

MÉTIS LAW IN CANADA

by Jean Teillet



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Dedication Page

Métis Law in Canada is dedicated to Richard B. Salter and the late Arthur C. Pape (1942-2012).

In 1992, when I was still in second year of law school at the University of Toronto I walked into Rick Salter's office. It was supposed to be a 20-minute interview for a summer position. Twenty-one years have passed and I have never left. I have never wanted to leave. I could never imagine another law firm that would provide such a rich, creative and supportive work environment. From the very first day Rick and Art mentored, supported and encouraged me in my wish to work in the field of aboriginal law. I walked into their law offices full of my desire to work on Métis law, which at that time was essentially a non-existent field of law. Rick and Art underwrote financially and with their mentorship all of those early Métis cases that I worked on – including *Powley*. They had been together as law partners for eight years before I came along. In 2005, I became a partner and the firm became Pape Salter Teillet.

In 2012, Arthur Pape passed away and Rick is beginning a gradual retirement from the field. These two remarkable men have contributed generously and often in unacknowledged ways to the aboriginal peoples of Canada and to the field of aboriginal law. They have been participants in almost every major aboriginal rights case from *Sparrow*, *Delgamuukw*, *Haida* and *Taku*, *Powley* and many more. They have negotiated major land claims agreements in the Yukon and NWT. They have also mentored two generations of aboriginal lawyers.

From the first day that I started writing *Métis Law in Canada* (at that time known as the Métis Law Summary) in 1999, Rick and Art have financed it. My vision was to provide, free of charge, a guide to Métis law that would be accessible to the Métis – especially the people in the small communities, the beaders, the trappers, the children in northern classrooms, Métis harvesters and the politicians who sit on Métis representative bodies across the Métis Nation. It gradually grew into the book that is now used in law schools and native studies departments at colleges and universities across Canada. It still remains the only full collection of Métis case law in the country.

Métis Law in Canada exists because of these two extraordinary men.

Foreward by Dr. Arthur Ray



Métis Law in Canada reminds me of a conversation I had with Professor Doug Sanders shortly after I had arrived at UBC in 1981 to take up a position in the History Department. Doug already was a highly recognized authority on human rights law and the previous year he had been involved in the early precedent-setting British Columbia native fishing rights case, which is remembered as *Jack v. Regina*.¹ When we met I had not yet been involved in rights litigation as an expert witness, but I was interested in the ongoing process. So, I had many questions for Doug. In particular, I wondered if the Métis would make any headway in advancing their rights? I also wanted to know what role, if any, history played in the development of native law more generally. Regarding the advancement of Métis rights, Doug was doubtful that very much could be accomplished given the very complex issues that their rights claims raised. Their dual aboriginal and Euro-Canadian ancestry was particularly problematic when it came to recognizing rights based on distinctive cultural practices. What neither of us anticipated at the time was that the following year Canada would approve a new constitution (the *Constitutional Act, 1982*), which included the game changing section 35 that protected existing, but undefined, aboriginal and treaty rights in 35(1) and included the Métis as one of three groups of aboriginal people in 35(2).

The provision of constitutional protection for aboriginal and treaty rights brought to partial fruition the ongoing political struggle of First Nations, Inuit, and Métis political leaders to have the rights of their people recognized and protected in Canadian law. The Métis effort had begun with armed conflicts in Western Canada in 1870 and 1885 under the leadership of Louis Riel and it was carried forward in the political arena by a succession of Métis activists. Harry Daniels (1940-2004) is credited with playing the crucial role in having the Métis included in section 35. This Métis accomplishment made Canada the first country to give constitutional recognition to people of mixed European-indigenous ancestry. The inclusion of section 35 in the new constitution also opened a flood-gate of aboriginal and treaty rights litigation because it had left it to the courts to provide content for this constitutional provision. In the course of doing so the courts have had to address the very complex issues concerning the Métis that Doug Sanders had anticipated. And this is where Jean Teillet came in. Jean, who is the great grandniece of Louis Riel,

¹ *Jack v. Regina*, [1979] S.C.J. No. 107.

has been in the forefront of Métis rights litigation, and aboriginal and treaty rights more generally, from the time she was called to the bar in Ontario in 1996. She has represented numerous First Nations and Métis claimants from Ontario to the Pacific Coast and the Arctic watershed.

As for my second question to Doug Sanders in 1981, the one about history and the law, he pointed out to me that native law was one of the few areas of jurisprudence where historical evidence played an important role in developing the precedent-setting case law. It was the importance of historical evidence in native rights litigation that eventually led me to work with Jean Teillet.

While Jean was preparing to act as lead counsel for the Métis defendants in the foundational rights case of *R. v. Powley*² (2003), an historical geographer of the Métis, Frank Tough of the Native Studies Department at the University of Alberta, recommended that she contact me to test my willingness to act as an expert witness. Frank thought I could educate the court about: (a) the historical geography of the fur trade of the Great Lakes region on the eve of the Robinson Treaties of 1850, (b) the role the Métis played in that economy, and (c) the nature of their economy in the vicinity of Sault Ste. Marie circa 1840-50. When Jean followed Frank's suggestion and called me to explain who she was and what she needed from me, I readily accepted her invitation. I agreed to contribute partly because of my long-standing interest in historical geography of the Métis. As a graduate student in the early 1960s I had intended to make the Métis of the Red River valley the focus of my doctoral dissertation.

I got 'sidetracked' however, by looking at the roles various aboriginal peoples played in the Canadian fur trade and considering the impacts that their involvements had had on their traditional economies and ecological situations. So, Jean's invitation gave me a tantalizing opportunity to revisit an old interest of mine even though her request concerned a community that was located far to the east of Red River and pre-dated the founding of that settlement. I also was excited about the prospect of working for member of the legendary Riel family, particularly one who was continuing the political/legal traditions of her famous ancestor.

