UNIVERSITY OF MANITOBA

Metis Aboriginal Rights in the Twenty-First Century: Looking Beyond Powley

by Lisa D. Chartrand ©

A thesis submitted to the Faculty of Law in partial fulfillment of the

requirements for the degree of Master of Laws

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Metis Aboriginal Rights in the Twenty-First Century: Looking Beyond Powley

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ACKNOWLEDGMENTS

I am a member of a large extended Métis family and a member of more than one Métis community. In addition, I am associated with more than one contemporary political organization representing Metis persons for the purpose of Metis Aboriginal rights recognition. I have lived my life within the complexities and intricacies of the multiple relationships that inhere in these relationships. The knowledge that I have been given and have acquired through these relationships and their associated activities permits me to speak to the social, cultural and political implications of processes that are being pursued contemporaneously by government and political organizations representing Metis persons and communities. It is this first-hand knowledge and experience that motivates me to construct this thesis so that scholars, legal practitioners and Metis peoples may contemplate the consequences of actions that are now being taken.

There are numerous persons to whom I would like to express my appreciation to for sharing their wisdom and for providing continuing support and encouragement to me. To Dr. DeLloyd Guth and Professor Wendy Whitecloud, thank you both for the multiple reviews and commentary provided on this work. To Professor Paul Chartrand and Dr. Raoul McKay for sharing with me their knowledge and experiences as Métis. To Professor Larry Chartrand for his review of my work and commentary.

I would like to express my appreciation to three Métis organizations in Alberta. The relationships and experiences I have gained in association with each of them have profoundly affected my views and perspectives on Métis Aboriginal rights in Canada. As a community and organization, I thank and acknowledge Paddle Prairie Métis Settlement. To the staff and governing members of the Métis Settlements General Council, for the support and encouragement they have given to me over the years. I also wish hto thank and acknowledge the Métis Nation of Alberta for the experience I gained in association with that organization, without which I would not have appreciated the dynamics that exist with respect to Métis political organizations in Canada.

Many persons in my personal life had a profound impact on my understanding of the issues discussed in this work as well as my decision to write the thesis. I would like to acknowledge and thank my friends and relatives of Métis communities throughout northern Alberta - for the knowledge and experiences I have gained by these associations, as well as for teaching me what community genuinely means. To my husband, Lionel, for sharing his knowledge and experience as a Métis lawyer. To my children, thank you for your enduring patience and understanding. My brother, Paul, for continuing in the traditions of our Métis ancestors. Lastly, to my mother Cora Weber-Pillwax, who I thank for her innumerable critical discussions and debates, and her extensive knowledge and experience as a Métis woman and scholar.

ABSTRACT

In September 2003, the Supreme Court of Canada rendered its first decision regarding the Aboriginal rights of Metis peoples in Section 35 of the *Constitution Act, 1982*[1]. In the process of establishing a legal framework for these types of claims, the Court in *Powley* triggered important questions such as "who is Metis?", "what is a Metis community?", and "what constitutes effective European control?", highlighting these questions as essential to determining Metis Aboriginal rights to be accorded constitutional protection. In this work the author explores and presents several conceptualizations of the significant issues that have evolved in connection with these questions, including the social and political responses that have developed as a consequence of the direction given in *Powley.*

The thesis focusses on two challenges implicit to recognizing Metis Aboriginal rights. The first relates to defining and identifying "who is Metis?" and "what is a Metis community?" for the purpose of Section 35. The second challenge relates to the role of contemporary Aboriginal political organizations in the resolution of Metis Aboriginal rights. In *Powley,* the Court seems to attribute a central role to such organizations in the recognition and identification of Metis Aboriginal rights-holders. In theory, this could be interpreted as recognition of Metis peoples' rights of self-determination and self-government, including the identification of rights-holders and negotiation of rights recognition. However, as the author discusses, membership in a contemporary political organization does not necessarily reflect "community" at the grassroots level, where the ability to exercise one's traditional practices is arguably most important. Social, cultural, and political factors have and continue to contribute to the issue of individual Metis identity, as well as to the form and recognition of Metis communities. The combination of these factors creates complicated and evolving issues, which are likely to have an impact on the recognition of Metis Aboriginal rights in Canada.

An initial reading of the Supreme Court of Canada's decision in *Powley* suggests that it is a clear, concise first ruling on Métis Aboriginal rights. However, to characterize *Powley* as being the ultimate determinant on the matter is to overshoot its value. Constitutional recognition of the rights of Métis as Aboriginal peoples remains a complicated matter. Through legal research and analysis, and personal experience and knowledge as a Métis scholar, Chartrand emphasizes the often-implicit connection between Aboriginal law, politics, and bureaucracies, and the effect of these on Metis'Aboriginal rights in Canada.

[1] *Constitution Act, 1982,* being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.

CHAPTER ONE
INTRODUCTION

In September 2003, the Supreme Court of Canada rendered its first decision regarding the Aboriginal rights of Metis peoples in Section 35 of the *Constitution Act, 1982*[1]. While it had an immediate effect on the parties to the action, in the broader context, *R.* v. *Powley*[2] set out the test to be met by future Metis claimants who, through the courts, seek constitutional recognition and affirmation of their existing Aboriginal rights. The decision therefore makes substantial contribution to the development of the common law relating to Metis peoples and Metis Aboriginal rights in Canada.

In the process of establishing a framework for these legal claims, the Court in *Powley* triggered important questions such as "who is Metis?", "what is a Metis community?", and "what constitutes effective European control?", highlighting these questions as essential to determining Metis Aboriginal rights. This work explores and presents several conceptualizations of the significant issues that have evolved in connection with these questions, including the social and political responses that have developed as a consequence of the direction given in *Powley.*

While the focus of this work is not on the social, cultural and ontological realities of Metis life, it is these that form its foundation and substance. This foundation

[1] *Constitution Act, 1982,* being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
[2] *R. v. Powley*, [2003] 2 S.C.R. 207 (S.C.C.).

becomes significant in consideration of the impact that the questions raised in *Powley* will have, and in some cases has already had, on the social, political and legal aspects of numerous and dynamic relationships: among Metis peoples, between Metis people and Metis organizations, between Metis and First Nations peoples, between Metis organizations and provincial and federal governments, and between Aboriginal and non-Aboriginal Canadians. How the questions raised by *Powley* are addressed, whether through litigation or negotiation, will require careful and informed approaches that respect and contribute to the integrity of these relationships.

In addition to setting out the framework that can apply in claims brought before the courts, *Powley* has rekindled the highly profiled political debates that followed entrenchment of Section 35 in the *Constitution Act, 1982.* These debates included matters of political representation and the definition and process of defining Aboriginal rights. Having secured constitutional recognition of the Metis as Aboriginal peoples in Section 35(2), organizations representing Metis persons entered into a formal process of dialogue and negotiations, anticipating that Metis peoples and their Aboriginal rights would finally be recognized by Canada. These processes did not result in recognition of Metis Aboriginal rights and since 1982, Metis people, communities and organizations have continued to advocate for their recognition by Canada, including taking such matters before the courts.

This work focuses on Metis peoples and communities within Canada and the impact that the *Powley* decision is likely to have on those who constitute such peoples. Due in large part to the broad uses and meanings of the term "Metis" throughout history, and into the present day, I begin in Chapter Two with a discussion about who and to what groups I am referring in this work. Chapter Two also elaborates on the complexities that generally surround the formal and legal identification of Aboriginal peoples for the purpose of Aboriginal rights.

Chapter Three briefly describes the methodological approach that I have taken in this work, including literature, legislative and case law review. In addition to these conventional forms of research, a significant component of this work reflects knowledge I have gained from my life experiences as a Metis person and member of Metis communities.

The thesis then proceeds in Chapter Four to consider the questions of "who is Metis?" and "what is a Metis community?," as these were discussed in *Powley*. The chapter is intended to demonstrate how serious the implications are when these interpretations are applied to the lives of Metis individuals, families and communities. In particular, Chapter Four emphasizes how there are often differences between the legal responses given to these questions and the social, cultural and political realities of *being* Metis.[3]

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[3] Indeed, the *Powley* decision also affects Aboriginal persons other than self-identifying Metis; it also has the potential to affect First Nations and Inuit persons, as well as those who do not have recognized status as such. These issues are extremely complex and it is beyond the scope of this thesis to expand on them. However, it is important to note and be aware that *Powley* also has the potential to affect these persons.

Chapter Five entails an analysis of the general common law principles that have been applied in Aboriginal rights claims.

In *Powley,* the Court adopted the date at which legal and political control is effectively asserted over a given territory as the relevant time frame for characterizing Metis Aboriginal rights. This is a sharp move away from the standard that has been applied in Aboriginal rights claims to date. Accordingly, Chapter Six discusses the concept of effective control. In order to contextualize the discussion, Chapter Six gives particular attention to the legal significance of certain historic events that took place in pre-confederation Manitoba. This analysis is intended to provide insight into how courts might find effective European control in various parts of Canada for the purpose of Metis Aboriginal rights claims.

Chapter Seven focusses on the complexities inherent to the issue of Metis political representation and the role of contemporary organizations in the negotiation of Aboriginal rights recognition. It is apparent that the political response to positive judicial pronunciations on Metis Aboriginal rights is, for example, to enter into processes of negotiations with political organizations representing Metis persons and communities. This points immediately to the significance and complexities embedded in Aboriginal political representation as this relates to the negotiation of Aboriginal rights recognition. Chapter Seven

discusses why, in addition to legal factors, the formal definitions of Metis adopted by these organizations should take into account significant social, cultural, and political factors that may not be reflected in the legal definition of Metis and Metis community that has been implied in *Powley.* The chapter will demonstrate how these factors, that flow directly from the lived reality of Metis people have not necessarily been contemplated in the negotiations processes to date.

CHAPTER TWO
SETTING THE CONTEXT

Introduction

Historians, government and Aboriginal groups use various terms to refer to Metis persons and collectives. These include Metis, Métis, metis, Brulé, Half-breed, Breed, voyageur, Native, Indian, and more recently, the generic term, Aboriginal. Contemporary political organizations representing Metis individuals, and most self-identifying Metis communities, commonly although not exclusively use the word Metis or Métis. These terms have also been used interchangeably in legislation, governmental policy documents, court decisions and the *Constitution Act, 1982* in reference to mixed-blood individuals and collectives.

In this thesis, the word Metis is used throughout and refers to those persons of mixed-ancestry: European explorers, traders and immigrants to Canada, and the various Indigenous peoples of Canada.[4] Reference will be made to Metis peoples, or Metis communities, when referring to individuals who form a community that identifies itself and is recognized as representing Metis persons collectively.

Origins of the Term Metis

[4] The exception to this will be situations where sources referred to use a variation of the term Metis.

According to historian Jennifer Brown, the word métis was a term adopted by the French in reference to the mixing of two species or breeds.[5] Upon their arrival to this continent and through the inter-relationships that evolved between the European traders and Indigenous peoples of the territory, the term métis began to be used in reference to the mixed blood children born of these early relationships. Original pronunciation of the word was Méchif, or Michiss, a term that continues to be used by many Metis persons today.[6]

Historians report that there were two distinct mixed-ancestry groups in the Red River area prior to Confederation. [7] There were the Country-born or "Half-breeds", who predominantly were those descendants of Cree women of the Hudson's Bay hinterland and the Hudson's Bay Company personnel.[8] According to the historic record, the country-born tended to settle in the Red River region between 1800 and 1860, at the encouragement of the Hudson's Bay Company.

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[5] Jennifer Brown and Theresa Schenck, "Métis, Mestizo, and Mixed-Blood," in Neal Salisbury and Philip Deloria, eds., *Blackwell Companion to Native American History* (Malden: Blackwell Publishers, 2002) at 325.

[6] In addition to usage of the term Méchif in reference to the people, Méchif is a traditional language of some Metis communities in western Canada For discussion about the Méchif language, see John C. Crawford, "What is Michif?" in Jennifer Brown and J. Peterson, eds., *The New Peoples, Being and Becoming Metis in North America* (Winnipeg: The University of Manitoba Press, 1985) at 231; also Metis oral history, Raoul McKay, Ph.D., June 2005, Winnipeg.

[7] For example, see Jacqueline Peterson and Jennifer S. H. Brown, *The New Peoples, Being and Becoming Metis in North America.* (Winnipeg: The University of Manitoba Press, 1985). This treatise was cited by the Supreme Court of Canada in *Powley* and is also described in P. Chartrand, "Who are the Métis in Section 35?" in P. Chartrand, *Who are Canada's Aboriginal Peoples? Recognition, Definition, Jurisdiction* (Saskatoon: Purich Publishing Ltd., 2002) at 86. Also, Méchif oral history attests to this historic fact: Raoul McKay, *supra* note 6.

[8] The earliest recorded reference to the term "half-breed" appears in the 1814 Hudson's Bay Company records where trader John Peter Pruden began to differentiate "half-breeds" from freemen among North West Company rivals (HBCA B. 27/a/5,1 Nov.), cited in Brown, *supra* note 5 at 326. In 1819, Alexander McDonnell, "A Narrative of Transactions in the Red River Country," routinely distinguishes "the free Canadian hunters and Half-breeds in the usual and peaceable occupations" (p. 26) as aqs well "the rights and properties of the Half-breeds and Natives" (p. 39): British Library, 1196.i.27, courtesy of Dr. DeLloyd J. Guth.

The Country-born were more apt to lead a sedentary and agriculture-oriented lifestyle. Politically, they were reportedly more closely connected to the Hudson's Bay Company. The other mixed-ancestry group was identified as Metis. This group of persons was predominantly the French-speaking mixed-ancestry persons of the area, more associated before 1821 with the North West Company, politically independent from the Hudson's Bay Company and more inclined to trading and buffalo hunting as their traditional means of livelihood.

According to Paul Chartrand, several factors have contributed to the perception that one Metis people originated at Red River. The most significant of those factors include the following circumstances:

- The Half-breeds and Metis joined forces politically to oppose the Dominion government's survey of lands at Red River. Together, they participated in the establishment of a provisional government under the leadership of Louis Riel;
- Land provisions within the *Manitoba Act* (1870) applied to all residents of Manitoba. In particular, Section 31 referred to "the Half-breed residents", although the provision also applied to the Metis;
- Subsequent provisions in the *Dominion Lands Act* (1879) referred to the land grants made to satisfy the 'claims of Half-breeds of Manitoba and the North-West Territory'. Provisions in the *Dominion Lands Act* were similar to the *Manitoba Act* provisions in that they applied equally to Half-breeds and Metis;
- General common usage over time of the term Metis merged in reference to descendants of either English-speaking Half-breeds or French-speaking Metis.[9]

[9] Chartrand, *supra* note 7.

It can also be argued that the historic distinction between Metis and Half-breeds was based essentially on language differences. The fact that the French term métis translated into mixed, and was used in reference to the inter-mixing of European and Indigenous peoples, supports this conclusion. Company records also support this conclusion. For example, when property was reportedly destroyed at Red River, blame was attributed to the "Canadians and half-breeds, Brulees or Metifs"[10]. Similarly, Cuthbert Grant Jr., who participated in the Battle of Seven Oaks as leader of the Metis, used "half-breed" when he wrote in English, and brulé or bois brulé in French.[11]

Notwithstanding negative connotations of the term Half-breed, historically it had significant meaning in law and policy. As noted above, in the *Manitoba Act,* Metis land provisions referred to the "Half-breed residents" of the territory. Similarly, as a means to address Metis concerns, which continued to be raised throughout the province during the Depression era, the Alberta government's Legislative Assembly passed a formal resolution in 1933 calling for a study into the condition of the Half-breed population of Northern Alberta.[12]

As we enter the twenty-first century, the term Half-breed is generally considered to be derogatory when used in reference to persons of mixed Aboriginal ancestry. This is particularly the case where the speaker or writer is not a

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[10] Brown, *supra* note 5 at p. 327, citing HBCA, B. 22/a/19.
[11] *Ibid.,* citing Selkirk Papers, vol. 6: 1867-7.
[12] Alberta, Lieutenant Governor, Royal Commission, (Alberta, 1933) (The Ewing Commission) in Hamblin Beharry, "Alberta's Métis Settlements: A Compendium of Background Documents" (Alberta: Native Affairs Secretariat, 1984).

member of the group referred in this context. By comparison, in certain cases, it has persisted as an acceptable term of self-identification.[13]

Use of the word Metis as a self-identifier has not always been for cultural or historical reasons. In some instances, it was simply viewed as the widest, all-encompassing term that could be used in reference to the group. According to anthropologist Joe Sawchuk, the term Metis was virtually unheard of in Ontario during the 1970s, the term "half-breed" or "breed" being much more common. The term Metis would become known and used by Ontario organizations because of the growing political activity on the prairies. Sawchuk cites the recollection of an Ontario Metis elder:

> The Lake Nipigon meetings... all started because we had read in the paper about out west where Jim Sinclair and Dr. Howard Adams were doing something about the Metis movement out there. At that time, we didn't know what a Metis was. We thought you had to be half French to be a Metis. We knew we were half-breed but some people called us non-status Indians. According to them two fellows, we were all Metis, so that's how we founded the Lake Nipigon Metis Association, because we heard those guys talking about it.

All of these terms and examples attest to the fluidity and diversity with which persons of mixed ancestry self-identify, and by which they were identified and recognized by others. None is any more or less correct than the other.

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[13] For example, Brown, *supra* note 5 at 325, cites this to be the case among the older Scots-Cree at Moose Factory on James Bay. In addition, self-identification as Half-breed persists today amongst many rural northern Alberta communities.

The term Metis has now supplanted most other terms and has come into general use in most situations to describe generally persons of mixed ancestry.[14]

Contemporary Use and Meaning of the Term Metis

Terms used to describe ethnic and national groups continuously shift and change through time and location, often being considered acceptable during one era, offensive or pejorative in others. Similarly, over time there have been dramatic changes to the manner and frequency with which persons of Aboriginal ancestry self-identify as being Aboriginal. Such is the situation with terms that have been used over time in reference to Metis peoples in Canada, as well as patterns of self-identification.

While birth rates are undoubtedly a factor, as we enter the twenty-first century, it is apparent that self-identification has substantially affected statistics regarding Metis demographics in Canada. Of the 976,305 people who identified themselves as Aboriginal in the 2001 Census, 292,310 persons (approximately 30%) self-identified as being Metis.[15] This was a 43% increase from the 1996 Census, where 204, 120 claimed Metis as their Aboriginal identity. It is presumed that the increase in people identifying as Metis is attributable to a number of factors, including increased awareness of Métis issues through legal

[14] There are some exceptions to this statement, as will be elaborated on herein.
[15] Canada. http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/groups2.cfm.

and political lobbying efforts, constitutional discussions, and general social acceptance of Metis heritage.[16]

Notwithstanding the national increase in use of the term "Metis" to describe one's Aboriginal ancestry and identity, it has also been the subject of much contention. For example, the *Royal Commission on Aboriginal Peoples* reported that Metis is the term historically used in reference to the Metis of the Métis Nation, and that many members of the Métis Nation believe that, based on this fact, they should therefore have the right to exclusive use of the term.[17]

Without minimizing the importance and evolution of a distinct Metis identity that is clearly associated with the Red River area of Manitoba and which in many instances assumes the contemporary title, "Métis Nation", one must be sensitive to the fact that there are other distinct Metis communities in Canada, which do not identify with that particular Metis community. These are Metis who have both a distinct collective identity, and a social, cultural and political existence, from their Indian and European forebears. These Metis also have unique cultures and practices, and are arguably also rights-bearing Metis communities, as these are contemplated in *Powley*.

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[16] "Aboriginal Share of Total Population on the Rise", see http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm

[17] Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities,* vol. 4 (Ottawa, Supply and Services Canada, 1996), c. 5.

With respect to Metis self-identification and community recognition, use of the descriptor "Metis" has reified since *Powley*. Concurrently, there has been a resurgence of claimed territoriality and exclusivity as reported by the Royal Commission during its investigations. As an example, consider the publicized comments of counsel for the Powleys, Jean Teillet, following the release of *Powley*:

> I've never thought those people were Metis. The classic one was the woman I met who said to me, 'Well, I'm Metis too'. And I would play what I call Metis geography, which is 'Where are you from?' and 'What's your real family name?' Because there are really only about 20 real Metis names. You're either a Riel or a Laviolette or a Poitras or a Chartrand or something when it gets down to it. She said to me, 'My mom is part Shuswap and my dad is part Shuswap'. And I asked 'Well, why doesn't that make you Shuswap?' And she said, 'Because I grew up in Calgary.' And I asked...'How does that make you Metis?' And she looked at me and said, 'Well, I guess every body has a different definition of who is a Metis.' And my response was, 'Yes, and some of them are wrong.' [18]

Indeed it is interesting to note that the Powley's ancestors were reportedly members of the Batchewana Band, and resided at the Garden River Indian Reserve.[19]

Problems of Labelling

It would appear from a general observation of Section 35 and Aboriginal law issues that "Aboriginal" refers to all Indian, Inuit and Métis persons. Notwithstanding this liberal interpretation, there are many categories of

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[18] Jean Teillet, Counsel, Pape & Salter, quoted in Windspeaker Newspaper, Volume 21, No. 7, October 2003.

[19] *R .v. Powley & Powley,* Memorandum of Law (Ont. Prov. Court) Court File No. 0131 999 93 3220-01.

"Aboriginal" that one must be aware of in order to appreciate the complexities inherent to Aboriginal identity, status, recognition and community belonging. Briefly, and only for the purpose of illustrating the difficulties that arise in respect of these important matters, a number of contemporary terms associated with Indian persons and groups which have a profound effect on Aboriginal legal issues today are described below.

Within the category of "Indian", a number of diverse terms are used. Status Indians are those persons who are recognized as meeting the statutory requirements set out in the federal *Indian Act*[20] and are therefore registered with the federal government as Indian. Comparatively, Treaty Indians are those individuals whose ancestors were signatories to the treaties made between various Indian tribes or nations with Britain and later Canada. Treaty Indians do not necessarily have status under the federal *Indian Act,* many having been disenfranchised as a result of historic changes made to that legislation. In other instances, regardless of their status with the federal government, many Treaty Indians prefer this designation, emphasizing that it illustrates the nation-to-nation relationship that exists between their communities and Canada.

Another designation of Indian status that has been created as a result of changes made to the federal *Indian Act* is that which has come to be referred to as "Bill C-31 Indians". These are individuals whose Indian status was reinstated under the federal *Indian Act* following amendments to that legislation in 1985. Although it is

[20] *Indian Act*, R.S.C. 1985, c. I-5, as. am., s. 6

beyond the scope of this work to elaborate on the complexities that have been created as a result of these changes, these have had a dramatic impact on persons who may have otherwise self-identified and been accepted as Metis prior to being reinstated.

Another label that has been created through imposition of law and policy in relation to Indians is the on-reserve, off-reserve designation. Although legally there is no difference between those resident on reserve and those who reside elsewhere, significant social, cultural and political distinctions have been created as a result of legislative changes and judicial decisions and the effects of these are far-reaching on self-identification and recognition.

The issue of labelling can be confusing and is exacerbated by the fact that many of these terms are not mutually exclusive. For example, a "non-status Indian" can also be socially, culturally and politically, Metis. "Status" can include Treaty and non-Treaty Indians, persons with Indian status derived from Bill C-31, on-reserve Indians or off-reserve Indians. As described herein, there are significant legal and social distinctions between these categories.

Laws and policies are complex sources of power and knowledge, which exert a powerful effect on how people think about, and generate knowledge about, what it means to be Aboriginal. Although there might not be obvious social and cultural differences between status Indians, non-status Indians and Metis, the *legal* differences between them are certain.

Aboriginal Rights

Although the primary intent of this thesis is not to formulate an argument for recognition of Metis Aboriginal rights, brief reference to Aboriginal rights and explanation of the meaning that I give to this concept in this thesis is necessary in order to contextualize conclusions that are drawn.

Aboriginal rights is a Canadian common law concept based on the premise that, prior to the imposition of European laws and government, Aboriginal peoples existed here, living in distinct societies with unique customs, traditions, values and belief systems. The doctrine, which has evolved in response to court decisions involving interpretation of the customs, practices, traditions, and beliefs to be accorded constitutional protection, is intended to recognize and affirm these pre-existing aspects of Aboriginal society.

Socially and culturally, the Metis were and are distinct from both their European and First Nation forebears. Their relationship to the land and its resources, including the animals, was and is inextricably bound to their identity as a distinct and independent people. Historically, and contemporaneously, they place great value in the ability to travel freely for purposes of subsisting and trading in goods derived from these harvesting activities.

Those whose traditional territories fell within the prairie buffalo ranges relied primarily on the buffalo hunt, and trade of goods derived from the hunt for subsistence. They also harvested other products from the land, including fish, fur-bearing animals, roots and berries.

In many instances, Metis people and communities maintain these traditional practices into the present day. [21] The doctrine of Aboriginal rights, entrenched in Section 35 of the *Constitution Act, 1982,* mandates that Canada recognize and affirm these practices as being existing Aboriginal rights.

As with most Aboriginal peoples or groups in Canada, Metis societies had practices, customs and traditions that were integral to their distinctive existence. These traditions included practices that related to hunting, fishing, trapping, and gathering resources from the land. Metis societies also had customary laws and beliefs, and forms of governance. It is this holistic vision of traditional practices that is considered to be the foundation of Metis Aboriginal rights in Canada today, and which is contemplated in this thesis.

Metis Community

[21] Although many of these traditional practices have been criminalized over time through the imposition of European and Canadian laws: L. Weber, *What is a Crime? Pimatsiwin Weyasowewina: Aboriginal Harvesting Practices Considered* (Ottawa: Law Commission of Canada, 2005).

It is apparent that the courts understand Aboriginal community in a variety of ways. For example in *R. v. Gladue*, the Supreme Court of Canada gave a liberal interpretation to the definition of Aboriginal community:

> In defining the relevant aboriginal community ... the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre.[22]

Comparatively, in *Powley,* the Court considered a Metis community to be "a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life".[23] As will be demonstrated in this work, Metis communities today do not necessarily reflect the "rights-bearing community" envisioned by the Court in *Powley*.

Metis communities have evolved throughout the Prairies and into the woodland areas of the now-Prairie Provinces. Similar to those whose traditional territory is on the prairies, Metis communities within the woodland regions have relied on hunting, fishing, trapping and gathering as a means of earning a livelihood. These communities would also participate in the fur trade, although more often their participation would involve extensive travel to the trading posts that had been established throughout Rupert's Land, rather than through permanent settlement at communities.[24]

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[22] *R. v. Gladue* [1999]1 S.C.R. 688 (S.C.C.) at para. 93.
[23] *Supra* note 2, at para. 12.
[24] Although this also occurred at places such as Lac La Biche, St. Albert, and Athabasca Landing (Alberta).

