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**In a Manner of Speaking:  
Towards a Reconstitution of Property in Mid-Nineteenth  
Century Quebec**

**Tom Johnson\***

The author studies the Report of the 1843 Commission appointed to inquire into seigniorial tenure. The contrast with a previous report written in 1836 is striking and the author investigates the rupture in contemporary discourse which in less than a decade led to an official recommendation to abandon the seigniorial system. Of particular interest to the author is the way in which the 1843 Commission interpreted the answers to questionnaires it had sent to seigniors,  *censitaires*, entrepreneurs and other interested parties. The author demonstrates how the information received by the Commission, especially from the  *censitaires*, was recategorized with a view to conforming to its objective of abandoning seigniorial tenure. The Commission is shown to have embodied a Benthamite notion of property. The author concludes that the 1843 Commission exemplified law as an "arena of conflict" wherein legal rules and discourse served to frame the debate on, and to legitimize the abandonment of, the seigniorial system, while preserving the appearance of a democratic proceeding.

L'auteur examine le Rapport de la Commission nommée en 1843 pour enquêter sur la tenure seigneuriale. Ce Rapport contraste avec un rapport antérieur de 1836, et l'auteur s'intéresse à la rupture dans le discours contemporain qui a donné lieu, en moins de dix ans, à une recommandation officielle d'abandonner le système seigneurial. L'auteur s'attache en particulier l'interprétation faite par la Commission de 1843 des réponses aux questionnaires qu'elle avait communiqués aux seigneurs, censitaires, entrepreneurs et autres intéressés. Il démontre comment l'information reçue par la Commission, surtout celle provenant des censitaires, a été interprétée conformément à son objectif d'éliminer la tenure seigneuriale. Il démontre aussi que la Commission avait une notion de la propriété qui relevait de Bentham. L'auteur conclut que la Commission de 1843 illustre le droit en tant que « forum de débat » dans lequel les règles et la discours juridiques ont servi à encadrer les représentations et à légitimer l'abandon du régime seigneurial, tout en maintenant une apparence de processus démocratique.

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## Introduction

Upon disembarkation at Quebec city in the spring of 1836, a visitor would have learned that a report on the topic of land occupation and seigniorial rights had been presented, on 1 March of that year, to the Legislative Assembly of Lower Canada. The Report issued by the Standing Committee of Lands and Seigniorial Rights and authored by the Committee's chairman and sole member, Augustin-Norbert Morin, had been written hastily.<sup>1</sup> Indeed, it consisted of two paragraphs, informing the Assembly that no conclusions had been reached but that in order to present preliminary findings to the current session of the Assembly the Chairman had decided to submit the evidence collected without conclusions. This evidence was gathered by way of interrogation of certain individuals between 9 November and 31 December 1835.<sup>2</sup> The substance of the interrogation (the questions asked) reveals that the Committee was concerned principally about deviations from the "ideal" operation of the two principal settlement schemes in force in the province: seigniorial and quit-rent grants. At issue was the disjunction between promises made by the Crown or seigniors to settlers and the expectations left unfulfilled after a period of time. Under the quit-rent scheme, these promises related to the issue of title to land granted originally by way of a location ticket. Under the seigniorial scheme, complaints related to the breach of the obligation to cede land to *censitaires*, and the obligation to facilitate the erection of mills.<sup>3</sup>

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<sup>1</sup>Lower Canada, House of Assembly, "First Report of the Standing Committee on Lands and Seigniorial Rights" in *Journals of the House of Assembly of the Province of Lower-Canada*, app. EEE (1 March 1836) [hereinafter 1836 Report].

<sup>2</sup>There were eighteen individuals in all. They had petitioned the Assembly, requesting redress of perceived injustices. They were settlers in the District of Gaspé and the Eastern Townships. Their occupations range from "cultivator", "farmer", "surveyor", "navigator" to "Member of the House."

<sup>3</sup>The seignior had the right, provided compensation was given, to appropriate mill sites within his or her seignior. No one else could erect a mill without the seignior's permission. Usually such permission was given only in exchange for compensation. The person who erected the mill — usually the seignior — had the right to compel *censitaires* residing within the borders of the seignior to have all grain intended for personal sustenance ground at the seigniorial mill. The toll for grinding such grain was one fourteenth of the quantity ground. The seignior's right to erect a mill had to be exercised within twelve months of the seigniorial grant, otherwise it lapsed, and any *censitaire* could erect a mill within the seignior.

*E.g.*, those who had settled within seigniories complained of seigniors demanding payment of rents *in specie* rather than in kind at a time of currency shortage (see, *e.g.*, 1836 Report, testimony of Mr. Jacques Auffroi, 9 November 1835, answer 2 — there was a currency shortage throughout the mid to late 1830's, culminating in the failure of banks when the American Bank failed); protested the reservation of all building timber by seigniors within their grants to *censitaires* (answer 4); and objected to the refusal by seigniors to erect mills and took issue with the inability of young settlers to exploit mill sites (answers 7 and 8). They also resented the increase of rents which placed unconceded property within the seignior out of the reach of new settlers (answer 10); and criticized the refusal by the seigniors to allow surveys of concessions or to issue proper titles to the land (answers 13-16).

Close scrutiny of the 1836 Report reveals that neither the Committee nor the respondents envisaged the abandonment of either scheme, but rather the correction or disciplining of behaviour not in conformity with either scheme's "proper" operation. There is no indication in the Report that any of the parties entertained any thought of substituting such alternate forms of property holding as freehold tenure for those currently in place.

In contrast, the returning visitor, disembarking ten years later at Quebec city, would have detected a significant change in the discourse surrounding the issue of property regimes. A new Report, prepared by a Commission appointed to inquire into seigniorial tenure and laid before the Legislative Assembly in the fall of 1843, had been devoted to finding a "fair and equitable means" of commuting the seigniorial lands.<sup>4</sup> This commutation, the Commission noted, had become "the only resource left", and was one that "should be based on strictly just principles."<sup>5</sup> The Commission made this recommendation following the discovery that the seigniorial system, rather than being suitable to the Province's needs, was checking "all progressive improvement in the country ... its resources for advancement in the arts of civilized life are in the hands of the Seigniors, and they may alone reap the advantage."<sup>6</sup> Furthermore, the Commission noted that the *censitaire*

toils through existence without the hope of relief, and transmits to his posterity a worthless inheritance. Under the operation of such a tenure, his right of property may become a mere delusion; as a moral being he is degraded, and his position is one of perpetual dependence.<sup>7</sup>

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<sup>4</sup>Province of Canada, Legislative Assembly, "Report of the Commissioners Appointed to Inquire into the State of the Laws and other Circumstances Connected with the Seigniorial Tenure, as it Obtains in that Part of the Province of Canada heretofore Lower Canada, Laid before the Legislative Assembly, by Message from His Excellency the Governor General, on the 4th October 1843" in *Journal of the Legislative Assembly of the Province of Canada*, app. F at 1 (4 October 1843) [hereinafter 1843 Report].

The Report, while itself an appendix of the *JLAPC*, contains both the Report and two internal appendices, (A) and (B). No pagination exists for the Report or the appendices. Accordingly I have paginated the Report, page one being the first page of the Report itself (*i.e.*, excluding the title page). There are 18 pages in the Report.

The system used by the compilers within each internal appendix is to list the documentary evidence by number. The contents of Appendix A are numbered 1-45. In addition evidence #2 within Appendix A is divided between A-J. The numerical order recommences at 1 in appendix B, and runs to 128. I have followed the system of the compilers for the internal appendices. So, for example, documentary evidence listed as 2H in internal appendix A is listed in the notes that follow as "1843 Report, app. A, #2H". An answer to a question within, for example, documentary evidence #35 of internal appendix B is listed in the notes that follow as "app. B, #35, answer n".

<sup>5</sup>*Ibid.* at 12.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*

Thus the seigniorial system, according to the 1843 Commission, was damaging to seignior and  *censitaire*  alike. The seignior faced the omnipresent threat of riotous overthrow from a permanently oppressed other, the  *censitaire* ; while the  *censitaire* , according to the Report, was at the mercy of a ruthlessly exploitative system. The Commission therefore concluded that "sound policy ... requires that the Feudal Tenure should be abolished."<sup>8</sup>

This new characterization of seigniorial tenure as an "impediment to progress" and "an odious and burdensome tax on improvements" would probably have surprised the returning visitor. Something had transpired within Quebec during the intervening decade: a system fully accepted, indeed praised, by the community as the best-devised settlement scheme in British North America came to be described as "the relic of a barbarous age ... in its practical operations, antagonist to the growth and permanency of free institutions."<sup>9</sup>

Two decades later, after the debate had subsided, and the seigniorial system had been commuted into one of free tenure ( *franc aleu roturier* ), an attentive observer would have noted that the  *censitaires* ' economic obligations to the seignior had not changed significantly. That is, the seigniorial system had been abolished in name, but for those inhabitants unwilling or unable to pay the lump sum necessary for commutation, annual rental payments continued in essentially the same form as before.<sup>10</sup>

If there was no significant material change, it follows that historians of the 1835-1845 period who have premised their analyses on theories of economic determinism may have been misled by some of the hortatory rhetoric at large in the 1840's. This is not to disparage the work of those historians who have participated in the "agricultural crisis" debate, but merely to

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<sup>8</sup>*Ibid.* at 11.

<sup>9</sup>*Ibid.* For analogous 20th-century interpretations, see D.A. Heneker, *The Seigniorial Regime in Canada* (Québec: L.A. Proulx, 1927); M. Trudel, *The Seigniorial Regime* (Ottawa: Canadian Historical Association, 1971) at 17.