Powley gave me my first opportunity to get to know Jean in and out of the courtroom. I was immediately struck by her intense interest and excitement about the historical questions that this Métis hunting rights case raised. Jean had a well-ar-

² *R. v. Powley*, (2003) SCC 43, aff'g [2001] O.J. No. 607 (CA), aff'g [2000] O.J. No. 99 (SC), aff'g [1998] O.J. No. 5310 (PC)

ticated ‘theory of the case,’ as she always does, and wanted to know if historical evidence would support it. What I appreciated was that she treated her theory as a hypothesis that had to be tested. Jean never encouraged me, or the other expert she retained, to selectively winnow records in order to find data that supported her theory while ignoring evidence to the contrary. In that respect, she took a sound scholarly approach. While not wanting us to read the historical record selectively, she did want us to put forward expert opinions (and draw conclusions) about what the records said about the issues *Powley* raised. As a result, her questions during my examination-in-chief often were as pointed and difficult to address as were those put forward by opposing counsel during cross-examination. In fact, because Jean’s probing questions usually went straight to the heart of the issues in dispute, my replies often became the subject of the toughest questions I faced during cross-examination. In *Powley* they concerned: (a) the issue of whether a ‘species-specific’ approach to aboriginal hunting made sense in light of the nature of traditional First Nations/Métis economies in the Lake Superior region during the early 19th century, (b) whether there was a distinct Métis community in the Sault Ste. Marie area before the establishment of effective British/Canadian control, and (c) whether that community had defended its rights in the 19th century?

When the trial was over, Jean remarked to me that I had received a ‘vicious cross.’ I smiled and replied, half-jokingly, that my discomfort was of her making because she had set me up for it by her questions of me during my evidence-in-chief. As stressful as this courtroom experience was for me, working with Jean as an expert was a strangely fun experience that was also intellectually challenging and rewarding. I readily teamed up with her again in *R. v. Goodon*³ (Manitoba) and *R. v. Hirsekorn*⁴ (Alberta), where we addressed issues that arose from *Powley* regarding how Métis communities and settlements are to be defined.

Beyond the courtroom I have come to appreciate Jean’s dedication to legal education and community service. I first became aware of these commitments when one of my female students of native history expressed an interest in pursuing a career in aboriginal rights law. She asked me what I thought about her plan. I recommended that she contact someone who was active in the field and who could speak to the demands and rewards that such a career could offer. I told her that Jean would be an excellent person to interview. Knowing that Jean is always extremely busy, I volunteered to contact her to see if she would be available. When I phoned, Jean promptly replied: ‘I always have time for students.’ It is this spirit and commitment

³ *R. v. Goodon* [2009] 2 CNLR 278

⁴ *R. v. Hirsekorn*, [2011] A.J. No. 1217 [QB], rev’g in part [2010] A.J. No. 1389 [PC]

to making the law accessible at all levels that helps explain how she has managed to find the time to produce her variously titled summary of Métis law every year since 1999.

Numerous online sources now exist for all aspects of Canadian law. The web sites of the various courts are particularly useful. Yet, Jean's annual review of Métis law remains the essential reference work because she provides much more than summaries of cases. For example, two very useful features of her annual review is the brief opening section that highlights the key legal developments of the past year under the heading 'What's New,' which is followed by 'What We're Watching,' where she flags important developments that are under way.

In 'Part One' of what follows these introductory sections of her annual review, Jean masterfully intertwines Canadian native and legal history and case law to provide an incomparable narrative overview of a broad array of crucial Métis issues. These include: the challenges of Métis identity, harvesting rights, land title, constitutional interpretations, human rights, constitutional questions, class actions, criminal law, legislative concerns, the duty of the Crown to Métis, and Self-government. Jean's chronicle is essential reading for those who want to gain an understanding of all aspects of the historical roots and present state of Métis rights. In Part Two she follows up with case law summaries. She leads off with an index of Métis cases, which is organized by subject and jurisdiction. The case summaries that follow, which inevitably are written in very accessible prose, are ordered alphabetically.

As a teacher, researcher, writer and occasional expert witness, I have found Jean's annual review to be an invaluable resource. I eagerly await it every year. Teillet's *Métis Law In Canada* also is an ongoing testament about the remarkable extent to which the place of the Métis in Canadian law has changed fundamentally since the early 1980s, an advancement for which Jean has played a central role.

Dr. Arthur Ray
South Africa, 2012

About the Author – Jean Teillet, IPC

Jean Teillet, IPC (B.F.A, L.L.B., L.L.M) is a partner in the law firm of Pape Salter Teillet LLP. She is called to the Bar in Ontario, Manitoba, NWT, BC and Yukon. She practices primarily in the field of aboriginal rights law with a particular emphasis on Métis rights law. Jean has acted as counsel for aboriginal groups in several leading Supreme Court of Canada aboriginal rights cases including *Behn, Manitoba Métis Federation, Cunningham, Blais, Beckman, Haida, Taku, Paul, Delgamuukw* and *Pamajewon*. She also acted as lead counsel for the Powleys at all levels of court in the landmark Métis harvesting rights case – *R. v. Powley*. She is involved in negotiations of modern land claims agreements for First Nations and has been active at negotiation tables with respect to Métis rights. Jean has published many articles in various journals. She also speaks regularly at universities in Canada and internationally. Jean is currently the Vice-Chair of Indspire (formerly the National Aboriginal Achievement Foundation). She is a member of the Canadian Judicial Council Chairperson’s Advisory Committee. She is a past vice-president and past treasurer of the Indigenous Bar Association of Canada.

Lexpert ranks Ms. Teillet as a “consistently recommended” lawyer. Canadian Legal Expert 2013 ranks Ms. Teillet as a “leading practitioner in aboriginal law.”

In 2002, Ms. Teillet was awarded the Law Society of Upper Canada’s first Lincoln Alexander Award. In 2005, she was awarded the Aboriginal Justice Award by the Aboriginal Law Students Association of the Faculty of Law, University of Alberta. In 2007, the University of Windsor Faculty of Law established the Jean Teillet Access to Justice Scholarship. In 2011, she was named Indigenous People’s Counsel (“IPC”) by the National Indigenous Bar Association of Canada. In 2012, Jean was awarded the Queen Elizabeth II Diamond Jubilee Medal.

Ms. Teillet is a great grandniece of Louis Riel.

Credits & Back Issues

Métis Law in Canada was originally published as the *Métis Law Summary* in 1999. The name was changed to *Métis Law in Canada*® in 2010.

The author would like to thank the many people who have contributed to *Métis Law in Canada* over the years including: Rick Salter, the late Arthur Pape, Jason Madden, Donna Tribe, Josephine Norris, Darcy Belisle, Arthur Ray, Gwynneth Jones, Frank Tough, Clément Chartier, Tony Belcourt, Guadalupe Jolicoeur and Ed Henderson.