Regardless of their geographical isolation and location, Metis community members and communities joined together, sharing resources, providing social and cultural networks, sharing languages. These communities are often related through kinship ties to the Metis communities that were established in more southerly and publicly acknowledged locations such as Red River.

CHAPTER THREE
METHODOLOGY

This thesis required three general sources: literature review, statutory and case law research, and personal experience and knowledge. The contributions that each of these sources provided are set out below.

Literature Review

Numerous secondary publications describe the evolution of distinct Metis identities and communities in Canada. Many focus on the historic mid-nineteenth century Red River Settlement in present-day southern Manitoba. These publications include *Canada and the Métis, 1869 – 1885* (Dougles Sprague); *The Birth of Western Canada* (George Stanley); *The Metis of Manitoba* (Joseph Sawchuk); *The Other Natives: The Metis* (Antoine S. Lussier and D. Bruce Sealey, eds.); *The Metis: Canada's Forgotten People* (D. Bruce Sealey and A. Lussier); and *Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Paul L.A.H. Chartrand, ed.); *The New Peoples: Being and Becoming Métis in North America* (J. Peterson & J. Brown, eds.).

Due to the abundance of published materials about the Red River Settlement as a particular Metis community, to which has been attributed the origins of the Metis as a "people" or a "nation", several references in this work will point to the notion of Red River as being the "origin" of the Metis in order to contextualize and

elucidate the substance of my own thesis. Many publications, including those mentioned, were reviewed in order to gain a deeper understanding of the history of Metis peoples and to avoid falling into the conceptual trap of recognizing or identifying "the Metis" as only those persons who claimed ancestral connections with the Red River Settlement and who, in some instances, collectively assume the contemporary title, "Métis Nation". Such a claim, by definition, has geographical, legal as well as political implications; but it has tended to hide the fact that there are other Metis peoples in Canada and in contemporary circumstances, excluded other Metis from the process of self-determination. Papers reviewed within the Brown and Chartrand collections confirm the conclusions I draw about this reality through personal experience and knowledge. Additional references discussed in *The Royal Commission Report on Aboriginal Peoples*, Volume 5; *Metis Land Rights in Alberta: A Political History* (The Metis Association of Alberta, *et al.); Metisism, A Canadian Identity* (Alberta Federation of Métis Settlements Associations); *Lac La Biche and the Early Fur Traders (*Edward J. McCullough, and Michael Maccagno); *Broken Promises: The Aboriginal Constitutional Conferences* (R.E. Gaffney, *et al.)* also substantiate this conclusion, and are referred to in this work.

Legal Research

It is arguable that, as Aboriginal peoples, Metis possess the same rights and entitlements as Indian and Inuit peoples recognized under Section 35. This thesis

presents the argument that historic and contemporary legislative and constitutional commitments, which have been extended to "Aboriginal peoples," must logically also be extended to Metis peoples. Numerous legislative and common law sources have been researched to clarify this argument and are summarized in the conclusions of Chapter Five.

It is often through policy that government implements judicial directives. Recognizing this fact, the legal research here also includes a review of select governmental policies that deal with Metis communities and collectives, specifically in the context of Aboriginal rights. This literature-based research and analysis provides a solid theoretical and policy-based framework for Chapter Six, which discusses the role of contemporary political organizations in the rights recognition process for Metis.

Indigenous Knowledge

It is becoming more common for Aboriginal persons to conduct primary research and writing about issues affecting them as individuals and as members of communities. This differs from the historical academic practice of representing Aboriginal peoples through "other" voices, usually non-Aboriginal and usually outside of the Aboriginal experience. The academic and legal representation of Metis in scholarly literature and research was no exception. The critique of "outside representation" in research associated with Aboriginal peoples has been widespread in the last two decades. It has not been limited to Aboriginal

scholars and academics (Chartrand, Goulet, Marcus & Fisher, Churchill, Monture-Angus, Hampton, Meyer, Wilson, Steinhauer, Weber-Pillwax). This supports the claim of Aboriginal scholars and community members that elucidating issues embedded in the relationship between Aboriginal community members, between Aboriginal individuals and their governments, and between Aboriginal communities and external governments and entities, needs to be done by Aboriginal scholars who have lived these experiences and developed the necessary and related foundations of epistemological and empirical knowledge.

Few sources have articulated the subtle and complex nature of relationships and interactions between Metis peoples, communities, and representative organizations on the one hand and the federal and provincial governments. This increases the significance of scholarly contributions made by Metis researchers, especially where the substance of such research is validated by personal experiences that reflect the richness of meaning that flows to the individual from the oral transmission of intergenerational knowledge.

Professional Experience

As a lawyer, I have had the fortunate experience of working with both First Nations and Metis governments in Aboriginal rights recognition processes. These involvements have provided me with insights about First Nations and Metis individuals and communities (collectives) as they pursue recognition of

their traditions, beliefs and values, contemporaneously characterized as Aboriginal rights, and the social, cultural and political effects of these approaches.

As an Aboriginal scholar, and in addition to experiences within my own Metis family and communities, I have had opportunity to conduct research, interact with, and present to diverse audiences across Canada on the issue of Metis identity, community, and Metis Aboriginal rights in Section 35. These experiences have provided me with tremendous insight into the views of judicial decision-makers, political representatives, and other academics regarding Metis identity, community and rights.

The methodology I am using in this work adheres to the principles of Indigenous research methodology described by Weber-Pillwax (1999) and, in some ways, can be interpreted within the frame of politics as ascribed to research by Indigenous scholars on decolonizing research (Linda Smith, Indigenous Research Methodology). Secondly, the elaboration through conventional legal research and elucidation of the existence of more than one legal or formal "source" of Metis identity in this process is significant, in that it can reach beyond the parameters of this thesis and impact positively in the daily lives of Metis individuals and communities.

The inclusion of my personal experiences as a Metis scholar and community member in this work enhances and gives meaning to the formal case law, policies and literature reviews. Without the human experience that represents or speaks to the integration of the written words, the text overcomes and subsumes the person, objectifying and dehumanizing issues that are at the heart of real peoples' lives: identity, rights, self, relationships, community, knowledge.

I intend this work to contribute meaningfully and positively to the communities of Metis peoples throughout Canada and assist them in the processes of rights recognition. This work has a mission beyond its collection of words, which can be talked about by persons who have nothing to lose if the topic remains a discourse into the next century, but which must move into the realms of concrete experiences and living truths.

CHAPTER FOUR
METIS SELF- IDENTITY AND METIS COMMUNITY

Introduction

Section 35 (2) of the *Constitution Act, 1982* states that the Aboriginal peoples of Canada include the Indian, Inuit and Métis.[25] Since 1982 entrenchment of Section 35 in the Constitution, and the discussion processes associated with this,[26] Metis identity has been dramatically affected by national politics and legal jurisprudence relating to Aboriginal peoples.

Although Section 35 is an explicit constitutional acknowledgment that Metis are Aboriginal peoples, it fails to identify who is Metis for the purpose of Aboriginal rights. In the absence of clear constitutional or legislative direction on this issue, legal and political complexities are created; and the ultimate determination of exactly who is contemplated as being within this category is left to interpretation.

This chapter will demonstrate how individual Metis persons and communities are experiencing revolutionary changes as a direct consequence of these factors. The analysis will begin with an overview of how the courts are characterizing Metis identity and Metis community as legal constructs. Law and policy makers, including the courts, have only recently begun to consider these concepts and, as will be elaborated in this paper, their responses to these questions are

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[25] *Supra* note 1.

[26] I am referring here specifically to the series of First Ministers conferences held after 1982. Section 37 of the Act reflected the Prime Minister's commitment to dialogue with leaders for the express purpose of giving meaning to Section 35. This history is developed in greater detail in Chapter Seven.

complicated and evolving. This chapter will also consider whether or not, and to what extent, these approaches reflect the social, cultural and political realities of Metis individuals and communities in Canada. To contextualize this discussion, specific examples and definitions of Metis and Metis community will be discussed.

Judicial Definitions of Metis Identity

The laying of a criminal charge against an Aboriginal person for breach of federal or provincial laws typically precipitates constitutional recognition of Aboriginal rights.[27] Notwithstanding the rich history of Metis peoples in Canada, recognition of their existence as Aboriginal peoples, whose traditional practices arguably constitute Aboriginal rights, has only recently occurred in the courts. A consequence of this recognition has been a resurgence of self-identity and sense of community among Metis people across Canada.

Various courts across the country have, since 1982, had numerous opportunities to consider issues relating to Metis identity and community, and the Aboriginal

[27] For example, a report submitted to the Law Commission of Canada, January 2004, *Pimatsiwin Weyasowewina: Aboriginal Harvesting Practices Considered (*cited *supra* note 21) considers Aboriginal harvesting practices as criminal activity and documents the experiences that traditional hunters, trappers and gatherers have had with law enforcement officials in northern regions of Alberta and Manitoba, while practicing their traditional practices. Many of these interactions resulted in the laying of criminal charges: see *R.. v. Quinney*, 2003 ABPC 47; *R. v. Ferguson*, 2001, ABPC 215; *R.v. Breaker*, 2000 ABPC 179; *R.v. Lamouche*, 2000 ABQB 461; *R .v. Rodgers*, 1998 ABPC 127; *R. v. Jacko*, 1998 ABPC 10, accessible through the Alberta Courts Judgment database at http://www.albertacourts.ab.ca .

rights of Metis people.[28] In each case, they have grappled with the complexities inherent in determining and recognizing individual Metis status and Metis community, including issues such as the impact of governmental policy in relation to Métis and Indians, as well as on intra-group organization and disparity.

It was not until 2003 that the Supreme Court of Canada had opportunity to consider these questions, which are fundamental to determining Metis Aboriginal rights. Both of those cases, *R. v. Blais*[29] and *R. v. Powley*[30] are referred to at various points in this thesis. The cases are of equal importance, each making distinct contributions to an understanding of the complexities involved in Metis Aboriginal rights recognition in Canada, particularly to the issue of Metis individual and community identity.

Swail's J. *obiter* comments in *R. v. Blais* reflect the difficulties inherent to identifying Metis persons for the purpose of Section 35. Ernie Blais and others had been charged in 1994 with unlawfully hunting deer out of season, contrary to the Manitoba *Wildlife Act*.[31] Mr. Blais argued as a defence that Section 13 of the Manitoba *Natural Resource Transfer Agreement*[32], which guaranteed to Indians the right to hunt, fish and trap for food, extended to him as a Métis person. The

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[28] *R. v. Blais,* [2001] 3 C.N.L.R. 187 (Man. C.A.); aff'g *R. v. Blais,* [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.); *R.. v Grumbo* (1998) S.J. No. 331 (Sask. C.A.); rev'sg (1996) S.J. 504 (Sask. Q.B.); rev'sg *R. v. McPherson* (1994) M.J. 750 (Man. Q.B.); aff'g (1992) MJ No. 438 (Man.Prov. Ct.); *R. v. Morin* (1996) S.J. No. 262 (Sask. Prov. Ct.); *R. v. Powley* [2001] C.N.L.R. 291 (Ont. C.A.); *R. v. Powley* (1998) O.J. No. 5310 (Ont. Prov. Ct.)

[29] *R. v. Blais* [2003] 2 S.C.R. 236 (S.C.C.)

[30] *R. v. Powley* [2003] 2 S.C.R. 207 (S.C.C.)

[31] *Wildlife Act,* R.S.M. 1987, c. W-130, as amended by S.M. 1989-90, c. 27, s. 13

[32] Paragraph 13 of the Manitoba Natural Resource Transfer Agreement constitutionally entrenched in *Constitution Act, 1930,* 20-21 George V, c. 26 (U.K.)

accused also submitted that he had a common law right to subsistence hunting for game by virtue of being Métis. Regarding Métis identity for the purpose of Section 35, Swail J. stated:

> The question of exactly who is a Metis within the meaning of this Section of the Constitution Act is a difficult one. It is complicated by the fact that the term Metis has been used in different ways at different times. Even today there is dispute as to the correct meaning of the term at any given period of history. ... Another complicating factor is the evolution of the use of [the] term "Metis", which saw the Government of Canada adopt a protocol by at least 1870 whereby all mixed blood descendants of European and Indian people were referred to in official documents in English as "half-breeds" and in official documents in French as "Metis". Beyond this, the question of who is or is not a Metis has been highly politicized by some fairly disparate organizations claiming to speak for the Metis of today. A further, final complicating factor has been the change by the Government of Canada of the criteria for status as an Indian under the Indian Act in 1985. This apparently has resulted in a substantial number of people, who might otherwise have claimed status as a Metis, now taking status as Indians.[33]

In *Powley,* Vaillancourt J. of the Ontario Provincial Court set out the following definition of Metis for the purpose of Section 35 analyses:

> Without a universally accepted definition of Metis to be found, I shall attempt to distill a basic, workable definition of who is a Metis. Accordingly, I find that a Metis is a person of Aboriginal ancestry; who self-identifies as a Metis; and who is accepted by the Metis community as a Metis.[34]

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[33] *Supra, Blais* note 29 (Man. Prov. Ct.) at paras. 21 to 23.
[34] *Supra, Powley,* note 29 (Ont. Prov. Ct.) at para. 47.

On appeal by the Crown, this working definition was slightly modified by the Ontario Court of Appeal:

> A Metis is a person who,
>
> (a) has some ancestral family connection, not necessarily genetic;
> (b) identifies himself or herself as Metis, and
> (c) is accepted by the Metis community or a locally-organized community branch, chapter or council of a Metis association or organization with which that person wishes to be associated.[35]

The *Powley* case provided the Supreme Court of Canada with its first opportunity to consider specifically the claim of Metis persons under Section 35. At the time that the Court heard the Crown's final appeal in that case, the constitutional meaning of the phrase "Metis" in Section 35 remained uncertain. Given this reality, the Court needed to establish a framework to be used as indicia of Metis identity for the purpose of Section 35 claims. Drawing on discussions in the lower courts in *Powley*, the Court identified the following three elements as essential components to a legal definition of Métis in Section 35: self-identification, ancestral connection, and community acceptance.[36]

Given the fact that its decision would have precedential value throughout Canada, the Court elaborated extensively on the meaning it attributed to Metis in Section 35. With respect to individual identity, the Court stated

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[35] *Supra* note 29 (Ont. C.A.) at para. 64.
[36] *Supra* note 2, at para. 30. Having set out these broad parameters for identifying Metis rights-holders, the Court explicitly stated that it was not purporting to set out a comprehensive definition of who is Metis for the purpose of exercising Aboriginal rights.

that the term "Metis" in Section 35 (1) of the *Constitution Act, 1982* has a specific meaning, and that it does not include all individuals of mixed Indian and European heritage. Rather, as it is used in the provision, the term refers to distinctive peoples who have developed unique customs and ways of life, which are part of a distinctive community.

Judicial Definitions of Metis Community

An equally important aspect of proving Metis Aboriginal rights relates to proof of Metis community and in particular proof of belonging to the community in question. This is consistent with Section 35 jurisprudence, which states that Aboriginal rights are communal rights, exercisable by individuals by virtue of their (ancestrally based) membership in the collective.[37] Accordingly, for their traditional practices to be characterized as Aboriginal rights, and therefore accorded constitutional protection, Metis people must self-identify as Metis, and must identify with and be accepted by a distinctive Metis collective.

The Court in *Powley* equated community membership in the case of First Nations with Indian band membership.[38] First Nations people and communities have had an extensive relationship with the Government of Canada, pre-dating Confederation in many parts of Canada. With respect to registered membership, as reflected in the federal *Indian Act,* Canada has assumed responsibility for

[37] As stated by the Court in *Powley, supra* note 2, at para. 29; also *Twinn v. Canada* [1987] 2 F.C. 450 (F.C.T.D.) at 462; *R. v. Sparrow* [1990] (S.C.C.) 1075 at 1112.
[38] *Supra* note 2, at para. 12.

maintaining a list of all members of Indian bands;[39] in Canada's Constitution, it has assumed the fiduciary duty to manage "Indians and Lands reserved for the Indians".[40] Accordingly, it is much easier to verify state-determined community membership in the case of First Nations persons than it is for Metis.

Unlike First Nation communities, and with the exception of the Métis Settlements in Alberta,[41] there exists no state-sanctioned definition of Metis, and no identifiable Metis land base. This political and legal reality makes identification of Métis communities more onerous for those claiming to be part of these communities. The difficulties inherent in defining and identifying Metis communities was noted by O'Neill J. of the Ontario Court of Appeal:

> It is not so easy to package up and describe a Metis community, as in this case, by comparison with, for example, a recognized Indian band occupying recognized reserve lands as defined under the Indian Act, R.S.C. 1985, c. I-5. Given governments' treatment of Metis people, it may seldom be the case that Metis rights will be found where there is a flourishing Metis community, as opposed to one that is only now beginning to put back together aspects of its culture. This is recognized by the federal government, which admitted in its statement of reconciliation in 1998 that Metis people suffered at the hands of government policy.[42]

In the absence of a state-sanctioned definition of Metis community, the Court determined that, for the purpose of Metis claims in Section 35, a Metis community is "a group of Metis with a distinctive collective identity, living together

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[39] *Supra* note 20, s. 8.
[40] *Constitution Act, 1867,* 30 and 31 Vict. c. 3 (U.K.), *s.* 91 (24).
[41] The implication of the Métis Settlements for Metis Aboriginal rights is discussed further herein.
[42] *R. v. Powley , supra* note 4 (Ont. C.A.), at para. 29.

in the same geographic area and sharing a common way of life".[43] Similar to its approach to describing individual Metis identity, the Court elaborated on the concept of Metis community, stating that as a group the Metis have an identity that is separate from Indians, Inuit and Europeans.[44] Moreover, in articulating its interpretation of the term "Metis peoples" in Section 35, the Court recognized that there are distinct groups of Metis within Canada:

> The Metis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of "the Metis". However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Metis exhibit their own distinctive traits and traditions. This diversity among groups of Metis may enable us to speak of Metis "peoples", a possibility left open by the language of s. 35(2), which speaks of the "Indian, Inuit and Métis peoples of Canada.[45]

The Aboriginal rights of these distinct Metis groups may be unique to each group, or they may be identical. Unless they are negotiated between Métis representatives and Canada, characterization of the rights of Metis peoples will be determined on a case-by-case basis by the courts. For the purpose of the discussion at hand, the important point is that distinct Metis groups do exist, and that these distinct groups likely have Aboriginal rights.

Lower courts have considered the principles set out in *Powley* regarding Metis community. Their interpretations suggest that the courts will take a liberal

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[43] *Supra* note 2,at para.12.
[44] *Ibid.*, at para. 10.
[45] *Ibid.*, para. 11

approach to defining Metis community for the purpose of Aboriginal rights claims.[46]

Contemporary Membership as Proof of Community

Proving Metis community is an onerous task. Claimants must not only prove the existence of the community; they must verify their ancestrally based membership in that community. Moreover, they must demonstrate that the community in question has an historic and contemporary existence. Evidence of the historic existence of a Metis community may be presented in the form of demographic records, testimony of shared customs and traditions, and generally evidence of the existence of a distinctive, collective identity. In *Powley,* expert testimony was given at trial, which substantiated the defendant's claim that "[t] he settlement at Sault Ste. Marie was one of the oldest and most important [Métis Settlements] in the upper lakes area".[47]

With respect to proof of the contemporary Metis community, the Court in *Powley* seemed to accept membership in a contemporary quasi-political organization as proof of membership in a contemporary Metis community. However, it acknowledged that these organizations and their memberships are often in a state of flux, and that "as Metis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that

[46] These cases are discussed further in Chapter Five.
[47] *Ibid.,* para. 21

membership requirements become more standardized so that legitimate rights-holders can be identified."[48]

Until such time as Metis communities established membership criteria, which would identify legimate rights-holders, the Court set out three indicia which it would accept as proof of Metis identity and community membership:

> a) Self-identification: The individual must self-identify as a member of a Metis community. This identification must have an ongoing connection to an historic Metis community;
>
> b) Ancestral connection: Metis rights-holders must have some proof of ancestral connection to the historic Metis community whose collective rights are being exercised. Ancestral connection here means birth, adoption or other means; and,
>
> c) Community acceptance: The claimant must provide proof of acceptance by the contemporary community. With respect to demonstrated membership in a Metis political organization, membership alone will not be sufficient proof of community acceptance for the purpose of establishing entitlement. Further, the membership criteria would need to be objectively verifiable.

In 2002, the Métis National Council endorsed a national definition of Métis.[49] The definition states, "Metis means a person who self identifies as Metis, is of historic Metis Nation ancestry, is distinct from other Aboriginal peoples and is accepted by the Metis Nation".[50] Stansfield J. of the British Columbia Supreme Court

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[48] *Ibid.*, para. 29.
[49] The Métis National Council is comprised of five provincial organizations representing its registered members in the provinces of Ontario, Manitoba, Saskatchewan, Alberta, British Columbia. The Métis National Council and this definition is discussed further herein.
[50] Cited at Métis National Council website: (http://www.metisnation.ca/who/definition.html).

considered the Métis National Council definition in *R. v. Willison*[51]. With respect to proving membership in a Metis community, Stansfield J. stated "provided that persons meet the membership criteria set out in *Powley,* and the 'national definition of Metis' as established by the Métis National Council, there is no need for every member of a local Metis community to demonstrate a personal ancestral connection to the Metis persons who formed the [British Columbia] ancestral community".[52]

In light of this decision the courts are likely to equate membership in quasi-political Aboriginal organizations with Metis community existence and belonging.

CONTEXTUAL ANALYSIS

Having set out the legal framework that has been applied by the courts to determine Metis identity and Metis community, a contextual analysis of these issues will now be considered. This will demonstrate that social, cultural, and political factors have and continue to contribute to the issue of individual identity, as well as to the form and recognition of Metis communities whose members are arguably entitled to exercise constitutional rights. The combination of these factors creates complicated and evolving issues, which are likely to have an impact on the recognition of Metis Aboriginal rights in Canada. To support the

[51] *R. v. Willison* [2005] B.C.J. No. 924 (B.C. P.C.).
[52] *Ibid.,,* at para. 113.

conclusions drawn, examples of historic and contemporary Metis communities will be discussed.

Who are the Metis?

It is not a foregone conclusion that Aboriginal persons who do not identify, nor are recognized by Canada, as First Nation or Inuit, are Metis. The fact that there are thousands of Canadians of mixed-blood ancestry who culturally and politically identify themselves as First Nation or Inuit refutes this premise. Nor can it be assumed that being of mixed-blood ancestry makes a person Metis. In some cases, individuals of mixed-blood Aboriginal ancestry may be legally identified and recognized as being First Nation or Inuit. In other situations, persons who may biologically be Aboriginal, identify themselves as non-Aboriginal.

Being Metis can mean different things in different contexts. Self-identifying as Metis for social, cultural, even political reasons; acquiring and maintaining membership in a contemporary Metis organization; being a member of a legislated Metis organization; living as a "Metis" – any or all of these may apply to an individual. These meanings can exist independent of one another but are often intertwined. The interconnectedness of these parts is made most obvious in recent court challenges based on Metis rights. Self-identity as being Metis is fundamentally a personal matter, reflecting one's sense of being and place in the

world. A comment to the Royal Commission from Delbert Majer makes the point:

> I'll say I'm Metis or other young people that I know that are Metis have been confronted with the same question: 'Oh, I didn't think you were Metis. You don't look it.' You know, it's not a biological issue. It's a cultural, historical issue and it's a way of life issue; and it's not what you look like on the outside, it's how you carry yourself around on the inside that is important, both in your mind and your soul and your heart.[53]

Use of the term "Metis" to describe one's Aboriginal ancestry and identity has been the subject of much contention. For example, the Royal Commission reported that Metis is the term commonly been used in reference to the Metis of the Metis Nation. Many members of the Metis Nation believe that, based on this fact, they should therefore have the right to exclusive use of the term. Comparatively, the Commission noted that the dictionary definition of the term 'Metis' simply means 'mixed'.[54] After having conducted consultations and interviews across the country with individuals and communities that are in many cases not affiliated with the Métis Nation, the Commission concluded that there are many distinctive Metis communities across Canada and more than one Metis culture. Consequently, the Commission reflected on the complexities inherent to Metis identity:

> [Being Metis] can mean different things in different contexts: one context may speak to an individual's inner sense of personal

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[53] Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities,* vol. 4 (Ottawa, Supply and Services Canada, 1996), c. 5.

[54] *Ibid.*

> identity; another may refer to membership in a particular Metis community; a third may signal entitlement to Metis rights as recognized by Section 35 of the *Constitution Act, 1982.*[55]

Numerous scholars and historians have researched and written extensively on the unique and sometimes ambiguous place of Metis peoples in Canada's history.[56] These writings are consistent with assertions of a number of individual Metis persons and collectives throughout history, who maintain that they have a distinct and unique existence as Aboriginal peoples.[57]

Who are the Métis in Section 35?

Who are the individuals and collectives whose practices, cultures and traditions are to be given constitutional protection by Section 35? The fundamental legal and political question of "who" is located within the categories of Indian, Inuit and Metis peoples has for the most part been avoided.

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[55] *Ibid.*

[56] Jennifer S. H. Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: University of British Columbia Press, 1980); Murray Dobbin, *The One-and-a-Half Men: The Story of Jim Brady and Malcolm Norris, Metis Patriots of the Twentieth Century* (Vancouver: New Star Books, 1981); Jacqueline Peterson and Jennifer S.H. Brown, *The New Peoples, Being and Becoming Metis in North America* (The University of Manitoba Press: Winnipeg, 1985); Chartrand Paul L.A.H., (ed.), *Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction*" (Saskatoon: Purich Publishing Ltd., 2002).

[57] Alberta Federation of Métis Settlements Associations, *Metisism, A Canadian Identity* (Edmonton: Alberta Federation of Métis Settlements Associations, 1981); *Chartrand, supra,* note 7; J. Madden and Metis National Council, eds. *Snapshot of the Nation, 2000/01, (*Ottawa: Metis National Council, 2000/01); The Metis Association of Alberta and Joe Sawchuk, *et al., Metis Land Rights in Alberta: A Political History*. Edmonton. (Metis Association of Alberta, 1981); Metis Heritage Association of the Northwest Territories, *Picking up the Threads. Metis History in the Mackenzie Basin.* (Metis Heritage Association of the Northwest Territories and Parks Canada, Unpublished Manuscript, 1998); Fred J. Shore and Lawrence J. Barkwell, *Past Reflects the Present: The Metis Elders' Conference (*Winnipeg: Manitoba Metis Federation Inc., 1997).

Paul Chartrand and John Giokas[58] discuss the complexities of this situation for future recognition of Métis Aboriginal rights. Although the authors do not propose any specific solution to the issue of legally defining and recognizing Métis individuals and collectives, for the purpose of Section 35 constitutional rights, they effectively demonstrate, through a number of examples, the inconsistency of Canadian law and policy regarding Indian and Metis identity, and how this has contributed to the contemporary problem of Metis identity and recognition for the purpose of Metis Aboriginal rights in Section 35.