<sup>10</sup>At another level there was significant change wrought by the abolition of seigniorial tenure: collection of rental payments was more enforceable following abolition. Moreover, the process of debate over abolition led to confirmation of the seigniors' rights in unconceded land within their seignories — a questionable conclusion under the Custom of Paris. In addition the fragmentation of rights in a given lot of land had been on a horizontal level prior to abolition. That is to say, the two principal parties, seignior and  *censitaire* , held mutually exclusive and equal elements of a total bundle of rights. The seignior held the  *domaine direct* , while the  *censitaire*  held the  *domaine utile* . Following abolition, there was only one set of rights in the same lot of land, held by one individual. If two parties wished to hold rights in the same piece of land under the new scheme ( *franc aleu roturier* ), the only way in which it could be accomplished was by the principal party conceding a lesser portion of the totality to the other party in such a manner that the second party was subordinated to the first in a debtor/creditor relationship. That is to say, following abolition fragmentation of property rights within the community took place on a vertical, rather than horizontal level.

emphasize the need to examine the discursive strategies of the relevant historical actors.<sup>11</sup>

The methodological assumption on which this essay rests is that law can be regarded as an "arena of conflict" wherein discursive struggles take place. This approach has been successfully used by Hendrick Hartog, and is closely allied to John Pocock's techniques for dealing with the history of political discourse.<sup>12</sup> For Hartog and Pocock, it is important to ascertain not only the meaning attributed by a speaker to the utterance of such keywords as "property", "obligation" or "legal right", but also to understand how the meaning of such words is routinely appropriated, altered, and rearticulated by a speaker's interlocutors and subsequent interpreters.<sup>13</sup>

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<sup>11</sup>The agricultural crisis debate has been well summarised by R. M. McInnis, "A Reconsideration of the State of Agriculture in Lower Canada in the First Half of the Nineteenth Century" in D. H. Akenson, ed., vol. 3, *Canadian Papers in Rural History* (Gananogue, Ont.: Langdale Press, 1982) 9. Briefly, the debate is between those who emphasise internal, rather than external causal factors for Quebec's apparent inability to compete economically with Upper Canada in the first half of the nineteenth century. Internal factors include supposedly "backward" farming techniques, soil exhaustion, pestilence, overpopulation, and land scarcity. The major external factor cited is the lack of market opportunity for Quebec's agricultural produce. The internal factors are often linked to the operation of the seigniorial system. However, new evidence suggests that the abolition of the seigniorial system could not have been necessary on any immediate economic grounds. Despite rising rents, land was still cheaper in Quebec than in either Ontario or the Eastern states. Mill tithes, a monopoly right of the seigniors, were similarly less expensive. As for the shortage of land, McInnis has convincingly questioned the accuracy of that claim. At the moment of abolition, more than one tenth of the available lands lay unceded, and of the area which had been ceded, only one half had been cleared (*supra* at 31). As stated above in the text, I have no desire to engage in this debate over the agricultural crisis. Rather, the emphasis in this essay is on another dimension — rhetoric — of that period.

<sup>12</sup>See H. Hartog, "Pigs and Positivism" (1985) 6 *Wis. L. Rev.* 899. Readers of English social history will recognise the influence of E.P. Thompson in this methodology. However, Thompson treated the law as an arena of conflict wherein *class* struggles take place: see *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975); see also D. Hay *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975). This shift to a focus on the discursive levels is an attempt to avoid the implicit reductionism often present in examinations of class conflict. The emphasis on discursive struggles results from the influence of John G.A. Pocock; see "Introduction", *Virtue, Commerce and History: Essays on Political Thought and History Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985) 1.

<sup>13</sup>In adopting a technique from historians of political discourse, I am conscious of the fact that one cannot do so without taking into consideration the different institutional restraints that speakers encounter in different institutional contexts. So, *e.g.*, one cannot expect the idiomatic expressions used in legal discourse to mirror those expressions used in political discourse. One must take into account the particular meanings already current in a given institutional domain, and the "institutional citizenship" of the speaker. Otherwise one would still be engaged in an exercise in reductionism, albeit of a different sort to the reductionism used by many who utilise political economy analyses.

Of particular concern in the present essay is the manner in which the 1843 Commission, having received diverse and often unanticipated responses to its interrogatories, reworked these statements into an official account of the seigniorial system. In what follows an attempt will be made to detail the various strands of meaning attributed to the interrogatories by differently situated actors: rural seigniors and *censitaires*, “notable inhabitants” (for example, rural professionals), clergy and urban entrepreneurs. It will be shown how the Commissioners succeeded in manufacturing a monologue or unilateral account out of these diverse discourses.

It will also be argued that in reconstituting social facts as legal claims the Commissioners may seem to have been

concerned with reference, that is with relationship between what is said and events in the world. It is a special type of reference, however, not so much retrospective as prospective. [That is, such inquiries as the one conducted by the Commission] allow the construction of consistent and publicly accessible accounts of events. [But the] fit between [such] accounts and the events to which they ostensibly refer is not as important as the effectiveness with which they constrain future action and interpretation.<sup>14</sup>

With these considerations in mind, let us now turn to consider the constitution and activities of the 1843 Commission.

## I. The 1843 Commission

### A. *Context and modus operandi*

In the aftermath of the Rebellions of 1837 and 1838, property issues were among the first questions tackled by the new unified Canadian Legislative Assembly. On 7 September 1841 the Assembly resolved that a Commission be appointed to inquire into commutation of seigniorial tenure.

Three aspects of this resolution are notable. First, legislation was to be enacted because the House was “desirous of improving the conditions and promoting the welfare of the People ...”.<sup>15</sup> The decision had been made to dismantle the seigniorial system, due to the prevalent perception that it had a detrimental effect on public welfare. The issues that remained were finding a replacement regime, and implementing it “fairly and equitably”.

Second, the end sought — a fair and equitable commutation — was to be achieved through manipulation of the laws. The Commission was “to enquire into the laws which have, from time to time, governed, and now

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<sup>14</sup>D. Brenneis, “Official Accounts: Performance and the Public Record” (1983) 3 Windsor Y.B. Access Just. 228 at 242.

<sup>15</sup>1843 Report, *supra*, note 4, app. A, #1, “Journal of Proceedings of the first Commission.”

govern" the system. Laws were, according to this utterance, structuring the system. Significant alteration of these laws would, therefore, according to the prevailing instrumentalist logic, bring about a new system. Mastery of legal technique being essential, the Assembly decided that the most appropriate Commissioners would be residents "well versed in the law and practice of the said Tenure, and being a Practitioner at the Bar, or a Notary of long standing ...". Only through appropriate manipulation by persons qualified to manipulate laws would "the end in view ... be best attained ...".

Connected with the achievement of this end was the requirement of knowledge — knowledge to be gained by searching into the "public Records and Notarial acts from the time of settlement of the Country ...". That knowledge was comprised of the "true conditions" upon which previous grants had been made; the laws reputed to govern the seigniorial system; the "present working of the system" (to be discovered through examination of randomly-selected seigniories); the present rents, dues and charges; the quality, quantity, and value of conceded territory; the average *lods et ventes*; and the number and value of the seigniorial mills. Knowledge was also to be gained, through consultation with the seigniors and *censitaires*, of the fairest and most equitable means of commuting the lands and the most acceptable means of resolving disputes involved in the commutation process.

The first meeting convened under the aegis of this ambitious mandate took place on 25 April 1842. The Commissioners were George Vanfelson,<sup>16</sup>

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<sup>16</sup>Vanfelson was born 23 April 1784 in Quebec, and died 16 February 1856 in Montreal. He studied law with Jean-Antoine Panet from 1798, and was admitted to the Bar on 25 April 1805. He was elected to the Legislative Assembly in 1815, replacing J.A. Panet who was appointed to the Legislative Assembly. In 1817 Vanfelson was appointed both Commissioner to purchase grain for poor parishes and for opening roads in Quebec City. In 1819 he was appointed the province's Advocate General, and therefore withdrew from the political scene between 1820-1827. In 1827 he stood as a *patriote* candidate and was defeated. In 1830 he was again appointed as Advocate General. Elected to the Legislative Assembly as a supporter of L.J. Papineau in 1832, Vanfelson was one of the first to defend the "Ninety-Two Resolutions" of 1834. When the *patriotes* divided during the governorship of Gosford — the moderates or Quebec Party, led by Elzéar Bédard and John Neilson — Vanfelson, Berthelot, R.-E. Caron, and A.-N. Morin were attracted to that branch of the party. In 1836 Vanfelson became the head of the moderates. However in 1837, disturbed by a meeting held to protest Lord Russell's resolutions, Vanfelson quit politics. In 1843 he was made Q.C. and Inspector of Police for Montreal. In 1849 he was appointed judge of the Superior Court of Lower Canada where he served until his death. See F.G. Halpenny, ed., *Dictionary of Canadian Biography*, vol. 8 (Toronto: University of Toronto Press, 1985) at 906.

John Samuel McCord, and Nicholas Benjamin Doucet.<sup>17</sup> At this meeting the Commissioners resolved, among other items, “to consult freely with all those who may be considered as representing the two great parties concerned.” This consultation was to be achieved by circulating questionnaires. Each questionnaire was to be “adapted to each class of persons to whom application will be made”: the members of the Legislative Council and Assembly residing in Canada East; the clergy of Canada East; seigniors; members of the Bar; notaries; surveyors; physicians; merchants; and the “Notables among the Inhabitants”.<sup>18</sup> Also consulted were the Commissioner of the Jesuit Estates,<sup>19</sup> the Clerk of the Land Roll<sup>20</sup> and the Clerks of the Courts of Appeal and King’s Bench.<sup>21</sup>

The broad extent of the knowledge to be gained by this inquiry, and the cross section of concerned individuals to be consulted is striking. But what is even more remarkable is the exclusion from this list of the population most directly affected by this whole enterprise — the “ordinary” rural *censitaires*.

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<sup>17</sup>Doucet was born 19 February 1781 in Three Rivers, and died 27 May 1858 in Montreal. Doucet commenced his legal training in 1799 in Three Rivers under Joseph Bardeaux. He became a notary on 17 March 1804 and a Justice of the Peace in 1811. Doucet married the daughter of a wealthy land-holding family. In 1815 he was secretary-treasurer of the Commission of Inquiry into the state of roads and construction of a prison; and in 1821 he became an agent for the Indian Department. In the late 1830’s he published his treatise, *The Fundamental Principles of the Laws of Canada* ([Montreal]: [Lovell], n.d.). In 1842 he was appointed as Commissioner in the inquiry into seigniorial tenure. In 1843 he stepped down, along with his colleagues, for some unknown reason.

<sup>18</sup>I have been unable to ascertain the criteria for selection of this latter group, although from the answers it appears that they were either professionals, clergymen, or agents for some of the seigniors. In other words, they appear to be only those who fit the classification of “Notable Inhabitant.”

<sup>19</sup>The Commissioner of the Jesuits’ Estates, John Stewart, was presented with a series of questions designed to elicit the history of all grants and concessions within each Estate, the size of each holding, the extent of unconceded land, the number and value of seigniorial mills, the value of annual *cens et rentes*, *lods et ventes*, applications for concessions from *censitaires*, and so on. In short, the Commissioner was asked to provide all information relevant to the financial operation of the Estates. Seigniors were asked questions similar to those sent to John Stewart, as were “certain *censitaires*”.

<sup>20</sup>The Clerk of the Land Roll was asked to supply a list of the names of all the seigniors, copies of the original grants, whether made during the French Regime or after the conquest, names of all seigniors who had applied for commutation of tenure together with some indication of the success of their applications, and information about the monies paid for such commutations.

<sup>21</sup>The Clerks of the Courts of Appeals and King’s Bench were required to list all the judgments on register in which seigniors and *censitaires* were litigants, the subject matter of the litigation, whether the action was determined or abandoned, and the result of the judgment, if any. In addition, the Clerk of the King’s Bench, guardian of the notarial records of all deceased notaries, was asked to provide a list of all grants and concessions, names of the parties involved and like information.

### B. *Unanticipated Responses*

While some of the informants replied promptly, others balked at the task. The Commissioners were directed by some of the respondents to send their communications to another person, who supposedly was better informed about the daily operations of particular seigniories. Other respondents noted, for example, that responding to the questions would "require a labour which would interfere with [their] professional occupations",<sup>22</sup> or observed that "I am sorry to say that my present position and my little leisure do not permit me to satisfy the wishes of the Commission with reference to the task which has been intrusted to them."<sup>23</sup>

On the other hand, some replies were from groups of ordinary rural *censitaires*, following the holding of impromptu meetings in their district.<sup>24</sup> These uninvited responses are of particular interest because they did not provide the kind of input the Commissioners were looking for as grist for the mutation mill. However, let us first consider the diversity in the responses of the seigniors themselves.