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About the Publisher - Pape Salter Teillet, LLP

Pape Salter Teillet, LLP is a law firm with offices in Vancouver and Toronto. They practice primarily in the field of aboriginal rights law. The law firm was established by Arthur Pape and Rick Salter in the 1980s. Jean Teillet joined them in 1992 and has been a partner since 2005. Pape Salter Teillet has been at the forefront of aboriginal litigation and land claims negotiations. The firm has been actively involved in the negotiations of the Yukon Umbrella Agreement, the Nacho Nyak Dun Land Claims and Self-Government Agreements, the Tłı̄cho Agreement and is currently working on the Sto:lo Xwexwilmexw Treaty in BC. Pape Salter Teillet has acted for aboriginal clients in landmark litigation at the Supreme Court of Canada including: *Sparrow*, *Guerin*, *Delgamuukw*, *Van der Peet*, *Pamajewon*, *Powley*, *Haida*, *Taku River*, *Manitoba Métis Federation*, *Cunningham* and *Moulton Contracting*. The law firm assists aboriginal peoples with the negotiation of agreements on major developments that are taking place in their territories. Pape Salter Teillet also advises aboriginal peoples on the development and implementation of self-government.

Introduction

Welcome to *Métis Law in Canada*. The subject of Métis law has grown dramatically since the late 1990s when the *Métis Law Summary* began. Each year now brings many new developments in Métis law. Not only has the volume of case law grown, Métis law has become a unique subset of aboriginal law. Because the Métis raise issues of identity on the individual, community and societal level, legal principles developed for Métis law are now being used in many other areas of law that are grappling with identity issues. Métis also raise issues of mobility, again at the individual, community and societal levels. Euro-Canadian law, which has developed largely out of a society that defines itself in terms of fixed boundaries in its concepts of identity, ownership, title, property, is being challenged by Métis cases. *Métis Law in Canada* therefore includes a discussion of these sociological and historical ideas.

What's New in Métis Law in Canada in 2013

Did Canada breach its honour of the Crown duties in its implementation of the *Manitoba Act, 1870*? – *Manitoba Métis Federation v. Canada & Manitoba* – The Manitoba Métis Federation launched this court case in 1981. The Métis sought a declaration that the lands they were promised in the *Manitoba Act, 1870* were not provided in accordance with the Crown's fiduciary and honour of the Crown obligations. They also sought a declaration that certain legislation passed by Manitoba that affected the implementation of the *Manitoba Act* was not within the jurisdiction of the Province of Manitoba. The case was dismissed at trial in 2007. The trial judge found that there was lengthy delay in implementing the land provisions of the *Manitoba Act* and that the delay was due to government error and inaction. However, he found that there was no fiduciary duty or a duty based on the honour of the Crown. The trial judge took the view that a fiduciary duty required proof that the Métis held the land collectively prior to 1870. Since the evidence showed that the Métis held their lands individually, their claim was fundamentally flawed. The trial judge also held that the claim was filed too late and was barred by limitation periods and the delay (laches). Finally, he denied the Manitoba Métis Federation standing. In effect, he held that while the individual plaintiffs were capable of bringing the claim, the *MMF* was not. The Manitoba Court of Appeal rejected the trial judge's view that aboriginal title was essential to the fiduciary duty claim. But then found it unnecessary to make any decision with respect to the fiduciary duty claim. The Court of Appeal said the trial judge's findings of fact

did not support any breach of the duty. They rejected any claim with respect to the honour of the Crown and held that the entire claim was moot because there was no live controversy. They upheld the trial judge's finding that the MMF had no standing. The Supreme Court of Canada handed down its reasons for judgment on March 8, 2013. They granted the MMF's appeal in part and held that the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown. The Supreme Court of Canada also granted the MMF standing and gave them costs throughout.

- **Are Métis 'Indians'?** – *Daniels*¹ – On January 8, 2013, Justice Phelan of the Federal Court Trial Division handed down his reasons for judgment in *Daniels*. The plaintiffs sought three declarations. First, a declaration that Métis are 'Indians' within the meaning of s. 91(24) of the *Constitution Act, 1867*. Section 91 is the section of the Constitution that lists the powers of the federal government. The 24th head of power reads “Indians, and Lands reserved for the Indians.” The court held that Métis and non-status Indians are 'Indians' within the meaning of s. 91(24) and declared them to be under federal jurisdiction. The second declaration the plaintiffs sought was that Canada owes a fiduciary duty to Métis and non-status Indians. The third declaration sought was that Métis and non-status Indians have the right to be consulted. The court held that Canada was in a fiduciary relationship to Métis and non-status Indians because they are within federal jurisdiction. The court would not go so far as to say that there was a fiduciary duty and distinguished the fiduciary relationship from any duty. The court would not grant a declaration in this respect and also denied the third declaration saying the consultation duty arose in certain circumstances and was not a general duty at large. In attempting to define the Métis, the judge held that they are “a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status.” This definition conflicts with the definition of Métis handed down by the Supreme Court of Canada in *Powley*. It is a problematic definition that takes little to no account of the Métis of the Northwest, who are a people and define themselves according to their Métis heritage, not with their “Indian heritage.” The case has been appealed to the Federal Court of Appeal where it will be argued on October 29-31, 2013.

- **Métis Settlement Identification Card not sufficient to prove Métis harvesting rights** – *L'Hirondelle*² – The question before the Alberta Court of Appeal was whether membership in a Métis Settlement is conclusive proof of an entitlement to

¹ *Daniels v. Canada*, 2013 FC 6

² *L'Hirondelle v. Alberta*, [2013] A.J. No. 11

constitutional aboriginal rights? Alberta has a policy respecting Métis Harvesting in Alberta, which states that to qualify for aboriginal fishing rights, the applicant must satisfy the criteria in *Powley*. Mr. L'Hirondelle went to a Fish and Wildlife Office, presented his Métis Settlement identification card, and requested a Métis domestic fishing licence. He was advised that further proof of Métis status would be required, and was denied the licence pending that proof. Mr. L'Hirondelle then applied for judicial review, seeking an order quashing the decision to deny him a fishing licence. He also applied for a declaration that a Métis Settlements identification card is sufficient proof of *Powley* status. The chambers judge held that the relief sought was not available to the applicant. The Court of Appeal found that the chambers judge erred in concluding that judicial review was not available relief. The Court of Appeal held that Métis Settlement lists are not universal, because not all Métis in Alberta are land-based, and there are many persons with s. 35 Métis aboriginal rights that are not on those lists. The court noted that s. 35 requires an ancestral link to a historic Métis community, something that is not a necessary requirement for membership in a Métis Settlement. *Powley* does not create a rule that the government is only entitled to have one list of Métis status holders, which the government is required to use for all purposes. Notwithstanding what is written on his Métis Settlement identification card, Mr. L'Hirondelle is not entitled to s. 35 status just because he is a member of a Métis Settlement. Leave to the Supreme Court of Canada was denied.