Giokas and Chartrand discuss the historic scrip land distribution system, an administrative scheme implemented by the federal government between 1870 and 1921 to extinguish Half-breed, or Metis, land interests. Administration of scrip was fraught with error and inconsistency. Scrip-takers were noted to include not only persons of mixed ancestry who were connected to the Red River and Rupert's Land Métis communities, but also mixed-ancestry persons who had perhaps accepted treaty payments and provisions but who subsequently chose to take scrip instead. Consequently, many mixed Aboriginal ancestry individuals are referred to (and often self-identify) as Metis because they or their ancestors were associated with the Dominion government's historic scrip land distribution system.

At the same time, historically, many Half-breeds or Metis persons identified and lived with "Indians". Consequently, at the time of treaty making between the

[58] *Supra,* Chartrand, note 7.

Dominion government and First Nations groups, Metis and Half-breed individuals were often given the choice to "become" treaty Indians at the time of treaty-making. Although these persons and families may have self-identified, and been recognized socially and culturally as Metis, they would "become" Indian as a consequence of becoming beneficiaries of the treaty. In other cases, Metis and Half-breeds were given the choice to take land or money scrip.[59] Ostensibly the intent of this action was to extinguish their Indian land title interests; it did not necessarily affect their identity as Metis.

Legislative changes to the federal *Indian Act* and the treaty processes implemented with the historic numbered treaties across the Prairie Provinces also had a profound and irreversible effect on the construction of Metis identity. Historic federal legislative and policy changes affected a person's status under the *Indian Act,* which, in many instances, resulted in an accompanying loss of the right to reside on reserve lands. Consequently, many people who had self-identified as "Indian" and were recognized legally, politically and socially as such, suddenly found themselves landless, no longer considered "Indian", certainly not "White", but not necessarily "Metis". [60] Notwithstanding the differences in legal status, these landless and non-status Indians shared common social circumstances with many self-identifying Metis families and communities. This

[59] *Ibid.,* at 87. See also Gerhard J. Enns, *Treaty Eight and Metis Scrip*, (Historical Report prepared for the Community Legal Assistance Society, Community Law Program, February 1999).
[60] Reference is also made to this phenomenon in Shore, *et al., supra* note 56 at 11.

drew these people together and contributed to the evolution of unique political and social identities.[61]

The cumulative result of this history for Aboriginal peoples and communities in general has been the creation of large numbers of Aboriginal persons whose legal identity was shaped and contorted as a result of the Canadian legal, political and social environment. This history contributes substantially to the contemporary difficulty faced by law and policy-makers, and indeed by Metis persons and communities, who in many cases are only now seeking realization of their Aboriginal rights as Métis people in Section 35 of the *Constitution Act, 1982*.

What is a Metis Community?

Aboriginal rights are rights inherent to the collective. Thus, for Metis to have and exercise Aboriginal rights by virtue of being Metis, they must not only self-identify; they must also belong to a Metis collective that recognizes them as Metis and accepts them as part of that community. One's ability to exercise traditional Aboriginal rights is therefore dependent on their recognized affiliation and acceptance by the group. The focus then becomes the group that holds itself out as, and is recognized as, being Metis.

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[61] See also D. Bruce Sealey and A. Lussier, *The Metis: Canada's Forgotten People* (Winnipeg: Manitoba Metis Federation Press, 1975).

There are many distinctive Metis communities across Canada, and more than one Metis culture. Many of these were noted by the Royal Commission, and include communities at Sault Ste. Marie, Ontario, the Red River and White Horse Plains, Manitoba, at Batoche, Saskatchewan, and St. Albert, Alberta.[62] The Commission also referred to a distinct Metis culture of people in Labrador. Additional Metis communities were noted to exist in Quebec, Ontario, Nova Scotia, New Brunswick, British Columbia and the Canadian North.

Many of these communities have substantial historic meaning, both in respect of Canada's development as a nation and as distinct Metis communities. For example, in *Powley,* Sault Ste. Marie was identified as historically having been a distinct Metis community.[63] There are numerous other communities situated throughout western Canada that grew out of the fur trade era, which can likely be characterized as distinct Metis communities. In the province of Alberta, communities such as Lac La Biche Mission (pre-1785), Fort Vermilion (1779), and Fort Chippewyan (pre-1778), would also fall into this category.[64] Although they are less prominent on a national level, provided they are able to meet the standard of proof set by the Supreme Court of Canada in *Powley,* members of each or any of these communities can bring a defence based in Section 35 by reason of being Metis.

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[62] *Supra* note 52, at p. 220.
[63] *Supra* note 2, at para. 12.
[64] Edward J. McCullough and Michael Maccagno, *Lac La Biche and the Early Fur Traders* (Lac La Biche: Canadian Circumpolar Institute, 1991)

Finally, recent case law suggests that small clusters of persons living within wider communities who seek each other for the purpose of enhancing their survival as distinct communities, would meet the threshold of proof required in Metis claims. Stansfield's J. approach in *Willison*[65], in characterizing community, reflects the reality of many Aboriginal persons and communities in Canada today. Similarly, Kenelith J.'s judgment in *Laviolette*[66] acknowledges the nomadic lifestyle and land use patterns of numerous Prairie Metis community persons.

For reasons relating to economic needs, educational and career advancements, health and social services, many Aboriginal people are leaving their traditional areas to reside in urban settings. Research on these migration patterns points out that connections with the traditional territories are often maintained by Aboriginal peoples for purposes of maintaining cultural identity.[67]

To what extent does the approach taken by the courts to identifying and recognizing Metis persons and communities, reflect the social, cultural and political realities of Metis individuals and communities in Canada? To contextualize this discussion, three separate groups will be discussed: Metis communities and groups represented by the Métis Nation, Metis communities

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[65] *Supra* note 50.
[66] *R. v. Laviolette* [2005] S.J. No. 454 (Sask. Prov.Ct.)
[67] K. Graham & E. Peters, "Aboriginal Communities and Urban Sustainability", Discussion Paper F/27, Family Network. Canadian Policy and Research Networks, 2002.

represented by the Alberta Métis Settlements, and communities recognized by the Royal Commission on Aboriginal Peoples as "Other Metis".[68]

The Métis Nation

As a Historic Metis Community

This cannot be a comprehensive history of the Métis community that has claimed the title and is known as the Métis Nation; but any discussion about Metis identity and community should consider the historic evolution of this particular and distinct Métis community.

In order to identify the Métis community that I will be referring to here, a very brief overview of certain aspects of western Canadian history is required. Although it is not the intent of this chapter to start "in the beginning", when the first traders and explorers first arrived on this continent for the purpose of exploiting the resources, general reference to this history is necessary in order to realize the evolution of Metis as distinct peoples in Canada.

By the mid-eighteenth century, an influx of fur traders began arriving on this continent for the purpose of exploiting the fur trade when King Charles II granted Rupert's Land to the Hudson's Bay Company (1670). Upon arriving in the Northwest the traders did not purport to assert sovereignty over the Indigenous

[68] Here I am using the title "Other Metis" as identified by the Royal Commission on Aboriginal Peoples.

populations that they encountered through trade. Rather, trading relations were conducted on a nation-to-nation basis.[69]

In many instances, social relationships between the Indigenous and Europeans were encouraged and resulted in the birth of children of mixed-blood. This was in particular the practice of French explorers, who sought to form alliances with the Indigenous nations they encountered. The earliest record of this approach is in the recorded statement of Samuel de Champlain (1537-1635) to the Huron:

> "Our young men will marry your daughters, and we shall be one people".[70]

Although they would not at this point refer to themselves as such, the children of these early inter-relationships were the first Métis, who would become the principal players in the expansion of the west.[71] Their participation in the fur trade as suppliers, traders; freighters, couriers, interpreters, guides and diplomats would be integral to the expansion and eventual settlement of the Canadian west.

The historic record indicates that mixed-blood persons did not always self-identify as Métis. Rather, the common practice for early generations was for the children

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[69] For an extensive discussion about the history of Indigenous-European relationships at contact, see Olive Dickason, *Canada's First Nations, A History of Founding Peoples from Earliest Times* (Toronto: The Canadian Publishers, 1992).
[70] Thwaites, Reuben Gold (ed.), *Jesuit Relations and Allied Documents,* Vol. 5, p. 209 (Cleveland: Burrows Brothers).
[71] Maggie Siggins, Riel: A Life of Revolution (Toronto: HarperCollins Publishers Ltd., 1994), c. 1.

to identify with and be raised amongst either their maternal Indigenous relations, and to assume an identity associated with the Indigenous community or nation of their mothers; or with their parents together, but assuming the cultural traditions and practices of their European fathers, and identifying then as French or English.[72]

At the turn of the nineteenth century, "all posts of both the Hudson's Bay Company and the North West Company had at least some residents of mixed ancestry".[73] However before the early 1800s, they were not identified in the public record as a distinct group from their European and First Nation forebears.[74] It was not until 1815 that individuals of mixed Aboriginal ancestry were recorded on the official public record as identifying themselves as distinct from their forebears. A letter written by a group of petitioners in 1815 to the Hudson's Bay Company illustrates the distinction which the people saw among themselves: the signatories wrote that "they, and not the Red River settlers were the owners of the soil." In closing, the writers identified themselves as 'The four chiefs of the half Indians by the mutual consent of their Fellows'."[75] This reference is illustrative of the ontological views of Métis. First, it indicates how

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[72] According to the historic record, there were also instances where children would return to England or France with their European fathers where they would be educated and raised in the European traditions: Dickason, *supra* note 68.
[73] Brown, *supra* note 55.
[74] Historical scholarship has raised doubts about the birth of Métis self-consciousness as a separate and distinct community prior to those events occurring in 1812 – 1814 associated with the Selkirk Settlement. L. Chartrand, "The Definition of Métis Peoples in the *Constitution Act, 1982"* [2004] S.L.R. 67 (1) 209 at 218, citing John E. Foster, "Wintering, The Outsider Adult Male and the Ethnogenesis of the Western Plains Métis" in Theordore Binnema, Gerhard J. Ens & R.C. Macleod, eds. *From Rupert'sLand to Canada* (Edmonton: The University of Alberta Press, 2001) 179; L. Weber, "Opening Pandora's Box: Métis Aboriginal Rights in Alberta" [2004] S.L.R. 67 (1) 318 at 323.
[75] *Supra,* note 5 at 327.

they saw themselves in relation to others of the area, as having an interest in the land that was distinct from both the settlers at Red River as well as the Indians. It also illustrates that a form of structured governance and leadership existed amongst this group.[76]

More important for the purpose of this work, notwithstanding the fact that the representatives mentioned in the situation described in the preceding paragraph distinguished themselves from the Indians and Europeans, self-identity of the petitioners was not as "Métis". This leads to an interesting question of the origin of the term Métis in reference to mixed ancestry peoples.

By the 1850s, the Hudson's Bay Company's trading rights were due for renewal by Britain. Concurrently, Britain was gaining an interest in expanding agricultural settlement further into the new frontier. Thus, rather than simply renewing its agreement with the Company, the imperial parliament struck a committee to investigate the matter of keeping the *status quo* with the Company, or revoking its jurisdiction, with a view to promoting agricultural settlement on the prairies.

To an extent, agricultural settlement had already occurred with the introduction of a permanent settlement at the junction of the Red and Assiniboine Rivers. There Thomas Douglas, earl of Selkirk, had established the Red River settlement for

[76] Note however that this analysis is beyond the scope of this thesis.

the primary purpose of enabling Irish and Scottish immigrants to farm the territory. By 1821, the majority of families at Red River were in fact Métis. Their settlement at Red River had in large part been instigated by amalgamation of the Hudson's Bay Company with the North West Company in 1821, which resulted in the forced retirement of hundreds of employees. Many European traders and employees had married or co-habited with Aboriginal women, resulting in the birth of mixed-blood children. The Company encouraged settlement of the retired employees and their families at Red River.

The families who settled at Red River often maintained small farms for growing gardens and livestock. However, they did not rely solely on agriculture as the primary means of livelihood. Families typically maintained some economic connection to the Hudson's Bay Company or became 'freemen'. Freemen were those Metis who were not members of First Nation or Indian communities, thus not bound by Indian custom. Nor were they current employees of the fur trade companies, although many were former employees. Their employment contracts having ended, Company laws arguably did not apply to them.[77]

As freemen, the Metis would often trade in commodities. One such commodity was pemmican, a combination of dried buffalo meat, fat and berries. Pemmican became an important provision during the fur trade. Voyageurs would rely on pemmican to sustain themselves on long journeys between trade posts. The

[77] As argued in Chapter Six of this work, Company laws applied only to employees of the Company. They did not apply to those not employed by the Company, including the Indigenous peoples of the territory, nor the Metis: J. Foster, "Paulet Paul: "Metis" or House-Indian Folk Hero?" Manitoba History, Number 9, Spring 1985, for discussion on role of Freemen.

Metis who were also buffalo hunters, would make the pemmican and trade it as a valuable commodity during the peak years of the fur trade on the prairies.

In 1814, under the auspices of Hudson's Bay Company rule, Macdonnell would issue a prohibition on the trade and export of pemmican and other commodities from the District of Assiniboia.[78] Whether the embargo was instigated by a genuine shortage of food at Red River Settlement or as a means of undermining the free trade practices of the Metis is a matter of interpretation. Regardless of the underlying rationale, the prohibition was not received favourably by Metis traders, many of whom were either freemen or traders with the Hudson Bay Company's rival, the North West Company. The Metis at Red River relied on pemmican trading as one means of securing their economic livelihood. In their view, the unilateral prohibition constituted monopolization of the trade and was aggressively opposed by the Metis, with an ultimate outbreak when HBC representatives sought to prevent a group of Metis traders from transporting pemmican at Seven Oaks, a location in present day Winnipeg. The Battle at Seven Oaks resulted in numerous deaths to Company men at the hands of the Metis. The Battle at Seven Oaks was pivotal in the evolution of a distinct Metis collective identity.[79]

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[78] Dale Gibson, "Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba" in DeLloyd J. Guth and W. Pue, eds., *Canada's Legal Inheritances* (Manitoba: Canadian Legal History Project, 1996) 247.

[79] Robert Coutts and Richard Stuart, *The Forks and the Battle of Seven Oaks in Manitoba History*, (Winnipeg: Manitoba Historical Society, 1994); Dickason, *supra* note 68.

Years later, actions taken by the Hudson's Bay Company and the Dominion government would similarly disregard pre-existing rights and interests of the Metis as a distinct group. The climactic event which caused the Metis to unite, resulting in the development of a collective identity as a Métis nation, was the transfer of Rupert's Land to the Dominion government in the absence of consultation or consent. When land surveyors arrived at Red River in anticipation of the transfer, the settlers, led by Métis leader Louis Riel, refused the surveyors entry. To ensure that no further action could be taken, Riel and his followers seized control of Upper Fort Garry and established a provisional government.

Through their efforts, and the leadership of Louis Riel, the Metis demonstrated an unprecedented level of Metis political organization and identity. They had joined together as a distinct group, sought for and obtained recognition from community members as well as the Dominion government. Specifically, the Metis had asserted their right to negotiate the terms of Manitoba's entry into confederation. Further, and of particular importance to the future of Metis Aboriginal rights under Section 35, the Metis lobbied for and secured the incorporation of Section 31 in the *Manitoba Act, 1870,* which guaranteed them land rights as an Aboriginal people.

Canada's fulfillment of the obligations set out in Section 31 was filled with error and fraud. Although it is beyond the scope of this thesis to discuss this issue of

scrip fraud, it is significant to note that this issue forms the subject matter of litigation pending in Manitoba, scheduled to be tried by the courts in April 2006.[80]

As a Contemporary Métis Community

The Métis Nation is a collective of Metis people in Canada who share common culture and values. The members of this community share a common history; significant aspects of that history relate to the resistance movements occurring in Manitoba and Saskatchewan during the nineteenth century.

Contemporaneously, community members of the Métis Nation often hold membership with one of the governing members of the Métis National Council. These include provincial organizations in Alberta, Saskatchewan, and Manitoba, and regions of British Columbia, Ontario and the North West Territories.

The Métis National Council was formed as a result of political re-organization efforts, which took place immediately prior to entrenchment of Section 35 in the *Constitution Act, 1982.* During the 1980s and the patriation of Canada's Constitution from Britain, national focus on Aboriginal rights became a matter of high political profile. As part of the patriation process, the Constitution had been

[80] *Dumont v. Attorney-General of Canada,* Statement of Claim, dated 15 April 1981, as amended 18 February 1987, No. 1010181, decided in 1990 – preliminary considerations made in *Dumont* v. *A.G. Canada* [1990] 2 C.N.L.R. 19 (S.C.C.); rev'g (*Manitoba Metis Federation Inc.* v. *Attorney General of Canada*) [1988] 3 C.N.L.R. 39 (Man. C.A.); rev'g [1987] 2 C.N.L.R. 85 (Man. Q.B.).

amended to recognize the Métis as one of the Aboriginal peoples of Canada. Representatives of the prairie province Métis organizations sought to strengthen their Métis-specific position regarding Metis Aboriginal rights, breaking away from the Native Council of Canada to form the Métis National Council.

Politically and legally, the position of the Métis National Council is that the term Métis in Section 35 refers specifically to those Métis who are descendants of the Métis who received land grants and/or scrip under provisions of the *Manitoba Act, 1870*[81] or the *Dominion Lands Act, 1879,* and amendments thereto.[82] Geographically, the land area claimed by this Métis community as "the Métis Nation Homeland" roughly corresponds with that area transferred from the Hudson's Bay Company in 1870 to Canada under the North-West Territory Order of 1870.

Community members of the Métis Nation include persons who self-identify as Métis, who are accepted by other members of that community, but who do not necessarily hold membership in any contemporary quasi-political provincial Métis organization, or in the Métis National Council. It would seem then that being a member of the Métis Nation as a distinct Metis community as defined in *Powley* is not contingent upon obtaining and maintaining membership with a contemporary quasi-political organization such as the Métis National Council or

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[81] *Manitoba Act, 1870,* 33 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 8

[82] This definition is set out in the Métis Nation Accord, which was proposed as part of the failed Charlottetown Accord. Also noted by Swail J. in *Blais, supra* note 29 (Man. Q.B.) at para. 28 as being "an appropriate definition of who is Métis".

its affiliates. However, this community-based, traditional form of community belonging and acceptance is evolving with the introduction of new codified membership regimes by each of the National Council's provincial affiliate organizations. As discussed further in this chapter and in Chapter Seven, membership in Metis communities, including the Métis Nation for the purpose of asserting Section 35 Aboriginal rights is becoming contingent on demonstrative membership in a contemporary political organization.

The "Other" Métis

While the definition of Métis adopted by the Métis National Council may be relevant to those Métis who are in fact descendants of the Métis Nation, it is not necessarily applicable to those Metis who do not trace their ancestry to this particular community, or who do not identify with or associate with the Métis National Council and its affiliates.

There are numerous Metis communities in Canada, particularly in the eastern provinces and the North whose existence is independent of the Métis Nation. In many instances, such communities were actually formed prior to the evolution of the Métis community at Red River.

In addition to the existence of these communities, there are also distinct Metis communities that historically and contemporaneously exist simply by virtue of

their common identity and cultural beliefs. As mixed ancestry peoples who self-identify as "Metis", they also have shared values which often include reliance on the land and its resources.

The Metis of these distinct communities maintain their entitlement to recognition as distinct Aboriginal peoples in Section 35 (1). For example, the Metis of Labrador stated to the Royal Commission on Aboriginal Peoples:

> For many generations...even long before Canada itself existed as a nation, the Labrador Métis, who were then commonly referred to as the 'livyers', or settlers', lived on the coast both north and south, in complete harmony with the land and the sea, much the same as their Inuit and Indian neighbors...I say to you and to Canada, we are not livyers. We are not settlers. We are Métis – the progeny of our Indian and/or our Inuit and European settlers who long ago settled this harsh and beautiful land when others considered Labrador to be the land God gave to Cain.[83]

For the purpose of recognizing Metis Aboriginal rights, and the existence of distinct Metis communities, it was significant that the Supreme Court of Canada took notice in *Powley* of the reference made by the Royal Commission on Aboriginal Peoples to the Labrador Metis.[84]

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[83] Bernard Heard, Labrador Métis Association. Cited in *The Report of the Royal Commission on Aboriginal Peoples, supra* note 17 at p. 256.

[84] *Ibid.,* at p. 199. The *Report* reads:

> The French referred to the fur trade Métis as coureurs de bois (forest runners) and bois brulés (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called "livyers" or "settlers", those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland.

There are also Metis communities throughout the Prairie Provinces who, for the purpose of status and determination of Metis Aboriginal rights in Canadian law, consider themselves to be distinct Metis peoples. This is most likely to occur in remote rural communities where Metis self-identify as Metis, are accepted by the local community a being "Metis", but who do not affiliate with or identify with the Métis community referred to as the Métis Nation. For example, in remote communities situated near Indian reserve communities, there are individuals whose ancestors may have taken scrip, who are therefore not entitled to be registered as members of an Indian Band, nor as Indians under the federal *Indian Act.* Often, these individuals self-identify as Metis.

Knowledge of the Metis landscape in Canada is of paramount importance when theorizing about Métis Aboriginal rights. It is plausible that the Metis in Section 35 (1) includes the following persons and groups:

1. descendants of the Metis who received land grants and/or scrip under the provisions of the *Manitoba Act, 1870,* or the *Dominion Lands Act, 1879*, and who are represented by the Métis National Council and its affiliates;

2. descendants of the Metis who received land grants and/or scrip under the provisions of the *Manitoba Act, 1870*, or the *Dominion Lands Act, 1879*, who are not or choose not to associate with or be represented by the Métis National Council and its affiliates;

3. descendants of the Metis who did not receive lands grants and/or scrip, who may have Indian status under the *Indian Act*, but who self-identify as Metis, and are accepted by a community that holds itself out as being a distinct Metis community separate and apart from the Metis Nation.

Alberta Métis Settlements as Metis Communities

The Métis Settlements are commonly referred to in only a cursory fashion in discussions regarding Metis Aboriginal rights. Notwithstanding, it is likely that the Settlements are one of the most profound legal and political realities to affect future recognition of Metis Aboriginal rights in Canada.[85]

The lobbying efforts of early Alberta Metis settlers and their supporters prompted establishment of the Métis Settlements in 1939.[86] Many of these families migrated to Alberta following the 1885 Metis resistance at Batoche, Saskatchewan, settling at places that already had a Metis presence, such as Lac La Biche, St. Albert, and Lac Ste. Anne.[87] Similar to the situation faced by Metis people who had remained in Manitoba and Saskatchewan, many Alberta Metis families were landless and destitute during the Depression era. In an effort to alleviate their destitution, the settlers lobbied the provincial government for provision of lands and services.[88]

In response to the continuing pressure by the Metis, the province formed a commission to investigate the "condition of the half-breed population of Northern

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[85] For a discussion of the Métis Settlements in Alberta and the unresolved issue of the legal nature of these Metis communities for Metis Aboriginal rights, see L. Weber, "Opening Pandora's Box: Metis Aboriginal Rights in Alberta", [2004] S.L.R. 67 (1) at 315.
[86] For a comprehensive history of these efforts and representatives, see Dobbin, *supra* note 55.
[87] *Supra* note 70; also referred to in Weber, *supra* note 83.
[88] The organization which was first formed to represent the interests of the Metis in Alberta was known as "L'Association des Metis d'Alberta et les Territoires du Nord-Ouest": English translation: Association of Metis of Alberta, cited in Dobbin, *supra* note 55 at 57.

Alberta."[89] Following a two-year investigation, the Ewing Commission recommended that lands be set aside for the use and benefit of Metis people. This and other recommendations of the Commission were formally accepted by the Alberta government in 1938, through enactment of provincial legislation, the *Metis Population Betterment Act,*[90] which defined Metis as persons of mixed white and Indian blood, but specifically excluded Indians or non-treaty Indians as those terms were then defined in the federal *Indian Act.*[91]

Arguably, the founding legislation of the Métis Settlements facilitated evolution of the communities as "distinct Métis communities," as expressed in *Powley.* Settlement lands were set aside for the exclusive use, benefit and occupancy of Metis persons and families. Liberal hunting, fishing and trapping privileges extended to all members of the Settlements, exercisable throughout the Settlement areas. In essence, the Settlement communities became enclaves within which Metis families could live in community and, in doing so, enhance their cultural survival as Metis.

Notwithstanding this history, it has been argued that the Métis Settlements' legislative regime poses a threat to the existence of the Métis Settlements as

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[89] *Supra* note 70.
[90] The *Metis Population Betterment Act* S.A. 1938, c. 6, as am. S.A. 1940, c. 6.
[91] *Supra, The Metis Population Betterment Act, s. 2* defined Metis as follows:

> 2. In this Act unless the context other requires, -
>
> (a) "Metis" means a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in *The Indian Act,* being chapter 98 of the Revised Statutes of Canada, 1927; ... .

distinct Metis communities.[92] One area most profoundly affected by law and policy relates to Settlement membership. The example provided below illustrates the complexities inherent to this issue.

Although substantial inter-marriage has occurred between First Nations and Metis Settlement members, many maintain that membership provisions within the *Métis Settlements Act* have the potential to undermine the integrity of the Settlements as distinctive Metis communities. For example, in *Vicklund,*[93] it was argued that Section 75 (2) of the *Métis Settlements Act* was unconstitutional because it gave preferential treatment to certain persons.[94] The applicant in that case maintained that applications for membership by First Nation persons should be rejected where the person has voluntarily applied for and obtained Indian status under the federal *Indian Act.* Provisions within the *Métis Settlements Act* authorize Settlement Councils to enact by-laws to admit status Indians as

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[92] Consideration of the legislative history of the Métis Settlements, which is provided in Chapter Five of this thesis, reflects the problems that have been created by legislation and policy approaches to the Métis Settlements in Alberta.

[93] *Vicklund v. Peavine Metis Settlement* [2003] A.M.S.A.T.D. No. 10.

[94] *Métis Settlements Act,* R.S.A. 1990, c. M-14. Section 75 (2) states:

> 75. (2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if
>
> (a) the person was registered as an Indian or an Inuk when less than 18 years old,
> (b) the person lived a substantial part of his or her childhood in the settlement area,
> (c) one or both parents of the person are, or at their death were, members of the settlement, and
> (d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

members. To do so, argues Vicklund and others, is to undermine the integrity of the Settlements as "Metis communities".

