Smith drove the last spike for the transcontinental railway. In

27 Canada, *Consensus Report on the Constitution: Charlottetown, August 28, 1992* (Ottawa: Government of Canada, 1992).

28 The national referendum results were 54.3 per cent voting no and 45.7 per cent voting yes. Provincially, the Accord was rejected in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec and Nova Scotia.

29 *House of Commons Debates*, 124 (16 November 1994) at 7847 (Hon. Gilbert Parent).

30 The election was held in September of 1994.

31 The Quebec referendum was held on October 30, 1995. The results were 50.6 per cent voting no and 49.4 per cent voting yes.

32 The resolution was passed on December 11, 1995. In February of 1996, the House of Commons passed Bill C-110, *An Act respecting constitutional amendments*, 1st Sess., 35th Parl., 1994-95. The Act provides a veto for Quebec, Ontario and the Western and Atlantic regions over constitutional amendments that provinces cannot otherwise opt out of or veto directly.

33 Peter Edwards, *One Dead Indian: The Premier, the Police, and the Ipperwash Crisis* (Toronto: Stoddard, 2001). Dudley George was shot on September 30, 1995.

34 Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1-5 (Ottawa: Canada Communication Group, 1996).

that same year, French was banned in Manitoba. Louis Riel was, in fact, the victim of a miscarriage of justice that reflected the attitude to francophones at the time. People in Quebec knew that Louis Riel's cause was just....

He was a victim of his own cause, just though it was, and Quebecers and francophones across the country were outraged by the decision made by a jury of six Anglophones, negating the rights of Louis Riel. Despite the uproar this caused in Quebec, even John A. Macdonald, the Prime Minister of Canada at the time, said:

"All the dogs in Quebec can bark, but Louis Riel shall hang."

John A. Macdonald said that. It was a way to punish the French fact in the west, although the rights of francophones were supposedly guaranteed. I may also point out to my dear colleagues from western Canada that subsequently the rights of francophones in Manitoba were abolished for one hundred years.

The conviction of Louis Riel was unjust, unacceptable and unpardonable. If people want to reconcile Canada with its francophones, let them adopt, fairly and squarely, a formula to absolve or pardon Louis Riel.³⁵

Ottawa was being pressured on all sides to respond to the two outstanding and troubling issues of Canadian unity: namely, Quebec and Aboriginal peoples. The narrow defeat of the Quebec Referendum had shaken the government's complacency about the enduring commitment of Canadians to maintaining Canada.³⁶ The violence that was building in Aboriginal communities also needed to be addressed.

Finally, in January of 1998, the government released its response to the Royal Commission on Aboriginal Peoples report, in the form of a new government policy, *Gathering Strength: Canada's Aboriginal Action Plan*.³⁷ The policy is described as an "action plan designed to renew the relationship with Aboriginal people of Canada."³⁸ The

³⁵ *House of Commons Debates*, 087 (21 October 1996) at 5455-56 (Hon. Gilbert Parent). Jean-Paul Marchand, Bloc Québécois member for Québec East speaking to the second reading of Bill C-297, *An Act to revoke the conviction of Louis David Riel*, 2d Sess., 35th Parl., 1996.

³⁶ On September 14, 1997, the premiers and territorial leaders, except those of Quebec, unanimously agreed on a framework for open public consultations with Canadians on strengthening the Canadian federation.

³⁷ Canada, Department of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services Canada, 1997).

³⁸ *Ibid.* at 2.

policy stated that the Royal Commission report had acted as a catalyst and an inspiration for the federal government's decision to set a new course in its policies for Aboriginal peoples:

Gathering Strength looks both to the past and the future. It begins with a *Statement of Reconciliation* that acknowledges the mistakes and injustices of the past; moves to a *Statement of Renewal* that expresses a vision of a shared future for Aboriginal and non-Aboriginal people; and outlines four key objectives for action to begin now.³⁹

Unfortunately, when the draft policy was shared with Aboriginal leaders prior to its announcement, it contained no meaningful references to Métis. Métis leaders were outraged and lobbied for specific inclusion. The draft contained generic Métis references but no "action plan" for Métis issues. In response to the Métis outrage, the *Statement of Reconciliation* was redrafted. All Métis issues that required reconciliation were reduced to the issue of Riel:

No attempt at reconciliation with Aboriginal people can be complete without reference to the sad events culminating in the death of Métis leader Louis Riel. These events cannot be undone; however, we can and will continue to look for ways of affirming the contributions of Métis people in Canada and of reflecting Louis Riel's proper place in Canada's history.⁴⁰

It is in this dynamic context, where the issues of Quebec and Aboriginal peoples were so intertwined, that the movement to exonerate Riel was reinvigorated.

It is no surprise that Quebec influenced the exoneration movement as it has always played a role in the Riel debate. After the initial uprising began in 1885, the French-language press in Quebec increasingly came to the support of the Métis. When Riel's death sentence was pronounced, support in Quebec turned to outrage. After the hanging in November, the relationship between francophones and anglophones in Canada was forever changed. French Canadians believed that Riel died because he was French and Catholic; they saw the loss of Riel as the loss of French access to the West. In the immediate aftermath of Riel's death, the Conservative government in Quebec, seen as Protestant and English, was roundly defeated. The

³⁹ *Ibid.*

⁴⁰ *Ibid.* at 5.

new Quebec government was nationalistic and devoted to Quebec autonomy. In this way, the hanging of Louis Riel fertilized the nascent movement we now call separatism.

Quebec has never let go of its attachment to Riel, and Quebec nationalism continues to play a role in the Riel exoneration dialogue. To that end, private member bills to exonerate Riel have been sponsored by members of the Bloc Québécois and the motivating force behind the Bloc-sponsored bills is the exoneration of a francophone leader, not a Métis leader.⁴¹ If Riel were to be exonerated, it would set a precedent that would make it harder to accuse Quebec's separatist leaders of treason.⁴² The Liberal private member bill that later developed into an "all-party" bill was originally drafted as an attempt to outmanoeuvre the Bloc Québécois.⁴³

As is readily apparent, the Riel exoneration movement is part and parcel of the fabric of Canada. It ebbs and flows with the perceived urgency of placating Quebec. Exoneration for a francophone leader is intimately connected with the place of francophones and Quebec within our society. For many proponents, however, exoneration has little to do with Louis Riel the man, and even less to do with his Métis people.

IV. TREASON IS THE CHARGE

Louis Riel was charged and convicted of high treason. Treason is a breach of allegiance to the government or sovereign, and is the highest known crime. In the embryonic days of parliament, treason was an indignity or wrong against the King, his family, judges or the Chancellor. It was treason to commence war against the King, or to support, give aid, or comfort to the King's enemies either in the

⁴¹ In fact the word "Métis" was not even contained in some of the Bloc private member bills. See e.g. Bill C-297, *supra* note 35.

⁴² Bob MacDonald, "For Treachery Look to France" *Toronto Sun* (20 July 1997): "No wonder Quebec's treasonous separatists keep pushing La Belle Province steadily towards breaking away from Canada." See also *House of Commons Debates*, *supra* note 35 at 5454, for a speech by Stephen Harper, Reform member for Calgary West, where he states that

[t]here is no legal defence for taking up arms against the sovereign. If the movement is successful, a new legal order is created but if it fails, the instigators will be charged with treason...

I could add that my hon. friends in the official opposition [Bloc Québécois] may wish to keep all this in mind if they believe, as the Government of Quebec has said, that they can take Quebec out of Canada in defiance of the law and the Constitution.

⁴³ Five members of the House of Commons sponsored a bill in 2001 that claimed to have "all party support," which means that they have the support of at least one member from each party for the bill. It does not mean that the parties officially support the bill or that any more than one member of each party supports it.

country or elsewhere. In the past, it was also treason to counterfeit or bring counterfeit money into the country. Over the centuries, the definition of treason has changed. Today it includes acts against the government, but no longer includes counterfeiting. Nowadays, treason is a crime set out in the *Criminal Code*.⁴⁴ It is the offence of attempting, by overt acts, to overthrow the government or the taking up of arms in order to intimidate Parliament that now attracts a charge of treason.