- **Can Indians be members of the Métis Settlements?** – *Cunningham*³ – On July 22, 2011 the Supreme Court of Canada handed down its reasons for judgment in *Cunningham*. The Cunninghams registered as 'Indians' under the *Indian Act*⁴ contrary to the *Métis Settlements Act*.⁵ Their membership was revoked and they sought a declaration in court that the removal of their memberships violated their equality rights under s. 15 (equality) of the *Charter of Rights and Freedoms*.⁶ The Supreme Court of Canada denied their claim. The court held that the purpose of the *Métis Settlements Act* was to provide a land base for the Métis that would then enhance and preserve their identity, culture and self-governance. This necessarily means drawing distinctions and excluding some people.

- **Hunting & Mobility** – *Hirsehorn*⁷ – the Alberta Court of Queen's Bench

³ *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2001 SCC 37; rev'g 2009 ABCA 239 (CanLII) rev'g *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2007 ABQB 517 (CanLII).

⁴ *Indian Act*, RSC 1985, c. I-5

⁵ *Métis Settlements Act*, RSA 2000, c. M-14

⁶ Section 15, *Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

⁷ *R. v. Hirsekorn*, [2011] A.J. No. 1217 [AQB], rev'g in part [2010] A.J. No. 1389 [APC].

partially overturned the trial judge. In applying the *Powley* test, the appeal judge upheld the trial judge's finding of fact that there was insufficient evidence of hunting in Blackfoot territory and that their hunting in that part of Alberta was the result of European influences. On July 4th 2013 the Alberta Court of Appeal handed down its reasons for judgment. It upheld the lower courts and found that there was no historic Métis community in southern Alberta or in the Cypress Hills at the time of effective control. The Court held that effective control was in 1874 and that the Métis were not in sufficient numbers in southern Alberta at that time. The Court rejected the submission that the site-specific area could be defined as the plains in central and southern Alberta. Leave to appeal to the Supreme Court of Canada has been sought by Mr. Hirsekorn.

- **Aboriginal title – *William (Tsilhqot'in Nation)***⁸ – The BC Court of Appeal held that the Tsilhqot'in Nation is the proper rights-bearing entity for an aboriginal title claim. The court declined to find aboriginal title, saying that the plaintiffs brought the case on a territorial claim basis whereas aboriginal title is site-specific. The court held that the planning and policies of British Columbia with respect to logging unjustifiably interfered with the aboriginal rights of the Tsilhqot'in. Those aboriginal rights included the right to trade skins and pelts for a moderate livelihood and the right to capture wild horses. The Supreme Court of Canada will hear the appeal in November of 2013.
- **Are there Métis in NB?** – *Caissie*⁹ and *Castonguay*¹⁰ – Two more cases where the courts in New Brunswick have found that there is no historic Métis community in New Brunswick, no contemporary Métis community and that cards issued by the local groups belonging to the Congress of Aboriginal Peoples are insufficient to establish Métis rights. In both cases there was insufficient evidence to meet any part of the *Powley* test. The trial judges also rejected Mr. Caissie's claim to the defence of necessity and Mr. Castonguay's claim that he should be acquitted because he reasonably believed in a mistaken set of facts. The defence of necessity only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril. There was no evidence of such a risk in Mr. Caissie's case. The defence of mistaken facts was not available because the judge held that Mr. Castonguay knew or ought to have known that his card was not valid proof of Métis rights.

⁸ *Tsilhqot'in Nation v. Canada* 2012 BCCA 285; rev'g in part 2007 BCSC 1700

⁹ *R. v. Caissie* 2012 NBPC 1

¹⁰ *R. v. Castonguay*, 2012 NBJ. No. 442.

- **No aboriginal right to hunt in a wildlife sanctuary** – *Legrande*¹¹ – A status Indian (Legrande) and a Métis (Gauchier) from the Peavine Métis Settlement in Alberta shot a decoy moose on a resource road in a wildlife sanctuary. The judge found that there was no right of access to the sanctuary for hunting and that the defendants did not establish a prima facie infringement of their right to hunt. On that basis he did not need to consider whether any infringement was justified.
- **No historic Métis community in San Clara, Manitoba** – *Langan*¹² – Mr. Langan was charged with angling without a licence contrary to the *Fisheries Regulations* of Saskatchewan. Mr. Langan claimed his aboriginal right to fish for food as a Métis pursuant to s. 35 of the *Constitution Act, 1982*. The judge found that the Métis community that exists today in San Clara and environs was formed in 1906, after effective control in 1885, when Métis people moved from North Dakota. Finally the trial judge found that the requirement for a licence was a law of general application and that it did not create any personal or group distinction that could form the basis of a s. 15 claim of discrimination.
- **Métis right to harvest wood without a permit** – *Beer*¹³ – Mr. Beer harvested wood for domestic purposes without a permit. The trial judge found that Métis have a right to harvest wood for domestic purposes. Disclosure in the case revealed that at the time of the offence Manitoba had no Métis harvesting policy, but that a policy had been adopted shortly afterward. The evidence showed that Manitoba had never consulted with the Métis about the policy, it was not published anywhere and in fact the Métis had no idea of its existence.
- **Consultation with First Nation over Métis cabin in Park** – *Smith’s Landing First Nation v. Parks Canada Agency and the Fort Smith Métis Council*¹⁴ – Parks Canada approved the Fort Smith Métis Council’s application to build an elders’ cabin in Wood Buffalo National Park. Smith’s Landing First Nation objected that the cabin was built without proper consultation. The cabin remains in the Park and the parties settled out of court pursuant to court-facilitated mediation and the matter was discontinued on consent.
- **Incidental cabins** – *O’Sullivan Lake Outfitters*¹⁵ – the Crown claimed that the Meshakes, members of the Aroland First Nation, built a cabin for a commercial

¹¹ *R. v. Legrande* [2011] A.J. No. 1560

¹² *R. v. Langan* 2011 SLPC 125

¹³ *R. v. Beer* [2011] M.J. No. 405; supplementary reasons [2012] M. J. No. 158

¹⁴ *Smith’s Landing First Nation v. Parks Canada Agency and the Fort Smith Métis Council*, Federal Court docket # T-10-11.