It is foreseeable, if one were to set aside or not be aware of the implications of provisions such as Section 75 (2) of the *Métis Settlements Act,* that any or all of the Métis Settlements could meet the description of "Métis community" described in the *Powley* decision, which now appears to be accepted as a legal descriptor in the future determination of individual Metis rights. However, for the purpose of Metis Aboriginal rights recognition, *Powley* suggests that these communities must also meet the threshold of historic existence.

That the Settlements were only established in 1939 may lead to a finding that the Settlement communities are not historic Métis communities for the purpose of asserting Section 35 rights. This is not to be confused with the possibility that individual members of the Settlements are able to establish an ancestral connection to an historic Métis community in another geographical location, as occurred in the recent *Laviolette* case.[95] However, consideration of the negotiating process relating to recognition of Metis harvesting rights in the province of Alberta suggests that it may not be necessary for the Settlements to meet this threshold when rights are being negotiated, not litigated. The implications of this approach are explored in Chapter Six of this thesis.

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[95] *Supra* note 65. The accused, Ron Laviolette, is also a member of the Kikino Metis Settlement. See Métis National Council website for news bulletin citing this. (www.metisnation.ca.)

Metis Political Organizations as Contemporary Metis Communities

The Court in *Powley* seems to be acknowledging the actions of quasi-political organizations as these move to establish membership criteria that will serve the systematic process of identifying rights-holders.[96] Serious implications of the role of contemporary Metis community affiliation reach into issues of membership within contemporary quasi-political organizations purporting to represent Metis persons and peoples, particularly for the purpose of negotiating Aboriginal rights. Without drawing any conclusion regarding their representative authority, it is important to note that a number of these organizations purport to speak on behalf of Metis constituents. For example, the Métis National Council and its five provincial affiliates claim to represent approximately 350, 000 to 400, 000 Métis persons throughout Canada.[97] Comparatively, the Congress of Aboriginal Peoples (formerly known as the Native Council of Canada) represents off-reserve Indian and Metis people residing in urban, rural and remote areas throughout Canada.[98] The Métis Settlements General Council, discussed herein, represents approximately 6, 288 members of the eight Métis Settlements in Alberta. Self-identifying Metis persons are also represented by other organizations such as the North Slave Metis Alliance, which represents Metis persons whose traditional territories are in the vicinity of the Great Slave Lake,

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[96] *Supra* note 17.

[97] See Metis National Council website at http://www.metisnation.ca/who/index.html. The affiliate organizations of the Metis National Council include: Metis Nation of Ontario, Manitoba Metis Federation, Metis Nation – Saskatchewan, Metis Nation of Alberta, Metis Provincial Council of British Columbia.

[98] See Congress of Aboriginal Peoples website at: http://www.abo-peoples.org. Affiliate organizations of the Congress of Aboriginal Peoples are: Labrador Metis Nation, Federation of Newfoundland Indians, Aboriginal Peoples Council, Native Alliance of Quebec, Ontario Metis Aboriginal Association, United Native Nations (B.C.), C.A.P. National Youth Committee.

Northwest Territories. Metis are also self-represented in self-government and modern land claim agreements in the Northwest Territories, including the Sahtu Dené, and Metis Comprehensive Land Claim Agreement.[99] The Metis' traditional territory lies in the Mackenzie Valley, south of the coastal Inuvialuit area.[100]

The membership systems of these organizations are at various stages and, in certain instances, remain to be implemented. Indeed, changes to the legal and political framework of such organizations often results in an extremely ever-changing membership, not necessarily connected to any historic or, for that matter, contemporary "Metis" community. Moreover, membership often overlaps within the organizations, with individuals holding membership in more than one organization. The potential for these issues to cause irreversible and chaotic problems when it comes to negotiating rights recognition remains high.

CONCLUSION

Are all people and peoples who self-identify as Metis entitled to exercise Aboriginal rights pursuant to constitutional provisions in Section 35? Aboriginal rights jurisprudence supports a likely conclusion that self-identification as Metis is insufficient proof of entitlement. Claimants must meet the full standard of proof, including community affiliation and acceptance as set out in *Powley.*

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[99] Canada. Sahtu Dene and Metis Comprehensive Land Claim Agreement. http://epe.lac-bac.gc.ca/100/200/301/inac-ainc/sahtu_dene_metis_v1-e/sahmet_e.pdf

[100] Note that this list is not exhaustive of the groups that represent Metis persons in Canada.

A foreseeable implication of *Powley* is a "tiered" system of Metis identification; those Metis who have Aboriginal rights protected by Section 35, because they are able to meet the criteria set out in *Powley* relating to Metis individual identity and community acceptance; and those who identify themselves as being Metis and, in certain instances and for specific purposes, who may be recognized as being "Metis", but who do not have Aboriginal rights to be afforded protection by Section 35.

There are increasing numbers of Canadians who only recently self-identify as Metis. A likely legal consequence of this trend will be an increase in the number of Metis Aboriginal rights entitlement cases being considered by the courts and increased pressure by political organizations representing a larger constituent base. Unless and until negotiations commence between legitimate and representative Metis representatives and the federal government, entitlement pursuant to the common law principles set out in *Powley* will be the determining standard. Whether or not these claimants are able to meet the standard of proof that has been set out by the Court remains to be seen.

It is important to note, and as observed by the Court in *Powley,* there are many different Métis peoples in Canada.[101] Gaffney accurately stated this reality during the Aboriginal Constitutional conferences of the 1980s, when he wrote:

> There is no one exclusive Metis people in Canada, any more than there is one exclusive Indian people in Canada. The Metis of eastern Canada and northern Canada are as distinct from the Red River Metis as any two peoples can be. Yet all are distinct from

[101] *Supra* note 2 at para. 11.

> Indian communities by ancestry, by choice, and their self-identification as Metis.[102]

Although *Powley* sets out a framework to be applied in the context of litigation, in theory, the Court has directed Metis peoples to exercise self-determination and self-governance in the identification of rights-holders and negotiation of rights recognition with a view to minimizing litigation of these issues. This creates a daunting legal and political challenge because "who is Metis?" and "what is a Metis community?" for the purpose of recognizing Metis rights in Section 35 are issues that have, for the most part, remained unaddressed, often by Metis peoples themselves.[103] Membership regimes and provisions of various organizations representing Metis persons effectively demonstrate that this is indeed the case.

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[102] R.E. Gaffney, G.P. Gould & A.J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (New Brunswick Association of Metis and Non-Status Indians, 1984) at 62.

[103] An equally important question, but which will not be addressed within this paper is that relating to representation for the purpose of negotiating Metis rights.

CHAPTER FIVE
LEGAL FOUNDATIONS OF METIS ABORIGINAL RIGHTS

Introduction

When one considers the public historical record of the Canadian northwest,[104] scholarly interpretation and reconstruction[105], alongside the rich oral tradition of various Metis groups[106], it becomes obvious that Metis peoples in Canada have unique cultures integral to their distinctive societies. In many instances, Metis communities, which form the core of Metis peoples, continue to practice these customs and traditions, which can be characterized contemporaneously as Aboriginal rights, within Section 35 of the *Charter of Rights and Freedoms* (1982).[107]

The Crown[108] historically recognized the uniqueness of Metis individuals and collectives as distinct from their European and First Nations forebears. This is

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[104] These include the Provincial Archives of Manitoba, the National Archives of Canada, and The Hudson's Bay Company Archives.

[105] Including Arthur S. Morton, *A History of the Canadian West to 1870-71* (London: Thomas Nelson & Sons Ltd., 1939); George F. Stanley, *The Birth of Western Canada A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960); L. Thomas, ed. *The Prairie West to 1905* (Toronto: Oxford University Press, 1975); J. Peterson & J. Brown, eds. *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: The University of Manitoba Press, 1985); Métis Association of Alberta, J Sawchuck & T. Ferguson, *Métis Land Rights in Alberta: A Political History* (Edmonton: Métis Association of Alberta, 1981).

[106] As a member of the Métis Nation, I am aware of this history that has been passed down through many generations. In many instances, there is a shared history between Métis families and communities throughout the Prairies. Much of the oral history of Métis peoples has been remembered but not recorded; however, with increased awareness for the importance of this history to the ability to maintain cultural practices, customs, and traditions as protected Aboriginal rights, Métis communities are starting to record and collect these stories.

[107] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[108] Here I am referring to the British Crown prior to Confederation and thereafter, to Canada, but this can also mean the provincial governments.

evident in legislative and constitutional provisions enacted for the purpose of dealing with Metis interests. This history supports contemporary determinations of Metis community entitlement to Aboriginal rights recognition, including harvesting practices, self-government and self-determination.

Since 1982 there has also been an increase in court decisions involving Aboriginal rights under Section 35 of the *Constitution Act, 1982.* While many of these decisions have been rendered in the context of the rights of First Nations peoples, they nonetheless contribute to the body of law that applies generally to all claims by Aboriginal peoples, brought pursuant to Section 35.[109] To facilitate an understanding of how these general common law principles of Aboriginal rights apply to Metis claims under Section 35, this chapter will also discuss various cases and how these apply to the claims of Métis persons and communities for Aboriginal rights recognition.

The Doctrine of Aboriginal Rights

The doctrine of Aboriginal rights has developed as a concept of the common law, defining the relationship between the Crown and Aboriginal peoples. Legislative and constitutional provisions, as well as judicial decisions have shaped this relationship.

[109] General principles of legal interpretation would still apply, such as where cases are distinguishable based on the facts brought before the court.

General Legislative and Constitutional Provisions Relating to Metis Aboriginal Rights

Insofar as statutory references are made to pre-existing rights of the Indigenous peoples of Canada, it will be argued that these obligations are equally owed to Metis peoples. This conclusion draws on two bases. First, it will be argued that as descendants of the Indigenous nations, Metis peoples are entitled to the same recognition as are Indians and Inuit. Similarly, the courts have interpreted these instruments as applying to all Crown-Aboriginal relations, supporting a conclusion that these historic obligations apply equally to the claims of Metis communities, as recently confirmed by the Supreme Court of Canada in *Powley*.

In addition to these general provisions, there have been numerous explicit legislative and constitutional provisions made in respect of Metis individuals and collectives. These are also discussed below.

Royal Proclamation of 1763[110]

When the new government of Canada assumed control of British North America in 1867, it assumed all responsibilities that the British Crown had undertaken, including the responsibility to deal with unextinguished "Indian land interests" as set out in the 1763 *Royal Proclamation*. The critical passage of that historic obligation reads:

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[110] *Royal Proclamation of 1763,* R.S.C. 1985, App. II, No. 1.

> And whereas great Frauds and Abuses have been committed in the purchasing of Lands of the Indians to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Distontent, We do, with the Advice of Our privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies, where We have thought proper to allow Settlement... .[111]

The obligations owed by the British Crown towards Aboriginal peoples have been assumed by Canada, as reflected in Section 25(a) of the *Constitution Act, 1982:*

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763;[112]

The term "Indians" in the *Royal Proclamation* has not been judicially interpreted. However, Canadian courts have had to determine over which geographical territory the Proclamation applied. A literal interpretation of the Proclamation would encompass a small region of contemporary eastern Canada. However, case law and academic research and consideration have determined that the rules embodied in the *Royal Proclamation* in relation to Crown-Aboriginal

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[111] *Ibid.*
[112] *Supra* note 1, s. 25 (a).

relations apply throughout Canada.[113] This is evident in the manner in which Canada has implemented treaty making throughout Canada for the purpose of dealing with "Purchase from the said Indians of any Lands reserved to the said Indians".

The scrip distribution scheme implemented throughout the Prairie Provinces after Confederation to deal with Metis' "Indian land interests" is consistent with the obligations that were set out in the *Royal Proclamation* and supports the legal conclusion that Metis fall within the category of "Indians" contemplated in the *Royal Proclamation of 1763*.

Constitution Act, 1867[114]

The *Constitution Act, 1867* formalized the union of the four original colonies of Canada – Ontario, Quebec, Nova Scotia and New Brunswick. It further identified the division of legislative powers between the federal and provincial governments with enactment of Sections 91 and 92. The sub-section of particular importance to the issue of Aboriginal rights is Section 91 (24), which identifies that Canada is responsible for "all Matters pertaining to Indians and Lands reserved for the Indians"[115].

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[113] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (S.C.C.), at 376-79 and 392. For academic commentary, see Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196.
[114] *Supra* note 39.
[115] *Ibid.*

It is beyond the scope of this thesis to discuss Section 91 (24) and whether or not Metis were Indians then for the purpose of that provision. However, it is important to note that there remains an unresolved determination of whether or not the category of "Indians" in Section 91(24) of the *Constitution Act, 1867* now includes all Aboriginal peoples identified in Section 35 of the *Constitution Act, 1982.* That "Indians" is used in both constitutional provisions suggests that Indians in the 1867 Act includes more than those persons recognized as Indian as that term has been used in the various versions of the federal *Indian Act.* In *Re Eskimos,* the Supreme Court of Canada affirmed that, for the purpose of the *Constitution Act, 1867,* "Eskimos" would have been considered Indians as that provision was used historically.[116] The fact that the Court in *Re Eskimos* determined that Inuit are included in the Section 91(24) category of "Indians" supports an argument that Metis should similarly be included.

Constitution Act, 1930[117]

In 1930, ownership of sub-surface resources in present-day Alberta, Saskatchewan, and Manitoba were transferred to each of these provincial governments pursuant to the Natural Resources Transfer Agreements.[118] The principle purpose of the NRTAs was to effect the transfer of these resources from the federal government to each of the three Prairie Provinces. However, these

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[116] *Reference Re Eskimos* [1939] S.C.R. 104 (S.C.C.). In this reference case, Quebec sought direction from the Supreme Court of Canada as to whether or not Eskimos were Indians for the purpose of the *Constitution Act, 1867,* Section 91 (24).
[117] *Constitution Act, 1930,* 20-21 George V, c. 26 (U.K.).
[118] *Alberta Natural Resouces Act*, S.C. 1930, c. 3 Schedule, being a Schedule to the *Constitution Act, 1930, ibid.,* (Natural Resource Transfer Agreements referred to hereinafter as "NRTAs").

Agreements, signed between Alberta, Saskatchewan, Manitoba and Canada, also contained provisions, which reflected the obligation of the crown *vis-à-vis* "Indians", and in particular concerning land and harvesting rights.

Paragraph 1 of each NRTA is a general provision, reflecting the fiduciary obligation owed by the crown towards the Aboriginal inhabitants of each of these provinces. It is in that paragraph that the federal crown transferred "the interest of the Crown in all Crown lands, mines, minerals, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same.[119]

Paragraph 12 can be characterized as a "for-greater-certainty" clause, in that it provides that the province shall ensure that the rights of Indians to hunt, trap and fish will continue on unoccupied crown lands or lands that the Indians have rights of access to:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[120]

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[119] *Supra* note 113, para. 1.

[120] *Supra* note 114, para. 12. Note that in the Manitoba NRTA, it is paragraph 13 that contains this provision.

It has been argued in a number of cases that the term "Indians" as it was used in the 1930 NRTAs includes Metis persons.[121] A brief summary of these cases is discussed in this work. In light of these decisions, it is important to identify that the Agreements, and correspondingly the *Constitution Act, 1930* itself, is a source of the obligation owed by the Crown to Metis peoples within the Prairie Provinces.

Specific Legislative and Constitutional Provisions Relating to Metis Aboriginal Rights

Few legislative provisions have ever been enacted to deal specifically with Metis either as individuals or communities. However, as will be demonstrated below, the specific enactments that do exist support a legal conclusion that the Metis are Aboriginal peoples, with existing Aboriginal rights.

Rupert's Land and North-Western Territory Order[122]

Rupert's Land was that territory encompassing present-day Alberta, Saskatchewan, Manitoba and portions of British Columbia and the North-west Territory, which in 1670, was granted to the Hudson's Bay Company by letters patent charter of King Charles II.[123] This grant enabled European traders to establish trading posts throughout the interior for the purpose of expanding the

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[121] *R. v. Ferguson* (1993) 2 C.N.L.R. 148 (Alta. Prov. Ct.), aff'd (1994) 1 C.N.L.R. 117 (Q.B.); *R. v. Grumbo* [1996] 3 C.N.L.R. 122 (Sask. Q.B.); rev'g [1998] 3 C.N.L.R. 172 (Sask. C.A.)
[122] *Rupert's Land and North-Western Territory Order,* [R.S.C. 1985, App.II., No. 9].
[123] The Royal Charter Incorporating the Hudson's Bay Company, 1670, reproduced in E.H. Oliver, ed. *The Canadian Northwest: Early Development and Legislative Records,* Vol. I (Ottawa: Government Printing Bureau, 1914) at 135-53.

European fur trade, which would prosper for at least 200 years, prior to transfer of the land to Canada in 1870.

With a view to acquiring and settling the west, in 1869, the Dominion government began negotiations with Britain for the transfer of Rupert's Land to it. At the conclusion of those discussions, the Dominion government enacted the *Rupert's Land Act*, enabling it to accept the transfer from the Hudson's Bay Company.[124] The Order, which actually effected the transfer, was the *Rupert's Land and North-Western Territory Order*. It holds particular importance to Metis claims to land and to Aboriginal rights recognition. First, the Order committed Canada to recognize the "legal rights of any corporation, company, or individual within [Rupert's Land]".[125] Additionally, the Order stated that

> ...upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[126]

Thus, whether the Metis' interest in lands throughout Rupert's Land are considered "Indian" entitlement, or private interests as prior occupants of the land, the *Rupert's Land and North-Western Territory Order* could be interpreted as reflecting Canada's commitment to recognize and fufill land obligations owed to Metis peoples.

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[124] *Rupert's Land Act,* 31-32 Victoria, c. 105.
[125] *Supra* note 118, Schedule A.
[126] *Ibid.*

Manitoba Act, 1870[127]

The Metis associated with the community at and near the historic Red River Settlement aggressively opposed the Dominion government's attempts to unilaterally establish new provinces within Rupert's Land. Refusing to recognize the power of the Dominion government in the face of their own historic use, occupation and self-governance throughout the territory, the Metis asserted the establishment of a provisional government in 1869, representing the interests of the inhabitants of the Red River Settlement.

The *Manitoba Act, 1870* provided for establishment of an elected legislature for the province of Manitoba. With respect to the future recognition of Metis Aboriginal rights, the Act also provided for the setting aside of lands for the Metis:

> And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breeds heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.[128]

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[127] *Manitoba Act, 1870.* 33 Victoria, c. 3 (Canada)

[128] *Manitoba Act, 1870,* 33 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 8 Reference to "half-breed" residents was the official term used in reference to the Metis populations at various points in history.

The *Manitoba Act, 1870* was the first domestic legislative enactment that made specific reference to Metis or Half-breed interests. Moreover, the nature of these provisions was directly within the ambit of the Metis' entitlement to land by virtue of their Aboriginal ancestry.

Dominion Lands Act, 1879[129]

The *Manitoba Act* only applied to those lands in the original province of Manitoba.[130] In order to deal with the lands beyond this area in the North-west Territory, Canada enacted the *Dominion Lands Act*.

Although early versions of the *Dominion Lands Act* made no direct reference to Métis land rights, there was an acknowledgment of the need to deal with "Indian title" interests, similar to the language used in the *Manitoba Act* in reference to the Metis' land interests:

> None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished.[131]

In 1879 the *Dominion Lands Act* was amended to enable the issuance of Half-breed scrip grants throughout present-day Alberta and Saskatchewan. Section

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[129] *Dominion Lands Act*, S.C. 1879, c. 31.
[130] The "original" province of Manitoba is commonly referred to in the literature as the postage stamp province.
[131] *Supra* note 17, vol. 5, Appendix 5B, citing *Dominion Lands Act, 1872*, s. 42.

125 delegated authority to the Governor in Council to deal with the claims of the Metis or Half-breed residents:

> 125. The following powers are hereby delegated to the Governor in Council:...
>
> (e) To satisfy any claims existing in connection with extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and conditions, as may be deemed expedient.[132]

Arguably, the above provisions of the *Manitoba Act, 1870* and the *Dominion Lands Act, 1879* are the most explicit acknowledgment by the crown of obligations owed to Metis as Aboriginal peoples. These legislative obligations have in fact remained unfulfilled and form the subject matter of ongoing litigation in both Manitoba and Saskatchewan, which are discussed herein.

Metis Population Betterment Act[133]

In response to pressure by Metis people and communities in Alberta during the Depression era, that provincial government struck a royal commission to investigate the "condition of the half-breed population of Northern Alberta."[134] Following a two-year investigation, the Ewing Commission recommended that lands be set aside for the use and benefit of Metis people. This and other recommendations of the Commission were formally accepted by the Alberta

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[132] *Supra* note 125, s. 125 (e).
[133] *Supra* note 88.
[134] *Supra* note 12.

government in 1938, through enactment of provincial legislation. The *Metis Population Betterment Act* defined Metis for the purpose of the Act as follows:

> *2. (a) "Metis" means a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in The Indian Act, being chapter 98 of the Revised Statutes of Canada, 1927; ... .*[135]

At the time that the *Metis Population Betterment Act* was proclaimed, the 1927 federal *Indian Act* defined Indian as "any male person of Indian blood reputed to belong to a particular band, any child of such person, any woman who is or was lawfully married to such person". The *Indian Act* defined "Non-treaty Indian" *as* "any person of Indian blood who is reputed to belong to an irregular band or who follows the Indian mode of life, even if such person is only a temporary resident in Canada"[136].

Fifty years after the *Metis Population Betterment Act* provided for establishment of the settlement areas, an out-of-court agreement was signed between the Alberta and the Federation of Métis Settlements Association, an organization representing the interests of the Metis members of the Métis Settlements.[137] The Federation of Métis Settlements Association had commenced a civil action against the province of Alberta alleging mismanagement of and entitlement to subsurface resource revenues generated from Metis Settlement lands. An amendment to this action occurred in 1988 with inclusion of a clause seeking a

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[135] *Supra* note 88.
[136] *Supra* note 89.
[137] *Keg River Metis Settlement Association et al. v. Her Majesty the Queen in Right of Alberta,* Action 83520 and on behalf of the association and their members, *Maurice L'Hirondelle et al. v. Her Majesty the Queen in Right of Alberta*, Action No. 100945.

declaration of the existence of Metis Aboriginal rights, specifically the right to land, and breach of fiduciary obligation regarding Metis settlement lands. The out-of-court agreement provided for land, compensation, and legislative reform intended to enable the Metis to establish a form of local self-government.[138] Powers of self-government included, to an extent, the ability to determine membership in the Settlement community.

Metis Settlements Act[139]

Part 3 of the *Metis Settlements Act* sets out legislative rules and procedures pertaining to Metis Settlement membership. In order to apply for membership in a Metis settlement, a person must be Metis. However, the legislation also provides that Indians or Inuk persons may become members of the Metis Settlements:

> *75. (2) An Indian registered under the Indian Act (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if*
>
> *(a) the person was registered as an Indian or an Inuk when less than 18 years old,*
> *(b) the person lived a substantial part of his or her childhood in the settlement area,*
> *(c) one or both parents of the person are, or at their death were, members of the settlement, and*
> *(d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of*

[138] The signing of the Accord resulted in the enactment of provincial legislation, including the *Metis Settlements Accord Implementation Act,* R.S.A. 1990, c. M-15; the *Metis Settlements Land Protection Act,* the *Metis Settlements Act,* R.S.A. 1990, c. M-14, and the *Constitution of Alberta Amendment Act, 1990,* R.S.A. 1990, c. C-24.
[139] *Metis Settlements Act,* R.S.A. 1990, c. M-14.

that individual as a member of the settlement.[140]

Sub-section 75 (2) is a substantial change from the previous *Metis Population Betterment Act,* which stipulated that status Indians were ineligible to acquire membership in a Metis Settlement.[141]

Constitution Act, 1982[142]

In 1982 Canada proclaimed Section 35 in the *Constitution Act, 1982,* thereby confirming obligations owed to Aboriginal peoples to recognize and affirm their existing Aboriginal and treaty rights. That Métis are explicitly included in Section 35 (2) of the *Act* removes any doubt that the obligation owed by the crown is owed equally to Indian, Inuit and Métis peoples. However, as discussed in this work, determining who is within the broad category entitled Metis peoples for the purpose of Section 35 Aboriginal rights is a challenging task.

Common Law Principles of Aboriginal Rights

Although Aboriginal law jurisprudence has tended to focus on the Aboriginal and treaty rights of First Nations, it is arguable that these principles apply to the claims of Metis as Aboriginal peoples. The application of these principles to

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[140] *Métis Settlements Act, ibid,,* s. 75.
[141] *Ibid.,* s. 2 (a).

Metis claims is likely a result of an increasing number of claims involving Metis persons who seek recognition of their Aboriginal rights.

The purpose of this section is to discuss general common law principles of Aboriginal law that have developed since 1982 and which are applicable to claims involving Metis persons. This section will conclude with a discussion of the principles of law that are evolving specifically in respect of Metis claims. Last, I will identify pending cases yet to be argued.

***R. v. Sparrow*[143]**

Sparrow was the Supreme Court of Canada's first attempt at defining Aboriginal rights following patriation of the *Constitution Act, 1982.* In this decision, the Court considered the political background to Section 35 and its intended purpose of protecting the Aboriginal rights of Aboriginal peoples of Canada. Recognizing that such rights were yet to be determined, the Court suggested that a broad, liberal approach to defining Aboriginal rights was to be taken at all times.

***R. v. Van der Peet*[144]**

Six years later, the Supreme Court of Canada rendered its decision in *R. v. Van der Peet* where, signalling a shift away from the liberal approach suggested in *Sparrow,* the Court stated that "in order to be an Aboriginal right, an activity must

[143] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.)
[144] *R. v. Van der Peet* [1996] 2 S.C.R. 507 (S.C.C.)

be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right"[145]. Moreover, the Court stated that those practices, customs and traditions to be accorded constitutional protection are those that have continuity from a period prior to European contact to the present.

This aspect of *Van der Peet* would be particularly crippling for Metis claimants and was acknowledged by Lamer C.J.:

> [T]he history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. **At the time when this Court is presented with a Métis claim under s. 35 [emphasis is mine]** it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.[146]

***R. v. Adams*[147]**

The *Adams* case involved a Mohawk Indian charged for fishing without a license contrary to *Quebec Fishing Regulations.*[148] In his defence, the accused argued

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[145] *Ibid.*, para. 46.
[146] *Ibid.*, para. 67.
[147] *R. v. Adams* [1996] 4 C.N.L.R. 1 (S.C.C.)
[148] *Quebec Fishery Regulations, C.R.C., c. 852, s. 4 (1)*

that he had an Aboriginal right to fish for food and that the regulations violated that right.

The *Adams* decision made two significant contributions to Aboriginal law jurisprudence. First, the Court determined in that case that Aboriginal rights could not be inexorably linked to Aboriginal title. In arriving at this conclusion, the Court observed, "some Aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances".[149] This, the court continued, did not change the fact that Aboriginal peoples relied on the land and natural resources for sustenance prior to contact, and these practices were integral to their distinctive cultures.[150] Thus, while Aboriginal rights are necessarily related to the Aboriginal group's affiliation and identification with the land, Aboriginal rights do not exist solely where a claim to Aboriginal title has been, or necessarily can be, made.