Some held that obligatory, rather than voluntary, commutation was necessary, because otherwise the *censitaires*, believing as they did that seigniorial tenure was the best system, would not commute.<sup>25</sup> Others were of the opinion that seigniorial tenure was the most suitable system for the country.<sup>26</sup> However, thirteen of the twenty-three seigniors suggested schemes for commutation. Most of these recommended a simple commutation either at a fixed price per arpent (the suggestions ranged from 6 shillings to £1 per arpent), or commutation at a fraction of the value of the seignior (the estimates varied from one eighth to one tenth).

The *censitaires*, on the other hand, were not so willing to commute lands based on a fractional value of the seignior. Although one group of

<sup>22</sup>See, e.g., 1843 Report, *supra*, note 4, app. A, #18, "Letter from L. Barbeau, Esq.," dated Laprairie, 30 May 1842.

<sup>23</sup>*Ibid.*, app. A, #20, "Answer of the Reverend Manseau," dated Longueuil, 4 June 1842. However, Manseau did then provide some useful information.

<sup>24</sup>See, e.g., *ibid.*, app. A, #29, "Answers of the *Censitaires* of De Léry, Longueuil, and Laprairie to the Questions Put to them by the Commission of Inquiry on the Seigniorial Tenure", signed by 293 *censitaires*. Answers were also submitted from a group of *censitaires* (218) of the Parish of St. Cyprien (De Léry), *ibid.*, app. A, #30, and responses from a committee of 26 *censitaires* of Trois Pistoles, appointed following a public meeting, to respond to the Commission's questions, *ibid.* app. B, #40, "Letter from *Censitaires* of Trois Pistoles" dated Trois Pistoles, 7 August 1842. These public meetings of *censitaires* appeared to have been organized either by clergymen or politicians, and they only occurred in certain of the districts.

<sup>25</sup>See, e.g., *ibid.*, app. A, #33, "Answers of Xavier Malhiot", answer 39. Evidence from the *censitaires* corroborated this opinion. See, *infra*, note 27.

<sup>26</sup>See, e.g., *ibid.*, app. B, #97, "Answers of Madame de Montenach", answer 4.

*consitaires* recommended that seigniorial tenure be retained,<sup>27</sup> most of the *consitaires* were politically adroit enough to seize the high ground and ask for commutation based on the old rates, the rates of original concession, as granted under the French regime. Most *consitaires* were persuaded that much was to be gained by such a commutation.<sup>28</sup> Evidence suggests that some of the meetings at which opinions were solicited were hastily arranged,<sup>29</sup> yet certain *consitaires* quickly persuaded others that commutation at the old rates would be advantageous. As the *consitaires* of the Seigniorie of Lanaudière informed the Commission:

At a meeting where a great many met without any previous warning, and some quite by accident, these answers and reflections, hastily written and thrown together without sufficient time to specify all things, and without any regard to form or order, defective and deficient as they must of course be, were all approved, except the commutation, which, however, being read a second time, were understood and highly approved of by all present, with the exception of one individual, whose strange reasoning brought on him abundance of ridicule.<sup>30</sup>

The Commissioners were no doubt much dismayed by the manner in which groups of *consitaires* kept appropriating the legal language that accompanied the vision of the seigniorial system as a settlement scheme, and attempted to turn it against the seigniors. In doing so, the *consitaires* were swinging the pendulum of economic advantage in their favour.

## II. The Question of *lods et ventes*

The *lods et ventes* were a mutation fine consisting of one twelfth of the sale price, paid by the purchaser and levied on all transactions of land held *en censive* or *en roturier*, save in the case of direct lineal succession. Information provided to the Commission concerning the *lods et ventes* is fascinating, not only because it provides insight into the perceived effects of

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<sup>27</sup>*Ibid.*, app. B, #33, "Answers made by certain *consitaires* of the Seigniories of Deschambault and Lachevrotière [sic], in the Parish of Deschambault", answer 25, signed by Louis Remond, N. Gauthier and 17 others.

<sup>28</sup>I am referring to the farmers who chose to voice their opinions collectively. Others who were involved with the seigniors as agents and notaries, while technically *consitaires*, are not included in this comment.

<sup>29</sup>See, e.g., 1843 Report, *supra*, note 4, app. A, #45, "Answers of the Inhabitants of the Fief Mary Anne and Seigneurie de Lanaudière" signed by Michael Kenny and 32 others. The closing remarks state:

We have now our apologies to make for our apparent dilatoriness. We, indeed, heard a confused rumour of something of this sort going on but it was only on the first day of October [1842] that one of our Members, accidentally meeting with Mr. Fortier, of our neighbourhood, who had received one of these circulars and was kind enough to give it to us.

<sup>30</sup>*Ibid.*, answer 67.

that aspect of the seigniorial system, but also because similar rhetoric was used by two very different groups — the rural *censitaire* and the urban entrepreneur. Each group's worldly ambitions meant that the same rhetoric had different implications and meanings, according to the logic of each group's economic life.

#### A. *Response of the Rural censitaire*

For the most part, the rural *censitaires* claimed that the *lods et ventes* was a burden on improvements, as did the middle-class, urban *censitaires*.<sup>31</sup> These groups had different versions of what constituted improvements, although both calculated the sale price of "improved" property in a similar fashion. For the rural *censitaire*, the logic of the argument began with the nature of the "improvements" he or she was forced to make on a concession of virgin territory. These improvements may be contrasted with those made by a tenant in England or Scotland, for whom the word "improvement" conveyed a different meaning.

A tenant farmer in England or Scotland was granted land with all the necessary adjuncts — residence, farm building, fences and gates — supplied by the landlord. Hence the labour of the English or Scottish tenant was directed, from the moment of taking possession of the grant, towards the cultivation of his fields. As a result, the term "improvements" meant, for such a farmer, the better cultivation of his soil.

In contrast, the Quebec rural *censitaire* was granted wild land, with a charge of building a habitation on the land and dwelling there (*tenir feu et lieu*). Failure to fulfill this obligation meant escheat of the concession to the seignior. Therefore the first labours of a rural *censitaire* in Quebec, before he commenced cultivation of the soil, were directed towards the erection of a residence and the necessary adjuncts. It is in this prior erection of necessary adjuncts to the viability of farming that one finds the meaning of the term "improvements" for the Quebec rural *censitaire*.

The outlay of such labours markedly increased the value of the original grant of wild land. There was a noticeable difference following such labours, whereas in England or Scotland such "improvements" were literally taken for granted. The alienation price of tenant property in England or Scotland was therefore minimal, the improvements in the Quebec sense remaining constant between the first and second possessor; whereas in Quebec there was a significant change in the value of the property following the first possessor, as a result of his labours.

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<sup>31</sup>It must be borne in mind that the opinion of the seigniors with regard to the *lods* was not solicited.

Rural Quebec *censitaires* therefore recurred to what could be called a “labour theory of value” when they decried the injustice of the *lods*. Submissions provided by the *censitaires* of the Seignior of Lachenaye are typical:

We all consider and desire that this right of *lods et ventes* should be done away with; for in our opinion nothing is more unjust. When this right was established, the intention was to recompense the Seignior ... the value of the lands was so low that it did not exceed two or three hundred *francs*, which gave the Seignior from four to six dollars for the *lods*. At the present time, when our lands are cleared and improved by culture, and by good buildings and dependencies, they not unfrequently sell for 20, 25, 30 and 35,000 *francs* and upwards, and nothing is more unjust than to pay the twelfth part of these prices on property which owe its present high value to the expenditure, the cares, and labour, which have been bestowed on them; whereas, at the time when they were conceded they were only worth the rents.<sup>32</sup>

Other *censitaires* demonstrated the capacity of rural farmers to anticipate the implications of a given response and to buttress their argument against compensation for *lods* through legal rhetoric. These people were quick to inform the Commission that the system was not only unjust based on the labour theory argument, but also that the *lods* was a right which never arose, if the property passed in direct lineal succession: why, therefore, should the seigniors be compensated?

You may imagine that there are many families whose lands pass from family to family without paying *lods et ventes* at all, by their good management of their affairs. We desire that in case these persons should wish to free the lands, the Seigniors should have no right to require of them an indemnification for the rights of *lods et ventes* which they have never paid, because their said lands have never gone out of the family.<sup>33</sup>

### B. *Response of the Urban censitaire*

While rural *censitaires* dug in their heels based on a labour theory of value and un contemplated events, other respondents drew the Commission’s attention to the entrepreneurial vision held by certain people — namely, those who, in the words of one informant, “regard a land as a bale of merchandize, which they wish to convert readily into specie for

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<sup>32</sup>1843 Report, *supra*, note 4, app. A, #38 “Answers of *Censitaires* of the Seignior of Lachenaye [sic]”, dated Lachenaye [sic], 4 September 1842, answer 21.

<sup>33</sup>*Ibid.*, app. A, #29, “Answers of the *censitaires* of De Léry, Longueuil, and Laprairie”, no date, answer 21.

trade ...".<sup>34</sup> The opinion expressed in this instance was halfway between that of the rural *consitaire* and the urban entrepreneur. The latter could hardly argue a labour theory of value, because he did no labour himself. Rather, it was his capital that he put to work through his investment. And it was in the outlay and expansion of that capital that one finds the meaning of the term "improvements" in the urban entrepreneurs' vision. But, as the *Montreal Gazette* stated so poignantly, from an entrepreneur's perspective:

In all objects of enterprise the vassal has the seignior as a perpetual incubus on his energies. In whatever outlay he makes on property the seignior is a perpetual dormant partner, contributing nothing but dividing, upon termination, a very liberal share of the profits.<sup>35</sup>

Unlike the rural *consitaires*, the urban entrepreneurs were usually bound to pay *lods* because it was precisely in the turnover of property that entrepreneurs were engaged. In this turnover the entrepreneurs were at one time vendors, at another they were purchasers. They suffered from the *lods* no matter which position they occupied. As vendors, the *lods* deterred other parties from investing capital, through purchase, in the vendor's property. As purchasers with liquidated capital ready to invest in land, the *lods* was an assignment of one twelfth of the potential profit, no matter how large it might have been.

Hence urban entrepreneurs, like rural *consitaires* desired an end to the *lods et ventes*. But while the language of complaint used by the urban entrepreneur often echoed that of the rural *consitaire*, their economic motivation to rid themselves of the seigniorial system, particularly the *lods et ventes*, and the compensation they were prepared to offer the seigniors varied greatly from that of the rural *consitaire*. The latter tailored their objections to protest a scheme of commutation in which they would be forced to pay compensation not only for their own labours, but also for lands staying within the family. The urban entrepreneurs, on the other hand, were prepared to pay compensation once only to rid themselves of a right by which they were *usually* bound.