¹⁵ *R. v. O’Sullivan Lake Outfitters Inc.* [2011] 2 C.N.L.R. 307.

purpose and not for personal use. The Crown also claimed that its laws and policies did not unjustifiably infringe on the treaty right. The defendants were charged under a draft policy for unlawfully constructing a building on public land without a work permit and unlawfully continuing activity while a stop work order was issued, all contrary to the Ontario *Public Lands Act*.¹⁶ The court held that the cabin was part of the rights promised under Treaty 9 and that the permit requirement infringed those rights. At the time of the construction activity the Ministry of Natural Resources had not consulted with the Aroland First Nation with respect to the intent and application of the draft policy, which was treated as ‘in force’ by ministry staff. The court held that the work permit process had an adverse impact on people who are illiterate, whose second language is English and who would have to travel some 70 kilometers to the Ministry office. The court found that the cabin built by the Meshakes had a communal aspect in terms of the contributions in materials and labour by others, that it was built for the personal use of the Meshakes and their extended family and that the cabin was needed to exercise their rights to hunt, fish and trap in the area. The court upheld the finding of the Justice of the Peace that the cabin was for personal use and part of the treaty rights promised by Treaty 9.

- **No Métis Nation Harvesting Card – Paquette**¹⁷ – Mr. Paquette possessed a Métis Nation of Ontario citizenship card but had been denied a Harvesters Card. Pursuant to a 2004 Agreement, Ontario does not charge MNO Harvest Card holders who are hunting within their traditional territories. Individuals without an MNO Harvest Card who claim Métis hunting rights must prove their rights pursuant to the *Powley* test. Paquette’s genealogy showed that his claim to aboriginal ancestry came from Quebec and that his ancestors moved to Ontario after effective control. He provided no proof of an historic Métis community in the Sturgeon Falls area of Ontario. The judge found him guilty of hunting moose without a licence.
- **1870 Order – Ross River Dena**¹⁸ – these were actions filed by Ross River Dena Council, an Indian band in the Yukon. The case management judge directed that the following issue could be decided as a threshold issue - whether the terms and conditions referred to in the *1870 Order* were intended to have legal force and effect and give rise to obligations capable of being enforced. The case management judge held that the terms and conditions referred to in the *1870 Order* for compensation for lands required for the purposes of settlement were not, at the time,

¹⁶ *Public Lands Act*, R.S.O. 1990, c. P.43

¹⁷ *R. v. Paquette*, North Bay Court File No. 2561-110170, 2012.08.15 (OCJ)

¹⁸ *Ross River Dena Council v. Canada (Attorney General)* [2012] Y.J. No. 1

intended to have enforceable legal effect reviewable by the court. The *1870 Order* did not create a positive obligation on the Crown to settle claims for First Nation persons. Even if the relevant provision gave rise to legally enforceable obligations, those obligations were not fiduciary in nature. The band had not shown that there was a specific Indian interest in the claimed territory that was known to the government and was in the nature of a private law interest or that the government undertook to act in the band's best interests when exercising discretionary control over the territory.¹⁹ On appeal, the issue was whether it was appropriate for the court to sever the threshold question. The Yukon Court of Appeal held that it was not. It was only appropriate to sever issues where it appeared efficiencies would result from having one issue determined in advance of others. To be suitable for severance, an issue had to be capable of being decided independently. The issue of the original Parliamentary intentions underlying the *1870 Order* provisions, which was put before the Supreme Court, was not an independent issue. The question put forward was not decisive of any other issue and could not meaningfully advance the litigation. The *1870 Order* could only be interpreted in light of the Crown and First Nations' pre-existing relationship and the philosophical and jurisprudential precepts underlying Aboriginal title and rights. In trying to determine the issue on a preliminary basis, the judge considered evidence that went beyond the scope of interpreting the *1870 Order*. The judge determined some issues based on incomplete evidence. The Supreme Court order was quashed.

- **No tax exemptions for Métis elected officials under the *Income Tax Act* – *Bellrose***²⁰ – this was an appeal by Bellrose from the dismissal of his income tax reassessment appeals. The Métis Nation of Alberta was incorporated under the *Societies Act*, with the objectives of promoting the development, self-determination, constitutional and property rights of Métis in Alberta. Bellrose served as an elected official of MNA from 1996-2011. In four of those years he claimed an income tax exemption on the basis that his role was equivalent to that of an elected officer of an incorporated municipality. The Minister of National Revenue disagreed and reassessed Bellrose for each of those four years. The Tax Court judge dismissed Bellrose's appeal despite finding that the MNA performed commendable services for Métis. However, the MNA was not providing municipal-like services and was not a municipality. There was no obligation on the judge's part to interpret the *Income Tax Act*²¹ in a manner favourable to Bellrose as an aboriginal person. The *Income Tax Act* is not a treaty or a statute directly related to aboriginal peoples.

¹⁹ *Ross River Dena Council v. Canada*, 2013 YKCA 6

²⁰ *Bellrose v. Canada* [2012] FCJ No 301 FCA

²¹ *Income Tax Act*, RSC 1985, c 1

- **Individuals require authorization of aboriginal collective to assert rights in court** – *Behn v. Moulton Contracting Ltd.*²² – appeal by the defendants from an order striking portions of their statement of defence. Moulton was a logging company. The Behn defendants were members of the Fort Nelson First Nation, which is a signatory to Treaty 8. They blockaded the only access road to the permitted logging area. The Behn defendants were licensed to trap in the logging territory and argued that the plaintiff’s licences and road permit were invalid because they were issued in breach of the Crown’s duty to consult and infringed their Treaty right to hunt and trap. The Court of Appeal held that the judge was correct that the Behn defendants lacked standing and could not seek to avoid liability by attacking the licences and permit. Such an attack required authorization by the collective who are the proper rights holders of the treaty and constitutional rights. The defences were an impermissible collateral attack and an abuse of process. The Supreme Court of Canada upheld the lower courts on all points.²³

- **Harvesting Agreement between the Manitoba Métis Federation and the Province of Manitoba.** The Harvesting Agreement with the Province of Manitoba recognizes that Métis have harvesting rights in a specified area. Individuals who hold a valid MMF Harvesters Card will be recognized as Métis rights-holders. Métis harvesting rights will be exercised consistently with the MMF’s Métis Laws of the Hunt.