The second contribution made by the Court in *Adams* relates to the relevant time frame for determining Aboriginal rights. Rather than looking at the actual date that Cartier arrived in the St. Lawrence area as being the date of "contact" for the purpose of Aboriginal rights, the Court considered the "arrival of Samuel de Champlain in 1603, and the consequent establishment of effecive control by the French over what would become New France"[151] as the time that could most

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[149] *Supra* note 29 at para. 27.
[150] *Ibid.*
[151] *Ibid.*, at para. 46.

accurately be identified as "contact" for the purpose of determining the Mohawk's Aboriginal right to fish for food.[152] This emphasis on European control, as opposed to contact was further developed by the Court in *Powley.*

Haida Nation v. British Columbia[153] and ***Taku River Tlingit First Nation v. British Columbia***[154]

In 2004 the Supreme Court of Canada decided *Haida Nation* and *Taku River* concurrently, creating highly anticipated precedents relating to Aboriginal rights claims in Canada. Both decisions involved determinations relating to the crown's duty to consult with Aboriginal groups, where claims of unextinguished Aboriginal rights and title have been asserted but not yet proven or determined. Although both were brought on behalf of First Nations in British Columbia, the cases create significant precedents affecting all Aboriginal peoples, including Metis claimant groups.

In *Haida,* the central issue was the fact that British Columbia had approved the transfer of a tree-cutting license from one corporate entity to another, notwithstanding that the Haida Nation had asserted an Aboriginal title claim to the lands. The Haida challenged the Crown's transfer as having been made without their consent and in the face of their explicit objections. At all levels of court the issue was whether or not the crown had a duty to consult, and what that duty entailed. In 2004, the Supreme Court of Canada confirmed that, as Crown,

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[152] The Court confirmed in *R. v. Coté* [1996] 4 C.N.L.R. 26 at p. 50, par. 58, that "contact" is interpreted to be that period when the French began to assume effective control in New France.
[153] *Haida Nation v. British Columbia (Minister of Forests) (2004) 3 S.C.R. 511 (S.C.C.)*
[154] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 3 S.C.R. 550 (S.C.C.)

the Province of British Columbia owed a duty to consult with the Haida Nation. This duty, the Court stated, exists whenever the Crown has "knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it"[155].

In *Haida,* the Court also made a significant finding with respect to delegation of the duty to consult. In that regard, the Court held that the Crown's duty of consultation will not be met where it seeks to delegate this responsibility to a third party interest:

> ...the duty to consult and, if appropriate, accommodate cannot be discharged by Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations.[156]

The principles established in *Haida* were then applied to the facts in *Taku River*[157]. In that case, a mining company, Redfern Resources Ltd., had sought permission from the British Columbia government to re-open a mine. The company's plan included construction of a road through a portion of the Taku River's traditional territory. The First Nation had actively participated in the environmental assessment plan and had conducted a traditional land use study. Notwithstanding these steps, the First Nation was not satisfied with the consultation process and claimed that inadequate consultation had taken place.

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[155] *Supra* note 149, at para. 35.
[156] *Ibid.,* para. 10.
[157] *Supra* note 150.

Rendering its decision, the Court stated that the Crown's honour could not be interpreted narrowly and technically, but that it must be given full effect in order to promote the process of reconciliation mandated by Section 35 (1) of the *Constitution Act, 1982.*[158] With respect to the scope of the duty owed, the Court reiterated what it had said in *Haida Nation:*

> The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (Haida, supra, at para. 39). It will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.[159]

Due to the Court's finding that Taku Tlingit First Nation had actively participated in the consultation process, the Court found that the Crown's duty of consultation had been met.[160]

Taku contributes to the body of case law that has evolved in respect of Aboriginal rights in two significant ways. First, the case establishes that the Provincial Crowns will be found to owe a duty to consult where Aboriginal rights and title claims are asserted. Second, the case establishes that administrative procedures, such as provincial environmental assessment processes will contribute to a finding of adequate consultation where such a claim is asserted. Consequently, Aboriginal rights issues can and will be addressed through

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[158] *Ibid.,* para. 42.
[159] *Ibid.,* para. 29.
[160] *Ibid.,* para. 47.

administrative processes; consultation encompasses administrative procedures as well as political processes between representative Aboriginal governments and the Crown.

Metis Aboriginal Rights Cases Under Section 35

What follows is a brief summary of post-*Van der Peet* cases involving claims by Metis persons for recognition of their Aboriginal rights under Section 35. To date, Metis Aboriginal rights cases have dealt solely with traditional harvesting practices, and specifically with practices relating to hunting and fishing for sustenance. This is not meant to imply that traditional Metis practices are restricted to these activities. Given the history of their unique cultures and societies, it is plausible that various Metis communities could make an argument that they have sustained themselves through a variety of practices, including but not limited to hunting and fishing.

R. v. McPherson & Christie[161]

In *McPherson,* two Metis individuals were charged with hunting moose out of season pursuant to provisons of the Manitoba *Wildlife Act*[162]then in effect in Manitoba. In their defence, the claimants claimed that, as Metis, they had an

[161] *R. v. McPherson* (1992), 82 Man. L.R. (2d) 86, reversed (1994), 111 D.L.R. (4d) 278 (Man. Q.B.).
[162] *Wildlife Act*, R.S.M. 1987, c. W-130.

Aboriginal right to hunt for food, which right it was therefore incumbent on them to demonstrate to the court.

The defence provided extensive evidence at trial as to their ancestral connections to the Metis community at Big Eddy, a remote area in northern Manitoba. The Manitoba Court of Queen's Bench noted that, notwithstanding evidence led as to the claimant's ancestral connection with the community, none linked them to the historic Red River Metis community.[163]

In rendering its decision, the court described the Metis hunters as "fringe Metis", people of mixed blood ancestry who lived in areas adjacent to remote Indian reserves and who in large measure retained a traditional Aboriginal lifestyle, closely linked to the land and its resources. In terms of their social and cultural characteristics, the court took note of the nomadic lifestyle of the descendants of the accused and, in particular, the reliance that this group had on the ability to harvest resources from the land.

Having demonstrated to the court that they lived an Aboriginal way of life that relied on hunting for sustenance, the claimants were acquitted on all charges, on

[163] It is significant to note that *McPherson* predated *Adams*. In *Adams,* the Court had determined that Aboriginal rights could exist independent of Aboriginal title, thereby alleviating the level of proof from claimants seeking recognition of their practices under Section 35 (1).

the basis that they had an Aboriginal right to hunt for sustenance purposes and that this right was protected by Section 35 of the *Constitution Act, 1982.*[164]

R. v. Morin & Daigneault[165]

In this 1997 decision the Saskatchewan court made a number of points respecting Metis Aboriginal rights cases. First, the court considered the effect of the *Dominion Lands Act* and related orders-in-council on contemporary Métis Aboriginal rights. Specifically, the court considered whether or not scrip issued pursuant to the *Dominion Lands Act* effectively extinguished Métis Aboriginal rights. Rendering its decision, the court determined that the accused had an Aboriginal right to fish for sustenance purposes, and Section 35(1) of the *Constitution Act, 1982* protected that practice as being an Aboriginal right. With respect to the effect of scrip, the court determined that the fact that the accused's ancestors had taken scrip did not extinguish their right to fish for sustenance purposes.

Secondly, the court suggested that the date of effective British sovereignty was the crystallization point for determining Metis Aboriginal rights. This approach was not adopted by the Supreme Court of Canada in *Powley.*[166] Thus, notwithstanding that Crown sovereignty was asserted in 1870 over Rupert's Land and the Northwest Territories, as evidenced by the Rupert's Land Order, the

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[164] Although the Crown appealed the provincial court's decision, the findings of the lower court were upheld, the Queen's Bench Judge confirming the Aboriginal right of the claimants to hunt for food and therefore s. 26 of the *Wildlife Act* being of no force and effect.
[165] *R. v. Morin & Daigneault* [1997] S.J. 529 (Sask.Q.B.).
[166] In *Powley,* the Supreme Court specified that for Métis claims under Section 35, it is the date at which effective control moves from the Aboriginal peoples of the area to Europeans that is the determining factor, not the date of asserted British sovereignty.

factual history of the area must be considered in order to arrive at a finding of actual and effective control by Europeans.

Thirdly, the evidence in *Morin* established that there was no basis on which to distinguish between Indian and Metis groups with respect to the right to fish for food and that Saskatchewan regulations requiring Metis to hold a domestic food fishing licence constituted an infringement of the individual's Section 15 *Charter* rights.[167]

R. v. Powley[168]

Section 35 (1) is increasingly being used as a defence against criminal charges relating to traditional Aboriginal harvesting practices.[169] Similarly, the *Powley* case began with a charge against individuals for hunting wildlife without a license and being in possession of game hunted in contravention of provincial laws and regulations.[170]

In October 1993, Steve and Roddy Powley went hunting for moose near their home community at Sault Ste. Marie, Ontario. Neither individual possessed a

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[167] *Ibid.*, para. 58.
[168] *R. v. Powley* [1998] O.J. No. 5310 (Ont. Prov. Ct.); aff'g [2000] O.J. No. 99 (Ont. C.A.); aff'g [2003] 2 S.C.R. 207 (S.C.C.).
[169] For example, the following cases are cited in a report submitted to the Law Commission of Canada, January 2004, "*What is a Crime? Pimatsiwin Weyasowewina: Aboriginal Harvesting Practices Considered, supra* note 21. This report considers Aboriginal harvesting practices as criminal activity and documents the experiences that traditional hunters, trappers and gatherers have had with law enforcement officials in northern regions of Alberta and Manitoba while practicing their traditional practices. Many of these interactions resulted in the laying of criminal charges.
[170] *Powley* involved violation of Ontario's *Game and Fish Act*, R.S.O. 1990, c. G.1, ss. 46 and 47(1).

hunting license during the open season. Notwithstanding this, the father and son shot and killed a bull moose, and took it to their residence in Sault Ste. Marie. Subsequently both individuals were charged under Ontario provincial hunting laws for hunting without a license and being in possession of game that had been hunted and killed illegally.[171]

The defendants pleaded not guilty to both charges, claiming that as Metis they had a constitutionally protected right to hunt for food. Ten years later, the Supreme Court of Canada affirmed that, as Metis and as members of an identifiable Metis community, Steve and Roddy Powley had a right to hunt for food, and that this right was protected by Section 35 of the *Constitution Act, 1982.*

To arrive at this finding, the Court applied what has come to be referred to as "the *Powley* test". This ten-part test evolved from arguments, evidence and findings in the lower courts regarding this case. The test is analogous to that applied in determining the continuing existence of First Nations' Aboriginal rights, set out in the *Van der Peet* decision. However, while First Nation claimants must meet the *Van der Peet* test, Metis claimants must now meet a specified standard of proof set out by the Court in *Powley*.

[171] *Ibid., Game and Fish Act.*

The *Powley* test involves specific elements of proof in a ten-part test. Claimants who are using a defence based on Métis Aboriginal rights must demonstrate the following:

a) Characterization of the right;
b) Identification of the historic rights bearing community;
c) Identification of the contemporary rights bearing community;
d) Verification of membership in the contemporary Métis community;
e) Identification of the relevant time;
f) Determination of the integral nature of the practice to the claimant's distinctive culture;
g) Determination of continuity between the historic practice and the contemporary right.

Where a claimant is successful in demonstrating to the court on a balance of probabilities that the above criteria have been met, onus shifts to the Crown to demonstrate:

h) Extinguishment of the Aboriginal right in question; in the alternative,
i) Infringement of the right; and, if infringed upon,
j) Justification for that infringement.

Powley was the first opportunity for the Supreme Court of Canada to consider a Metis claim under Section 35. In order to give meaning to the inclusion of Metis peoples in Section 35(1), the Court modified the principles that it had set out in *Van der Peet* and, consistent with the approach suggested in *Adams* and *Coté,* proposed instead a "pre-control" test as a relevant time frame for characterizing Metis Aboriginal rights:

> The pre-contact test in *Van der Peet* is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their

> distinctive existence or relationship to the land. By analogy, **the test for Metis practices should focus on identifying those practices, customs and traditions that are integral to the Metis community's distinctive existence and relationship to the land [emphasis is mine]**. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area.[172]

The pre-control test contemplated by the Court in *Powley* is based wholly on the judicial determination of a particular point in time when the laws and customs of one group (the Indigenous or Aboriginal peoples of the area) are effectively replaced, through imposition and assertion, by the laws and customs of another (the Europeans) within a specific area.

Judicial Interpretations of *Powley*

A battery of cases relating to Metis claims under Section 35 since *Powley* continue to make their way through the courts, illustrating how the principles set out in *Powley* are being interpreted by lower courts in various jurisdictions.

Eastern Canada Cases

In the Maritime Provinces, a number of reported decisions have been rendered, dealing with claims based on Metis Aboriginal rights.[173] In many of these cases, membership in a contemporary Aboriginal organization was presented as proof

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[172] *R. v. Powley* [1998] O.J. No. 5310 (Ont. Prov. Ct.).
[173] *R. v. Castonguay,* [2003] N.B.J. No. 496 (NBPC); *R. v. Daigle,* [2003] N.B.J. 65 (NBPC); *R. v. Chiasson,* [2004] N.B.J. No. 62 (NBQB); *R. v. Hopper,* [2004] N.B.J. No. 107(NBPC).

of Aboriginal ancestry and Metis Aboriginal rights entitlement. However, with respect to weight given to this evidence, the courts clearly required proof of Metis community as well as individual self-identification:

> In order to have the right they are claiming, i.e., The right to cut timber on Crown Lands, the defendants must establish that they are Metis. They have all showed that they had an aboriginal ancestor. In 1999 they founded a modern association in order to exercise their rights. However, they are unable to show any connection with an historic Metis community in the St. Quentin area. No such evidence exists. Absent evidence of a modern Metis community that exists in continuity with an historic Metis community from the same area, I must conclude that the defendants cannot rely on any aboriginal right under section 35(1) of the *Constitution Act, 1982.*[174]

Western Canada Cases

The decision that is likely to have the most substantive impact for Metis persons represented by the Métis National Council and its affiliates is the decision in *R. v. Willison.*[175] This case involved an individual who had been charged with hunting without a license pursuant to British Columbia legislation.[176] In his defence, the accused claimed that he was exempt from the legislation by reason of his Section 35 Aboriginal rights as a Metis.

Stansfield J. elaborated extensively on what constituted community for the purpose of Aboriginal rights claims, stating that while "a discernible clustering of dwellings of persons who share certain traditions, practices and culture" are

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[174] *Ibid., Castonguay*, at para. 77.
[175] *Supra* note 50.
[176] *Wildlife Act* R.S.B.C. 1996, c. 488, ss. 26(1)(c), 33 (2) and Section 5(1) of B.C. Regulation 8/99

typical characteristics of community,[177] for the purpose of asserting Aboriginal rights, a relatively small minority of persons within a wider community who seek each other out for the purpose of enhancing their survival, as distinct communities, would meet the threshold of proof required in Metis claims. With respect to the traditional hunting territory of the Metis community, Stansfield took note of the nomadic lifestyle of the Metis, and stated that in determining Metis community, it needed to be understood expansively.

With respect to proving community, the Court considered the Métis National Council's definition of Métis that was presented by the defence. Regarding weight given to that evidence, and for proving membership in a Métis community, Stansfield J. stated: "provided that persons meet the membership criteria set out in *Powley,* and the 'national definition of Metis' as established by the Metis National Council, there is no need for every member of a local Metis community to demonstrate a personal ancestral connection to the Metis persons who formed the [British Columbia] ancestral community".[178]

Willison suggests that courts are likely to equate membership in quasi-political Aboriginal organizations with Metis community existence and belonging, notwithstanding the fact that the Supreme Court of Canada clearly stated in *Powley* that membership in a Métis organization will be *relevant but not determinative* of the issue of community membership.

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[177] *Supra* note 50 at para. 76.
[178] Ibid *at 113*

More recently, in *R. v. Laviolette*[179], Kalenith P.C.J. considered whether or not Mr. Laviolette, a Metis person, possessed an Aboriginal right to fish within the meaning of Section 35(1) of the *Constitution Act, 1982,* thereby exempting him from Saskatchewan's *Fisheries Regulations.* With respect to proof of Metis community, Kalenith P.C.J. considered both the *Powley* and *Willison* decisions. Expert opinion evidence was rendered for the purpose of demonstrating that Metis community members often moved between Metis communities, enabling them to "develop and maintain significant trade and kindship connections throughout the region and with the larger network of Metis people"[180] throughout the Prairies. This evidence, Kalenith P.C.J. determined, provided "sufficient demographic information, proof of shared customs, traditions and collective identity to support the existence of a regional historic-rights bearing community"...[181].

Identifying Metis Communities After *Powley*

Unlike First Nations communities, Metis collectives and communities typically have no state-sanctioned membership regime, and no identifiable land base. In the absence of a state sanctioned definition of Metis community, the Supreme Court of Canada determined in *Powley* that, for the purpose of Métis claims in Section 35, a Métis community is "a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way

[179] *Supra* note 65.
[180] *Ibid.,* at para. 23.
[181] *Ibid.,* at para. 28.

of life".[182] Having determined that the Powleys claimed membership in the community at Sault Ste. Marie, the Court continued: "it is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis "people", ***or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes*** **[my emphasis]**."[183] The Court's comments in *Powley* in this regard are consistent with the approach taken in *Laviolette* in regard to the larger Metis community.

Moreover, in general, these references support assertions that have been made by Metis communities and peoples in various parts of Canada: that they are distinct Aboriginal peoples whose traditional lands encompass a vast geographical area; that Metis communities are dispersed throughout the Canadian west; that in many instances, Metis communities share common history, tradition, culture and kinship ties.

Metis Aboriginal Rights and the Natural Resource Transfer Agreements

In addition to those cases argued on the basis of Section 35, Metis litigants in the Prairie Provinces have also sought to use the Indian sustenance provisions within the Natural Resource Transfer Agreements (NRTAs) as a defence. In these cases, it has been argued that provisions within the agreements reflect an

[182] *Supra* note 1, at para.12.
[183] *Ibid.*

obligation towards Indians and their right to hunt, fish and trap for food, and that this includes an obligation owed to Metis persons.

The NRTAs were entered into between Canada and each of Manitoba, Saskatchewan and Alberta for the primary purpose of putting these provinces on an equal economic footing with other Canadian provinces. The Agreements give each province jurisdiction and ownership over the natural resources occurring within their respective boundaries, subject to terms of the Agreements.

For the purpose of claims brought by Metis persons pursuant to the NRTAs, the relevant provision of the Agreements is paragraph 12 (Alberta and Saskatchewan) and 13 in the Manitoba Agreement. The provision is identical in each case and reads:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[184]

Whether or not individual Metis persons are "Indian" for the purpose of the NRTAs is strictly a matter of legal interpretation. Although this issue is not the subject matter of this thesis, it is important to be aware of such cases involving claims by Metis persons seeking protection of Paragraphs12 and

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[184] *Supra* note 112.

13 of the NRTAs. An awareness of these cases, considered in conjunction with the discussion about Metis identity and recognition in Chapter Four illustrates the complexities inherent to Metis and Aboriginal communities generally for legal and social purposes.

Alberta – *R. v. Ferguson*[185]

A Metis person of Cree descent[186] had been charged with hunting without a license and being in possession of wildlife contrary to the Alberta *Wildlife Act,* then in effect.[187] The defendant claimed that Paragraph 12 of the Alberta NRTA, which guaranteed Indians the continuing right to hunt for food on unoccupied Crown land, exempted him from prosecution.

At issue was interpretation of the term "Indian" in the 1930 NRTA. Goodson P.C.J. considered the definition of "Non-treaty Indian" as it was defined in the federal *Indian Act* in 1930:

> *2. (h) "Non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band or who follows the Indian mode of life, even if such person is only a temporary resident in Canada.*[188]

The court determined that non-treaty Indians were included in that definition and, finding that the defence had adduced sufficient evidence to

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[185] *R. v. Ferguson* (1993) 2 C.N.L.R. 148 (Alta. Prov. Ct.), aff'd (1994) 1 C.N.L.R. 117 (Alta. Q.B.).
[186] At the time that this case was considered by the courts, Mr. Ferguson was a member of the Métis community at Paddle Prairie Metis Settlement. (Lisa Weber, member, Paddle Prairie Metis Settlement.) Self-identification as "Métis", "Half-breed", "Native", "Indian", "Cree-Métis" – are all common terms used by Metis persons throughout northern Alberta. See Chapter Two for discussion.
[187] *Wildlife Act,* S.A. 1984, c. W-9.1.
[188] *Supra* note 89.

demonstrate that he was in fact "following an Indian mode of life", dismissed the charges.

The Court of Queen's Bench upheld Goodson's J. determination. No appeal was made by the Crown, leading to the conclusion that Metis in Alberta who demonstrate that they "are of Indian blood", and "live an Indian mode of life" will be able to use Paragraph 12 of the Alberta NRTA as a defence.

Saskatchewan – *R. v. Grumbo*[189]

In *Grumbo,* a Metis individual had been charged with possession of wildlife that had been taken by an Indian for food, contrary to Section 32 of the *Wildlife Act,* then in effect.[190] Similar to *Ferguson,* the defence in *Grumbo* argued that he had a constitutional right to be in possession of wildlife by virtue of Paragraph 12 of the Saskatchewan NRTA. At issue at trial was whether or not Mr. Grumbo was an Indian within the meaning of Paragraph 12 of the Saskatchewan NRTA.

The accused was convicted of the offence, based on a finding that he was not an Indian as that term was used in the NRTA. The decision was ultimately appealed to the Saskatchewan Court of Appeal where the court held that, in order to find that Metis were contemplated as being included

[189] *R. v. Grumbo* [1996] 3 C.N.L.R. 122 (Sask. Q.B.); rev'g [1998] 3 C.N.L.R. 172 (Sask. C.A.).
[190] *Wildlife Act,* S.S. 1979, c. W-13.1, as amended by S.S. 1993, c. 44, s. 6.

in paragraph 12 of the NRTA, a preliminary finding of existing Aboriginal rights was first required. This was necessary, the court stated, because the NRTA does not confer new rights but rather accommodates, preserves, and amends pre-existing rights. Accordingly, in order for Paragraph 12 to protect Metis harvesting rights, it would first need to be determined that the claimant possessed these rights as Aboriginal rights.

Manitoba – *R. v. Blais*[191]

A number of individuals had been charged with unlawfully hunting deer out of season contrary to the Manitoba *Wildlife Act.* The core issue was whether or not the defendants had, by virtue of Paragraph 13 of the Manitoba NRTA, a constitutional right to hunt for food on unoccupied Crown lands. Similar to the cases brought in Alberta and Saskatchewan, this determination would require the Court to find that the term "Indians" as used in Paragraph 13 of the Manitoba NRTA included Metis persons.

At trial, Swail J. considered a number of counsel's submissions on the meaning of the terms "Metis" and "Indian", in statutory and constitutional documents. Regarding Section 31 of the *Manitoba Act, 1870,* and reference to the "Indian Title to the lands" in that section, Swail J. concluded that the section was evidence of the existence of Metis Aboriginal rights. He concluded that, given the extensive influence of the Metis at this time in history, including the express acknowledgment of

[191] *R. v. Blais* [1997] 3 C.N.L.R. 109 (Msn. Prov. Ct.); aff'g [1998] 4 C.N.L.R. 103 (Man. Q.B.); aff'g (2001) 3 C.N.L.R. 187 (Man.C.A.); aff'g [2003] 2 S.C.R. 204 (S.C.C.).

"Half-breed" land entitlement in the *Manitoba Act*, "there was no likelihood of Metis being confused with Indians in government documents following the period of resistance in 1870".[192]

The *Blais* decision was ultimately appealed to the Supreme Court of Canada where it was heard concurrently with *Powley.* This fact alone must be taken into consideration when assessing the Court's treatment of both cases. The Court dealt with two very distinct cases, both involving Metis claimants. Each party was seeking recognition of Metis rights from distinct points of law. *Powley* required the Court to find, which the Court did, that Metis were distinct Aboriginal peoples, with a unique culture, history and practices. *Blais* would require the Court to find that Metis were *Indians,* for the purpose of the NRTAs. Although *Blais* did not require the Court to consider that Metis "lived like Indians", a line of argument that had been developed in earlier cases such as *Ferguson* mentioned herein, it nonetheless required the Court to consider Metis as Indians, even if only in a technical context. To make such a finding would be difficult and the Court would likely have been severely criticized.

The most significant contribution of the *Blais* decision for future Metis Aboriginal rights cases is in respect of claims brought within the province of Manitoba. First, on its own, the Court acknowledges that Mr. Blais was "a member of the Manitoba Métis community". This characterization supports future arguments in Manitoba that the Metis in that Province

[192] *Ibid.,* at 127.

constitute one homogenous Metis community. This alleviates the restrictive requirement of meeting the site-specific test that had been determined in *Powley.*

The second contribution that *Blais* makes is in respect of continuing Metis commercial rights. The NRTAs have been interpreted as modifying First Nation's harvesting rights.[193] The modification involves expansion of the geographical area where First Nations can hunt, fish and trap for food. The NRTAs have been interpreted as extinguishing any Aboriginal rights of a commercial nature that might have existed prior to 1930. Similarly, any sport hunting activities of First Nations have been deemed extinguished by the NRTAs.

If Manitoba Metis are not "Indians" for the purpose of the Manitoba NRTA, the conclusion is that the Aboriginal rights of the Metis to hunt, fish and trap for commercial purposes have not been extinguished. Metis would still need to establish proof of these types of practices as being Aboriginal rights; however, the abundant history of the Metis, and certainly the Manitoba Metis as hunters, fisherman, and traders, would support such a finding.

Ongoing Metis Claims Under Section 35

[193] *Horseman v. The Queen*, [1990] 1 S.C.R. 901 (S.C.C.); *R. v. Badger* [1996] 1 S.C.R. 771 (S.C.C.)

Metis Aboriginal Title and Claims Relating to Land Use

Dumont v. A.G. Canada[194]

In 1981 a civil action commenced in Manitoba's Court of Queen's Bench on behalf of the descendants of those Metis who were entitled to "Half-breed" land grants pursuant to Section 31 of the *Manitoba Act, 1870.* The plaintiff parties to this action seek a declaration from the court that various federal and provincial statutes and related orders-in-council,[195] passed in relation to Section 31 of the *Manitoba Act, 1870,* were unconstitutional because they substantively altered the provisions contrary to the prohibition against such alternation as stated in the *Constitution Act, 1871*[196]. The plaintiffs allege that these legislative amendments effectively deprived the Metis of lands to which they were entitled.