While Riel himself described his actions as self defence, these same actions were considered by the government of Sir John A. Macdonald to be treason. The difference in perspective is important because the act of taking up arms against the government is not always considered treason. For example, the events at Oka were described as a "conflict," not a "rebellion." While the participants were charged with various offences, and some were convicted, none were charged with treason. The decision whether or not to attach the label "treason" to a particular event is a political decision. It is not legally necessary to charge treason when someone takes up arms for political purposes.

After the uprising in Saskatchewan in 1885, the decision as to what charges were preferred was made by the Justice Minister, Sir Alexander Campbell, and the Prime Minister, Sir John A. Macdonald. They considered charging Riel and the other participants with treason or treason-felony.⁴⁵ In the end, only Riel was charged with high treason. All others were charged with the lesser offence of treason-felony.

In 1885, the criminal law in Canada was not codified. There was no statute called the *Criminal Code*. Macdonald and Campbell chose the statute under which Riel would be charged and reached back over 500 years to the 1351 *Statute of Treasons*.⁴⁶ There were other options available to the Justice Minister and the Prime Minister. They could

⁴⁴ R.S.C. 1985, c. C-46, ss. 46(1), 47(1):

- 46(1) Every one commits high treason who, in Canada,
- (a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
 - (b) levies war against Canada or does any act preparatory thereto;
- or
- (c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.

47(1) Every one who commits high treason is guilty of an indictable offence and shall be sentenced to imprisonment for life.

⁴⁵ Treason felony carried a maximum sentence of life imprisonment.

⁴⁶ (U.K.), 25 Ed. III, Stat. 5, c. 2.

have proceeded under either the *Fenian Act*⁴⁷ or under the 1868 *Canadian Treason-Felony Statute*.⁴⁸

Why did the Crown proceed under a statute that was over five hundred years old? The answer is simple. Macdonald wanted Riel to hang. The only available statute with a mandatory death sentence was the 1351 *Statute of Treasons*. The two other options offered only life imprisonment—not death.⁴⁹ Several authors have discussed the reason for the different charges.⁵⁰ Olesky asks,

Why were some rebels treated differently? There is a hint from Osler⁵¹ that “sympathy [was] great” for the “rank and file.” But Macdonald and Campbell must have known the public would not have accepted a mass execution of Riel’s men. And attributing the rebellion to Riel alone would divert public attention from Métis complaints. The government could even suggest that there were no genuine complaints—there was only one man to blame.⁵²

It seems that this “one man to blame” theory continues to motivate the government’s willingness to exonerate Riel today. Exoneration of Riel would again divert public attention from Métis issues and allow the government to suggest that perhaps there are none, because it is really all about one man—Riel.

This “one man to blame” theory also lies behind the discomfort many Métis and Indians feel about exonerating only Riel. There were many others who participated in the rebellion. Many were jailed, lost their lands or their health, and others lost their lives for the same

⁴⁷ In 1838, Upper Canada passed *An Act to protect the Inhabitants of this Province against Lawless Aggressions from subjects of Foreign Countries, at peace with Her Majesty*, 1838, 1 Vict., c. 3. This was subsequently amended by 1840, 3 Vict., c. 12. The statute was so heavily relied on to prosecute the Fenians that it became known as the “*Fenian Act*”. Under the *Fenian Act*, it was treason for a citizen of another country, an alien, to levy war against Canada. This would have been an appropriate determination for Riel because he had become an American citizen on March 16, 1883.

⁴⁸ S.C. 1868, 31 Vict., c. 69, formerly titled *An Act for the better security of the Crown and of the Government*. Under s. 5, it was treason-felony to levy war against the Crown or the government.

⁴⁹ Dickason, *supra* note 2 at 494-95 and n. 11, where she notes that this same statute was used to hang eight men for high treason during the War of 1812.

⁵⁰ Bumsted, *supra* note 3; see also George R.D. Goulet, *The Trial of Louis Riel: Justice and Mercy Denied* (Calgary: Tellwell, 1999); Siggins, *supra* note 2.

⁵¹ Britton Bath Osler, Christopher Robinson, George Wheelak Borbidge, David Lynch Scott, and Thomas Chase Casgrain were the prosecutors.

⁵² Ronald L. Olesky, “Louis Riel and the Crown Letters” (1998) 22:2 *Canadian Lawyer* 12 at 13.

cause. Many believe that exoneration should be extended to all participants and that the government should attend to the outstanding Métis issues. Otherwise, the exoneration of Riel is merely tokenism.

It could be argued that the exoneration of Riel is a first step that would lead to recognition and redress for the Métis. In view of the government's past record, it is difficult for Métis leaders to accept that exoneration of Riel would lead to anything more. After all, Métis history is littered with the broken promises of the Canadian government. Métis skepticism that exoneration of Riel is nothing more than tokenism is based on hard-learned lessons from the past, combined with the absence of any indication from the government that it intends any reconciliation with the Métis other than the exoneration of Riel.

Regardless of whether Riel's exoneration would be an isolated event or the first step in reconciliation with the Métis, the method and effect of such exoneration must be carefully considered because the process itself matters. Flawed processes can delay or preempt a desired result. The remainder of this article discusses the two methods currently under consideration—a pardon or an exoneration bill.

V. THE IGNOBLE HISTORY OF PARDONS

A pardon is the most discussed method of exoneration for Riel, if only because it is widely dismissed as inappropriate.⁵³ Despite this, there is little understanding, other than on an intuitive level, of why a pardon might be inappropriate. It is commonly thought that a pardon implies guilt, mercy, and forgiveness, and is "an expression of mercy that enhances justice in a broader sense...."⁵⁴ However, it is not understood that a pardon is rarely used for mercy; it is more commonly used as an after-the-fact means of smoothing a convicted criminal's re-entry into society. Pardons also have a history of being used for pragmatic and political considerations.

Daniel Kobil notes that the pardon is an ancient power. The granting of amnesty⁵⁵ (a pardon granted to a class of persons rather

⁵³ Riel was granted a conditional pardon in 1875 for his activities in 1869-70.

⁵⁴ Kobil, *supra* note 7 at 572.

⁵⁵ Amnesty is generally granted in advance of conviction. Pardons are generally issued after conviction, but can be issued either before or after. In the first Jacobite Rebellion (1715), pardons were issued to many of the convicted and were also issued in the form of a general pardon for all who participated and had not been caught—except for anyone bearing the name MacGregor (Rob Roy's clan). President Carter issued general amnesty to Vietnam draft dodgers—pardoning those who had been convicted and giving amnesty (a statement that the government would not prosecute) to those who had not. President Ford pardoned Nixon in advance of any charges being laid. The South African Truth and Reconciliation Commission issued over a thousand grants of individual amnesty without convictions. See also Part VIII, below.

than to an individual) was widely used in Athens.⁵⁶ The Romans made more frequent use of the pardoning power, usually as a means of quelling discord among the colonized inhabitants of the Roman Empire.

The Bible gives us an example of Roman use of the pardon in the story of Pontius Pilate and Jesus. The Roman practice was to grant a "Passover pardon," a gesture meant to ingratiate the public to the sovereign (and to ensure public peace). Pontius Pilate granted the Passover pardon to Barabbas and admitted that he was condemning an innocent man, Jesus.⁵⁷

In England, the pardon power has a long history. Prior to Henry VIII, the clergy, great earls and feudal courts, as well as the king, granted pardons.⁵⁸ However, in 1535 Parliament passed an act that left the king with exclusive pardoning power. Although known as the royal prerogative of mercy, British kings and queens subsequently used the power with remarkable ingenuity for everything except mercy—to win the support of nobles, to enhance royal coffers, to man the navy, to exact testimony from accomplices that would incriminate co-defendants, and to provide cheap labour for the American colonies. The pardon was almost never used for mercy or justice. These political uses prompted widespread criticism, which led Parliament to pass a series of Acts that limited the pardon powers of the sovereign.⁵⁹

Although the pardon is commonly referred to in Canada and Britain as the Queen's Pardon, the title is misleading. In fact, the pardon power was removed from the Queen when Queen Victoria

⁵⁶ Kobil, *supra* note 7 at 583-84, regarding clemency in ancient Athens, where the process of obtaining at least six thousand signatures on a petition, in support of a claim acted as a strong deterrent to most people. And see N.G.L. Hammond, *A History of Greece to 322 BC*, 2d ed. (Toronto: Oxford University Press, 1967) at 446-47; Aristotle, *Constitution of Athens* in *Aristotle's Constitution of Athens and Related Texts*, trans. by Kurt von Fritz & Ernst Kapp (New York: Hafner Press, 1974) c. 39.