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<sup>34</sup>*Ibid.*, app. A, #36, "Answers of J.R. Raymond, Esquire" St Jacques, 19 August 1842, answer 25. Raymond continued by citing an example in the village of l'Assumption, where "[a] good emplacement may be found. . . for one hundred dollars . . .". The *lods* on this would yield \$8.50 (£2). But if a "house and dependencies" were erected on it, the cost of which he estimated at £200 or £300, it would yield a *lods* to the seignior, when sold, of £25 (answer 27): "Is not that a tax on the industry, the sweat, and the capital of him, who in some instances has advanced the value of a swamp of no intrinsic value?"

<sup>35</sup>[*Montreal Gazette* (17 October 1835) at 2, col. 4. Compare the response of C.J. Forbes, *ibid.*, app. A, #34, answer 27.

### C. *Economic Existence and the Willingness to Pay Compensation*

The diverse answers received from the two groups, rural *centitaire* and urban entrepreneur, leads one to ponder the nature of the market as perceived by these historical actors, and the imagined impact of the *lods* on the value of the land. We have already noted above that the nature of the outlay for each of the groups affected their respective solutions notwithstanding the use of similar language. Did anything in the perception of the economic structure affect the debate? To answer this we need to examine the nature of the market for land, and the perceived impact of the *lods* on the market. Did it vary for each group, and did it have an effect on the willingness to provide compensation in exchange for the abolition of the *lods*?

In the commercial world, as in the rural economy, the price paid for land was seen as being composed in classic political economic terms: a combination of invested capital and labour. But there was also another, hidden belief, again borrowed from the political economists: the motive for selling — land sale was generally a purchaser's world. This belief appears to have been held by members of both groups. It was observed by several respondents that sellers in the rural areas usually sold land out of necessity and that the same had been noticed in the cities.<sup>36</sup> Vendors sold out of necessity, while purchasers bought in expectation of profit.

Because it was a buyer's market, the detrimental effect of the *lods* was felt in two instances. First, the purchaser tended to anticipate the taxes in the price at which land was offered for sale, thereby lowering the price offered, which in turn depressed the market value of property. In extreme instances no purchaser could be found.<sup>37</sup> The second effect of depressed market values was that vendors, both rural and urban, had fewer funds available for reinvestment. The result was a vicious circle best summed up by one of the respondents to the 1843 Commission's questionnaire:

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<sup>36</sup>See, e.g., 1843 Report, *supra*, note 4, app. B, #27, "Answers of Jean Baptiste Pouliot, Esquire, of Saint Patrice de la Rivière du Loup, Notary" dated 15 July 1842, answer #21; see also *ibid.*, app. A, #45, "Answers of the Inhabitants of the Fief Mary Anne and Seigneurie de Lanaudière", answers 27 and 28.

<sup>37</sup>See, *ibid.*, app. A, #28, "Answers of the Reverend M. Townsend (Noyan and Faucault)", dated Clarenceville, Noyan, 4 July 1842, answer 28. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of the Nations*, vol. 3, 7th ed., (London: A. Strahan & T. Cadell, 1793) wrote of the impact of fines upon transferral of land by succession and *inter vivos* transactions. He concluded that while the former fell on the buyer, taxes on *inter vivos* transaction almost always fell on the seller because, the seller was almost always in a position of having to sell. Thus, he concluded, *supra* at 319: "All taxes upon the transference of property of every kind, so far as they diminish the capital value of that property, tend to diminish the funds destined for the maintenance of productive labour . . .".

*Lods et ventes*, under whatever shape or form raised, must be burthensome, galling to the feelings, injurious to private interests as well as detrimental to the country at large; and it is hard to say whether that tax presses most upon town, village or farm lots, for

I.—Agriculture and commerce are mother and daughter, and the arts are so nearly allied to them, that whatever injures one, must necessarily affect the other; but

II.—Commerce and the arts being more fluctuating and dependent (in our times at least) on the whims and caprices of individuals, and various other external and uncontrollable causes for encouragement and protection: they must necessarily be more subject to fail and change localities, &c.&c.

These mutations causing the fines of *lods et ventes*, must be most deeply felt, particularly to the artist or commercial man, as the nature of their pursuits require such a variety (and some times of expensive as well as extensive) of buildings, causing great outlays of capital, which we may say lies dead; yet as these give the value, so is the increase of the mutation fine.

From this view, it would seem agriculture suffers less, but tyranny and taxes destroys all energy. See Sicily, Spain, &c. &c.<sup>38</sup>

Thus although the language adopted by both groups, rural *centsitaires* and urban entrepreneurs, was similar insofar as it proclaimed the *lods* “odious and burdensome”, the articulation of that claim differed depending upon the occupational role of its maker. The rural *centsitaires* turned their energies, in the answers they submitted, towards proving that the obligation to pay *lods* was either an unjust right, never intended to cover more than the original value of the land, or an obligation that they would rarely encounter and, either way, which would be non-compensable. The entrepreneurial *centsitaires*, on the other hand, although commencing with the claim that the *lods* were unjust, were willing to pay compensation to rid themselves of this obligation once and for all.<sup>39</sup> As a result, the Commission received two very different arguments, although couched in similar terms, in answer to their questions about the effect of the *lods et ventes* on the “industry and commerce” of the province. Both positions were premised on economic calculations, but each contained very different visions of the economic use of the land, and of the solutions each group was prepared to accept.

### III. Mill Rights: The Discourse of Economic Self-Interest

Economic insights were also apparent in debates about mill rights (*droit de banalité*). Not only does this issue demonstrate the extreme legalism and sophisticated manipulation of language by rural *centsitaires*, but it also il-

<sup>38</sup>*Ibid.*, app. A, #45, “Answers of the Inhabitants of Fief Mary Anne and Seigneurie de Lanaudière”, answers 27 and 28.

<sup>39</sup>The willingness of the entrepreneurs to pay compensation may have been based on one or several factors: they may have anticipated extra profit in the property value once freed of this encumbrance or they may have already factored the taxes into the purchase price of their present property, a one-time compensation thus costing them nothing.

illustrates their capacity to think prospectively when placed in an adversarial position. Their ability to constantly reinterpret the language delivered to them, and thereby seek a future economic advantage, was on a par with the most technical of lawyers.

The responses on the mill rights issue were, in keeping with the questions asked, limited in scope to the number, purpose, and value of the mills, together with some treatment of such subsidiary issues as the number of occasions on which the *droit de banalité* was enforced. The economic calculation, the anticipation of compensation, was characterized by a discrepancy between the values claimed for the mills. Some rural *centitaires* claimed that mills had been built for as little as £150, while the seigniors' figures ranged from £600 to £2500. Moreover, anticipation of recompense was exhibited by some seigniors who provided the Commission with the annual value of the mills as derived from the *droit de banalité*; these seigniors were not intending to claim compensation for the entire income of the mill. The *centitaires*, for their part, often stated that a mill building was of little importance, whereas the site itself was extremely valuable. One can only assume that *centitaires* made such claims in an attempt to offset the claims of their seignior. However, before turning to these arguments, the types of mills and the various means by which the seigniors capitalised on their resource of water power merit brief examination.

Statements from seigniors or *centitaires* with regard to the number of mills within each seignior were, if tendered at all, often deceiving due to the fact that one mill typically housed several banks of stones, between which different grains were ground.<sup>40</sup> Similarly, comments about the value of the mills is deceptive: in general, the seigniors claimed a high value, often between £1000 and £2000; while *centitaires* claimed a low value, typically between £150 and £400. Doubtless both parties did so in anticipation of compensatory measures.

### A. Categories of Mills

The answers received to questions about the *droit de banalité* also provide insight into the economic management by seigniors of their mill rights. This management usually fell into one of four categories. Some of the mills were grist mills, erected and maintained by the seignior exclusively for the

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<sup>40</sup>E.g., the mill at the Seignior of St. Hyacinthe, in the District of Montreal, included at least three sets of stones for grinding corn, barley and oats, in addition to housing a sawmill; see, *ibid.*, app. B, #61, "Examination of Peter Spink, Esq. of St. Charles", dated 22 July 1842, answer 8. Spink had been agent for about three years for the Hon. Mr Debartzch, proprietor of the Seigniories of St François-le-Neuf, Debartzch, part of St. Hyacinthe, Cournoyer and St Marc, in the district of Montreal.

use of the inhabitants of his seignior. In the second category, other seigniors had erected grist mills to fulfill their obligations under the *droit de banalité*, but had since opened these mills to the general public, or to *censitaires* from other seigniories. The seignior was, in these instances, visibly acting as an entrepreneur. Third, some seigniors leased their mills or mill-sites (or *droit de banalité*) to millers. Some of these leases were of an open value, that is, leases for a term of years — usually more than fifty but less than ninety-nine — with the lessee undertaking, in addition to an annual rent, to erect a building which was to be returned to the seignior without compensation upon the termination of the lease. Also within this third category were instances where the seignior had erected a building, then leased it for a fixed sum, a fixed quantity of grain or a share in the produce.<sup>41</sup> Lastly, there was the lease or sale of the *droit de banalité*, the right of exclusion itself, which may or may not have been leased with the building.<sup>42</sup> This latter category is important because often it was not the seignior who sued the *censitaires*, seeking to compel them to bring their grain to the seigniorial mill, but a miller.<sup>43</sup>

Once again, just as with the *lods et ventes*, three themes were present in the debates. The framing of the question helped frame the response, as the responses were usually framed within the logic of the law, and as they were framed in anticipation of specific goals.

### B. Key Questions Asked

After asking for the number of seigniorial mills in the seignior, the Commissioners then asked key questions of the *censitaires*. Those questions, reproduced here at length because of the importance of the language, were as follows:

14.- Are the said mills used exclusively by the *Habitans* or *Censitaires* of the said *Fief* for grinding the grain which they are bound to cause to be ground at the said banal mills.

15.- Were the said mills originally built as banal mills (*moulins banaux*) for the sole use of the *Censitaires*; or were such mills or any of them built and intended for grinding grain generally, as matter of interest or speculation on the part of the Seignior; if yea, please state how many mills, if there are more than one, in the said *Fief*, are exclusively used as banal mills by the *Censitaires*,

<sup>41</sup>In most of these instances the amount was between 1/16 and 1/4 of the estimated value of the mill.

<sup>42</sup>*E.g.*, a miller could lease a mill, thereby getting the *droit*, close the mill and open a better mill two miles downstream.

<sup>43</sup>See, *e.g.*, 1843 Report, *supra*, note 4, app. B, #14, "Answers of the Honorable Amable Dionne, Seignior of the Fiefs and Seigniories of Ste. Anne de la Pocatière, St. Roch des Aulnets [sic] and St. Denis" dated 20 June 1842, answer 31.

and how many as general manufacturing mills, and also how many are used for such purposes.