In addition to the ongoing *Dumont* claim, Metis communities in northern Manitoba are in the process of opposing treaty land entitlement claim settlements between Canada and various Manitoba First Nations, claiming that these agreements affect their traditional lands.[197]

Morin v. *Canada & Saskatchewan* [198]

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[194] Statement of Claim, dated April 15, 1981, as amended 18 February 1987, No. 1010181, decided in 1990 – preliminary considerations made in *Dumont* v. *A.G. Canada* [1990] 2 C.N.L.R. 19 (S.C.C.); rev'g (*Manitoba Metis Federation Inc.* v. *Attorney General of Canada*) [1988] 3 C.N.L.R. 39 (Man. C.A.); rev'g [1987] 2 C.N.L.R. 85 (Man. Q.B.).
[195] For example, Order-in-Council, P.C. 41, 2 August 1870; Order-in-Council, 13 January 1872.
[196] *Constitution Act, 1871* (U.K. c. 28).
[197] Personal interview, Lionel Chartrand, Legal Consultant to Manitoba Metis Federation, 2005.
[198] *Morin v. Canada & Saskatchewan* (Q.B. File No. 619 - 1994).

In 1994, a civil claim was initiated in Saskatchewan on behalf of Metis peoples in that province claiming that the scrip land distribution did not have the effect of extinguishing Aboriginal land rights of Metis who took scrip; and therefore they continue to possess unextinguished Aboriginal title. The case is yet to go to trial and research is ongoing with respect to scrip issued throughout the Prairie Provinces.

Maurice et al. v. Indian Claims Commission et al.[199]

Maurice related to a loss of land use claim that was expressed by Métis communities situated in Northwest Saskatchewan and Alberta. A military air weapons bombing range had been established in the Metis' traditional territory in 1954, with the consequence that numerous families lost access to their homes and traditional harvesting areas. While the First Nation communities in the area who were affected by the range negotiated an out-of-court settlement with Canada for loss of traditional land use, the Metis were excluded from this process.[200] The Metis sought the assistance of the Indian Claims Commission (the "ICC") to review Canada's refusal to negotiate. The response of the Commission was that its mandate did not enable it to receive or decide on Metis claims, and that Metis were beyond federal jurisdiction.[201]

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[199] *Maurice et al. v. Indian Claims Commission et al.*, Federal Court of Canada No. T-1356-98.
[200] First Nations that were compensated were Canoe Lake First Nation (Saskatchewan) and Cold Lake First Nation (Alberta). In July 2002, Cold Lake First Nation received $25 million in compensation for loss of traditional lands. See http://www.turtleisland.org/news/news-coldlake.htm.
[201] *Supra* note 190, cited by D. Gibson, "When is a Metis an Indian?" in Chartrand, *supra* note 7.

In 1998, Metis groups from Northwest Saskatchewan commenced a legal action against both Canada and the ICC, claiming that Canada was discriminating between First Nations and Metis persons affected by the air weapons range contrary to Section 15 (1) of the *Charter of Rights and Freedoms.* In March 2005, an out-of-court settlement was reached between the parties. The agreement provides the Metis of northwest Saskatchewan with $19.5 million in compensation for loss of traditional lands and establishment of an economic development fund for four communities impacted by the range.[202]

Although it occurs in the context of a *Charter* equality argument, the *Maurice* case is likely to have profound impact on the future recognition of Metis Aboriginal rights in Canada and in particular rights to land. In addition, resolution of *Maurice* by means of an out-of-court settlement may indicate the approach that will be taken in future for resolution of Métis claims in Section 35.

Metis Harvesting Cases

In Manitoba, there are at least twelve cases before the courts involving Métis individuals who have been charged under the Manitoba *Wildlife Act* and the federal *Migratory Birds Convention Act* and the federal *Fisheries Act.* In each case, the accused are seeking acquittal on the basis that they were exercising their traditional practices, which can be characterized as Métis Aboriginal rights.[203]

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[202] See http://www.cbc.ca/story/canada/national/2005/03/18/metis-sask-050318.html.
[203] Seven of these cases involve individuals from the Métis community at San Clara, Manitoba.

Conclusion

When Section 35 was included in the *Constitution Act, 1982,* Canada re-affirmed the fiduciary obligation it had assumed from the British Crown to protect the rights and interests of the Aboriginal peoples of Canada. Section 35 (1) was drafted with the explicit intention of including Metis. It must therefore be presumed that the rights afforded protection by Section 35 includes the practices, customs and traditions of Metis peoples. To otherwise interpret Section 35 (1) would render meaningless the inclusion of Metis in that provision. Numerous Metis claimants have argued this logic successfully.

Metis Aboriginal rights have never been extinguished according to the tests that have been established by the Supreme Court of Canada, leading to the legal and factual conclusions that these rights still exist. Moreover, recent developments in Aboriginal rights jurisprudence suggest that the Crown is morally and legally obligated to consult with affected Metis communities that assert their interest in traditional lands on the basis of continuing Aboriginal rights and title, even where the claim has yet to be confirmed.

Both the Section 35 and NRTA cases demonstrate that social, cultural and political factors affect individual self-identity and community belonging and recognition. It is imperative that the judiciary is aware of these dynamics in all Aboriginal communities, and that the outcome of their decisions will have profound effects on the lives of many individuals and communities.

CHAPTER SIX
THE LEGAL CONSTRUCT OF EFFECTIVE EUROPEAN CONTROL

INTRODUCTION

A strict interpretation of *Powley* and other cases relating to Aboriginal rights implies that those practices, customs and traditions that are integral to distinctive Metis communities at the time that effective European control is established within a given area will be accorded constitutional protection by Section 35. It is obvious, given Canada's history that the relevant time frame for Metis claims will vary, depending on what geographical location is implicated in a rights claim.

This chapter considers the concept of "effective European control" as characterized by the Court in *Powley.* In order to contextualize the discussion, particular attention will be given to certain historic events which took place in pre-Confederation Manitoba for the purpose of considering how the courts might find effective European control to have been established in various parts of Canada. Particular attention will be given to the historic Red River Settlement and the contiguous area historically known as the District of Assiniboia. The conclusions drawn will be based largely on primary sources available through the Hudson's Bay Company Archives and the Provincial Archives of Manitoba, or which are referred to in secondary sources.

Against this contextual framework, I will hypothesize how in other areas of the Prairie Provinces the Crown is likely to argue that effective control was asserted and achieved. In particular, I will discuss provisions of the *Dominion Lands Act* and related orders in council relating specifically to Metis persons. This analysis will emphasize how the relevant time frame for Metis claims will vary depending on what geographical location is implicated.

Effective European Control As A Legal Concept

The fundamental purpose underlying Section 35 is to acknowledge the fact that Aboriginal peoples lived throughout present-day Canada in distinctive societies, with their own practices, traditions and cultures, and to reconcile this fact with the asserted sovereignty of the Crown.[204] In order to fulfill this duality of recognition and reconciliation, the majority in *Van der Peet* emphasized the need to identify those practices, customs, and traditions that were integral to particular Aboriginal cultures prior to contact:

> ...- the test for identifying the Aboriginal rights recognized and affirmed by section 35 (1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North American prior to contact with the Europeans.[205]

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[204] *Supra* note 140, at para. 31.
[205] *Ibid.*, at para. 44.

Recognizing that Metis cultures post-dated European contact, Lamer C.J. noted that the test to be applied in the case of a Metis claim would not necessarily be the same as that for other Aboriginal groups:

> [T]he history of the Metis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Metis are defined... . The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.[206]

The 2003 *Powley* case was the first opportunity for the Supreme Court to consider a Metis claim under section 35. In order to give meaning to the inclusion of Metis peoples in section 35(1), the Court in *Powley* modified the principles that it had set out in *Van der Peet* and proposed instead a "pre-control" test as a relevant time frame for characterizing Metis Aboriginal rights:

> The pre-contact test in Van der Peet is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Metis practices should focus on identifying those practices, customs and traditions that are integral to the Metis community's distinctive existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area.[207]

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[206] *Ibid.*, at para. 67.
[207] *Supra* note 2, at para. 37.

The pre-control test contemplated by the Court in *Powley* is based wholly on the judicial determination of a particular point in time when effective control moves from the Aboriginal peoples to Europeans. "Control" is contextually determined according to the laws and customs effectively asserted over a specified geographical area.

A review of court transcripts from the Ontario Provincial Court decision in *Powley* illustrates factors that were considered in order to determine when effective European control was established in the Sault Ste. Marie area.[208] With the support of expert testimony and archival evidence[209], counsel for the defence was able to argue that effective European control over that region came sometime between 1848 and 1850. That evidence described colonial efforts to survey the lands in question in preparation for land transfers. In order to make land available for European settlement, treaties were made with the Indians whose traditional territories were in the environs of Sault Ste. Marie.

The court distinguished between European policies relating to peace, trade and exploration and that of permanent settlement and treaty-making, and considered the latter to constitute effective European control for the purpose of Metis claims:

> The historical record indicates that the Sault Ste. Marie Metis community thrived largely unaffected by European laws and customs until colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement in the mid-19th century. The trial judge found, and the parties agreed in their pleadings before the lower courts, that

[208] *R. v. Powley*, Excerpts from Trial (4-7 May 1998), Sault Ste. Marie 999 93 3220 (Ont. Crt. Prov. Div.)
[209] *Ibid.*, at para. 58, where Dr. Victor Litwyn was called and gave evidence as a defence expert witness.

> "effective control [of the Upper Great Lakes area] passed from the Aboriginal peoples of the area (Ojibway and Metis) to European control" in the period between 1815 and 1850 (para. 90). The record fully supports the finding that the period just prior to 1850 is the appropriate date for finding effective control in this geographic area, which the Crown agreed was the critical date in its pleadings below.[210]

Effective Control in Pre-Confederation Manitoba

In this section, three distinct periods in Manitoba's history will be discussed in order to contextualize the discussion about effective European control. First I will discuss the authority granted to the Hudson's Bay Company as set out in its Charter of 1670 and will consider whether or not that charter could constitute proof of effective European control. Secondly, I will discuss the establishment and administration of justice at the Red River Settlement under the authority of the earl of Selkirk directly and then the Council of Assiniboia. Last, I will discuss Riel's provisional government, actions taken by it and, most important for the purpose of this discussion, the authority of the provisional government as a representative Metis government.

This survey of the legal and political circumstances occurring in pre-confederation Manitoba will illustrate the uncertainties that exist with respect to a finding of effective European control. More importantly, for the purpose of entertaining a discussion about Metis Aboriginal rights, this discussion will demonstrate that control did not shift from the Aboriginal peoples in certain areas

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[210] *Ibid.*, at paras 39-40.

to the Europeans until some point after Confederation, with much later dates of assertion throughout the province of Manitoba today.

Hudson's Bay Company Law and Governance

In 1670, the Hudson's Bay Company obtained a royal charter from King Charles II, granting it the exclusive right to trade in furs throughout Rupert's Land.[211] The charter encompassed all lands drained by rivers, which emptied into the Hudson's Bay, covering contemporary boundaries of Ontario and parts of Quebec, Manitoba, most of Saskatchewan, southern Alberta, eastern Nunavut Territory, as well as portions of Minnesota and North Dakota in the United States.

The primary purpose of the Charter was to grant an exclusive right to trade and commerce to the Hudson's Bay Company throughout the area known as Rupert's Land:

> AND WHEREAS the said undertakers for their further encouragement in the said design have humbly besought us to Incorporate them and grant unto them and their successors the sole Trade and Commerce of all those Seas Straits Bays Rivers Lakes Creeks and Sounds in whatsoever Latitude they shall be that lie within the entrance of the Straits commonly called Hudson's Straits together with all the Lands Countries and Territories upon the Coasts and Confines of the Seas Straits Bays Lakes Rivers Creeks and Sounds aforesaid which are not now actually possessed by any of our Subjects or by the Subjects of any other Christian Prince or State... .[212]

It was through this grant that European traders established trading posts throughout the interior for the purpose of expanding the European fur trade.

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[211] *Supra* note 119.
[212] *Ibid.*

Britain recognized that some form of governance and system of law would be required in order to maintain social order among those traveling to Rupert's Land and establishing posts for the purpose of trade.[213] Accordingly, in addition to granting exclusive rights to trade, King Charles granted the Company plenary governance and legislative authority:

> AND FURTHER, Our Will and Pleasure is, and by these Presents, for Us, Our Heirs and Successors, WE DO grant unto the said Governor and Company, and to their Successors, that it shall and may be lawful, to and for the said Governor and Company, and their Successors, from time to time, to assemble themselves, for or about any the Matters, Causes, Affairs, or Businesses of the said Trade, in any Place or Places for the same convenient, within our Dominions or elsewhere, and there to hold Court for the said Company, and the Affairs thereof; and ... to make, ordain, and constitute, such, and so many reasonable Laws, Constitutions, Orders and Ordinances, as to them, or the greater part of them being then and there present, shall seem necessary and convenient for the good Government of the said Company, and of all Governors of Colonies, Forts and Plantations, Factors, Masters, Mariners, and other Officers employed or to be employed, in any of the Territories and Lands aforesaid, and in any of their Voyages; and for the better Advancement and Continuance of the said Trade, or Traffic and Plantations, and the same Laws, Constitutions, Orders and Ordinances so made, to put in Use and execute accordingly, and at their Pleasure to revoke and alter the same, or any of them, as the occasion shall require: And that the said Governor and Company, so often as they shall make, ordain, or establish, any such Laws, Constitutions, Orders, and Ordinances, in such Form as aforesaid, shall and may lawfully impose, ordain, limit and provide, such Pains, Penalties and Punishments upon all Offenders, contrary to such Laws, Constitutions, Orders and Ordinances, or any of them, as to the said Governor and Company for the Time being, or the greater Part of them, then and there being present, the said Governor or his Deputy being always one,

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[213] Although it can be debated as to whether or not King Charles had the authority to grant such broad sweeping rights by royal prerogative, this issue will not be discussed in this paper. Similarly, the existence of Indigenous legal traditions which may have existed throughout Rupert's Land prior to the Charter is not discussed; however the relevance of this question to the issue of contemporary claims based in Section 35 should be noted.

> shall seem necessary, requisite, or convenient for the Observation of the same Laws, Constitutions, Orders and Ordinances... .[214]

It can be argued upon careful reading of the charter provisions that the Company's jurisdiction was restricted to business matters and relations between company employees. The extent of Company control over its employees was made evident by the policy adopted by the London Committee in 1673, requiring "all members of the Company and others relateing to theyr Services, accordeing as the Charter Shall directe" to swear an oath of allegiance to the Company.[215] Moreover, while the Company may have been empowered to enact laws, constitutions, orders and ordinances for the purpose of ensuring social order, Britain intended that these law-making powers would endure for a specific period of "Seven Years" and no longer,[216] suggesting that European presence in Rupert's Land was for the primary and temporary purpose of exploiting the fur trade, with no priority then being given to permanent settlement.[217] In consideration of this underlying policy, it is reasonable to conclude that the Hudson's Bay Company Charter and actions taken by the Company to

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[214] *Supra* note 207.

[215] *Minutes of the Hudson's Bay Company, 1671-1674, 67.* Cited in Russell Smandych and R. Linden, "*Co-existing Forms of Aboriginal and Private Justice: An Historical Study of the Canadian West*" in Hazelhurst, Kayleen M., ed. (Vermont: Ashgate Publishing Company, 1995), pp. 1-37 at 9. The London Committee was comprised of Company shareholders situated in England who exercised law-making authority over Rupert's Land.

[216] House of Commons Journal Volume 10: 13 May 1690, *Journal of the House of Commons: Volume 10: 1688-1693* (1802), pp. 412-13. (URL: http://www.british-history.ac.uk/report.asp)

[217] Notwithstanding this stipulation in the Act, *An Act for Confirming to the Governor and Company Trading to Hudson's BayTheir Privileges and Trade*, 2 W. and M. c. 23, 1690), the Company would continue to claim legal jurisdiction over Rupert's Land until 1870 when its Charter was sold to the Dominion government.

implement laws and governance institutions pursuant to the Charter did not constitute effective European control as contemplated in *Powley.*

The Selkirk Settlement

The historic record suggests that for nearly two centuries following King Rupert's grant to the Hudson's Bay Company, law-making and governance within Rupert's Land was restricted to Company business and those affiliated or affected by Company business. One significant variation of this approach arose in 1811 with the introduction of a permanent agricultural settlement at the junction of the Red and Assiniboine Rivers. Agricultural settlement in Rupert's Land was based on a plan proposed to the Company by one of its controlling shareholders, Thomas Douglas, earl of Selkirk. As a means to assist impoverished farmers suffering displacement caused by the Agricultural Revolution in Scotland, Selkirk sought to establish a permanent settlement at the juncture of the Red and Assiniboine Rivers in present-day southern Manitoba. To facilitate this plan, in 1811 the Hudson's Bay Company transferred ownership in 116, 000 square miles of its territory to Selkirk for the purpose of establishing the agricultural community. The new area would come to be known as the Red River Settlement in the District of Assiniboia.

By the time that the first Scottish immigrants arrived at the Red River Settlement in 1812, the Company had not established a governance and legislative regime

to be applied throughout Rupert's Land, including the area proposed to be Selkirk's Settlement. Correspondence from Selkirk to the Settlement's first leader, Miles Macdonell, suggested that the London Committee did not treat law and governance as a matter of priority.[218] Notwithstanding this fact, Selkirk and Macdonell recognized that "some kind of judicature would be required for the colony" if agricultural settlement was to be encouraged.[219] Thus, in the absence of Company motivation to establish a system of law, Selkirk provided interim written instructions to Macdonell relating to the administration of justice within the Settlement.[220] Based on these and subsequent instructions from Selkirk, a rudimentary system of justice administration was introduced at Red River.

It is questionable whether or not Selkirk as owner of the settlement, and Macdonell as supervisor, had the jurisdiction to introduce and enforce any laws. Of particular importance to this issue was the fact that while the deed of conveyance gave Selkirk title to the land, the Company retained all jurisdictional powers. In addition, notwithstanding the grant to Selkirk for the express purpose of establishing an agricultural settlement, it is unlikely that official colonial policy encouraged permanent settlement throughout the territory. A shift in policy from one based on fur trade expansion to permanent settlement would severely undermine the exploitation of the fur trade, which continued to be the primary purpose of European presence in the west.

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[218] Reference to this problem is subject matter of a letter written by Selkirk to Andrew Colville, 5 June 1813. Selkirk Papers, N.A.C., E1-1(2), Vol. III at 629 as cited by Dale Gibson, *supra* note 76.
[219] *Supra* note 119 at 178.
[220] *Ibid.*, at 186.

Regardless of whether or not inhabitants of the country were aware of this jurisdictional fact, historic facts demonstrate that the Hudson's Bay Company did not exercise effective legal and political control throughout Rupert's Land, giving rise to legitimate questions about effective European control. A number of key events in Manitoba's history are discussed below to support this conclusion.

Challenges at Red River
The Pemmican Wars: 1814 – 1816

As discussed in Chapter Four, in 1814 local law-makers at Red River issued a proclamation prohibiting the export of pemmican. The prohibition was not received favourably by many Metis traders, many whom were either Freemen[221] or who traded with the Hudson Bay Company's rival, the North West Company. The Metis had come to rely on pemmican trading as a means of securing their economic livelihood. In their view, Macdonell's unilateral prohibition constituted monopolization of the trade. Accordingly, the Proclamation was aggressively opposed by the Metis, with the support of the Nor'westers. A series of hostile altercations occurred, resulting in the arrest of Macdonell and other officials of the Settlement and forced expulsion of settlers from Red River. In 1816, the situation would come to a head at Seven Oaks when Company representatives sought to prevent a group of Metis traders from transporting pemmican, resulting

[221] Freemen was a term used in reference to those Metis who were not members of Indigenous or Indian communities, thus not bound by Indian custom; nor were they employees of the fur trade companies and therefore arguably not bound by Company laws.

in numerous deaths to Company men for which no criminal charges were laid against the Metis.

Administration of justice following the incident at Seven Oaks was of questionnable value and validity. Gibson recounts how the behaviour of officials of both the North West Company and the Hudson's Bay Company used their authorities as justice officials for private interests, placing the administrative of justice into disrepute.[222] In light of this instability, the British Crown appointed a royal commission to investigate the situation in Rupert's Land, with the result that "all justices of the peace and magistrates for the 'Indian Territories' were withdrawn, leaving the commissioners as the only judicial officers acting under the *Canada Jurisdiction Act* [223] in the northwest."[224]

Treaty-Making as Proof of Effective European Control

The court in *Powley* distinguished between European policies relating to peace, trade and exploration and that of permanent settlement and treaty-making, and considered the latter to constitute effective European control for the purpose of the Powley's claim. In this section, the effect of the Selkirk Treaty will be discussed as constituting evidence of effective European control.

The violence that had escalated between representatives of the Company and the Metis following the Pemmican Wars had caused considerable uneasiness

[222] *Supra* note 76, at 260-261.
[223] *Canada Jurisdiction Act,* 43 George II, c. 138.
[224] *Supra* note 76, at 262.

among the Indian tribes of the area who, like the Metis, were concerned about how European settlement might affect them. Lord Selkirk was aware of this tension, as evidenced in personal correspondence to Hon. W. B. Coltman, July 1817:

> You are aware that one of the allegations which have been made in vindication of the North West Company, is that the outrages committed here have risen from the jealousy of the native Indians against agricultural settlements, and their resentment against my settlers, for having possession of their lands without their consent or any purchase from them. I believe you have already heard enough to be satisfied how little foundation there is for any such idea. But it would be still more satisfactory if the sentiments of the Indians on that point were explicitly and formally declared in your presence, and still more so if they would consent to a specific cession of a portion of their lands to be set aside for the express purpose of agricultural settlements.[225]

As a means of securing the cooperation of the Indian tribes to facilitate successful settlement, Selkirk treated with the Saulteaux and Crees of the area. In exchange for

> ...all that tract of land adjacent to Red River and Ossiniboyne River, beginning at the mouth of Red River and extending along same as far as Great Forks at the mouth of Red Lake River, and along Ossiniboyne River, otherwise called Riviere des Champignons, and extending to the distance of six miles from Fort Douglas on every side, and likewise from Fort Daer, and also from the Great Forks and in other parts extending in breadth to the distance of two English statute miles back from the banks of the said rivers, on each side, together with all the appurtenances whatsoever of the said tract of land ...[226]

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[225] *Supra* note 119, at 1288.
[226] "The Selkirk Treaty", cited in *Oliver*, *supra* note119.

Lord Selkirk committed to providing to each of the signatory First Nations one hundred pounds of merchantable tobacco.

For the purpose of this chapter, the critical question is whether or not the Selkirk Treaty constituted a "treaty" for the purpose of establishing effective European control. The most important issue identified in the historic record relates to the authority of the signatories to the treaty. Regarding the authority of the Indian signatories, Peguis, a local Ojibwa chief, claimed that the Treaty had not properly extinguished the Aboriginal title of the signatory groups because the four chiefs who signed the treaty did not have the authority to do so.[227] If the signatories had no authority to enter into the treaty, its validity was certainly questionable. Indeed, the fact that Treaty One and Two would be negotiated in 1871, involving the same tracts of land, which were the subject of the Selkirk Treaty, is suggestive of this conclusion.

Second, it is important to recall that the *Royal Proclamation of 1763* required that all land cessions by the various Indian tribes had to be acquired by the Crown:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds.--We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure. that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence

[227] *Supra* note 168.

> whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments. as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.[228]

Any land transactions that purported to involve sales or surrenders of land by Indians had to be taken by the Crown. Thus, while Selkirk may have been well intended, he likely did not have the authority to treat with the Saulteaux and Cree for the purpose of extinguishing their Aboriginal title, implying that the treaty was invalid for this purpose. Nor can it be assumed that the Selkirk Treaty is demonstrative of official colony policy based. Given these historic facts, it is probable that the date of the Selkirk Treaty would not be considered relevant to establishing effective European control for the purpose of determining Metis Aboriginal rights in the Red River Settlement area.

Riel's Provisional Government

With a view to acquiring and settling the west, the Dominion government negotiated the transfer of Rupert's Land to it from the Hudson's Bay Company in 1869. Legally, the *Rupert's Land Act* enabled the Crown to accept the transfer from the Company.[229] Notwithstanding the legalities that may have existed, the

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[228] *Supra* note 106.
[229] *Supra* note 120.

actual transfer was aggressively opposed by the Metis settlers at Red River who maintained that the transfer had been negotiated without their knowledge and in the absence of consultation with them. Prior to joining Confederation, lands in the postage-stamp province of Manitoba had not been surveyed. Legal land surveys were the first requisite to any scheme of settlement or development. In anticipation of the transfer to Canada, surveyors were sent out to the Settlement area in 1869 for the purpose of conducting surveys. When surveyors arrived at Red River, the settlers, led by Louis Riel, refused them entry. To ensure that no further action could be taken, Riel and his followers seized control of Upper Fort Garry and established a provisional government. Gibson comments: "The governor and council of Assiniboia were outraged at these actions but...powerless to prevent them".[230]

The provisional government would remain in a position of power and authority at Red River until Manitoba joined Confederation. During this time, Company institutions, including the courts and government were interrupted and replaced by the provisional government. Regarding the legitimacy of Riel's government, it is significant to note that the provisional government, and the demands it expressed on behalf of the Settlement members, were recognized and acted upon by the Canadian government. Indeed it was due to Riel's participation in the negotiations of the Bill of Rights that provisions for Half-breed land rights, and

[230] *Supra* note 76.

the protection of languages and institutions, were incorporated into the terms of the *Manitoba Act*[231].

For the purpose of discussing effective European control, it is significant to note that in theory, Confederation was to be the impetus of European expansion and settlement of Canada. In the absence of colonial policy of encouraging European settlement, there was no foreseeable need to conduct land surveys. The Metis successfully prevented land surveys at Red River when the Dominion sought to implement its policy of settlement. Thus, notwithstanding the fact that official colonial policy may have been based on permanent settlement, the fact that the Dominion was not able to implement unilaterally its policy gives rise to questions about defining effective European control.

An additional argument that can be raised, which supports this conclusion relates to the powers exercised by the provisional government in 1869-1870. It is arguable that if effective European control existed in 1869, Riel would not have been able to assert political and legal jurisdiction through the provisional government. However, the provisional government was formed and asserted its powers as a government. Moreover, it was recognized by the Dominion government, as evidenced by Riel's participation in the constitutional negotiation process leading to Manitoba's joining Confederation. The history of this political situation gives rise to questions about *de facto* effective European control which,

[231] *Supra* note 123.

although not raised in that context in *Powley,* are crucial factors in determining the existence of Metis Aboriginal rights in Canada.[232]

Effective Control in Rupert's Land and the Northwest Territory

In areas outside of the original 'postage stamp' province of Manitoba, the Crown might assert that the legal transfer of Rupert's Land and the Northwest Territory from the Hudson's Bay Company to the British Crown in 1870 established effective European control. Alternatively, the Crown may assert that the enactment of the *Dominion Lands Act* and related Orders-in-Council is evidence of effective European control being asserted and acquired over Rupert's Land and the Northwest Territory.