⁵⁷ Luke 23:14-25.

⁵⁸ Rolph, *supra* note 5 at 19, where he notes that it was the clergy's power to pardon fornications "which led Henry VIII, that paragon of erotic self-discipline, to enact the *Jurisdiction in Liberties Act, 1535*," which "extinguished the power of the Church and the great landowners to grant pardons." The result was that the pardon power became a matter exclusively within the royal prerogative powers of the king.

⁵⁹ See the *Habeus Corpus Act, 1679*, (U.K.) 31 Charles II, c. 2, s. 12, which prohibited a pardon from the King for persons convicted of causing others to be imprisoned outside of England and placing them beyond the reach of English *habeus corpus* protection. See also *Act of Settlement, 1700*, (U.K.) 12 & 13 Will. III, c. 2, s. 3 which removed the Crown's power to pardon as a bar to impeachment. See also *Hoffa v. Saxbe*, 378 F. Supp. 1221 (1974), wherein the court notes that in passing *An Act for the King's most gracious, general and free pardon*, 7 Geo. I, c. 29 (1720), the British Parliament asserted its own right to pardon which was "judicially noticeable": *Hoffa, ibid.* at 1227, n. 13. Parliament limited the king's power to pardon as a means of forestalling impeachment.

ascended to the throne in 1837. Victoria was thought too young and the wrong sex to preside over such matters of life and death.⁶⁰ The Home Secretary assumed and has since kept those powers.

Throughout the Commonwealth, pardons were commonly granted under the prerogative powers of the Crown.⁶¹ The prerogative is the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown, that has not been displaced by statute.⁶² Canada is a federal state; therefore, the prerogative powers are distributed between the federal and provincial governments and follow the comparable legislative powers.⁶³ In Canada, the Governor General or the Governor in Council (Cabinet) exercises the royal prerogative of mercy.⁶⁴ Both may grant clemency upon the recommendation of the Solicitor General of Canada, or at least one other minister.⁶⁵ The National Parole Board reviews clemency applications, conducts investigations, and makes recommendations to the Solicitor General of Canada.⁶⁶

⁶⁰ Rolph, *supra* note 5 at 25.

⁶¹ See *ibid.* at 72 for the situation in Sweden, where despite the existence of a monarchy, pardons are within the exclusive jurisdiction of the government.

⁶² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1959) at 425. For more on the royal prerogative powers see Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown* 3d ed., (Toronto: Carswell, 2000) at 15-21.

⁶³ Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Thomson Carswell, 1997) vol. 1, c. 19 at 21.

⁶⁴ *Criminal Code*, *supra* note 44, s. 748:

748(1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament, even if the person is imprisoned for failure to pay money to another person.

(2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.

(3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.

(4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted.

Pardons may also be granted by the Solicitor General pursuant to the *Criminal Records Act*, R.S.C. 1985, c. C-47. The effect of the pardon is contained in s. 5 of the Act. Also in s. 748(1) of the *Criminal Code*, the Governor General may order another form of clemency—remission of fines and forfeitures.

⁶⁵ See 1947 *Letters Patent Constituting the Office of the Governor General*, s. XII, which states "And We do hereby direct and enjoin that Our Governor General shall not pardon or relieve any such offender without first receiving in capital cases the advice of Our Privy Council for Canada and, in other cases, the advice of one at least, of his Ministers."

⁶⁶ *Criminal Records Act*, *supra* note 64, s. 2.1: "The Board has exclusive jurisdiction to grant or issue or refuse to grant or issue or to revoke a pardon."

In Canada, a pardon is not usually an exemption from the punishment the law would otherwise inflict on a person. It is usually used to restore the reputation and civil rights of an individual after he has completed his designated punishment and demonstrated rehabilitation by leading an exemplary life upon release. It means only that an individual's criminal record, after a pardon is granted, is kept separate and apart from other criminal records.⁶⁷

With respect to the effect of a pardon, the Supreme Court of Canada held that "while a pardon does not make the past go away, it expunges consequences for the future. The integrity of the pardoned person is restored, and he or she need not suffer the effects associated with the conviction in an arbitrary or discriminatory manner."⁶⁸ This does not mean that the conviction is wiped out or that the person was wrongly convicted. Even where a pardon specifically proclaims innocence, the conviction is not erased from the court's record as it is if the conviction is quashed on appeal.⁶⁹ The following is a sample of the limitations of pardons:

A pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity.⁷⁰

Another example is as follows:

The effect of [a] pardon [is] to remove the criminal element of the offence named in the pardon, but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted.⁷¹

⁶⁷ All information pertaining to convictions is supposed to be removed from the Canadian Police Information Centre (CPIC) and is not supposed to be disclosed without permission from the Solicitor General of Canada. The *Criminal Records Act* however, applies only to records kept within federal departments and agencies. Provincial and municipal law enforcement agencies (courts and police services other than the RCMP) do not usually restrict access to their records, even if notified that a pardon has been granted. Police records and files are not affected by a pardon and are almost never destroyed, restricted, or sealed.

⁶⁸ *Re Therrien*, [2001] 2 S.C.R. 3 at 85, 200 D.L.R. (4th) 1.

⁶⁹ See Lord Robertson re the pardoning of Patrick Meehan, "the actual terms of the Free Pardon itself...appear to free Meehan from the consequences of the conviction and not from the conviction itself. It certainly doesn't quash the conviction by due process of law": cited in Christopher H.W. Gane, "The Effect of a Pardon in Scots Law" (1980) *Juridical Review* 18 at 26.

⁷⁰ *R. v. Cosgrove* (1948), *Tas. S.R.* 99 at 106.

⁷¹ *Re Royal Commission on Thomas*, [1980] 1 N.Z.L.R. 602.

Under some authorities it has been stated that the effect of a full pardon is to make the offender a new man, and that a full pardon blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offence. This view, however, has not been universally accepted, recognized or approved.⁷² Accordingly since the very essence of a pardon is forgiveness or remission of penalty, assessed on the basis of the conviction of the offender, "a pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as has been tersely said: it involves forgiveness and not forgetfulness."⁷³

If the above is a rather long list of all the things a pardon does not do, one must ask what it can do and why anyone would want one. A pardon has some limited effects. It will restore any incidents of citizenship that may have been removed, such as the right to serve in the armed forces or to hold other public offices.⁷⁴ A pardon will also permit one to apply for government jobs, obtain bonding or security clearances, and in some cases obtain foreign visas. To some extent, a pardon can give financial reparation for the harm caused and it is defamatory to refer to a pardoned man as though his conviction is still extant.⁷⁵ If the conviction had removed pension rights, these too would presumably be restored.⁷⁶

None of the above benefits would apply to Louis Riel.

VI. POSTHUMOUS PARDONS

Although there is no law that expressly prohibits it, Canada has never issued a posthumous pardon. It is likely that such a pardon could not

⁷² *Corpus Juris Secundum*, vol. 67A, §18 at 21-23 (MA, U.S.A.: Thomson West, 2002) (Restatement of American Law). For more on the American law on pardons, see *United States v. Wilson*, 32 U.S. (Pet.) 49 (1933), and Mark P. Zimmert, "The Law of Pardon" (1974) *Ann. Surv. Am. L.* 179. For a consideration of Civil War guilt and presidential pardon, see *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 18 L. Ed. 366 (1867). For an American review of English authority on the pardon and the extent of pardon power, see *Ex Parte Wells*, 59 U.S. (How.) 307, 15 L. Ed. 421 (1856). For presidential conditional pardon of Teamsters' president Jimmy Hoffa, see *Hoffa v. Saxbe*, 378 F. Supp. 1221 (1974). For amnesty for Vietnam draft dodgers, see *United States v. Lockwood*, 382 F. Supp. 1111 (1974), 604 F.2d 7. For President Ford's pre-conviction pardon of Richard Nixon, see *Murphy v. Ford*, 390 F. Supp. 1372 (1975) [*Murphy*]. See Rolph, *supra* note 5 at 108.