16.- Will you state, for the information of the Board, the true and exact value of every such mill, distinguishing and keeping apart those mills used exclusively by the *Censitaires* as banal mills (*moulins banaux*.) from those used as manufacturing mills, and also from those used for both purposes?<sup>44</sup>

Two points are noticeable in terms of these questions: first, the Commissioners intended to elicit responses that would highlight the distinction between banal mills, which the seigniors were obligated to erect, and manufacturing mills, erected for the seignior's "speculation", that is, for profit. In the first question on mills, number thirteen, the Commissioners asked how many "seigniorial" mills there were in the seignior. The question was thus limited to mills for which the *droit de banalité* was claimed. The Commissioners were, in framing the questions the way they did, requiring information about three categories of mills: banal mills, manufacturing mills, and "those that combined both functions".

Their purpose in asking about the three categories is unclear, although a consistent reading of the four questions (thirteen to sixteen) taken together would suggest that, in framing the questions, they had one of two issues in mind: future data for compensation and the possible abuse of the *droit de banalité* by seigniors. Question fourteen about the scope of the mill's clientele, when read with question thirteen, about the number of seigniorial mills, would suggest that the Commissioners were enquiring about abuses of power by the seigniors. How many banal mills were there, and were they truly banal mills? That is, was the entitlement reciprocal? The *censitaires* were compelled to grind their corn at the mill, but they were also, as a result, entitled to have their needs fulfilled.

But in the second part of question fifteen, in which the *censitaires* were asked if mills were originally built for reasons of speculation — that is, for grinding grain generally — the question as to "how many ... are exclusively used as banal mills by the *censitaires*" suggests that the Commissioners were more concerned about eliciting precise data for the purposes of compensation. This second interpretation is reinforced by question sixteen, the last concerning mills, which asked for values to be allocated to the mills, "distinguishing and keeping apart" the three categories of mill: banal, manufacturing, and combinations of the two. Hence a consistent reading of the four questions would favour the view that the Commissioners were search-

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<sup>44</sup>*Ibid.*, app. A, #2J, "A Series of Questions to be Submitted to Certain *Censitaires* in the Several *Fiefs* or Seigniories in the Province", questions 14, 15, and 16.

ing for data, using the distinction of "exclusive use" as a banal mill for the purposes of establishing a more precise figure for compensation.<sup>45</sup>

Also implicit in the questions are two assumptions about the law relating to the *droit de banalité*: first, that the *centsitaires* were bound by positive law, not contract, to grind their grain at the seignior's mill;<sup>46</sup> and, second, that the seignior's entitlement only extended to grist mills, and not to manufacturing mills.<sup>47</sup> Thus, framing their questions in this manner, the Commissioners were not only working within the broad framework of the *droit de banalité*, but also revealing their beliefs about the proper interpretation of this institutional framework.

### C. *The Appropriation of the Commission's Language by the Respondents*

But it was the reception and interpretation of the questions that was most remarkable, particularly the responses forwarded by groups of *centsitaires*, and the interplay between their answers and those of seigniors. The striking aspects of the responses from groups of *centsitaires* are, first, their capacity to reinterpret the questions to suit their own ends; second, their ability to appropriate legal language and use it in a highly formalistic fashion to legitimate those ends; and, third, the uniformity of responses across particular groups of *centsitaires*. This last point raises questions about the originators of this discourse. Were they several agitators moving throughout the province, or were they lawyers who were consulted by *centsitaires*? Before examining these questions, let us turn to a brief description of the different types of responses received.

#### 1. Disgruntled Millers

The responses of those consulted and who chose to reply fall into three general categories.<sup>48</sup> The first group is of little interest, their responses being predictable. They were disgruntled millers or other small-scale entrepreneurs complaining of the injustices they had to suffer due to the *droit de banalité*. Adolphe Stein, a *centsitaire* in the Seigniorship of Gentilly, complained that

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<sup>45</sup>A further meaning is implicit in this search for data, given the commissioners' later-revealed bias against the seigniorial system. The Commissioners may have been soliciting evidence to demonstrate that while the *droit de banalité* existed, given that it was a monopoly, manufacturing enterprises were unduly suppressed. Such an implication can be seen in question 15, where the concern over the original intention of the mills — banal or manufacturing — broadened into a concern that banal mills may have become manufacturing mills.

<sup>46</sup>*Supra*, note 44, question 14.

<sup>47</sup>*Ibid.*, questions 15 and 16.

<sup>48</sup>Not all those who replied were consulted. There are several hints, particularly from the groups of *centsitaires* who responded following local meetings, that they learned of the questions indirectly: see, *supra*, note 29.

not only did the seignior constantly threaten to exact an indemnity for a small-scale sawmill that Stein owned, but that the reservations of water rights by seigniors allowed the latter to refuse compensation to *censitaires* whose land was cut by canals dug by the seignior to promote his own mill or for damage occasioned by the superfluous waters which flooded their lands. Furthermore, Stein implied, if the *droit de banalité* were abolished, many more mills would spring into existence. The demand, he claimed, was not met by the supply of mills, while the seignior held this monopoly right.<sup>49</sup>

## 2. "Reasonable Men"

Those in the second category either supported the *droit de banalité*, claiming it was primarily of benefit to the *censitaires*, or accepted the fact that commutation was inevitable and offered "reasonable" schemes for compensation for this right. A belief that the mill rights worked to the advantage of the *censitaire* was not confined to the claims of some seigniors. The comments of Amable Morin, proprietor of several lands within the *fief* of St Denis, and like those of others in the Seigniorship of Grande Anse, were typical:

I am far from regarding the right of *banalité* as a charge, for I look upon it on the contrary as advantageous to the *Censitaires*. What makes me so regard it is this: the Seigniors in order to exercise this right, which is limited, are obliged to have good mills which they must keep in good order, they generally place in these mills able and honest millers, who for the most part serve the *Censitaires* well; whereas if this right were abolished, a strong competition would arise among the mill proprietors, a great number of whom would attend their own mills, and would not be able to keep up their establishments in conse-

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<sup>49</sup>1843 Report, *supra*, note 4, app. B, #2, "Answers of Adolphe Stein", dated Gentilly, 15 June 1842. See also answer 4 in which Stein establishes that he was a saw-miller holding at will and threatened by the seignior. See answer #11 for the complaint about lands and flooding, and #13 for the implied lack of competition. Stein's evidence was corroborated by Laurent Genest, a Notary of Gentilly: see, *ibid.*, app. B, #3, "Answers of Laurent Genest, Esquire, Notary of Gentilly", no date. However, that only raises the question of the independence of the *censitaires'* answers.

Other millers claimed they had been forced to pay an indemnity for the erection of saw-mills. See, *e.g.*, *ibid.*, app. B, #21, "Answers of Joseph Brassard, *censitaire* of Malbaie", dated Malbaie, 1 July 1842, who added as an addendum to his response: "I have built a sawmill on my premises, and am obliged to pay [the Seignior] 7s.6d rent, annually." But see *ibid.*, app. A, #24, "Answers of the Reverend M. Paquin, Priest, St. Eustache", dated St Eustache, 22 June 1842, answer 40, where he claimed that the *droit de banalité* "prevents the erection of a greater number of mills than are necessary, whereby they frequently become unprofitable." Paquin advocated a return to the "pure" form of seigniorial tenure, rather than a commutation to free and common soccage.

quence of the competition; poverty would follow and would bring dishonesty, which is usually its attendant.<sup>50</sup>

This claim that the *droit de banalité* worked in favour of the *censitaires* was supported by a second subset in this second category, namely, interested parties, usually seigniors, who listed expenses involved in either erecting or maintaining a mill, with the object of demonstrating that the *censitaires* were well served by the seigniors, with regard to mills, and that the mills were not a profitable venture.<sup>51</sup>

A third subset within this second category was comprised of those "notable inhabitants" who accepted that the seigniorial system would be commuted and endeavoured to propose "reasonable" schemes of compensation for the *droit de banalité*. Gabriel Marchand of St Johns, in the Barony of Longueuil, suggested that because "every *habitant* knows how much grain he gets ground in a year, generally forty to eighty *minots* of wheat, and from twenty to thirty of other grain", one could calculate one fourteenth of this amount and project that as interest on a capital sum to be redeemed by the *censitaire*.<sup>52</sup>

Common to all three subsets within the second category of responses was a recognition that there were mutual obligations under the *droit de banalité* and that, if the system was to change, then compensation was due for those rights.<sup>53</sup>

<sup>50</sup>*Ibid.*, app. B., #12, "Answers of Amable Morin, Esquire", dated St Roch, 15 June 1842, answer 29. See also *ibid.*, app. A., #14, "Answers of J.B. Taché, Esquire", answer 29. Some groups of *censitaires* were of a similar opinion. See, e.g., *ibid.*, app. B., #23, "Answers of sundry *Censitaires*, Isle d'Orléans", dated St Jean, Isle d'Orléans, 2 July 1842, answer 29.

<sup>51</sup>See, e.g., *ibid.*, app. B., #7, "Letter of Messire Ranvoyzé [Priest], Ste. Anne", dated Ste Anne, 2 June 1842; where it was claimed that "the mills of St. Joachim and *Petit Prê*, do not produce more than two percent of profit, and that the mill at St. Joachim does not pay its expenses." Ranvoyzé was writing as representative of the Ecclesiastics of the Seminary of Quebec, Seigniors of Beaupré. An identical claim was made by a person of the same last name (Ranvoyzé), also of Ste Anne, but identifying himself as "Captain Militia"; see *ibid.*, app. B., #4, "Letter of Mr. Ranvoyzé, Ste Anne", dated Ste Anne, 23 May 1842.

<sup>52</sup>*Ibid.*, app. A., #25 "Answers of Gabriel Marchand, Esq., St. Johns . . .", n.d., answer 40.

<sup>53</sup>However, Marchand was not prepared to recompense those seigniors who had not fulfilled their obligation: see *ibid.*; nor was the Reverend M. Townsend, *ibid.*, app. A., #28, "Answers of the Reverend M. Townsend, [Noyan and Faucault]", dated Clarencville, Noyan, 4 July 1842, answer 29:

[T]his culpable omission on the part of the Seigniors to fulfil a condition contemplated by their charters, while they refused permission to their *Censitaires* to erect a mill for themselves, has been a serious evil and oppression to their tenantry, by compelling them to carry all the grain of these two Seigniories to other mills at a distance of 10, 20 and 30 miles. This neglect of the Seigniors should form, in equity, the ground of a just claim upon them for indemnity to the *Censitaires*; it cannot then be expected that the latter should be required to pay an equivalent for a right so nominal as never to have benefitted them, nor produced an income to the

### 3. Legalists

In contrast with the second category's use and acceptance of legal argumentation, responses that fall into the third category accepted a rigid legal interpretation of the *droit de banalité*, and then manipulated factual data to achieve the desired ends. The seigniors who fell into this category typically manipulated facts by omission. That is, they omitted to state only the banal mills, as they were asked to do (windmills, sawmills and carding mills were often included);<sup>54</sup> and rather than present the "average value of rent, toll, or *droit de mouture*," as requested, they included gross revenue from the mills without separating out the income collected as a result of the *droit de mouture*.<sup>55</sup>

However, those who made most use of the manipulation of the language to fit the facts that suited them were the groups of *censitaires* who responded.

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#### Seignior.