Two important points can be made regarding the effect of the *Dominion Lands Act, 1879 (*and related orders-in-council) on Metis Aboriginal rights in Manitoba and the Prairie Provinces. The first point is in relation to the relevant time frame. Although the *Act* was proclaimed in 1879, it was not until 1885 that an order-in-council was passed by the Governor-in-Council allowing for issuance of either land scrip or money scrip to extinguish Metis land interests. If a court were to find that an order-in-council is evidence of effective European control, it might be argued that effective control was neither asserted nor acquired throughout the area until some time after 1885.

[232] Note that the issue of *de facto* effective European control as being an element of proof for the purpose of determining Aboriginal rights is beyond the scope of this paper.

Rather than date of effective British sovereignty, which had been used in *Morin*[233], the Court specified in *Powley* that for Metis claims under Section 35, it is the date at which *effective control* moves from the Aboriginal peoples of the area to Europeans that is the determining factor, not the date of asserted British sovereignty. This finding suggests that, notwithstanding that Crown sovereignty was asserted over Rupert's Land and the Northwest Territories as evidenced by the Rupert's Land Order, the factual history of the area must be considered in order to arrive at a finding of actual and effective control by Europeans.

The second point to be noted regarding the *Dominion Lands Act* relates to the effect of the legislation and Crown actions taken pursuant to Section 125. If the argument is made that the *Dominion Lands Act* and related orders-in-council had the effect of extinguishing Metis Aboriginal title, Section 35 jurisprudence has clearly established that Aboriginal rights can exist independent of Aboriginal title[234]. In these cases, the Court determined that while site-specific practices will require a clear link to land, where claimants have not shown that occupation and use is sufficient to support a claim of title, they may still demonstrate that they have an Aboriginal right to engage in a specific practice, custom or tradition, which is entitled to constitutional protection.[235] Thus, even if it is determined in

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[233] *Morin*, *supra* note 129.
[234] *Adams, supra* note 143; Côté, *supra* note 148.
[235] *Supra* note 143, at para. 26; also Côté, *supra* note 148 where, at page pp. 166-167, Lamer C.J. stated:

> *"...Aboriginal rights may indeed exist independently of aboriginal title. As I explained in Adams, at para. 26, aboriginal title is simply one manifestation of the doctrine of aboriginal rights...and there is no a priori reason why the defining practices, customs and traditions of such societies and communities should be limited to those practices, customs and traditions which represent incidents of a continuous and historical occupation of a specific tract of land."*

future cases that provisions of the *Dominion Lands Act* had the effect of extinguishing Metis Aboriginal title, this does not imply extinguishment of Aboriginal rights. [236]

Conclusion

This chapter has considered historic events that occurred in pre-Confederation Manitoba for the purpose of exploring how contemporary courts might find effective European control. In *Powley,* the Court found that effective control passed from the Aboriginal peoples of the area to Europeans when colonial policies shifted from a focus on peace, trade and exploration to permanent settlement and treaty-making. Using this standard as a framework, primary archival materials and secondary sources were researched with a view to ascertaining if and when this transfer of control took place. Particular attention was given to historic colonial policies relating to law and governance institutions introduced in Rupert's Land by the Hudson's Bay Company and particularly the area historically known as the Red River Settlement.

For contemporary Metis Aboriginal rights claims, which involve lands falling within the original postage stamp area of the province of Manitoba, it is likely that the Crown can argue that effective European control was established by 1870.

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[236] The *Morin & Daigneault* case, *supra* note 163, discusses the findings of the Saskatchewan Court of Queen's Bench on this issue.

This, arguably, is evident by a number of historic occurrences and most particularly, the establishment of the first Manitoba legislature. The Crown would have the onus of proving how and when effective European control was acquired. However, a critical consideration of the concept of effective control as articulated in the *Powley* decision suggests that the unilateral political act of establishing a legislature does not necessarily constitute effective control.

The chronological overview of the legal and political history of the Red River Settlement and District of Assiniboia discussed earlier demonstrates that prior to Confederation, the British Crown neither possessed nor asserted control over the Red River Settlement area. Analysis of primary sources demonstrates that at Red River and throughout Rupert's Land, early legal and governance institutions focussed on facilitating colonial policies of trade and exploration. The historic record does not support a conclusion that jurisdiction over the Indigenous inhabitants was contemplated or prioritized by the British government, nor early Company officials.

In light of the focus given by the court in *Powley* to official governmental policy to determining effective European control, neither can it be asserted that the delegation of authority to the earl of Selkirk at Red River constituted effective European control. While settlers did arrive at Red River for the purpose of establishing an agricultural settlement, official colonial policy had not shifted to a focus on permanent settlement. Peaceful relations with the Indigenous

populations for the purpose of promoting the fur trade continued to be the basis of colonial policy until the Hudson's Bay Company's interest in Rupert's Land was sold to the Dominion government in 1870.

Although the focus of this chapter has been the framework set out in *Powley* for determining when effective control is asserted over a specific territory, the issue of *de facto* or actual effective control has also been raised. In *Powley,* the Court describes what effective European control is through examples. In doing so, the Court suggested that effective control is a state or circumstance that passed from the Aboriginal peoples of the Upper Great Lakes area to the Europeans at a specific point in time. Considering when European laws and customs affected the Aboriginal communities, to the extent that a shift in control occurs, proved the crucial period when control was deemed to have passed in the Great Lakes area.

This logic was applied to the context of the provisional government, which remained in a position of power at Red River from 1869 to1870. Notwithstanding that the legal steps had been taken to transfer Rupert's Land to Canada, the Metis demonstrated to the Dominion government a highly sophisticated level of political organization through the assertion of the provisional government. Although it was despised at the time, the Dominion government and others recognized its power and control. That the Metis were able to assert and maintain political and legal control over the Red River Settlement and the District of Assiniboia in the face of asserted Dominion sovereignty demonstrates that

effective control had not passed from the Aboriginal peoples to the Europeans in 1870.

Similar logic applies to the area of Rupert's Land falling outside of the boundaries of the original postage stamp province of Manitoba. Legally, the *Dominion Lands Act* was enacted for the specific purpose of enabling European settlement. Specific provisions granted the governor-in-council the authority to deal with Metis unextinguished Indian interest, through the issuance of scrip.

When formulating a defence based on Aboriginal rights, it is important to note that identifying the relevant time frame relates to the crystallization point for characterizing the right in question. A finding of effective European control will therefore only go to the time period when the practice in question must be characterized. Those practices, customs and traditions that are integral to the distinctive Metis societies at the time that European control is determined asserted over a given area, will be accorded constitutional protection.

Regardless of when effective control is determined to have occurred within a given area - 1870, 1885, 1930, or 2005 - distinctive Metis societies have historically and contemporaneously maintained their traditional practices. These practices are broad and include but are not restricted to activities relating to hunting, fishing, and gathering. In the absence of extinguishment prior to 1982 – through clear/plain legislation prohibiting the act, agreement (treaty) with the group, or constitutional extinguishment (NRTA provisions limiting practices -

these practices still exist as rights and are entitled to constitutional protection by virtue of section 35.

Aboriginal rights are not absolute and may be subject to infringement. However, infringement of Aboriginal rights must be justified according to the standards that have been set in cases such as *Sparrow*[237] and *Gladstone*[238]. With respect to the Crown's duty to consult where infringement exists, this duty arises whenever they have actual or constructive knowledge of an asserted Aboriginal right, which could be infringed by state action[239]. Thus, the duty to consult will be found to exist prior to proof of the claimed right.

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[237] *Supra* note 36.
[238] *R. v. Gladstone* [1996] 2 S.C.R. 723 (S.C.C.)
[239] *Supra* note 149.

CHAPTER SEVEN
METIS ABORIGINAL RIGHTS IN THE TWENTY-FIRST CENTURY

INTRODUCTION

As we enter the twenty-first century, Metis Aboriginal rights are for the most part being shaped and defined in response to federal and provincial laws, and in response to the actions taken by governmental and political organizations representing Metis persons. Similar to its approach in dealing with the rights of First Nations peoples, government only appears willing to acknowledge traditional Metis practices, as Aboriginal rights entitled to constitutional protection, once a court renders a decision to that effect. The political response to these positive judicial pronouncements is, by default, to enter into negotiations with political organizations representing Metis persons and communities. Accordingly, it is important to understand the implications of negotiating Aboriginal rights recognition, as well as the complexities of Aboriginal political representation in Canada.

One primary means by which political organizations representing Metis individuals and communities are moving their agendas forward on Metis Aboriginal rights is through strategic political lobbying and negotiation processes. Presumably, the primary purpose of these efforts is to enable Metis people the ability to continue to practice their cultures and traditions, thereby facilitating their continuing existence as distinct Aboriginal peoples. However, as will be

discussed in this chapter, critical consideration of the nature of these agreements and arrangements demonstrate that they are not necessarily based on recognition of any rights accorded to the Metis as Aboriginal peoples. In fact, it will be argued that these agreements may be undermining Metis peoples' aspirations of self-determination, which include the ability to exercise their traditional practices, customs and beliefs freely.

Serious implications for the role of contemporary Metis community affiliation, for the purpose of ascertaining Metis Aboriginal rights in Section 35, reach into issues of membership within contemporary political organizations claiming to represent Metis persons. The historic legal and political framework of these organizations has in some cases resulted in an ever-changing membership not necessarily connected to any historic or, for that matter, contemporary "Metis" community as defined by the Supreme Court of Canada in *Powley*. Consequently, uncertainties may be created by deferring to membership in a contemporary political organization for the purpose of identifying legitimate Aboriginal rights-holders.

In certain cases, political organizations representing Metis persons are addressing this aspect within their respective membership regimes. These actions are being taken largely in response to the direction given by the Court in cases such as *Van der Peet, Powley* and *Blais* respecting proof of Aboriginal rights. Notwithstanding the positive steps taken by these organizations, the

approaches and perceptions of Metis individuals, communities, indeed peoples created by these actions, are far-reaching. This chapter will conclude by identifying foreseeable problems created by these actions created by the approach that is being taken by political organizations, the provinces, and the federal government in the process of negotiating Metis Aboriginal rights recognition.

CONSTITUTIONAL REFORM AND POLITICAL REPRESENTATION

The political atmosphere in Canada immediately before and following patriation of the Canadian Constitution in1982 is particularly relevant to interpreting Section 35 and, for the purpose of this chapter, understanding the role that contemporary political organizations play in the recognition process. In order to appreciate the relevance of this history to the issue of contemporary representation, a brief overview of the constitutional patriation process follows.

The lobbying efforts of many Aboriginal representative groups became particularly active during the period immediately preceding and throughout the patriation process. Aboriginal rights were a matter of high political profile and, due in large part to the lobbying efforts of Aboriginal leaders, amendments to the *Constitution Act* included an Aboriginal rights clause.

The Aboriginal organizations that participated in the discussions leading up to entrenchment of Section 35 were the National Indian Brotherhood, representing

the interests of Status Indians in Canada; the Inuit Committee on National Issues represented the Inuit; and the Native Council of Canada represented the Metis and Indians who did not have status under the federal *Indian Act*[240] and who were not represented politically by the National Indian Brotherhood. With respect to the meaning to be attributed to Metis in Section 35, the Native Council's stated position was:

> 7. That the word 'Metis' as it presently exists in section 35(2) refers to all persons of aboriginal ancestry in Canada who declare themselves to be Metis, including: (a) those constituents of the Native Council of Canada who identify themselves as Metis, whatever their community or origin, (b) those constituents of other organizations who identify themselves as Metis by virtue of their association with the western provinces an/or (sic) the Metis of Red River.[241]

Following entrenchment of Section 35, these organizations recognized a need to have further discussions on the meaning to be attributed to the provision. Therefore, they negotiated for a series of conferences to be held among federal, provincial and Aboriginal leaders for this purpose. The agreement reached with Canada was reflected in Section 37 of the *Constitution Act, 1982,* with Canada's commitment to conduct consultations with national statesmen for the purpose of considering the nature and scope of the rights mentioned in Section 35:

> S. 37 (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be

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240*Indian Act,* R.S.C. 1985, c. I-5, as. am.
241 Cited in P. Chartrand, "Problem of 'Outside-Naming' for Aboriginal People" (1991) 2 Journal of Indigenous Studies 1 at 13.

convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister shall invite representatives of those peoples to participate in the discussions on that item.[242]

The consultations agreed to in Section 37 (2) were manifested through a series of First Ministers' conferences, held between 1983 and 1987, and involved invited representatives of the three Aboriginal groups identified in Section 35. The Assembly of First Nations, which replaced the National Indian Brotherhood, participated in the discussions on behalf of Status Indians and Bands in Canada.[243] The Inuit living in the Northwest Territories, Northern Quebec and Labrador were represented by the Inuit Tapirisat of Canada. With respect to Metis representation, two organizations participated: the Native Council of Canada, representing the interests of Metis and non-status Indians throughout Canada regardless of their location, and the newly formed Métis National Council, representing descendants of persons of mixed ancestry who self-identified with the Metis community that had assumed the title Métis Nation in western Canada[244]. The Métis who formed the Métis National Council were of the opinion that the Native Council of Canada did not adequately represent

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[242] Supra note 1, s. 37.

[243] The Assembly of First Nations currently represents the interests of more than six hundred federally recognized Indian bands: (Assembly of First Nations website at www.afn.ca).

[244] Description of organizations participating in the constitutional talks and representing the Aboriginal peoples of Canada referred to in David C. Hawkes, *Negotiating Aboriginal Self-Government. Developments Surrounding the 1985 First Ministers' Conference. Background Paper Number 7.* (Kingston: Queen's University, 1985) at 5.

Métis-specific views. Therefore, as a means of strengthening their position regarding Métis Aboriginal rights, they broke away from the Native Council of Canada in 1983 and formed the Métis National Council.

CONTEMPORARY POLITICAL REPRESENTATION

When issues relating to Aboriginal peoples are discussed in national political fora today, three organizations are typically invited to participate: the Assembly of First Nations, the Métis National Council, and the Inuit Tapirisat of Canada. Broadly speaking, official federal policy recognizes these three Aboriginal political organizations as representing the interests of the Aboriginal peoples of Canada. Perhaps more important to the issue of Aboriginal self-determination, when agreements and political protocols are concluded between Canada and Aboriginal peoples, it is these three organizations that are signatories to the agreements.

While these organizations represent specific groups of Aboriginal peoples within Canada, and are undoubtedly representative Aboriginal political organizations, it is incorrect to conclude that they are the Aboriginal leaders or political representatives of all Aboriginal peoples in Canada. This is an incorrect assumption that is often made by the media and the federal and provincial governments.

For the specific purpose of interpreting the meaning of Métis in Section 35, the Métis National Council did not come into existence as a political lobbying group representing the interests of its constituents until 1983. Accordingly, it is incorrect to assume that Metis in Section 35 refers only to those Métis who are descendants of the Métis Nation in western Canada who, for national political lobbying purposes, are represented by the Métis National Council.

> The Blais decision suggests that the definition debate has a significant political component linked to it. I would agree with this characterization. The *Constitution Act, 1982* is an expression of Canada's political essence. Accordingly, when s. 35 refers to a group identified as Métis, it would seem appropriate that the elected representatives of this nation dialogue with the key participants in the arena and arrive at a workable definition of who is a Métis.[245]

In consideration of the *obiter* comments in *Powley* noted above, one might conclude that the Métis National Council is "the key participant in the political arena" contemplated by Vaillancourt J. However, the stated and actual mandate of the Métis National Council demonstrates that, while it may effectively represent the interests of its constituents, it may not be capable of, nor wish to represent, the interests of *all* Métis peoples. This conclusion is reasonable, in that there are numerous distinctive Métis peoples in Canada, each forming distinctive societies, with their own practices, traditions and cultures. [246]

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[245] Vaillancourt J. in *R. v. Powley* [1998] O.J. No. 5310 (Ont. Prov. Ct.) at paras. 37 and 38, cited in *R. v. Powley* [2000] O.J. No. 99 (Ont. C.A.) at para. 73.
[246] *Supra*, note 2 at para. 31.

In actual fact, numerous political organizations purport to speak on behalf of Metis persons. The Métis National Council states that it represents the Métis Nation, made up of the descendants of an historic Métis community in western Canada. Politically and legally, the position of the Métis National Council is that the term Métis in Section 35 refers specifically to those Métis who are descendants of the Métis who received land grants and/or scrip under provisions of the *Manitoba Act, 1870* or the *Dominion Lands Act, 1879,* and amendments thereto. Through its affiliate organizations, the Métis National Council represents approximately 350, 000 to 400, 000 Métis citizens.[247] The five-affiliate organizations of the Métis National Council include the Métis Nation of Ontario, the Manitoba Métis Federation, the Métis Nation - Saskatchewan, the Métis Nation of Alberta and the Métis Provincial Council of British Columbia.

The Congress of Aboriginal Peoples (formerly known as the Native Council of Canada) states that through its affiliates[248], it represents over 800, 000 off-reserve Indian and Métis people residing in urban, rural and remote areas throughout Canada.[249] The Congress does not aggregate enumeration data relating to each of its constituent groups.

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[247] See Métis National Council website at http://www.Métisnation.ca/who/index.html.
[248] Affiliate organizations of Congress of Aboriginal Peoples are: Labrador Métis Nation, Federation of Newfoundland Indians, Aboriignal Peoples Council, Native Alliance of Quebec, Ontario Métis Aboriginal Association, United Native Nations (B.C.), C.A.P. National Youth Committee.
[249] See Congress of Aboriginal Peoples website at: (http://www.abo-peoples.org). The Congress does not differentiate between its Indian and Métis members therefore it is not possible to enumerate Métis constituents.

Looking within provincial borders, the problems associated with political representation for the purpose of ascertaining Métis Aboriginal rights are amplified. Within the province of Alberta, over 66, 000 individuals have self-identified as Métis in the 2001 federal Census. [250] At the time of this writing, no provincial enumeration has been conducted by the Métis Nation of Alberta, which could confirm how many self-identifying Métis persons in Alberta are members of that organization. Notwithstanding this fact, the Métis Nation of Alberta states that it assumes full responsibility for representing the Métis people within the province of Alberta.[251]

Comparatively, the Métis Settlements General Council reported in 1998 that the eight Métis Settlements in Alberta collectively had a population of 6, 288 persons.[252] The Métis Settlements General Council assumes responsibility as the collective government of the Métis Settlements and is recognized from within the enabling legislation as the central government entity. The General Council is also recognized as the central governing authority of the Settlements by Alberta, and to an extent, Canada. [253] Given this reality, it is unclear what representative group will be considered the appropriate voice for Alberta Métis for the purpose of negotiating Aboriginal rights recognition. As demonstrated in Chapter Four,

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[250] Statistics Canada, *Canada's Ethnocultural Portrait: The Changing Mosaic* (Ottawa: 2001 Census: Analysis Series) at 25, which cites that 66, 055 individuals in Alberta self-identified as being Métis. Those who participated in the census were given a choice of North American Indian, Inuit, or Métis with respect to Aboriginal self-identity categories.

[251] J. Madden and Métis National Council, eds., *Snapshot of the Nation, 2000/01, (*Ottawa: Métis National Council, 2000/01) at 107. Further, this is the position that has been maintained by the Métis Nation of Alberta in its contractual relations with the Alberta government.

[252] See Métis Settlements General Council website at (http://www.msgc.ca/MétisSettlements.html), citing 1998 internal census data.

[253] *Supra* note 83.

with regard to Métis identity and community affiliation with the Métis Settlements, one can be both "Métis" as defined in the *Metis Settlements Act*[254], and "Indian" as defined in the federal *Indian Act.* [255] In addition, in many cases, members of the Métis Settlements also hold membership with the Métis Nation of Alberta.[256]

To complicate matters more, in Alberta the history of the Métis Settlements involves a significant out-of-court settlement based on a legal claim, which sought a declaration of the existence of Metis Aboriginal rights.[257] With respect to political representation of the eight Metis Settlement communities, a forty-member assembly, the Métis Settlements General Council, assumes responsibility as a collective government of the Settlements and is recognized from within the enabling legislation as the central government entity of the Settlements. The General Council is also recognized as the central governing authority by the provincial government of Alberta, and to an extent, by Canada.[258] It is therefore unclear which political organization can be considered the representative voice for Metis people and communities in Alberta, for the purpose of negotiating Metis Aboriginal rights recognition.

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[254] *Métis Settlements Act,* R.S.A. 2000, c.M-14

[255] *Indian Act, supra* note 5. This is a predominant fact at many of the Settlements, including Gift Lake, Paddle Prairie.

[256] This data is not aggregated. For example, I am concurrently a member of both Paddle Prairie Metis Settlement and the Métis Nation of Alberta.

[257] *Keg River Métis Settlement Association, et al. v. Her Majesty the Queen in Right of Alberta*, Action 83520 and on behalf of the association and their members, *Maurice L'Hirondelle, et al. v. Her Majesty the Queen in Right of Alberta*, Action No. 100945.

[258] *Supra* note 83, at 337.

In Ontario, similar problems arise with respect to Metis identity, community and political representation. In that province, two distinct organizations purport to represent Métis in Ontario: the Métis Nation of Ontario, an affiliate of the Métis National Council, and the Ontario Metis Aboriginal Association, whose national affiliation is with the Congress of Aboriginal Peoples. Each organization has a distinct idea about Metis identity. As an affiliate of the Métis National Council, the Métis Nation of Ontario supports and has ratified as its own the definition of Métis passed by the Métis National Council in 2002. The Métis Nation of Ontario asserts that it alone represents Métis people in Ontario, and that it "offers the most legitimate way in Ontario for Métis people to be recognized" .[259]

By comparison, the Ontario Metis Aboriginal Association attributes Métis identity in Ontario as a distinct Aboriginal identity, differentiating Metis persons from Europeans and Indians. However, Metis people, according to the Association's definition, are not necessarily connected to the historic Métis community associated with the Métis National Council and its affiliates. A quote by Mike McGuire, former president of the Ontario Metis Aboriginal Association, illustrates the dynamics inherent to Metis identity in Ontario:

> Well, Tony Belcourt (president of the MNO) wanted to go more with the Red River things, eh? Maybe they wanted to say to be Metis, you have to come from the Red River in order to have that identity. But in Ontario we don't identify with that. The Metis people of Ontario; they are the Ontario Metis people. They're not from the west. Tony comes from Alberta. He comes into Ontario and says well, here are the values of the Metis people. Well, maybe in the west they do have a different set of values. But in Ontario we're a different being... . So that's how the split (between OMAA and

[259] http://www.ecclectica.ca/issues/2003/2/sawchuk.asp, citing Métis Nation of Ontario website, 2001.

> MNO) began. I think it was more of the Western Metis concept, I think that they wanted to put the Western Métis values here (McGuire 1997).[260]

Thus, today there are two Ontario organizations, both purporting to speak for the Metis of Ontario.

This pattern of ambiguity regarding political representation of Aboriginal peoples and communities is not restricted to the Metis. Political representation of Indians at the national level is equally problematic. For example, critical consideration of the stated mandate of the Assembly of First Nations reveals that the organization only represents Status Indians and Bands. It does not purport to represent all persons who self-identify as Indians or who may socially and culturally be Indian. Nor does the Assembly purport to represent persons who might not be entitled to be registered due to the enfranchisement processes associated with the *Indian Act*[261], or First Nations who choose not to be registered as Indian under the *Indian Act* or be represented politically by the AFN.[262]

Given this reality, it is misleading to assume that the organizations that the federal government defers to as representing certain Aboriginal groups, and

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[260] *Ibid.*

[261] Here referring to both the historic and contemporary provisions of the *Indian Act* affecting the legal status of thousands of Indian citizens. These were reflected in the *Indian Act* at various stages including : S.C. 1876, c. 18, s. 86 (compulsory enfranchisement for becoming a doctor, lawyer, teacher or clergyman; S.C. 1951, c. 29, s. 108 (enfranchisement for off-reserve Indians); S.C. 1951, c. 29, s. 108(2), compulsory enfranchisement of Indian women who married non-Native, Métis, or unregistered Indian men; Bill C-31, R.S.C. 1985, c. 32, s. 20, which re-instated women who had lost their status under the 1951 provisions noted above, however re-instatement is limited to two generations of children.

[262] For example, Barriere Lake Algonquins (Ontario) , and the Mohawk Nation (Quebec).

which may participate in contemporary discussions regarding Aboriginal peoples are *the* representatives of the Aboriginal peoples of Canada identified in Section 35. Rather, a more accurate observation would be that the Assembly of First Nations and the Métis National Council represent the interests of their respective First Nation and Métis constituents at the level of national politics in Canada, a reality often obscured by contemporary national politics.

CONTEMPORARY NEGOTIATIONS

A j ËTIS NATION ACCORD

Discussions held at the First Ministers' Conferences in relation to Aboriginal constitutional matters focused on defining Section 35. After a series of four meetings held over a period of five years, an impasse arose regarding the meaning of "existing" in Section 35 and "self-government". Ultimately, no agreement was ever reached through the national constitutional reform process.[263]

During the Conferences, the Métis National Council lobbied for a long-term commitment from Canada and the provinces of Ontario, Manitoba, Saskatchewan, and Alberta, to conduct future negotiations of importance to the

[263] Subsequent attempts were made to deal with the Aboriginal and treaty rights section of the Constitution in the Meech Lake Accord (1987) and the Charlottetown Accord (1992), constitutional reform processes which attempted to deal with a broad spectrum of constitutional issues of national importance, including Aboriginal and treaty rights matters. It is beyond the scope of this thesis to discuss either the Meech Lake Accord or the Charlottetown Accord in detail, although specific references will be made to the pertinent issues contained in each relating to Métis Aboriginal rights issues discussed in the thesis. Neither of these agreements were approved.

Métis National Council and its affiliate organizations. Agreement was ultimately reached in 1992 between the parties, terms reflected in the Métis Nation Accord. This Accord provided for future negotiations on issues of self-government, lands and resources, transfer of Aboriginal programs and services, and cost-sharing agreements relating to Métis institutions, programs and services.

Substantively, the Métis Nation Accord would have provided the Métis National Council and its affiliates with a broad framework within which Metis Aboriginal rights relating to self-government and lands could be negotiated with Canada. However, the Accord was part of the Charlottetown Accord, which was defeated in a 1992 national referendum.[264] Although never ratified, having failed with the Charlottetown Accord, the concept of a Métis Nation Accord with Canada did not die.