⁷³ *Page v. Watson*, 140 Fla. 536, 192 So. 205 (1938), cited in *Murphy*, *supra* note 72 at 1375.

⁷⁴ For a survey, see Mirjan R. Damaška, "Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study" (1968) 59 *J.C.L.* 347.

⁷⁵ *Cuddington v. Wilkins* (1615), *Hob.* 67, 80 *E.R.* 216; *Leyman v. Latimer* (1878) 3 *Ex. D.* 352.

⁷⁶ Riel was entitled to a pension as a three times elected member of Parliament. The result of his high treason conviction was that his pension was denied to his widow and children.

lawfully be issued pursuant to either the *Criminal Code* or the *Criminal Records Act*. These Acts apply only to a "person" and someone who has been dead for 118 years is not legally a "person."⁷⁷

The legal definition of "person" has changed over the years. It was not until 1929 that women were considered "persons" for the purposes of appointment to the Senate.⁷⁸ Also, for legal purposes a fetus is not a "person,"⁷⁹ while a corporation is. For criminal law purposes, courts have usually held that a "person" must be alive and breathing. If a fetus is not a "person" for the purposes of criminal negligence under the *Criminal Code*, it is unlikely that a dead man would be a "person" for the purpose of a pardon under that same *Code* or the related *Criminal Records Act*. Therefore, a pardon under the *Criminal Code* or the *Criminal Records Act* likely would not be granted posthumously. This means that a posthumous pardon issued in Canada could be granted only pursuant to the Governor General's royal prerogative of mercy or by an act of Parliament.⁸⁰

Criminal charges apply only to a living person. They cannot be inherited. If a person dies before being brought to justice or even during the trial, the case is ended. If a deceased cannot be brought to justice, can a deceased be relieved of injustice? While no posthumous pardons appear to have been granted in Canada, the practice is increasing in other countries.⁸¹

In England at least two posthumous pardons have been issued. In 1950, Timothy John Evans was convicted of murder and was executed. In 1966, the Queen issued a posthumous pardon on the advice of the Home Secretary.⁸² In 1998, another posthumous pardon was issued

⁷⁷ *Criminal Records Act*, *supra* note 64, s. 3(1): "A person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament, may apply to the Board for a pardon in respect of that offence...."

⁷⁸ *Re Section 24 of the B.N.A. Act*, [1930] 1 D.L.R. 98, [1929] 3 W.W.R. 479, as to the meaning of the word "Persons" in Section 24 of the *British North America Act, 1867*, now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. And see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 33(1): "Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations."

⁷⁹ See *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 where a fetus was found not to be a "human being" for the purpose of right to life; *R. v. Sullivan*, [1991] 1 S.C.R. 489, 122 N.R. 166 where a fetus was found not to be a person within the *Criminal Code* offence of death by criminal negligence.

⁸⁰ The Governor-General can grant free and conditional pardons, remission of fine, forfeiture and pecuniary penalty. However, the power is used only when it is not possible to proceed under the *Criminal Code*.

⁸¹ *Halsbury's Laws of England*, 4th ed., vol. 8(2) (London: Butterworths, 1996) at 482, para. 823.

⁸² See U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 734, col. 38-40 (18 October 1966) (Dr. Rt. Hon. Horace King, M.P.); Darryl W. Jackson *et al.*, "Bending toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper" (1999), 74 *Ind. L.J.* 1251 at 1274-1276 [Bending toward Justice].

to Derek Bentley who was convicted of murder and executed in 1953.⁸³ This particular posthumous pardon is most ironic because it was a pardon only in respect of sentence. It adds insult to injury to reduce a sentence forty years after a man has been hanged.

In England, since the changes to the *Criminal Appeal Act 1995*,⁸⁴ it is possible to refer posthumous cases to the Court of Appeal for a reconsideration of the case.⁸⁵ Under such circumstances the reconsideration is treated as an appeal against conviction. In two cases, the Court of Appeal has quashed convictions that in the 1950s resulted in executions.⁸⁶ It is interesting to note that Derek Bentley was pardoned in respect of sentence and later had his conviction quashed.

In the United States, there have been several posthumous exoneration. In 1977, Massachusetts Governor Michael Dukakis issued a pardon stating that Sacco and Vanzetti had been denied a fair

83 *R. v. Bentley (Deceased)* [1998] E.W.J. No. 1165 (QL), EWCA Crim. 676 (BILII); see Criminal Cases Review Commission (CCRC), online: <<http://www.ccrcc.gov.uk>>. The CCRC was established pursuant to the recommendations of a Royal Commission Report, which was presented to the British Parliament in July of 1993. The Royal Commission was charged with examining the effectiveness of the criminal justice system in securing the conviction of the guilty and the acquittal of the innocent. The Royal Commission itself was established largely in response to the spectacular miscarriage of justice in the case of the Birmingham Six, who were freed after the Court of Appeal quashed their convictions for the murder of twenty-one people. One of the recommendations of the Royal Commission was the establishment of an independent body (the CCRC) to consider miscarriages, to arrange for investigation, and to refer cases to the Court of Appeal. The CCRC also can, on request of the Court of Appeal, assist the court on issues before it decides a case, give advice to the Home Secretary with respect to the issuing of royal pardons, and refer pardon cases to the Home Secretary. For more on the CCRC and the Royal Commission see online: Criminal Cases Review Commission <http://www.ccrcc.gov.uk/aboutus/aboutus_background.html>.

84 (U.K.), 1995, c. 35.

85 In Canada, pursuant to s. 690 of the *Criminal Code*, *supra* note 44, the Minister of Justice, on an application for mercy by a person convicted in proceedings by indictment or sentenced to preventative detention, may order a new trial or hearing or refer the matter to the Court of Appeal, or direct a reference. In *Reference re: Milgaard (Can.)*, [1992] 1 S.C.R. 866, 90 D.L.R. (4th) 1 [Milgaard], the Governor in Council referred the case to the Supreme Court of Canada to determine whether the continued conviction of David Milgaard would constitute a miscarriage of justice. Even if the record did not establish that there had been a miscarriage of justice, the Court might still have considered advising the Minister to grant a conditional pardon under s. 690(2).

86 See CCRC, online: <<http://www.ccrcc.gov.uk>> for the case of *R. v. Mattan (Deceased)* [1998] E.W.J. No. 4668 (QL), EWCA Crim. 676 (BILII). Mr. Mattan was hanged in 1952 following his murder conviction. The CCRC referred the case to the Court of Appeal, which quashed the conviction in 1998. The Court of Appeal ruled that the conviction was unsafe because the main prosecution witness was unreliable. See also *R. v. Bentley (Deceased)*, *supra* note 83.

trial when they were convicted of murdering a paymaster and his guard during a 1920 robbery.⁸⁷ They were executed in 1927 in a case that continues to stir public debate. Their supporters argue that they were convicted because of their anarchist beliefs, rather than by compelling evidence.⁸⁸ Governor Dukakis, in granting the pardon, said the trial was rooted in prejudice and tainted by withheld evidence. The pardon did not declare the men innocent or overturn their convictions. It stated that "any stigma and disgrace should be forever removed" from their names.⁸⁹ The posthumous exoneration generated a furious public backlash with the result that the Massachusetts Senate voted to censure the governor.⁹⁰

At least nine states in the U.S. have granted posthumous pardons since 1977.⁹¹ None of these states has seen any impediment to issuing

⁸⁷ Bending toward Justice, *supra* note 82 at 1282.

⁸⁸ *Fatal Flaws: Innocence and the Death Penalty in the USA* (12 November 1998), online: Amnesty U.S.A. <<http://www.amnestyusa.org/rightsforall/dp/innocence/innocent-1.html>>.

⁸⁹ Bending toward Justice, *supra* note 82 at 32.