- **No Proof of Connection to Métis Community; No Proof of Commercial Logging** – *Blais (Ont)*²⁴ – The defendants, Michel Blais and his children, Matthew and Tracey were charged with unlawfully harvesting forest resources in a Crown forest without authority of a licence contrary to the *Crown Forest Sustainability Act*. The defendants defended themselves by claiming that they were Métis with a Métis right to commercially harvest timber. They reside near Sault Ste. Marie within the area covered by *Powley*. They claimed that the Crown breached a non-delegable duty to consult and negotiate with the representatives of the Métis community in and around Sault Ste. Marie to develop opportunities for members of that community in the local forest resources industry. They claimed this was a breach of the honour of the Crown and that the prosecution was an abuse of process. They also claimed their right to make full answer and defence under the *Charter* was infringed because the trial judge would not join their trial to a similar one involving

²² *Moulton Contracting Ltd. v. British Columbia* [2011] B.C.J. No. 1271 (BCCA)

²³ *Behn v. Moulton Contracting* [2013] S.C.J. No. 26

²⁴ *R. v. Blais* (unreported, Ontario Court of Justice, May 2, 2013)

members of the Batchewana First Nation or to adjourn pending the result of that trial or to allow Batchewana to intervene. The defendants claimed that the *Crown Forest Sustainability Act* was inapplicable to their timber harvesting by virtue of the doctrine of interjurisdictional immunity. The Justice of the Peace found against them on all points. The court noted that Mr. Blais appeared to be motivated to claim Métis status in order to access forestry opportunities and for personal gain. There was no evidence of Métis community involvement in his forestry corporation and no evidence that Mr. Blais had any authority to act on behalf of the Métis community. There was no evidence that Mr. Blais had any ancestral connection to the community and he failed to establish his membership in the Sault Ste. Marie contemporary community.

What We're Watching

Here are some Métis cases that we are watching this year. They have been filed in court or argued, but with no decision as of our publication date in 2012.

- *Chartrand v. the Queen (Tax Court of Canada)* – This case seeks tax relief for elected officials who work for Métis bodies that provide government functions.
- *Peavine Métis Settlement v. Alberta (Minister of Energy)* – Peavine Settlement, in a claim filed in 2010, seeks a declaration that the Alberta government has a duty to consult with Peavine prior to posting Crown petroleum and natural gas leases and licences.
- *Métis Settlements General Council v. Alberta* – This claim, filed in 2008, seeks a declaration that Alberta breached the terms of the Financial Agreement, the Accord, the Settlement Agreement, fiduciary duties and the Honour of the Crown by failing to complete or even undertake legislatively mandated funding reviews since 1993, including the duty to adjust the financial arrangements in light of prevailing circumstances.
- *Enge & North Slave Métis Association v Mandeville*²⁵ - In a judicial review of a decision of the Government of the Northwest Territories (GNWT) to allow two aboriginal groups (the Tłı̄cho and the Yellowknives) to have a limited harvest of the Bathurst Caribou herd in a 'no hunting zone' while expressly prohibiting the North

²⁵ *Enge & NSMA v Mandeville*, SCNWT Court File No. S-1-CV-2012-000002

Slave Métis Association (NSMA) from hunting in that zone. In 2009, the GNWT imposed a ‘no hunting zone’ on an area north of Great Slave Lake. Then, over a period of two years, the GNWT allowed a limited aboriginal harvest of 300 +/- 30 Bathurst caribou to be harvested in the zone. There are harvesting authorization cards for the limited hunt. GNWT told NSMA that it would not consult with them because they held only asserted and not proven aboriginal rights. GNWT said that until Canada recognized NSMA as an aboriginal group for the purposes of negotiation of land claims, the GNWT could not consult with them about their aboriginal rights. GNWT did consult with the NSMA about the Bluenose East caribou herd, which lies to the northwest of the Bathurst herd range.

- *The Commissioner of the NWT v. Clem Paul and Canada (Attorney General)* – Mr. Paul is charged with trespass for unlawful occupation of Commissioner’s land in the NWT. In 2005, Mr. Paul built a cabin on Prosperous Lake just outside Yellowknife. Mr. Paul defended and counterclaimed against Canada claiming aboriginal title in the cabin area and Yellowknife Game Preserve. He claims shared exclusivity of title and an unfettered right to use and occupy that land, including the right to build a cabin. He also claims damages for lost property rights, accounting for resource royalties, Charter breaches, and a breach of the UN Declaration on the Rights of Indigenous Peoples. Mr. Paul claims to represent the Treaty 11 Métis. He is seeking an advanced costs order of \$2.8 million and has filed a motion to have certain questions of law determined by the court in advance of a hearing on the merits. Specifically Mr. Paul wants advance court determinations as to the effect of the Tłı̄cho Agreement on his asserted Métis rights and title.

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Métis Law in Canada is divided into two parts. Part One contains a discussion about the basic theory of aboriginal rights and title as it applies to the Métis. This part also contains a sociological and historical analysis of the Métis Nation of the North West.

Part Two contains a summary of Métis case law. *Métis Law in Canada* deals primarily with rights issues. There are many civil law actions where the Métis are either plaintiffs or defendants. These civil cases are not dealt with in *Métis Law in Canada*.



Chapter One: Who are the Métis?