Townsend was, however, prepared to concede that normally the *banalité* should be commuted "by the payment of such sum as would form the principal of which the clear annual value of the mill (after deducting the interest on the capital invested and the annual charges for repairs and attendance) would be the interest." Townsend, while he in some measure straddles categories two and three, is placed here in two because those in three used factual, rather than equitable arguments.

<sup>54</sup>*E.g.*, the statement of revenues from the seignior of Argenteuil, owned by Colonel C.C. Johnson, included revenues from two grist mills, one oat mill, one barley mill, one sawmill and one carding and fulling mill. Johnson was examined by the Commission on 1 August 1842. In the process he was asked to furnish information regarding the revenue of his seignior "distinguishing the respective amounts of *cens et rentes, lods et ventes* and *banalité*." He responded by listing four mills, two of them grist mills, one an oatmeal mill and one a barley mill: see *ibid.*, app. B, #65 "Examination of Colonel Charles C. Johnson, Esq., Seignior of Argenteuil", dated 1 August 1842.

The response is somewhat misleading as in reality only the first two should be listed as banal mills. C.J. Forbes, a member of the Legislative Assembly and also a *censitaire* within the Seignior of Argenteuil told the Commission that there were only two banal mills, "besides oatmeal mills recently erected at both places, which the agent of the Seignior pretends he has a right to compel all the *Censitaires* to make use of . . .". Forbes also informed the Commission that even the banal mills were used by *censitaires* from other seigniories. He added:

I presume the mills were originally built for the use of the *Censitaires*, but they have never been applied solely to their use; they have been sometimes let, and the lessee would naturally make the most of his bargain. They have been likewise used for manufacturing purposes, both from wheat purchased on the Seignior and wheat imported; oatmeal is constantly manufactured for the Montreal market; all the mills are equally applied to the advantage of the Seignior.

See *ibid.*, app. A, #34, "Answers of C.J. Forbes", answers 13-15. Forbes' response is corroborated by the answer of Dr D.C. McLean, another *censitaire* within the Seignior of Argenteuil: see *ibid.*, app. A, #43, answers 13-15.

<sup>55</sup>There were some exceptions to this listing of gross revenues: see, *e.g.*, *ibid.*, app. B, #29 "Answers of Juehereau Duchesney, Esq. of Ste Catherine de Fossambault", dated 25 July 1842, answer #6. See also *ibid.*, app. B, #90, "Answer of Messire Fortin [sic], Priest [for the Ursuline Nuns, Three Rivers]", dated Three Rivers, 26 August 1842.

These groups had remarkably similar responses, which raises the question of prompting. But before dealing with this issue, it is appropriate to review the responses these groups gave and to consider how they manipulated the language they received from the Commission to suit their own ends.

It bears repetition that the language in which the mill questions were phrased was intended to elicit facts with a view to compensation by limiting the responses to information regarding those mills for which the *droit de banalité* could be claimed. Furthermore, it invited *censitaires* to distinguish between “banal” and “manufacturing” mills. And distinguish they did, not by separating mills into these two categories, but by screening out the third category (those that were a mixture of the two) and by stating that such mills were not therefore banal mills. Taking the logic further, they claimed therefore that no compensation was due for mills in this category. The response of the *censitaires* of the Parish of Berthier was typical of such manipulation:

Strictly speaking, there are no Seigniorial mills in the parish; there is only one flour-mill in the parish which is considered Seigniorial (*banal*), and this is situate in the *Fief* Randin. This mill, however, has always served as a means of speculation, inasmuch as strangers frequently get their grain ground there before the *Censitaires* of the parish.<sup>56</sup>

In stating their answers in this manner, these *censitaires* and others like them demonstrated a belief in a reciprocal relationship as far as the *droit de banalité* was concerned; a belief similar to that held by those in the second category. That is, they framed their responses in accordance with the legal issues. Yet those in the third group went further by highlighting the adjective “seigniorial” in the Commission’s thirteenth question, and then using the Commission’s “banal” and “manufacturing” categories to limit the number of mills that could be categorized as banal mills. Furthermore, they reinforced their logic through an emphasis on the Commission’s use of the words “exclusively” and “speculation.” Those mills that ground grain for a clientele larger than the *censitaires* within the seignior, these respondents claimed, could not have been banal mills. Instead, they must be manufacturing mills. The logic was reinforced by the observation that no distinction

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<sup>56</sup>*Ibid.*, app. A, #37, “Answers of *Censitaires* of the Parish of Berthier”, dated 21 August 1842, answers 13-16. See also *ibid.*, app. A, #29 “Answers of the *Censitaires* of De Léry, Longueuil and Laprairie”, answer 13; *ibid.*, app. A, #30 “Answers of *Censitaires* of the Parish of St. Cyprien De Léry”, answer 13; *ibid.*, app. A, #38 “Answers of *Censitaires* of the Seignior of Lachenaye [sic]” answers 13-15; and *ibid.*, app. A, #42, [Answers of the *Censitaires* of the Parish of St Cuthbert], answers 13-16.

was made in terms of priority of service between *centsitaires* subject to the *droit de banalité* of a particular mill and those who had a choice of mills.<sup>57</sup>

The making of these claims by these groups of *centsitaires*, and the appropriation and manipulation of the language presented to them as an interrogatory was not without purpose. Framed within the logic of the law, these responses were then connected to an economic goal: to preempt a finding that compensation for the *droit de banalité* was due to seigniors. If the seignior erected the mill as a result of his obligations under the *droit de banalité* and had maintained those obligations, then compensation was due. If, on the other hand, the mill was erected as a general mill to serve the broader community, or if it had originated as a banal mill but had expanded to service the larger clientele, it was deemed by this group of *centsitaires* to be a "speculative" mill, one intended to operate as a business venture and therefore non-compensable.<sup>58</sup>

#### IV. Origins of the Abolitionist Discourse: Vocation and Identity of the Respondents

One of the highest profile respondents to resort to the legalistic logic was Charles John Forbes, a member of the Legislative Assembly. The fact that a member of the Legislative Assembly could be utilizing this logic raises the question of its origins. From whence were these arguments derived? Was it prompting by elites that was then appropriated by *centsitaires*, or were the rural *centsitaires* contriving the responses themselves? Were the rural *centsitaires* indeed poor agricultural tenants, or were they literate country gentry, the "middling sort"? The answers to these questions are unclear, although some speculation would not be inappropriate. There is evidence to suggest that the responses were, even when uttered by poor rural *centsitaires*, conditioned by elite members of each community. For example, the response given by Forbes was very similar to that given by Dr D.C. McLean. Both men held property in the Seigniorship of Argenteuil.<sup>59</sup> Furthermore, many of the responses from groups of *centsitaires* were from "representatives" (usu-

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<sup>57</sup>See, e.g., *ibid.*, app. A, #43 "Answers of Dr. D.C. McLean", answer 15:

There are three mills in the Seigniorship which I conceive to be mere matters of speculation, as any of the inhabitants of the Township of Chatham or the surrounding Seigniorships will get their turn before me, and often I have had to wait 24 hours, and all before me lived out of the Seigniorship.

<sup>58</sup>A summation of this logic may be found in the response of C.J. Forbes, Esq., M.P.P., *ibid.*, app. A, #34, "Answers of C.J. Forbes".

<sup>59</sup>See *ibid.*; compare *ibid.*, app. A, #43, "Answers of Dr. D.C. McLean, (Argenteuil).

ally three or four) appointed to answer the questions "following a public meeting".<sup>60</sup> How many attended the meeting is often not stated.<sup>61</sup>

Some communication must have gone on between neighbouring groups of *censitaires*. For example, the responses submitted by the *censitaires* of the Parish of Berthier, "following a meeting held in the public hall of the parish on 21 August 1842", were identical to those of the *censitaires* of St Cuthbert, submitted "following a meeting held on 7 April" of the same year.<sup>62</sup> The sameness of response even extends to the "preamble" which, in the response of *censitaires* of the Parish of St Berthier, claimed that at the meeting "the following persons were unanimously chosen to take cognizance of the grievances which might be submitted to them, and to draw up a categorical answer to the said questions." While the named representatives differed in the two parishes, their identical response throws into doubt the claim that "categorical answers" were drawn up at the August meeting in Berthier. Rather, it is more likely that the second response was discussed in the form of a petition than as independent answers. This "petition" format is also noticeable in some of the other responses, where one person would give the answers, followed by a series of individual attestations that the signatory had read and understood the answers submitted, and agreed.<sup>63</sup>

The ethnic identity of the *censitaires* is similarly indeterminable without further research. Responses from groups of *censitaires* are sometimes signed by people of British origin, sometimes by French Canadians and sometimes by a mixture of the two. Edward Gibbon Wakefield claimed in a letter to the Commission that "at the recent meeting at George Town ... not a single [French] Canadian attended, though many were invited by the old country people [the British], by whom the meeting had been got up."<sup>64</sup> Despite qualms one may have about accepting as factually accurate any evidence

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<sup>60</sup>See, e.g., *ibid.*, app. A, #44, "Answers of the *Censitaires* of Daillebout [sic: D'Aillebout d'Argenteuil]":

We, *Censitaires* in the Seigniori of Daillebout . . . having called a meeting on the 7th of August, for the purpose of appointing three persons to answer the Questions of the Commission of Inquiry on the Seigniorial Tenure, have appointed the three persons hereinafter named, viz: Charles Laporte, Councillor, Firmin Grandchamps and James Benny.

<sup>61</sup>However, sometimes the number of signatures is listed; see, e.g., *ibid.*, app. A, #29 "Answers of the *Censitaires* of De Léry, Longueuil and Laprairie", where 293 signatures were listed. However, one could expect many more *censitaires* than this on these three seignories. And often the number of signatures was no more than five or six.

<sup>62</sup>See *ibid.*, app. A, #37, for the Parish of Berthier; and app. A, #42, for the Parish of St Cuthbert. Berthier and St Cuthbert were neighbouring parishes.

<sup>63</sup>See, e.g., *ibid.*, app. B, #35 "Answers of certain *censitaires* of St. Joseph de la Beauce", dated St. Joseph, 8 August 1842. The answers in this instance were followed by nine such attestations, all of which had the same notary as witness.

<sup>64</sup>*Ibid.*, app. B, #69, "Views of Edward Gibbon Wakefield, Esquire".

from such an eloquent rogue as Wakefield, there is some corroboration of his claim that many of the meetings were attended primarily by disgruntled British settlers and not by French Canadians. However, it is clear that at least some of the respondent groups were composed of French Canadians: their versions of the answers published in English by the Commission were listed as translations, and the names given as signatories were French Canadian.

There is also evidence that members of the legal profession had been consulted on prior occasions and advised some rural  *censitaires*  of their rights. For example, Dr C.D. McLean of the settlement of Beechridge in the Seigniorship of Argenteuil informed the Commission:

[I]n 1828, we collected a sum of money for the purpose of ascertaining, if possible, the Seignior's rights, which sum was entrusted to Mr. Thomas Cooke; he applied to Mr. Beaubien, in Montreal, and I believe to other French Lawyers, but we saw that we had no better chance with the laws of this country, than a cat in Purgatory without claws, for, part of the Judges and Advocates are Seigniors or connected with Seigniors.<sup>65</sup>

It may have been that certain members of the legal profession stood behind the claims made by the rural  *censitaires* . These  *censitaires*  were clearly well advised in terms of their use of legal language, of "property rights" discourse, and were able to articulate their claims in a convincing and unanticipated manner.