⁹⁰ See Amnesty U.S.A., *supra* note 88:

Authorities in the USA have never directly admitted to executing an innocent person in this century. A classic instance is the famous case of Nicola Sacco and Bartolomeo Vanzetti, executed by the state of Massachusetts in 1927 despite worldwide protest. In 1977, on the 50th anniversary of the executions, Massachusetts Governor Michael Dukakis directed that their names be cleared, after an investigation concluded the prosecutor in the case had "knowingly" used "unfair and misleading evidence", that the trial had taken place in an atmosphere of prejudice against foreigners (both defendants were Italian immigrants) and that the judge had presided over the case in a prejudicial manner. However, the Governor stopped short of conceding that the innocence of Sacco and Vanzetti had been established.

For more on Sacco and Vanzetti, see Herbert B. Ehrmann, *The Case that Will Not Die: Commonwealth vs. Sacco and Vanzetti* (Boston: Little, Brown and Company, 1969).

⁹¹ In some states the governor has the exclusive authority to bestow pardons. In others, the recommendation of an advisory board is required for the governor to issue the pardon. In some, the pardon power is vested in the decision-making body, which includes the governor. In Georgia, the State Board of Pardons and Paroles has the authority to issue pardons. In 1986, the Nebraska Board of Pardons overturned the conviction of William Jackson Marion, who had been convicted of murder and hanged in 1887: Bending toward Justice, *supra* note 82 at 35. The Board issued the pardon after hearing argument that the body had been misidentified and that the man thought to have been murdered had been seen alive four years after Marion's hanging. In 1979, Pennsylvania Governor Shapp granted a posthumous pardon to Jack Kehoe, who had been executed in 1878. Kehoe was a leader of the Molly Maguires, a group of Irish coal miners. He was convicted of murdering a mine foreman after a trial that the Pennsylvania Board of Pardons said was conducted "in an atmosphere of religious, social, and ethnic tension": Bending toward Justice, *supra* note 82 at 33. For more on the Molly Maguires see Kevin Kenny, *Making Sense of the Molly Maguires* (New York: Oxford University Press, 1998).

posthumous pardons. In 1999, President Clinton pardoned the first black Army officer, Lieutenant Henry Flipper, of a military conviction. Flipper was convicted in 1882. This was the first posthumous pardon issued by a United States President.⁹² Also in 1999, the United States Senate voted to exonerate two officers blamed for decades for the 1941 Japanese attack on Pearl Harbour. The Senate voted to give posthumous pardons to both officers and restore them to the ranks they held before 1941.

In 1998, Russia granted posthumous pardons to several cousins of Adolf Hitler who died in Soviet prisons after being arrested at the end of World War II. They were "rehabilitated" after the Russian military concluded that they had no links to Hitler's crimes and were innocent victims of repression. In 2000, the New Zealand government announced it would proceed with a bill granting posthumous pardons to five New Zealand soldiers executed during World War I for desertion or mutiny. This announcement came following emergence of evidence that the men suffered from shell shock or illness.

In many of these cases, the families or supporters actively sought the posthumous pardon. As a result, there is an assumption that the person being pardoned (or his family and supporters) would accept a pardon and all of its consequences. The interesting point about the recent calls for a pardon for Riel is that they are being sought in spite of protests by the Riel family and the Métis people. However, under the law, it seems that no family consent or acceptance is required.

During the 1800s in the U.S., the defendant himself had to accept the pardon. In *Burdick v. United States*⁹³ the Court held that acceptance of a pardon was necessary. In another case, the Court recognized that the stigma of a pardon might be more burdensome than the consequences of a conviction: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."⁹⁴

The requirement of acceptance was abandoned by the United States in 1927 when Holmes J. stated that a pardon was an act for the public welfare and "not a private act of grace from an individual happening to possess power."⁹⁵ Holmes J. wrote that the prisoner "on no sound principle ought to have any voice in what the law should

⁹² Bending toward Justice, *supra* note 82.

⁹³ 236 U.S. 79 (1915), 59 L. Ed. 476 (1915). The case concerned a city editor of a newspaper, who refused a presidential pardon that was extended to induce him into answering federal grand jury questions.

⁹⁴ *United States v. Wilson*, 32 U.S. (7 Pet.) 150 at 161 (1833), 8 L. Ed. 640 (1833).

⁹⁵ *Biddle v. Perovich*, 274 U.S. 480 at 486 (1927), 71 L. Ed. 1161 (1927) [Biddle].

do for the welfare of the whole."⁹⁶ Thereafter, a pardon no longer required acceptance by the offender in the U.S.

The Supreme Court of Canada explored the necessity of acceptance in *Re Royal Prerogative of Mercy Upon Deportation Proceedings*⁹⁷ and reasoned that a pardon "is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."⁹⁸ This is a clear statement that greater public welfare, over and above the wishes of the Riel family and the Métis people, will be the guiding principle for a posthumous pardon for Louis Riel.

VII. PARDONS AS MERCY OR JUSTICE

It is not surprising to note that the judicial system is fallible and does not always give rise to the correct decision about guilt or innocence, even when all appeals are exhausted. The very existence of the pardon is an acknowledgment that there are failures in the system. Indeed, the power to punish and the power to remit punishment have always been intimately connected. The power of leniency or remission of punishment is usually understood as an act of mercy—as if to say "the system has exacted enough suffering from this person, let him go."⁹⁹ While this is the common perception of pardons, it is not accurate. An examination of the history of the pardon indicates that mercy is rarely, if ever, the motivating factor for pardons. Certainly in Canada it cannot be said that modern pardons are issued as an act of mercy. After all, while it may have practical results, it is hardly an act of mercy to pardon a person after he has served his full sentence and shown proof of exemplary behaviour for up to five years following release.

If the purpose of most pardons has not often been mercy, it can be said that in some situations the purpose has been to correct judicial mistakes. In Britain, prior to the establishment of the Court of Criminal Appeal in 1907, virtually the only hope for the wrongly convicted or too harshly sentenced was a pardon by the Home Secretary.¹⁰⁰ When the appeal system was created in Britain, it was thought that it would forever relieve the Home Secretary of having to use the pardon powers

⁹⁶ *Ibid.* at 487.

⁹⁷ [1933] S.C.R. 269, 2 D.L.R. 348 [cited to S.C.R.].

⁹⁸ *Ibid.* at 273, quoting Holmes J. in *Biddle*, *supra* note 96; see also *Re Veregin* (1933), 2 D.L.R. 362, 59 C.C.C. 315.

⁹⁹ See *de Freitas v. Benny*, [1976] A.C. 239 at 247 (P.C.), where the Court held that "[m]ercy is not the subject of legal rights. It begins where legal rights end."

¹⁰⁰ The case of Adolf Beck, who was twice wrongfully imprisoned, was the catalyst that eventually moved the English Parliament to create the new Court of Appeal. See Eric R. Watson, ed., *Notable British Trials: Adolf Beck, (1877-1904)* (Florida: Gaunt, 1995); Rolph, *supra* note 5 at 36.

to correct the mistakes of the justice system.¹⁰¹ In reality, this turned out to be a vain hope. In fact, the only country where there has been an attempt to abolish the use of clemency powers and rely solely on the justice system was France after the revolution.¹⁰² The experiment was short lived as the need for some extra-judicial means of mitigating the harshness of the justice system again became apparent.¹⁰³ History seems to show us that pardons may never be eliminated as a means of correcting judicial mistakes.

The pardon is also used in some countries to offer relief to the innocent.¹⁰⁴ This is a most unfortunate use of clemency—when a wrongfully convicted man is pardoned for something that he has not done.¹⁰⁵ The pardon under such circumstances is a poor substitute for a declaration of innocence.¹⁰⁶ In some instances pardons merge mercy and justice. Before the death penalty was abolished, insane persons could be hanged for certain convictions. In this situation they could be said to have a claim to mercy as a matter of justice because their access to justice relied on mercy.

VIII. PARDONS AS POLITICAL EXPEDIENCY

A review of the pardoning power shows that historically it has been used most often for political reasons. It is this predominant use that overshadows the mercy or justice enhancing qualities of the power.