The Métis National Council has since lobbied Canada to commit to the principles reflected in the historic Métis Nation Accord. On 31 May 2005, their efforts were rewarded. At a Policy Retreat held between the federal Cabinet Committee on Aboriginal Affairs and Aboriginal Leaders, a new Métis Nation Framework Agreement was signed between the Métis National Council and the Government

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[264] The Métis Nation Accord appeared at article 56 of the Charlottetown Accord.

of Canada.[265] This Agreement reflects the goals originally set out between the parties in the 1992 Métis Nation Accord:

1. to engage a new partnership between Canada and the Métis Nation based on mutual respect, responsibility and sharing;
2. to build the capacity of the Métis National Council and its Governing Members, so that they may better represent the interests of the Métis Nation;
3. to develop and establish manageable negotiation and discussion processes as appropriate, that will address any Aboriginal and Treaty rights of the Métis, including the inherent right of self-government;
4. to identify options to resolve long outstanding issues between the Métis Nation and Canada outside of litigation; and
5. to identify and implement initiatives that will help to improve the quality of life of Métis people within Canada.[266]

The Métis National Council perceives the Framework Agreement as Canada's commitment to

> ...finally establishing effective rights-based negotiation processes with the Métis National Council. ...; Instead of denying the existence of Métis rights, which was the approach employed by Canada as the Powley case moved its way up to the Supreme Court of Canada, the Framework Agreement sets the groundwork for a pro-active and reconciliation-based negotiations process to be implemented.[267]

OTHER AGREEMENTS

[265] "Canada, Métis Nation Framework Agreement, Between Her Majesty the Queen in Right of Canada as represented by the Federal Interlocutor for Métis and Non-Status Indians and The Métis National Council", (Unpublished document, 31 May 2005).
[266] *Ibid., Objectives of the Framework Agreement.*
[267] Métis National Council, Press Release, *Métis National Council Signs Framework Agreement with Canada,* 31 May 2005, quoting Métis National Council President Clement Chartier.

With the failure of the First Ministers' Conferences and subsequent national Accords in defining Aboriginal rights and self-government, many governments have turned to negotiations on a bi-lateral and tri-lateral basis as alternative approaches to addressing these issues with Aboriginal groups. Although most are not considered to be as significant as the Métis Nation Framework Agreement, negotiated agreements have become the preferred means for enabling political organizations some measure of involvement over programs and services for their constituents. Contemporary examples are evident in the Aboriginal Human Resource Development Agreements, self-government agreements concluded with various First Nations and Inuit groups, and devolution of programs and services to First Nations and Métis organizations and service-providers. Negotiations precede the agreements and are held on a bilateral basis, between the Aboriginal groups and provincial governments;[268] some are on a tri-partite basis, involving both the federal and provincial governments. [269] Multi-lateral negotiations ensue at the national level on issues relating to self-government, economic development, and devolution of services. Although the arrangements tend to focus specifically on programs and services identified as governmental priority, these are often entered into by political organizations with a view to furthering objectives related to Aboriginal rights.

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[268] Métis Nation of Alberta. "Alberta/Métis Nation of Alberta Framework Agreement" (Unpublished document;2003); Memorandum of Understanding Regarding Negotiations to Develop a Métis Co-Management Framework Agreeement, Manitoba Conservation and Manitoba Métis Federation Inc. (Unpublished document, 2002).

[269] Métis Nation of Alberta, "Canada/Alberta/Métis Nation of Alberta Tri-partite Agreement" (Unpublished document: 2003).

C. HARVESTING AGREEMENTS

> ...a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.[270]

Since *Powley,* some provincial governments have followed the Supreme Court of Canada's directive and have entered into discussions with Metis organizations for the purpose of negotiating agreements that will enable Metis communities to harvest for sustenance purposes.[271]

In Alberta, these processes have involved negotiations and discussions between the provincial government and two distinct provincially recognized Metis organizations, the Métis Nation of Alberta and the Métis Settlements General Council. As legal counsel and negotiator for the Métis Settlements General Council in this process, I can attest to the circumstances surrounding the negotiations of the agreement between the Council and the Alberta government.

While the language of Métis "constitutional rights" was never formally acknowledged at the negotiating table, the discussions themselves were nevertheless clearly precipitated by the Court's decision in *Powley* and thus connected to the argument for Metis constitutional rights to hunt for food. In

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[270] *Supra* note 1, at para. 50.

[271] *R. v. Powley, supra* note 1, at para. 50:

> ...the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.

these proceedings the significant legal questions of "who is Metis?" and "what is a Metis community?" seemed to fall into secondary positions. Rather than using language that suggested Crown recognition of Metis Aboriginal rights, the stated purpose and intent of the Harvesting Agreements is to provide certainty:

> Purpose:
>
> The purpose of this Interim Agreement will be to provide certainty with respect to hunting, trapping and fishing by Métis Settlement members in Alberta ("Métis Harvesting") until such time as the parties may sign the Long Term Agreement, or otherwise terminate this Interim Agreement.[272]

In substance, the Harvesting Agreements enable Métis persons to harvest fish and wildlife for sustenance purposes on all unoccupied Crown land.[273] The agreements recognize traditional practices of food sharing and mobility of families between traditional areas and urban centres, and include provisions for distribution among family and community.[274]

While Alberta maintains prosecutorial discretion with regards to the laying of charges in certain instances[275], it can be argued that procedurally the agreements represent governmental recognition of the Metis' Aboriginal right to harvest for sustenance purposes.

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[272] Article 1 of *Interim Métis Harvesting Agreement between* the Métis Settlements General Council and Alberta. See Alberta government website at *http://www.aand.gov.ab.ca/PDFs/IMHA* to view the Interim Métis Harvesting Agreements made between the two political organizations noted.
[273] *Ibid.,* Article 5.
[274] *Ibid.,* Article 6.
[275] *Ibid.,* Article 4.

The enforceability of these Agreements as recognizing Metis Aboriginal rights remains questionable. None of the terms make reference to authority based on recognition of Aboriginal rights. Indeed, the Agreements explicitly state that they do not "affect, abrogate or derogate from, or recognize or affirm any constitutional or aboriginal rights of the parties".[276] Moreover, in the absence of substantive changes to legislation to reflect the terms of the agreements, provincial enforcement and prosecutorial discretion will prevail. While Metis leaders and negotiators raise these concerns at the negotiating table, provincial representatives do not agree to explicit mention of Metis Aboriginal rights in the agreement; nor could they commit to legislative amendments, which would reflect the terms of the Agreement. This result, negotiators conveyed, would have to be achieved through advocacy in the political arena.

In other jurisdictions, interim agreements have similarly been negotiated and entered into. The Métis Nation of Ontario has entered into a "Four Point Agreement with the province, whereby Ontario's Ministry of Natural Resources has agreed to recognize Harvester's Certificates issued by the Métis Nation organization. Ontario has however restricted this recognition to areas north of Sudbury, Ontario.[277] It follows then that only those Métis harvesters whose traditional territory is north of Sudbury are able to exercise their Aboriginal right to harvest for sustenance purposes.

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[276] *Ibid.*

[277] See Metis Nation of Ontario website for description of the agreement reached with the Province of Ontario. (http://www.metisnation.org/harvesting/Policy/home.html)

In Manitoba, the alleged "heartland" of the Métis Nation, Metis harvesters continue to be prosecuted for exercising their Aboriginal rights of hunting and fishing for sustenance purposes.[278] In September 2004, Manitoba had committed to following the direction of the Court in *Powley* respecting Metis harvesting rights. The province had agreed to honour the Metis Harvester Identification Cards issued by the Manitoba Metis Federation for the purpose of identifying legitimate rights-holders, and acknowledged that the harvesting practices of the Metis would be respected. Despite these commitments, Metis harvesters continue to be charged in Manitoba. Where individuals have sought to present their Harvester Identification Cards as proof of their entitlement to hunt or fish, enforcement officials have seized the cards, as well as the meat or fish that was gathered for sustenance purposes.

As a consequence of the 1996 Court of Queen's Bench decision in *R. v. Morin & Daigneault*, Metis in northwest Saskatchewan were able to harvest for food based on Aboriginal rights. Following *Morin & Daigneault,* Saskatchewan adopted an enforcement policy that enabled Metis, who live a traditional lifestyle and who have a longstanding connection to a northwest Saskatchewan community, to harvest for food without a license. The Saskatchewan policy is arguably narrow in its application and its provincial government has not entered into negotiations with Métis political organizations to amend its policy since *Powley.* It is foreseeable that the recently decided *Laviolette* case, discussed in Chapter Five, will affect Saskatchewan's enforcement policy.

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[278] See Manitoba Metis Federation website for particular information about continuing prosecution of Metis harvesters in Manitoba. (http://www.mmf.mb.ca/)

Although no agreement has been entered into between Metis communities and the Province of British Columbia, recent court decisions in that jurisdiction have determined that provincial laws infringe on Metis' Aboriginal rights to hunt for food.[279] With respect to a court's finding of the traditional territory of a Métis community in question in *Willison*, Stansfield J. has determined that this was an expansive area, from south-central British Columbia to south of the United States border.[280]

Metis communities outside of the Prairie Provinces have similarly been able to negotiate for recognition of their traditional practices. For example, members of the Labrador Metis Nation are able to acquire Aboriginal Communal Fishing Licenses, which enable them to exercise communal fishing practices in specific east coastal waters.[281] Similar to the Prairie Province Harvesting Agreements, the Aboriginal Communal Fishing Licenses state that they do not "define an aboriginal right to fish, and its scope"[282], and that they may be varied as required by the Director General, Newfoundland and Labrador Region.[283] It is foreseeable that the communal fishing licenses minimize the likelihood of Aboriginal rights claims arising in relation to fishing practices. However, in that the licenses restrict harvesting of certain species (cod) and reserve variation

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[279] *R. v. Howse* [2000] B.C.J. No. 905 (B.C. Prov Ct.); rev'd [2002] B.C.J. No. 379 (B.C.S.C.); leave to appeal to the B.C.C.A. granted on March 12, 2003; *R. v. Willison* [12 April 2005] File 15482-1 Salmon Arm (BCPC).
[280] *Ibid., Willison at para. 65.*
[281] Canada, Fisheries and Oceans, Communal Licence Number: CL-2004-2005-001, 2004. See Labrador Metis Nation website for copy of license: (http://www.labmetis.org/cflr.pdf).
[282] *Ibid.,* Preamble.
[283] *Ibid.*

rights to the Crown, claims based on infringement and lack of consultation may arise in future as case law in this area continues to evolve.

MEMBERSHIP IN CONTEMPORARY POLITICAL ORGANIZATIONS

In addition to setting out the legal framework for analyzing Metis Aboriginal rights claims, the Supreme Court of Canada has, in its *obiter* comments in *Powley,* suggested that Metis communities should exercise self-determination and self-governance in the identification of rights-holders:

> As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified.

Although in theory this is a laudable goal, standardizing membership requirements is a daunting legal and political challenge for Metis communities because "who is Metis?" and "what is a Metis community?," for the specific purpose of asserting Aboriginal rights in Section 35, are issues that have, for the most part, not been resolved. Indeed, self-identification and recognition of Metis communities is in itself a challenging feat, given the impact that Canadian law and policy has historically had on individual and collective Metis identity in Canada.

Notwithstanding this situation in various court decisions dealing with Metis claims since *Powley,* membership in a contemporary political organization is often

presented as proof of Metis ancestry and community belonging.[284] Moreover, it seems that proving community belonging is an essential component for proving Metis Aboriginal rights. However, with respect to the weight to be given to this evidence, it is important to note that the Court clearly stated in *Powley* that membership in such organizations will be *relevant but not determinative* of the issue of community membership.

A. Who is Métis? According to the Métis National Council

The Métis National Council is comprised of constituent organizations, primarily situated in the Prairie Provinces. Métis citizens are represented and participate in the affiliate organizations through elected "Locals" and provincial boards. The chairpersons or presidents of the provincial boards then make up the National Council's Board of Governors. In many respects, the affiliate organizations are autonomous in relation to each other. The Court's observations in *Powley,* that there is great diversity of traits and traditions among groups of Métis in Canada"[285] is consistent with this reality. A vast geographical territory encompasses Metis communities that affiliate with the Metis National Council, contributing to the diversity that exists among the respective provincial organizations making up the national organization. Most have an independent

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[284] *R.* v. *Castonguay* [2003] N.B.J. No. 496 (NBPC); *R.* v. *Daigle* [2003] N.B.J. 65 (NBPC); *R.* v. *Chiasson* [2004] N.B.J. No. 62 (NBQB); *R.* v. *Hopper* [2004] N.B.J. No. 107(NBPC); *R. v. Willison [April 12, 2005] File 15482-1 Salmon Arm (BCPC).*

[285] *Supra* note 5.

relationship with each of the federal and provincial governments of their respective jurisdictions.[286]

In 2002, the Board of Governors of the Métis National Council approved a national definition of Métis. The definition reads:

> "Métis means a person who self-identifies as a Métis, is distinct from other aboriginal peoples, is of historic Métis Nation ancestry, and is accepted by the Métis Nation.
>
> "Historic Métis Nation" means the Aboriginal people then known as Métis or Half-Breeds who resided in the Historic Métis Nation Homeland;
>
> "Historic Métis Nation Homeland" means the area of land in west central North America used and occupied as the traditional territory of the Métis or Half-Breeds as they were then known;
>
> "Métis Nation" means the Aboriginal people descended from the Historic Métis Nation, which is now comprised of all Métis Nation citizens and is one of the "aboriginal peoples of Canada" within s.35 of the Constitution Act of 1982;
>
> "Distinct from other Aboriginal Peoples" means distinct for cultural and nationhood purposes[287].

Incrementally, each provincial affiliate has endorsed the national definition and has taken steps to incorporate it in respective provincial governance regimes. Notwithstanding the positive intentions of endorsing a uniform definition to be applied throughout the Métis nation, the problem is in the historic membership provisions of some of the affiliate organizations. To contextualize this statement,

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[286] For example, the Métis Nation of Alberta has entered into bi-lateral agreements with the Government of Alberta since 1989. They provide annual operating and program funding to the organization. Federal programs are also accessed by the organization and are ratified by way of tri-partite agreement, which also involves Alberta. See Métis Nation of Alberta website: www.albertaMétis.ca .

[287] See Métis National Council website www.metisnation.ca for its national definition of Métis.

consider historic membership provisions of the Métis Nation of Alberta Association, the oldest affiliate organization of the Métis National Council.

The Métis Nation of Alberta

The Métis Nation of Alberta can trace its beginnings to December 1932 when the first convention and organization of *L'Association des Métis d'Alberta et les Territoires du Nord-Ouest*[288] took place near Fishing Lake, Alberta.[289] At this historic gathering, a group of concerned Métis and Indian activists gathered for the purpose of improving the social and economic conditions faced by the people as a result of their landless circumstance:

> The mere fact of scrip issuance, the word of the Government of the Dominion of Canada, on paper, to redeem the said transferable note, did not guarantee Justice. Today we are all too familiar with the story, lack of education, inexperience of the ways and lives of the white speculators, investors in syndicates formed for the wholesale acquisition of scrip notes. The age-old story of exploitation. So today we find many of our Métis people reduced to pitiable circumstances. Our hope lies in voluntary organization. Our provisional branches comprise a large number of men, who with their families and friends can do much to improve our condition by giving their support to the Métis movement. For through co-operation and solidarity we shall find the right road for the solution of our problems. [290]

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[288] Translation in English, The Association of Métis of Alberta and the Northwest Territories, now known and referred to as the "Métis Nation of Alberta".

[289] The Métis Association of Alberta and Joe Sawchuk, *et al.*, *Métis Land Rights in Alberta: A Political History*, (Edmonton: Métis Association of Alberta, 1981) at 188. Fishing Lake is now incorporated as one of the eight Métis Settlements in Alberta.

[290] Minutes, 1932 Convention of L'Association des Métis d'Alberta et des Territoires du Nord Ouest, Dion Papers (Glenbow Institute). Extract of Minutes cited at www.Métis.org/MNA-Culture-FirstMeeting.aspx .

Historically, membership in the Métis Nation of Alberta Association was not limited to persons of Métis Nation ancestry. In fact, the voluntary association and organization referred to by Joe Dion included numerous persons who either had Indian status, or who subsequently were re-instated through the 1985 amendments to the *Indian Act.*

To complicate matters, lifetime membership provisions were included in the by-laws of the organization[291]. Consequently, there are numerous cardholding members of the Association who may not meet the membership criteria adopted pursuant to the new definition of Métis and endorsed by the Métis National Council. The overall consequence of this history is that membership in the Métis Nation of Alberta may be uncertain as constituting proof of *being* a member of that Métis community for the purpose of Metis Aboriginal rights.

The Metis people of Alberta are a large and varied population, characterized by a shared Indian ancestry. As with other Prairie Provinces and regions in Canada, there is generally a stronger affinity for the Indian component of their heritage than the European. Métis identity remains inextricably linked to that of Indians in spite of the artificial boundaries that have been historically created by government through legislation and policy and, more recently, the contemporary organizations themselves.

Metis According to the *Metis Settlements Act*

[291] *Supra,* Article 6.1(a). This provision continues to be in place under the by-laws of the Métis Nation of Alberta.

Due in large part to the efforts of Metis advocates such as Joseph Dion and others who formed the Métis Association of Alberta, in 1939 lands were set aside for the use and benefit of Metis persons in Alberta. Governmental action which enabled this to occur included enactment of provincial legislation which specified who was Metis for the purpose of settling on these lands.

The *Metis Population Betterment Act* defined Metis as persons of mixed white and Indian blood, but specifically excluded Indians or non-treaty Indians, as those terms were then defined in the federal *Indian Act.*[292] In 1990 the Act was repealed and replaced by the *Metis Settlements Act,* which defines Metis simply as "a person of aboriginal ancestry who identifies with Metis culture and history".[293] Part 3 of the *Metis Settlements Act* sets out legislative rules and procedures pertaining to Metis Settlement membership. In order to apply for membership in a Metis settlement, a person must be Metis. However, the legislation also provides that Indians or Inuk persons may acquire membership in a Metis Settlement:

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[292] The *Metis Population Betterment Act* S.A. 1938, c. 6, as am. S.A. 1940, c. 6. defined Metis as follows:

> 2. In this Act unless the context other requires,
>
> (a) "Metis" means a person of mixed white and Indian blood but does not include either an Indian or a on-treaty Indian as defined in *The Indian Act,* being chapter 98 of the Revised Statutes of Canada, 1927; ....

[293] *Métis Settlements Act,* R.S.A. 2000, c. M-14, s. 1 (j)

75. (2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if

(a) the person was registered as an Indian or an Inuk when less than 18 years old,
(b) the person lived a substantial part of his or her childhood in the settlement area,
(c) one or both parents of the person are, or at their death were, members of the settlement, and
(d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.[294]

This provision is a substantial change from the previous *Act*, which stipulated that Status Indians were ineligible to acquire membership in a Metis Settlement.[295]

Notwithstanding the fact that substantial inter-marriage occurs between First Nations and Metis people, a social and cultural historical fact, many Settlement members maintain that legislative provisions such as Section 75 (2) have the potential to undermine the integrity of the Settlements as distinctive Metis communities. [296]

However, as with the contemporary situation of the Métis Settlements, it may not be necessary for members of the Metis Nation of Alberta to meet the threshold proof of Metis ancestry specified in the new definition for the purpose of

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[294] *Ibid.*, s. 75.
[295] *Ibid.*, s. 2 (a).
[296] See for example *Vicklund v. Peavine Métis Settlement* [2003] A.M.S.A.T.D. No. 10 where it was argued by the applicant that s. 75 (2) of the *Métis Settlements Act* was unconstitutional by reason of preferential treatment to certain alleged Settlement members. The applicant, Hazel Vicklund, maintained that the respondent's membership application should have been declined as she had voluntarily elected to be registered as a Treaty Indian under the federal *Indian Act.*

Aboriginal rights recognition in Alberta. As discussed herein, negotiations have and are taking place on issues relating to Metis Aboriginal rights in the absence of confirming Metis identity and community.

CONCLUSION

Metis Aboriginal rights are being shaped, defined and described through a fluid process that has evolved as a result of governmental responses in the form of policies and practices. From a near default position, governments continue to support a process of negotiations with contemporary political organizations.

The significant question of legitimate representation raised by these processes is often taken for granted. Given that the Supreme Court of Canada has directed that this is the preferred means of securing recognition of Metis Aboriginal rights, there is a need for an extensive knowledge-base and sensitivity to all relevant historical, social and political realities of Metis individual identity and community, and political representation prior to entering such negotiations.

Political organizations representing Metis persons and communities must consider "who is Metis?" and "what is a Metis community?" within the context of their own governance regimes. Their responses may or may not correspond with the characterization of Métis and community set out in *Powley,* as a guide for the identification of legitimate rights-holders. If they are to be altered, these organizations should reflect on the reasons why they might be changing their

membership rules and regimes. This is different from the notion of culture changing over time. This relates to changing the rules of the game so that persons who have been raised as Metis, as family and part of what is often a close-knit community, are as a consequence of changing these rules now ostracized. The ultimate consequence is that their identity as Metis can be stripped away by the very community they have perceived themselves a part of.

The impact of these strategies on Metis persons and communities are far-reaching, affecting self-identity, community identity, cultural practices and traditions, and lifestyles. From the point of view of self-determination, it is imperative that political organizations be sensitive to the broad social and cultural implications of following the directives of external institutions such as the court when devising or revising membership criteria. This caution is warranted because, as this work demonstrates, how Metis peoples see themselves as individuals and collectivities is often not reconcilable with the judiciary's understanding of Metis individual and collective identity.

With respect to the contemporary approach of negotiating agreements as an alternative to explicit recognition of Metis Aboriginal rights, Metis peoples and organizations should be cognizant to the fact that, while devolution of management and administration of programs and services to Aboriginal organizations may provide organizations with a certain sense of control and autonomy, to characterize devolution of program delivery and administration as

self-government avoids the core issues of recognition, representation for purpose of asserting and recognizing Aboriginal peoples, and legitimacy of representation, all aspects of Aboriginal rights of self-determination. Transition from assimilationist and integrationist policies to policies of accommodation, and ultimately, self-government must encompass the totality of government, law, legal institutions, social and political rights, and not merely service delivery. [297] True self-determination is never secure if it depends on legislation and delegated high-level political decision-making. Even constitutions can change.[298]

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[297] R. Niezen, *The Origins of Indigenism, Human Rights and the Politics of Identity* (Berkley and Los Angeles, California: University of California Press, 2003) at 92.

[298] E. Irene A. Daes, "*Introduction: Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples: Obstacles and Consensus,*" in Seminar: Right to Self-Determination of Indigenous Peoples. Collected Paper and Proceedings, New York, 18 May 2002. International Centre for Human Rights and Democratic Development.

CHAPTER EIGHT
CONCLUSION

An initial reading of the Supreme Court of Canada's decision in *Powley* suggests that it is a clear, concise first ruling on Metis Aboriginal rights. However, to characterize *Powley* as being the ultimate determinant on the matter is to overshoot its value. Constitutional recognition of the rights of Metis as Aboriginal peoples remains a complicated matter.

This thesis has focused on two challenges implicit in recognizing Metis Aboriginal rights. The first relates to defining and identifying "who is Metis?" and "what is a Metis community?" for the purpose of Section 35. The Court in *Powley* identified these issues as essential to any definition and determination of Metis Aboriginal rights. By way of example, personal experience and knowledge, there is often a difference between the legal response given to these questions and the social, cultural and political realities of *being* Metis in Canada. Although limited to the facts before it, the Court appears to have been sensitive to these dynamics. A foreseeable consequence then is that *Powley* will result in some Metis persons and communities gaining recognition of their traditional practices as Aboriginal rights, while others may not.

The second challenge created by *Powley* relates to the role of contemporary political organizations in the resolution of Metis Aboriginal rights. For the purpose of identifying Metis rights-holders, the court in *Powley* seems to be

acknowledging the role that these political organizations might fulfill in the recognition and identification of Metis rights-holders. The Court implied that these contemporary political organizations constitute community when it encouraged communities to standardize their membership systems and criteria. In theory, this could be interpreted as recognition of Metis peoples' rights of self-determination and self-government, including the identification of rights-holders and negotiation of rights recognition. This is a daunting legal and political challenge because "who is Metis?" and "what is a Metis community?" are issues that have, for the most part, remained unaddressed, often by Metis peoples and communities themselves. Notwithstanding this reality, negotiations relating to rights recognition between governments and Metis political organizations are taking place and the long-term effect of these agreements are yet to be known.

Finally, *Powley* has taken Aboriginal rights jurisprudence in a new direction in that it has attributed Metis Aboriginal rights to communities, not individuals, and not "groups". This may enable Metis, who now find themselves excluded or disqualified from holding membership in a contemporary Metis political organization, to gain recognition of their Aboriginal rights by virtue of *being* Metis.

Notwithstanding their rich and diverse histories, Metis communities and peoples have been the forgotten ones, the "non-peoples". Now faced with what seem to be opportunities to take their proper place as peoples within Canada, it seems that they have had minimal opportunity to reflect and articulate on how the

actions and opinions of others, including government, legal counsel and academics, affect their identity, their communities, and their traditions.

This work raises many more questions than answers. However, the fact is that courts and governments are only now starting to recognize the inherent and constitutional rights of Metis peoples in Canada. There are serious implications to the interpretations that are being given to *Powley* and it is imperative that Metis people, families, and communities are aware of the stage that is being set in the name of rights recognition. In that process, what is most important is that the resolution of these issues does not further divide Metis communities. History has demonstrated too well to Aboriginal peoples the effect of their own divisiveness, the disinterest and self-interest of non-Aboriginal Canadians and the political difficulties associated with Metis Aboriginal rights.

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Online Resources

Assembly of First Nations

www.afn.ca

Congress of Aboriginal Peoples

http://www.abo-peoples.org.

Metis National Council

http://www.Métisnation.ca/who/index.html

http://www.Métisnation.ca/Harvest_Guide_04/splash.html

http://www.msgc.ca/MétisSettlements.htm

Métis Settlements General Council

www.metis-settlements.org

Other Sites Referred to

http://www.ecclectica.ca/issues/2003/2/sawchuk.asp

http://www.albertacourts.ab.ca

http://www.turtleisland.org/news/news-coldlake.html

http://www.cbc.ca/story/canada/national/2005/03/18/metis-sask-050318.html

http://www.aand.gov.ab.ca/PDFs/IMHA

http://www.metisnation.org/harvesting/Policy/home.html

http://www.mmf.mb.ca

http://www.labmetis.org/cflr.pdf

www.albertaMétis.ca

www.Métis.org/MNA-Culture-FirstMeeting.aspx