It is equally certain that in writing to "certain of the noble inhabitants" the Commission had not expected that some of those noble inhabitants would call meetings of local parishes to consider their answers. The letter accompanying the questions submitted to "certain  *censitaires* " was addressed in the singular and asked for the recipient's answers, without mention of any broader range of informants.<sup>66</sup> Yet in at least two instances the responses received indicate either that the recipient took it upon himself to consult others or that local  *censitaires*  called meetings on their own initiative, having heard of the questionnaires indirectly.<sup>67</sup>

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<sup>65</sup>*Ibid.*, app. A, #43, "Answers of Dr. D.C. McLean, (Argenteuil)", answer 38.

<sup>66</sup>See *ibid.*, app. A, #2J, "Letter accompanying [a series of questions to be submitted to certain  *censitaires* ].

<sup>67</sup>For an example of the first, see *ibid.*, app. A, #38, "Answers of the  *Censitaires*  of the Seigniorship of Lachenaye [sic]" which is preceded by the following note, signed by Charles Laurier:

Sir, I have received your letter dated the 28th May last; it did not reach me till the 27th August. I hastened to make it public by a general meeting of the  *Censitaires*  of the Seigniorship of Lachenaye; they have replied to the questions of the Committee of Inquiry on the Seigniorial Tenure by the answers hereto annexed.

For an example of the second, see *ibid.*, app. A, #45 "Answers of the Inhabitants of the Fief Mary Anne", answer 67. See also, *supra*, note 29.

## V. Recovering Lost Language: Reappropriations by the Commissioners

The Commissioners, if they wished to legitimate their inquiry, had to accept the information they received. Yet if they wished to achieve their purpose of recommending commutation, they had to sidestep the information tendered, or at least recategorize it to conform to the Commission's ends. And recategorization of the information received is exactly what occurred with this "data".

### A. Law as an "Ideal-Type"

The Commission divided their report into three categories. Each category was differentiated by chronology (past, present and future) and level of abstraction (ideal-type, concrete level and future vision). In the first category, the past purpose of seigniorial tenure, the system as an "ideal-type", was considered. A long and detailed analysis of the legal doctrine and the various edicts and ordinances, together with the appropriate articles from the Custom of Paris, was transmitted. Through the use of various legal elements, the Commission composed its "ideal-type" model of seigniorial tenure prior to the Conquest. In doing so the Commission implicitly validated the claims of those *ceusitaires* who had claimed a legal right to low rents. At the same time, the Commission also validated the pre-1838 discourse of the seigniorial system. In other words, the Commission, in this section of their report, noted that not only had the rates in Quebec been fixed according to custom, but that the seigniors were under an obligation to concede:

In our estimation, the Royal Grants involved a Trust to re-grant such of the land as might be in an uncultivated state ... in parcels, to actual settlers, upon certain moderate rents ... without its being in the power of the Seignior to demand any money whatever, in the way of capital, for the concession.<sup>68</sup>

The Commission also concluded "that something nearly equivalent or approaching to" a regulation of rents, at a low rate, "became established before the conquest" by custom.<sup>69</sup>

The Commission reinforced their claim that the seignior's land, "incumbered with a species of trust, to promote the speedy settlement of the property", had to be conceded at a low rental rate with the observation that to do otherwise "would be to frustrate the very ends for which the *Edicts* and *Arrêts* had been made." They continued:

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<sup>68</sup>1843 Report, *supra*, note 4 at 3 (the reader is reminded that the pagination of the Report is mine, the original being unnumbered).

<sup>69</sup>*Ibid.* at 6.

We can recognize no difference between demanding, for the concession, a sum of money in the nature of a price, and the stipulation of that price in the shape of rent chargeable on the land; in truth, they are identical in their results.

In both instances there would be a violation by the Seigneur of the original conditions of his grant, because it would tend to impose more onerous charges than the law of the tenure allowed.<sup>70</sup>

All of this, the Commission concluded, was intended to establish a system of settlement "by placing within the reach of every man, the means of obtaining land, subject only to a small annual rent."<sup>71</sup> As for the other items, the *lods* "is incidental to the Seigniorial Tenure of land, and is the legal consequence of a ... *cens*."<sup>72</sup> The *droit de banalité* was, the Commission concluded, a legal obligation which need not be stipulated in the deed of concession. It had the effect of "imposing on the Seigneur the obligation to build Mills, for which they should have the corresponding right of compelling the tenants to carry their grain to be ground there, yielding a certain proportion as toll or multure."<sup>73</sup>

Thus far the Commission, in reconstructing the pre-Conquest seigniorial system, had done so entirely through a discussion of the law. It was through legal rules that they created their historical vision of the purpose and operation of the system. The corollary to this approach was that, throughout the discussion, they had erected an ideal-type: a seigniorial system as it was supposed to have operated in the pre-Conquest colony.

The most remarkable aspect of this stage of the 1843 Report is that the Commission was aware of what they had done, and they used the "legal" reconstruction to rob the *censitaires* responses of legitimacy. They at once recognized the *censitaires'* claims as valid "legal" points, and then delegitimated those claims by stating that they were only an ideal-type: the situation, rightly or wrongly, had changed. This legitimation and delegitimation is implicit in the Commission's summary of this first section:

In expressing our opinion on this branch of the subject, which we feel to be one of a delicate nature, and involving interests of great magnitude, we have calmly and dispassionately considered the matter as a purely legal question irrespectively of cases of individual hardships, or of what may be deemed vested rights founded on long and uninterrupted possession, or the obligation of contracts.

The Courts of Justice in later days, swayed, no doubt, by these considerations, have for the most part, disallowed the principle of a usual and accustomed rate.

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<sup>70</sup>*Ibid.* at 7.

<sup>71</sup>*Ibid.* at 8.

<sup>72</sup>*Ibid.* at 3.

<sup>73</sup>*Ibid.*

By their judgments they have maintained that the Seigneur had the right of conceding upon such terms and for such rents as he might agree upon with his tenant; and have refused to give relief to the  *censitaires*  from such conventional burthens.

They have departed not only from the strict letter of the law, regulating the tenure under the French Government, but from the true spirit and policy of that law, and the conditions of the original grants.<sup>74</sup>

The laws of the pre-Conquest era were indeed valid, and they “governed” the seigniorial system. But that system, its laws altered by the post-Conquest courts, was now changed. The Commission then examined the authority of these courts and concluded that they were properly empowered to enforce the pre-Conquest laws. The unstated implication is that they were also, therefore, empowered to modify them. Thus the Commission stated that the modifications were valid and the “ideal-type” invalid.

The concluding segment of the first division of the 1843 Report, in which the  *censitaires* ’ claims were constructed into an ideal-type and then delegitimated for being such, is followed by a pivotal point also constructed to utilize the data tendered by the  *censitaires*  while dismissing it. At the same time, this pivotal point, also completely legitimated the seigniors’ claims.

### ***B. Measuring the Present***

The Commission used the second phase of its Report to dismiss the idea that the seigniorial system could have a meaningful future. These goals were encapsulated in the Commission’s introduction to its second phase, a description of and comment upon the “present” operation of the system:

We come now to the second branch of the subject of our investigations, namely, as to the present working of the Feudal and Seigniorial Tenure in the Province. In stating our views on this branch of the inquiry, we must necessarily proceed on the assumption that the exorbitant pretensions of the Seigniors, at the present day, are just and founded in law as now administered.

Taking this for granted, it cannot be denied that this system of tenure is in many respects vicious and is productive of extreme injury.<sup>75</sup>

It was in this section, dealing with the present operation of the system and elaborated on a concrete level, that the Commission utilized the  *censitaires* ’ complaints to deride the seigniorial system. Thus, the Commission claimed:

Instead of being able to add to his resources by developing such advantages as his soil or its natural position may present in the free exercise of mechanical

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<sup>74</sup>*Ibid.* at 9.

<sup>75</sup>*Ibid.* at 10.

skill, he is bound to the land for the mere purpose of cultivation, and is dependent on its returns for a precarious subsistence.<sup>76</sup>

Using this claim as a springboard, the Commission leapt into a series of complaints against the system, condemning in turn the *droit de banalité*, the *lods et ventes*, the *retrait*, the *corvée* and the various contractual reservations, concluding that the *censitaire* "is thus kept in a perpetual state of feebleness and dependence. He can never escape from the tie that binds him and his progeny forever to the soil — as a cultivator he is born, as a mere cultivator he is doomed to live and die."<sup>77</sup>

In this manner the Commission altered the rhetoric of the *censitaires*. Language intended to justify or legitimate the desired end — legislative intervention to enforce the original system — was appropriated by the Commission and used to justify an alternative end. It became legitimate evidence to substantiate the Commission's position that the operation of the system "is an abuse and a departure from its true spirit." As a result the Commission concluded the second part of their report by stating:

Profoundly impressed with the importance of this subject, and its ultimate effect on the prosperity of this Province, and the welfare of its inhabitants, we feel that the time has arrived when a change or modification of the law in respect of the tenure of land, can no longer with safety be withheld.<sup>78</sup>

### C. Prophecy of a New Order

Having reached this conclusion, the Commission turned to a consideration of the various proposals for commutation. However, the conclusion reached had already eliminated all proposals for legislation that would reinstate the old system, the system as an "ideal-type." Moreover, it had signalled a dramatic shift in the concept of property. While Lockean labour theories of value had provided the impetus for the complaints against the seigniorial system and the language of labour theories was still utilized by the Commission, the desired end had shifted. Furthermore, in reaching that end, the Commission was adopting a more modern concept of property, one based on the theories of Jeremy Bentham.

## VI. The Security of Property

In adopting a modern theory of property the Commission was, like Bentham, confronting one of the central implications of John Locke's labour theory of property. If property belongs to the creator, the transformer of the raw material, to he who changes the state of nature into a useful commodity,

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<sup>76</sup>*Ibid.*

<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid.* at 11.

why should the *centsitaires* (in this instance) give any compensation to the seigniors for land which they, the *centsitaires*, had transformed, through their own labour, from a wild to a cultivated state? In short, why do the “haves” have, and “have nots” have not?