In Britain and the United States, there is a long history of using pardons to forestall or rescind impeachment.¹⁰⁷ In the early 1700s,

¹⁰¹ See Sir Leon Radzinowicz & Roger Hood, "Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem" (1979) 127 U. Pa. L. Rev. 1288 at 1340.

¹⁰² In France today a pardon is issued only to someone who has committed an unlawful act. See Rolph, *supra* note 5 at 69.

¹⁰³ David Tait, "Pardons in Perspective: The Role of Forgiveness in Criminal Justice" (2001) 13 Federal Sentencing Reporter 134 at 134-35, outline available online: National Court of the Future <<http://ncf.canberra.edu.au/events/pardonsperspective.pdf>> at 3.

¹⁰⁴ Finnish law does not regard an innocent man as a man who can be pardoned. See Rolph, *supra* note 5 at 71.

¹⁰⁵ Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1 (London: MacMillan, 1883) at 317: "the inconsistency of pardoning a man for an offence on the ground that he did not commit it." See also *Faderman*, (1850) 1 Den. 565 at 569, 169 E.R. 375 at 377.

¹⁰⁶ The miscarriage of justice of Alfred Dreyfus in France involved more than one offer of pardon, which he adamantly refused on the basis of his innocence. For more on Dreyfus see Rolph, *supra* note 5 at 63. Also see Emile Zola, *The Dreyfus Affair: 'l'accuse' and Other Writings*, trans. Eleanor Levieux (New Haven: Yale University Press, 1996).

¹⁰⁷ Charles II attempted to use his pardon powers to forestall impeachment of the Earl of Danby in 1678. Thomas Osborne, the Earl of Danby (1631-1712), had held various offices including Treasurer of the Navy, Privy Councilor, and Lord Treasurer. He was a staunch royalist, a fervent Anglican, and opposed to British alliance with France. While telling Parliament he was raising funds for war with

pardons were sought to rescind the impeachment of three Scottish Lords involved in the first Jacobite rebellion¹⁰⁸ and a pardon was used in 1805 to rescind the impeachment of Lord Melville.¹⁰⁹ In the United States, as part of the deal to remove President Nixon and forestall impeachment, President Ford pardoned Nixon after he resigned his presidency, but before he was charged with any offence.¹¹⁰

Britain has also made inventive use of the pardon to effect spy swaps. The case of the Krogers is the best-known example of this use of the pardon. The British government pardoned the Krogers, convicted spies who had been sentenced to twenty years imprisonment. The Krogers were then exchanged for a British subject imprisoned in a

France, he was reluctantly and under express orders from Charles II, negotiating a French alliance. Parliament was outraged and since the King was beyond reach, they took steps to impeach Osborne. Charles II pardoned the Earl prior to the conclusion of the impeachment process. This further outraged Parliament, which investigated limiting the scope of the royal pardoning prerogative. As a result of a political compromise, Osborne was not impeached, but he was imprisoned for five years.

¹⁰⁸ The unsuccessful Scots uprising of 1715 led to the impeachment of five lords. All pleaded guilty to charges of high treason and all but one received a sentence of death. Several intercessions seeking mercy were attempted. They were refused by both the King and the House of Commons. However, the House of Lords passed a motion to address His Majesty to grant them a reprieve. The reprieve was granted, but was of short duration and on February 24, 1716, the lords were beheaded. In April and May, twenty-two other prisoners were executed and approximately seven hundred were transported as slaves to West India merchants. Transportation was considered cruel punishment because the majority were Highlanders who had joined the insurrection in obedience to the commands of their chiefs. Public opinion shifted because of the severities exercised by the government. Though the rebellion was extinguished, its spirit remained and was, in fact, bolstered by the proceedings of the government. The Whigs, afraid of losing the election, prolonged Parliament to seven years. Finally in 1717, an act of grace was passed by the King and both Houses of Parliament that granted a free and general pardon to all persons who had committed any treasonable offences (except those who had been transported or attained and all persons of the name and clan of MacGregor). All others were freely pardoned and discharged.

¹⁰⁹ Henry Dundas, 1742-1811, First Viscount Melville. He was a career politician who served in several offices under William Pitt the Younger and was known as "King Harry the Ninth" and "The Uncrowned King of Scotland" for his skillful management of Scottish politics, 1775-1805. He was investigated by a special commission of inquiry regarding his financial management of the Admiralty as Treasurer. The commission's report in 1805 resulted in his impeachment. He was later acquitted of wrongdoing. See *Viscounts Melville Papers*, William L. Clements Library, The University of Michigan, online: <<http://www.clements.umich.edu/webguides/Arlenes/M/Melville.html>>.

¹¹⁰ Kobil, *supra* note 7 at 573, where he notes that President Nixon's advisors gave serious consideration to the possibility that President Nixon could pardon himself. And see U.S., *Pardon of Richard M. Nixon and Related Matters: Hearings Before The Subcommittee on Criminal Justice of the House Commission on the Judiciary*, 93rd Cong., 2d Sess. 154 (1974) (Gerald Ford).

foreign country. In defending the decision to release the Krogers, the Foreign Secretary carefully avoided using the term "pardon," stating only that "a recommendation will be made for the remission...of the remainder of the sentence."¹¹¹

Clemency granted in the form of pardons and amnesty has always played an important role in the remission of punishment. Amnesty, like a pardon, can be granted before or after conviction. The chief distinction between amnesty and pardon is that amnesty is usually granted to large groups of people. Frequent use of pardons and amnesty has been a feature of war, rebellion, and regime change. It has been used to cement the peace following civil conflict throughout history all over the world.

In the United States, a general grant of amnesty authorized by statute was used to restore peace after the Civil War.¹¹² Following the Vietnam War, President Carter granted amnesty to those who evaded service in Vietnam.¹¹³ After the collapse of apartheid in South Africa, a Truth and Reconciliation Commission was established in 1994. The Commission held hearings, made recommendations for reparations, and granted amnesty. By 2000, the Commission had granted amnesty or immunity from prosecution to over a thousand people.¹¹⁴

There is also a history of granting pardons to commemorate religious or civil ceremonies. The Islamic Republic of Iran grants pardons or commutes punishment during Iranian national or religious events. The Ayatollah Khamenei recently granted amnesty to or commuted the penalties of 279 Iranian prisoners who had been indicted in military courts. The grants were made at the request of the Judiciary Chief and did not include those held for rape, robbery, or threats to national security.

¹¹¹ U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 787, cols. 2146-56 (24 July 1969) at 2146. Remission of sentence is one of the recognized forms of pardon.

¹¹² Act of July 17, 1862, c. 195, §13, 12 Stat. 589 at 592, repealed by Act of January 21, 1867, c. 8, 14 Stat. 377: "[T]he President is hereby authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare."

¹¹³ Exec. Order No. 11967, 42 F.R. 4331, 3 C.F.R., 1977 at 91.

¹¹⁴ South Africa, Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, vols. 1-4 (Cape Town: CTP Book Printers, 1988) (Chair: Desmond Tutu). In its report, the Commission made extensive recommendations for reparations to victims in the form of monetary compensation, expunging criminal records and making symbolic reparations (monuments and renaming streets and community facilities). There was statutory recognition that healing and reconciliation required reparation in order to counterbalance the consequences of granting amnesties because victims would subsequently be denied the right to launch civil suits against the perpetrators and the state. See also Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity: How Truth Commissions around the World are Challenging the Past and Shaping the Future* (New York: Routledge, 2001).

Grants of clemency are also used as a good will gesture to ease internal political tensions. A recent example was seen when Russia offered amnesty to Chechen guerrillas.¹¹⁵

Another common practice is to issue pardons at the end of a term of power. In the final days of the Clinton administration dozens of pardons were issued, some of which were extremely controversial. In Argentina, President Duhalde, at the end of his term in office, pardoned a former guerilla chief and leader of a failed coup. In South Dakota, outgoing governor Bill Janklow pardoned American Indian activist Russell Means, wiping out a felony conviction from 1974. Means, a co-founder of the American Indian Movement, gained national attention when AIM members and supporters took over the village of Wounded Knee on the Pine Ridge reservation in 1973.