1.1 The Métis of the Northwest are an aboriginal people

The Métis are one of the “aboriginal peoples of Canada” within the meaning of s. 35(2) of the *Constitution Act, 1982*. Section 35 reads as follows:

s. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.¹

This definition is for the purposes of the *Constitution Act*. However, Métis are also aboriginal people for the purposes of the common law. As noted by the Manitoba Court of Appeal in *Manitoba Métis Federation v. Canada*, the inclusion of the Métis in s. 35 is the recognition, not the creation, of the Métis as an aboriginal people.² The Supreme Court of Canada in *Cunningham* held that,

The Métis considered themselves as one of three Aboriginal groups in Canada, but this was not recognized until the *Constitution Act, 1982*. Unlike Indians, however, they enjoyed no land base from which to strengthen their identity and culture or govern themselves. Their aboriginality, in a word, was not legally acknowledged or protected ... The history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians. Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance. The constitutional amendments of 1982 signal that that time has come for recognition of the Métis as a unique and distinct people.³

In *Powley*, the Supreme Court of Canada held that the Métis have “full status as distinctive rights-bearing peoples,” a characteristic they share with the Indian and Inuit peoples of Canada.⁴ Unfortunately, a Federal Court Trial Decision of early 2013, *Daniels v. Canada*,⁵ confuses the Métis definition clarity that has gradually been achieved in the *Powley*, *Manitoba Métis Federation* and *Cunningham* decisions. *Daniels* defines Métis as “a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status.” The *Daniels* decision ignores the Supreme Court of Canada findings that the Métis of the Northwest are a distinct aboriginal people and lumps Métis into a large group with non-status Indians.

¹ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

² *Manitoba Métis Federation*, (CA) *supra*, paras. 378-384.

³ *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2001 SCC 37, paras. 66 and 70.

⁴ *R. v. Powley*, (2003) SCC 43 at para. 38.

⁵ *Daniels v. Canada*, 2013 FC 6

When Canada adopted s. 35 into its *Constitution Act* in 1982, it was a unique constitutional enactment. Since then several countries have amended their constitutions to include recognition and protection of aboriginal (indigenous) peoples.⁶ Indeed, such constitutional recognition appears to be emerging as a customary international law norm. However, Canada's constitution remains unique in one respect. It is still the only constitution in the world that recognizes a mixed-race culture, the Métis, as a rights-bearing aboriginal people.

The Métis are appropriately considered aboriginal for two main reasons. First, because they grew into a distinct culture and became a people in the Northwest prior to that territory becoming part of Canada. In that sense they pre-date Canada, not just as individuals who happened to be in that territory first, but as a collective living in, using and occupying the Northwest. Second, they were not the culture-bearers of European civilization in the Northwest. Their culture was a unique response to the land. While they engaged in some farming, they were highly mobile and were not primarily 'settlers.' Theirs was a creative mixing of Amer-Indian and Euro-Canadian customs, languages and traditions. Métis culture in the Northwest had many long years to evolve before the settlers arrived.

Some Statistics about the Métis from the 2006 Canadian census:

- 404,000 people in Canada self-identified as Métis
- 41% of the Métis live in urban centers (65% non-aboriginal population)
- the median age of the Métis is 29 (39.4 is the median age of the non-aboriginal population)

1.2 Language and Naming

In law, prior to 1982 there were different legal terms for most of the aboriginal peoples of Canada. Today, it is common to use the terms First Nations, Inuit and Métis. Previously these same people were known in law as Indians, Eskimos and Half-breeds. None of these terms accurately reflect the cultural societies embodied in the terms. For example, the term 'Indians' does not refer to a single culture. It includes over 50 nations of people stretching from coast to coast. Since 1982, Indians have generally adopted the term 'First Nations.' The people we now know as the Inuit were previously known as 'Eskimos' and although they are not culturally 'Indians' they were included within the meaning of 'Indians' for the purposes

⁶ For example see the Bolivian Constitution, amended in 1994; the Brazilian Constitution, amended in 1988; the Columbian Constitution, amended in 1991; the Ecuadorian Constitution, amended in 1998; and the Political Constitution of Nicaragua, amended in 1995.

of including them in federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. This was accomplished by means of a reference case to the Supreme Court of Canada in 1939.⁷ The Métis were previously known as ‘half-breeds’ in legislation until 1982.⁸

The Métis, as a collective, are a people of many names. Many of these names come from the attempts of outsiders to identify the Métis either in their own language or according to their own understandings. These labels often say more about the labeler than about those to whom the label is attached. Because the Métis traveled widely over a vast area, they had relationships with many different peoples who spoke many different languages. Each of these groups had their own names for the Métis. The names reflect a variety of opinions – from the pejorative to claims of kinship. French language names include the terms *michif*, *metis*, *gens libre*, *hommes libre*, *bois brûlé* and *chicot*. English language names include free-men, half-breed, country-born and mixed blood. The Cree had two names for the Métis – *âpihtawikosisân* meaning ‘half people’ and *otipêyimisowak* meaning the ‘independent ones.’ The Chippewa referred to the Métis as *wisahkotewan niniwak* meaning ‘men partially burned.’ In the Odawa dialect of Ojibway the term for the Métis is *aayaabtaawzid* or *aya:pittawisit* meaning ‘one who is half.’ The Sioux describe the Métis as the ‘flower bead work people.’ There is even a Plains Indian sign language term for the Métis that combines the sign for cart and man. It has been noted by Peter Bakker that most of the terms for the Métis reflect one of four concepts: (1) an assertion that the Métis belong to one of the existing Amer-Indian or Euro-Canadian hegemonies; (2) a reference to their skin color; (3) a reference to their ‘mixed ancestry;’ or (4) stress their independence.⁹

The Métis themselves prefer the term ‘Métis’ or ‘Michif.’ Although ‘half-breed’ is the term commonly used in the English language historical records, the Métis rejected the term ‘half-breed’ as early as the days of Louis Riel.

The Métis have as paternal ancestors the former employees of the Hudson’s Bay and North-West Companies and as maternal ancestors Indian women belonging to various tribes. The French word Métis is derived from the Latin participle *mixtus*, which means “mixed”; it expresses well the idea it represents. Quite appropriate also, was the corresponding English term “Half-Breed” in the first generation of blood mixing, but now that European blood and Indian blood are mingled to varying degrees, it is no longer generally applicable. The French word Métis expresses the idea of this mixture in as satisfactory a way as possible and

⁷ *Re Eskimos* [1939] S.C.R. 104.