In this regard the *centsitaires* of the *Fief* of Mary Anne and the Seigniorie de Lanaudière echoed the utterances of many of the respondents when they asked the Commission:

What can indeed be more repugnant to reason and truth, and every human notion of right and justice, than this strange and sacrilegious division of a property that the Great Creator intended should be common to all his creatures into the hands of a few! The brute beast is satisfied with his portion, and he enjoys without molestation from his fellow brutes; but man! man alone, wrests from his fellow man his imperishable right — a right which he received directly from the Almighty; and if he only knew how he would also forbid him the light and the air, for the water he has also monopolized, so far as he could.<sup>79</sup>

In making this statement these *centsitaires* were also staking their claim on the basis of a natural law theory — not hierarchial natural law concepts, but secular natural law based on reason. In doing so, they explicitly rejected a hierarchial ranking based on birthright:

How then shall we remedy this without infringing on the rights of individuals? Alas! Infringe! What, the rights of 150 or 200 individuals? A great deal too much indeed. But what says the other side of the question. How, in the first place, were those rights obtained? In times of barbarism, in the iron ages, when might made right, when a man, if he had the misfortune to be born of poor parents, was considered, in some respects, as inferior to the brute beast, and certainly was worse treated. How many — what multitudes of these have been sacrificed for the mere amusement often of a few in power. Are these multitudes then only the herd? No; you gentlemen, nor any reflecting will say so.<sup>80</sup>

In their Report, the 1843 Commission relied on a Benthamite theory of property to counter these claims. *Principles of the Civil Code*, first published (in French) in 1802 and translated into English in 1830, contains Bentham's outline of a theory which justified an unequal distribution of property, maintaining the landholding status quo.<sup>81</sup> His theory was to the effect that since the overall purpose of “the distribution of rights and obligations” is the “happiness of society”, one may identify the following as “subordinate” ends: “To provide subsistence; to produce abundance; to fa-

<sup>79</sup>*Ibid.*, app. A, #45, “Answers of the Inhabitants of the *Fief* Mary Anne and Seigneurie de Lanaudière”, answer 53.

<sup>80</sup>*Ibid.*, answer #59.

<sup>81</sup>The English version is reprinted in C.K. Ogden, ed., *The Theory of Legislation*, (London: Kegan Paul, 1931). The excerpts relied on are those reproduced by C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) at 39-58.

your equality; to maintain security.”<sup>82</sup> Bentham then ranked “security” above the other ends, by claiming that it alone is concerned with the future.

[S]ecurity is the only one which necessarily embraces the future. Subsistence, abundance, equality, may be considered in relation to a single moment of present time; but security implies a given extension of future time in respect to all that good which it embraces. Security, then, is the pre-eminent object.<sup>83</sup>

What of equality? Bentham claimed that sometimes the four ends, and particularly those of equality and security, will be incompatible. But, he stated, “equality ought not to be favoured except in the cases in which it does not interfere with security; in which it does not thwart the expectations which the law itself has produced, in which it does not derange the order already established.”<sup>84</sup> Bentham buttressed his point with the observation that, “[i]f all property were equally divided, at fixed periods, the sure and certain consequence would be, that presently there would be no property to divide.”<sup>85</sup> This argument seems fallacious in the extreme, given that in Bentham’s own country at that time there already was no more property to divide. It was precisely that difficulty that the systematic colonizers were endeavouring to overcome by exploiting surplus population.

Bentham then continued, following a brief interlude where he subordinated the twin ends of “subsistence” and “abundance” to “security”, to consider the end of equality in more depth. During this consideration he posited his “moral thermometer” of pleasure and pain as a criterion for measuring attempts at redistribution. In a brief discussion analogous to that of an economist considering Pareto-superiority and optimality, Bentham concluded his consideration of equality by upholding the rights of the prior possessor.<sup>86</sup>

But it was in the following section that Bentham dealt with “the principle object of law, — the care of security.” Borrowing a Hobbesian vision of the state of nature, Bentham summoned up the spectre of “the savage state”, a situation in which chaos rules and all worthwhile labours are dissipated. But for law, claimed Bentham, society would descend into the savage state: “Law alone has done that which all the natural sentiments united have not the power to do. Law alone is able to create a fixed and durable possession which merits the name of property.”<sup>87</sup>

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<sup>82</sup>Macpherson, *ibid.* at 41.

<sup>83</sup>*Ibid.* at 42.

<sup>84</sup>*Ibid.* at 43.

<sup>85</sup>*Ibid.*

<sup>86</sup>*Ibid.* at 46-49.

<sup>87</sup>*Ibid.* at 50.

Having made these claims, Bentham then lowered his lance and charged the windmill vision of John Locke's labour theory of property:

Law does not say to man, *Labour, and I will reward you*; but it says: *Labour, and I will assure to you the enjoyment of the fruits of your labour — that natural and sufficient recompense which without me you cannot preserve; I will insure it by arresting the hand which may seek to ravish it from you.*<sup>88</sup>

It is this conception of the purpose of law — to secure the “enjoyment of the fruits of your labour” — that allowed Bentham to make his well-known, positivistic statement about property:

[T]here is no such thing as natural property ... it is entirely the work of law.

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it ... . It is not material, it is metaphysical; it is a mere conception of the mind ... .

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.<sup>89</sup>

It was this proposition, that property is nothing but a metaphysical creation of the law, meant to secure one's future expectations, that led Bentham to admonish the legislator to “[i]n consulting the grand principle of security ... decree respecting the mass of property already existing ... to maintain the distribution as it is actually established. It is this which, under the name of *justice*, is regarded as his first duty.”<sup>90</sup>

It is precisely in their rejection of the Lockean labour theory of property claimed by the *censitaires*, and their adoption of a positivistic conception of property rights, that the 1843 Commissioners reveal themselves as Benthamites. Justice, for the Commission, did not belong to the realm of distribution; rather, it was a justice born of the desire for security: “[W]e must necessarily proceed”, the Commissioners wrote, “on the assumption that the exorbitant pretensions of the Seigniors, at the present day, are just and founded in law as now administered.”<sup>91</sup> The Benthamite notion of property rights as secured expectation led the Commission to conclude that if those expectations were to be removed, they must be compensated: “The seignior

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<sup>88</sup>*Ibid.*

<sup>89</sup>*Ibid.* at 51-52.

<sup>90</sup>*Ibid.* at 57.

<sup>91</sup>1843 Report, *supra*, note 4 at 10.

must receive a compensation for his rights, and this compensation can only be given by means of a commutation."<sup>92</sup>

This belief, that security of expectation was the dominant principle of justice where property rights were concerned, led the Commission to announce that compensation should be based "on strictly just principles" and to dismiss the claims of the "inhabitants of French origin" by observing that "[t]hey are anxious to be exonerated from the burthens pressing most heavily on them, but in few instances do they express a willingness to pay any equivalent."<sup>93</sup>

In short, the Commission concluded that the seigniorial system had to be abolished and, in doing so, dismissed all calls for legislative intervention that would return the system to what the Commission claimed was an "ideal-type". This stance effectively dismissed many of the responses submitted by rural *censitaires*. Those "group" responses which remained, in particular the ones that resorted to labour theories of value to claim no compensation was due the seigniors, were dismissed as being incompatible with the Commissioners' concept of justice, a concept that had at its heart the Benthamite vision of property as the creation of positive law enacted to uphold and secure one's future expectations.

## Conclusion

The Commission's report, together with its documentary evidence, was laid before the Legislative Assembly on 4 October 1843. Although it might have escaped our attentive visitor's notice, the events surrounding the 1843 Commission's inquiry had had a significant impact on Quebec society. Woven through the process was the thread of legal liberalism. That is, the various groups who chose to respond (or, correctly speaking, were able to respond) to the questionnaires asserted their position through legal, rather than political, economic or social claims. People quickly learned that claims were most persuasive when framed in legal terminology derived from a specific set of legal rules. Without doubt, the questions asked betrayed both the nature of the interrogators and that of their mandate. In turn, the ques-

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<sup>92</sup>*Ibid.* at 12. The Commission emphasized the Benthamite concept by stating (at 11): Viewing a conversion of tenure in the abstract, or as a mere measure of public utility, called for by the advancement of a country in intelligence and civilization, it would be less difficult to give the general outlines of a plan calculated to effect it; but regarding the tenure as one under which the inhabitants of this country have lived since its first settlement, as one intimately blended with their laws and customs, the subject becomes intricate and demands the maturest examination.

<sup>93</sup>*Ibid.* at 12.

tions steered the language of the respondents towards legal discourse, thereby converting pluralistic visions and competing economic claims into a form which tended to legitimate and define the legal terrain as a valid arena for conflict within the democracy.

Resort to the legal arena gave equal voice to the competing claims, thus offering the promise of power to otherwise underprivileged groups. All utterances placed in the arena were potentially valid, provided they were phrased in legal terms. This gave the appearance of democratic proceedings, thereby reinforcing the ideal of "democracy".

At the same time, resort to the legal arena placed certain institutional limits on the discourse surrounding the conflict. The utterances of the informants were placed in the hands of lawyers — the Commissioners — further entrenching the use of legal language. Moreover, the Commissioners were lawyers with a particular vision of the future. That vision became the cultural filter through which the system was screened, and through their utterances a "consistent and publicly accessible account of events" was constructed.

In the manufacture of that account, certain data was chosen as legitimate, other data rendered meaningless. Words such as "improvements" were defined, and both the scope and nature of the *droit de banalité* were, for the moment, determined. The consequences that flowed, the "legitimate" account of the past, the unilateral condemnation of the present, and the search for the future were restricted to a certain construction of events, built around a vision. The assumption on which it rested was derived from a particular epistemology: a past constructed through legal rules (an ideal-type); the present measured against it, to produce the conclusion of chaos; and the glorious, almost messianic, quest for a new beginning through manipulation of the now-obsolete legal rules.

Furthermore, the Commission's account entrenched a Benthamite vision of property in the elite discourse of the society. Bentham's vision conveniently straddled the two eras: it acknowledged the past while embracing the future, reconciling the divergent realities with the doctrine of eminent domain. The gap between past and future is, in this doctrine, bridged by accepting the notion that compensation will be given for the loss of rights — enforceable expectations — to which individuals presently have legal entitlement, but which those individuals will be deprived of in the future, as a matter of "public interest". Thus future expectations that had definitely accrued to individuals (in this instance the seigniors) were compensable. Eminent domain acknowledged a past state — "the expectation of deriving certain advantages from a thing which we are said to possess", to use Bentham's words — while moving towards a (different) future vision.

The construction of an official account of seigniorial tenure and the means by which it was achieved had ramifications for the players who had entered the legal arena. Those who chose not to, or who were unable to, engage in the discursive struggle were not heard. Those who engaged in the struggle and "lost" were placed in a dilemma: the decision of the umpires — here the Commissioners — became the official account, and was final. Once the account was constructed, once the official monologue was voiced, the only immediate avenue available to dissentients was to withdraw from the struggle entirely and accept the loss or to continue the debate in another institutional arena.

The latter pattern was chosen, and the debate concerning the abolition of seigniorial tenure in Quebec continued in the Legislative Assembly for another decade. But when the debate moved out of the legal arena and back into the political institution, it was significantly altered. The issues debated centered on the concept of eminent domain: how could the "public interest" best be served, and what amounted to "just compensation"? But throughout the political debate, those who desired legislative intervention, those who echoed the opinions of the rural *censitaire*, were disadvantaged. Despite their cause being the most popular politically, they faced a major obstacle. That obstacle was not a given interest group *per se*, but an officially sanctioned set of beliefs about the normative ordering and the perceived impact of seigniorial tenure. Those beliefs constrained the directions the debate could take and the range of potential solutions as powerfully as other "empirical" data.

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