As can be seen from the above discussion, clemency powers in the form of pardons and amnesty can be used to forestall or gain a political result, as a protection mechanism, as a means of cementing the peace, or simply to express a shift in public opinion. The fact that in these situations the government grants a pardon to an individual or an amnesty to a group, shows that the pardon power is far more extensive than the concepts of mercy or justice would seem to indicate. A pardon may be thought to suggest forgiveness or the excusing of a fault, but that is hardly an apt description for action taken in the name of the public welfare or state expediency.

And it is this third purpose—state expediency—that is most pertinent to the current discussion of the exoneration of Louis Riel. Clearly, a pardon for Riel would not be mercy because he served his full sentence. It cannot be 'corrective justice' as the 'justice' of a death penalty cannot be corrected after the fact. A pardon for Riel would be political expediency. In 1885, Riel was the "one man to blame." He was sentenced and hanged in order to serve the political purposes of the Macdonald government. Now a pardon is contemplated, not as justice or mercy, but as a way to serve the political purposes of this day. A pardon is seen as a means of reconciling francophone/anglophone differences, pacifying Quebec, and perhaps addressing the injustices that have been meted out to Aboriginal peoples.

IX. A BILL TO EXONERATE

The other proposed method of exonerating Riel is by means of a bill in Parliament or the Senate. From 1983 to 2001, twelve bills were proposed in Parliament and the Senate to exonerate Louis Riel.¹¹⁶

¹¹⁵ See "Chechen Amnesty Approved" *BBC News* (6 June 2003), online: BBC News <<http://news.bbc.co.uk/1/hi/world/2968190.stm>>.

¹¹⁶ See *supra* note 10.

None was passed. There has never been a government-sponsored bill to exonerate Louis Riel.

Parliament, pursuant to its criminal law powers, clearly has the authority to enact a law that has the effect of either overturning or reversing a judicial decision. In fact, Parliament reacts to judicial decisions all the time. It is part of the dynamic democratic process.¹¹⁷ Parliament passes a law, the judiciary strikes it down for any number of reasons, and Parliament amends or enacts a new law. Any action by Parliament to exonerate Riel could be seen as part of this democratic process. What is unusual, in the context of the proposed exoneration bill for Riel, is the extreme length of time between the judicial decision and the proposed legislated response.

Concern has been expressed that the exercise of a bill to exonerate Riel would interfere with the independence of the judiciary. This is a reasonable acknowledgment of the respective constitutional spheres and it reflects the concern that the work of the courts can be completely undone by an act of the government or the executive. After all, one can envision situations where the courts might be required to quash a conviction after a pardon had been granted.¹¹⁸ However, as we have seen from the British example, it is possible for the legislature to pass a bill that gives the courts jurisdiction to review posthumous miscarriages of justice as if they were appeals, even after a pardon has been granted.¹¹⁹

With the exception of amnesties granted after the American Civil War pursuant to statute,¹²⁰ there are few examples of clemency powers being issued by means of legislative action. The more usual method is by executive (monarch or presidential) grant. There is a New Zealand example of the use of a bill to exonerate a man, but it was not a posthumous exoneration. It involved John James Meikle who was convicted of sheep stealing in 1877 and sentenced to seven years in prison. There was no Court of Appeal in New Zealand at that time

¹¹⁷ See e.g. Kent Roach, "Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 at 510-13, for a dialogue between the Court and Parliament with respect to constructive murder that took place from 1942 to 2000. The dialogue involved several amendments to the *Criminal Code* and several judicial pronouncements reminding the legislature about the fundamental principle that no one should be convicted of murder in the absence of a finding of fault. The dialogue took place over a period of almost sixty years.

¹¹⁸ *R. v. Peace*, [1976] 1 Crim. L.R. 119. In this case the applicant pled guilty and was convicted of arson and conspiracy to defraud. He was granted a free pardon and then applied to have the conviction set aside. The Court of Appeal held that it had no jurisdiction to set aside the conviction and, therefore, could not consider the effect of the pardon.

¹¹⁹ See *R. v. Bentley (Deceased)*, *supra* note 83.

¹²⁰ See Act of July 17, 1862, *supra* note 112.

and Meikle's only redress was by way of petition to Parliament claiming wrongful conviction. As a result of his petition, two judges of the Supreme Court were appointed to inquire into the matter. Their report stated that the evidence was not conclusive of guilt and that if the matter had been the subject of a retrial, Mr. Meikle would have been acquitted. In response, the General Assembly of the New Zealand Parliament enacted the *Meikle Acquittal Act*.¹²¹ The private Act, meaning that it applied only to Meikle and could not be used for the benefit of others, reversed the conviction and expunged the record "as if the said judgment and conviction had not been given or obtained."¹²² The reversal of Meikle's conviction came twenty-one years after his conviction. Prior to the passage of the Act, Meikle was granted £500 "in full satisfaction of all claims made by him in connection with his prosecution and conviction and all losses sustained thereby."¹²³ There was considerable opposition to the Act from members of Parliament who disapproved of Meikle. Others opposed the private Act because they would have preferred a public Act that could apply to anyone who was wrongfully convicted, sentenced and beyond the court's rescue.¹²⁴

In Canada, the Minister of Justice can refer cases to the courts and has done so in the case of David Milgaard.¹²⁵ Usually in Canada, we have used the instrument of the Royal Commission to inquire into miscarriages of justice that have exhausted the entire trial and appeal process. Most notable was the case of Donald Marshall.¹²⁶

More recently the federal government instituted a Royal Commission to inquire into Aboriginal peoples generally. Interestingly, this Royal Commission was instituted in response to the events at Oka in 1990. Canada has learned somewhat from its response to the events of 1885 in Saskatchewan. While it still charged and convicted the participants from Oka, it ameliorated the sense of injustice Aboriginal peoples felt by setting up the Royal Commission of inquiry. It was in response to the *Report of the Royal Commission on Aboriginal Peoples*¹²⁷ that the federal government made its *Statement of Reconciliation*,¹²⁸ which

¹²¹ (N.Z.), 1908, No. 1 (Private).

¹²² *Ibid.*, s. 3.

¹²³ Rolph, *supra* note 5 at 129, citing N.Z., "Report of the Petitions Committee," September 1905 (Appendixes to the *Journal of the New Zealand House of Representatives*, 1905, 1-2 at 5-7).

¹²⁴ *Ibid.*

¹²⁵ *Milgaard*, *supra* note 85.

¹²⁶ See Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1-7 (Nova Scotia: Queen's Printer, 1989). See also Association in Defence of the Wrongly Convicted, online: <<http://www.aidwyc.org>> for information regarding Guy Paul Morin, Steven Truscott, etc.

¹²⁷ *Supra* note 34.

¹²⁸ See text accompanying note 39, above.

promised some form of redress for Riel. It was pursuant to that promise that the government offered a pardon in the form of a bill.

Would a bill passed by Parliament or the Senate be a pardon? The answer is yes. Parliament has the authority to issue a pardon. Pardons can be granted pursuant to the royal prerogative by executive orders or proclamations, pursuant to statutes such as the *Criminal Code* and *Criminal Records Act*, or pursuant to Parliament's concurrent pardoning power via a government sponsored or private member bill.

There are several distinct types of pardon and the effect of each is different.¹²⁹ There is no standard form in which a pardon must be issued. As a result, it is not possible to generalize about the legal effects of a pardon. The best view is that it always depends on what the pardon itself states. With the notable exception of President Ford's pardon of Richard Nixon, a pardon usually states the offences that it covers. Also, a pardon does not have to indicate on its face that it is a pardon. It is issued pursuant to lawful authority and would likely be considered a pardon regardless of what it says on the face of the document. Indeed, this is precisely what was proposed by the Federal Department of Justice in 1998. The Department drafted a bill to exonerate Riel and stated that, in deference to the opposition of the Riel family and the Métis, it would not use the word "pardon." However, the Department made it clear that in its opinion, such a bill would still be a pardon.

While most of the bills to exonerate Riel were not called pardons, at least three of the bills that were introduced into the House of Commons were called a pardon on the face of the bill. The bills also contained the following saving provision:

Nothing in this Act shall be construed as limiting or reflecting in any manner Her Majesty's royal prerogative of mercy or the *Letters Patent Constituting the Office of Governor General of Canada* relating to pardons.¹³⁰

¹²⁹ An absolute pardon forgives the offence, without any conditions, and absolves the offender of most legal consequences. A conditional pardon limits forgiveness from a specific date or on the performance or non-performance of specific acts. A partial pardon relieves the offender of only a portion of the legal ramifications of conviction. Remission, another form of pardon, has two aspects: remission of sentence and remission or remittance of fines and forfeitures that accrue from offences. Remission reduces the sentence or penalty without changing its character.

¹³⁰ See Bill C-380, *An Act respecting the designation of a Louis Riel Day and revoking his conviction of August 1, 1885*, 2d Sess., 35th Parl., 1996-97, cl. 5; Bill C-297, *An Act to revoke the conviction of Louis David Riel*, 2d Sess., 35th Parl., 1996-97, cl. 2; Bill C-411, *An Act respecting Louis Riel*, 1st Sess., 37th Parl., 2001, cl. 5. Note that in Bill C-380 and Bill C-411, the word "affecting" is used instead of "reflecting."

Such clauses relate to the historic displacement of the prerogative by statute and are intended to preserve the prerogative of mercy.¹³¹ These clauses, by their very existence, imply that the power being exercised in the bill, whether clearly stated or not, is an exercise of the legislature's pardoning power. Bills are not issued pursuant to the royal prerogative of mercy, but there would be no need to insert such a clause if the bill were not a concurrent exercise of the legislature's pardoning power.

As we have seen above, clemency can come in many forms—pardon, amnesty, commutation, remission of fines, and reprieve. Clemency can have many names—grace, leniency, mercy, exoneration, and exculpation. Clemency can have many effects—reversal or revocation of conviction, restoration of civil rights or reduction of sentence. Clemency can be issued for many reasons—mercy, corrective justice or political expediency. Finally, clemency can be issued pursuant to different authorities—as a legislative exercise via a private bill, under a public statute, or by means of a grant under the royal prerogative of mercy. A bill to exonerate Riel would be an extrajudicial exercise of clemency. Regardless of its form, name, effect, reason, or issuing authority, and with due respects to Gertrude Stein, a pardon is a pardon.

X. THE VALUE OF THE DEBATE

The movement to exonerate Riel, whether by means of a pardon or a bill, shows the ongoing interest in the man. Regardless of whether one is for or against the exoneration of Riel, it is clear that at the dawn of the twenty-first century, Canadians continue to be interested in a man from the nineteenth century.¹³² His actions and reputation continue to speak to us across the centuries. Riel still has meaning for us.

There are many who remark on the amazing fact that Canada has engaged in a hundred-year discussion about Riel and his cause. However, there are many other instances of past injustices in other countries that have never been successfully laid to rest. It appears that, throughout the world, we accept the idea that there is inherent value in an examination of the historical record and that we, as Canadians, are prepared to re-evaluate our past.

There is inherent value in this ongoing public discussion and examination of the life and work of Louis Riel. Examining his work

¹³¹ See Hogg & Monahan, *supra* note 62 at 17: "The prerogative can also be displaced, abolished or limited by statute, and once a statute has occupied the ground formerly occupied by the prerogative, the Crown must comply with the terms of the statute."

¹³² For a discussion of ongoing representations of Riel, see Braz, *supra* note 11.

serves to focus debate on the many issues he represented—issues that continue to capture our attention to this day. Riel was an articulate advocate for Aboriginal peoples against the white hegemony, for the francophone minority against the anglophone majority, for Catholics against Protestants, and finally, he was the alienated Westerner against the assumed superiority of the East.

The examination of other past injustices has already led Canada to make official state apologies. The Canadian government has apologized to the Japanese Canadians for wrongful internment and confiscation of their property during the World War II,¹³³ to Indians for residential schools, to the Inuit for the forced dislocations of their communities,¹³⁴ and has stated a willingness to do something to exonerate Riel.¹³⁵

Canada's willingness to apologize for past injustices makes it unique among the western democracies. After all, one can scarcely imagine the United States making an official government apology to African Americans for legalized slavery. Similarly, Russia has not apologized to the millions of political prisoners who fueled its gulag system of labour in Siberia.

Official state apologies do have value. Such apologies are a clear statement that the government of today disassociates itself from past actions. In making the apology, the government is saying to the people it previously wronged, "We will never do that again: you can expect justice from us from now on." In this sense, justice begins with an apology. But an apology is only the beginning. The second step must be a solid commitment to healing, reconciliation, and reparations. If exoneration of Riel is the first step towards reconciliation with the Métis, then it must be accompanied by further commitments.

Western democracies were founded on the twin principles of democracy and justice. While these principles apply to our present actions and to the future, a nation can and should be vigilant in honouring its past as well. We cannot change our past, but there is good reason to try to understand the historic forces that created our present.

Our past injustices have shaped the Canadian present and, indeed, have affected justice and democracy in other countries. For

¹³³ In February 1988, a redress settlement package for Japanese Canadians was proclaimed. It included an official apology for unjustifiable racist wartime policies, individual compensation of \$21,000 for survivors, and a \$12,000,000 community fund. See "Terms of Agreement between the Government of Canada and the National Association of Japanese Canadians," online: Canadian Race Relations Foundation <http://www.crr.ca/EN/FAQs/RedressAgreement/eFaq_RedressAgreement.htm>.

¹³⁴ *Statement of Reconciliation*, delivered orally in Ottawa by then Minister of Indian and Northern Affairs, Jane Stewart, on January 7, 1998, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/gs/rec_e.html>.

¹³⁵ See text accompanying note 39, above.

example, in 1885 the Canadian federal government created what have come to be known as the "pass laws." These so-called laws were never set out in regulation or law, but were used to keep Indians on reserves. The pass laws established that no Indian could leave the reserve without permission. The laws were initially created to keep Indians in Saskatchewan from joining up with Louis Riel. These laws remained in effect until the 1950s. There is evidence that South African officials borrowed the idea of the pass laws to enforce apartheid.¹³⁶

The reason we seek to reconcile past injustices is to ensure that they will not negatively shape our future and that new injustices will not arise from the ashes of the old. This is the real value of the ongoing debate about Riel. The hanging of Riel is felt by many to be a past injustice—to the man and to his people—that remains unhealed. It continues to shape the future of Canada in negative ways. Robust public debate can help to heal this past injustice.

XI. CONCLUSION

Clemency has a long history of being used to effect political purposes. Grants of clemency imply guilt and never lose the taint of mercy.¹³⁷ They rarely, if ever, restore justice. They are extremely controversial¹³⁸ and they are not known to have any perceivable effect on the public reputation of the recipient. After all, the politically expedient pardon of Richard Nixon did not change public perceptions regarding his reputation or his activities as President of the United States.

Exoneration of Louis Riel would likely have a similar effect. Whatever authority is used to issue the exoneration, and whatever form the exoneration of Riel might take, in substance it would likely have little to do with the Métis people and the cause for which he died. The reputation Riel established during his life would remain the same. It is more likely that the only effect of exonerating Louis Riel would be the appearance that, in an act of political expediency, the government had exonerated itself.

¹³⁶ York, *supra* note 20 at 241 and 248.

¹³⁷ See Rolph, *supra* note 5 at 108, regarding President Ford. While speaking to White House Counsel, with respect to Nixon's pardon, he said that "the granting of a pardon can imply guilt—there is no other reason for granting one": *ibid.*, citing *Congressional Quarterly* (14 September 1974) at 2459.

¹³⁸ President Ford was not elected for a second term. Voter dissatisfaction with his pardon of Nixon contributed to his losing the election. Similarly, Illinois Governor John Peter Altgeld's pardon of the three surviving anarchists wrongfully convicted in 1887 of a bombing in Chicago's Haymarket Square during a labour uprising caused a furor in the press and he was not re-elected. The Massachusetts Senate censured Governor Dukakis for his posthumous pardon of Sacco and Vanzetti.