⁸ *Manitoba Act, 1870*, R.S.C. 1985, App. II, No. 8; *Dominion Lands Act, (35 Vic., c.23)*

⁹ Peter Bakker, *A Language of our Own: The Genesis of Michif, the Mixed Cree-French Language of the Canadian Métis* (Oxford University Press, New York & Oxford: 1997)

becomes, by that fact, a suitable name for our race.⁴

In 1932, *L'Association des Métis d'Alberta et des Territoires des Nord Ouest* passed a resolution that dropped the term 'half-breed.' By that time half-breed was seen as a racist term and was permanently deleted from the association's vocabulary. By the late 1960s and the early 1970s, as the public became more sensitized to the language of naming, the term half-breed fell out of favor entirely and 'Métis' became the new term.

1.3 Métis Identity¹⁰

The unfortunate reality is that Métis identity is confusing to everyone. There are several reasons for the confusion. First, the term "Métis" is often used to describe two distinct groups. Until the 1960s, references to the Métis were generally references to the historic Métis of the Northwest – the people in the Northwest part of Canada usually associated with the buffalo hunt, the fur trade and Louis Riel. However, in the 1960s the common usage of the term expanded significantly to include all persons of mixed aboriginal and non-aboriginal ancestry. It is this problem of the conflation of non-status Indians and Métis into one group that the trial judge in *Daniels* has exacerbated.

Another source of the confusion with respect to Métis identity arises from the close kinship between Indians and Métis. Inter-marriage between Indians and Métis has been a constant and continuing fact of history. Because of this inter-marriage some individuals may be Métis (from one ancestor) and Indian (status or non-status from another ancestor). Such an individual might self-identify as Métis or Indian.

While Métis individuals, such as Louis Riel and Gabriel Dumont, have been well recognized in Canadian history, the Métis as a collective has, since 1885 with the hanging of Louis Riel, been largely invisible to the general public except as a historical footnote. The collective features of the Métis of the Northwest have either not been recognized or have been misunderstood by outsiders. Instead of recognizing the collective features of the Northwest Métis as indicia of a society, observed cultural markers have been seen as factors that undermine a sense of collectivity.

This collective invisibility is the result of several factors: (1) the fact that, histori-

¹⁰ Much of this section on Métis Identity is taken from the author's LLM thesis *The Métis of the Northwest: Towards the Definition of a Rights Bearing Community for a Mobile People* (University of Toronto Law, 2008).

cally there were only two identity options in Canada – white or Indian – because no one wanted to recognize the existence of a mixed-race people; (2) the erasure of historic aboriginal geographic boundaries; (3) the hidden language of the Métis; (4) the fact that the Métis are not a distinct phenotype; (5) a general disinclination to publicly identify following the events of 1870 and 1885; and finally (7) their mobility.

The Northwest Métis arise out of two very distinct cultures – Euro-Canadian and Amer-Indian. They are the children of the fur trade and the marriages between Amer-Indian women and the voyageurs. Jacqueline Peterson stated that the Métis,

... were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between ... [they] did not represent an extension of French, and later British colonial culture ...¹

1.3.1 No One Wants a Mixed-Race People

As people of mixed race, the Métis have never fit comfortably into the cultural landscape in North America. It is difficult for many Amer-Indians and Euro-Canadians to accept that a new aboriginal people with Euro-Canadian ancestry evolved in Canada. The idea seems to defy deeply held notions about loyalty to one's ethnic ancestry, purity of race, and the entitlements of the 'first peoples.' In addition, Canadians are not comfortable with individuals or a collective having multiple identification opportunities that give rise to special rights. It suggests an unfair advantage or preferential rights.

Mixed race individuals have traditionally inspired discomfort in others. As Minelle Mahtani has noted, the public imagination surrounding mixed race individuals has been marked by a "relentless negativity" and the very notion of a mixed race identity has been resisted.² This negativity can be explained by the fact that mixed race people challenge established racial hierarchies or boundaries.

There is also a theory that mixed race peoples such as the Métis do not have a permanent identity. This theory envisions the Métis as a people who bridged the primitive and modern worlds. According to Arthur Ray, the Métis are generally cast in the middle of those models as "half-savage and half-civilized".³

¹ Jacqueline Peterson, "Many Roads to Red River: Métis Genesis in the Great Lakes Region, 1680-1815" in ed. Jacqueline Peterson and Jennifer Brown, *The New Peoples: Being and Becoming Métis in North America* (University of Manitoba Press, Winnipeg: 1985) p. 41.

² Minelle Mahtani, "What's in a name? Exploring the employment of 'mixed race' as an identification" (2002) 4 *Ethnicities* 2 at 470.

³ R. v. Goodon, Trial Transcripts, Testimony of Dr. Arthur Ray (October 16, 2006) at 42-43.

The half-breeds being more numerous and endowed with uncommon health and strength, esteem themselves the lords of the land. Though they hold the middle place between civilized and wild, one can say that, in respect to morality, they are as good as many civilized people.⁴

The assumption was that when the primitive ('Indian') component dissolved - the Métis ceased to exist.

The evidence suggests that no one, not Amer-Indians, Euro-Canadians, or the state wants a mixed race people to arise or exist. The very concept of Métis, as a people, challenged the established boundaries of culture in Canada. It also challenges our constitutional boundaries. This is the problem that the *Daniels* case grappled with – are Métis to be included as 'Indians' under federal jurisdiction? The Euro-Canadian dominant culture invested its treaty process in non-recognition of the Métis as a people, as a result of which only individual Métis were searched for and found during the 19th Century scrip/treaty process.

In addition, Canada has always focused its legal and policy attention on Indian collectives and to the extent that it has indulged this obsession, it has largely ignored the Métis. This myopia has been both a curse and a blessing for the Métis. The expanding Canadian state established a bureaucracy to deal with "Indians and Lands reserved for the Indians." The bureaucracy created new boundaries designed to enclose the lands and assimilate and immobilize Indian people. Indian lands were dramatically reduced by the surrender of traditional territory, the creation of tiny reserves and the division of the people into officially recognized 'bands.' In this way the new Canadian state rearranged Indians into different smaller groupings with new boundaries established according to its understandings and convenience. These newly defined small entities and their tiny land holdings in no way conformed to pre-existing Indian societies and traditional territories.

The Métis were not subjected to the relentless attention of the state in the same manner as Indians. They were not collectively enclosed on reserves and they were not removed or amalgamated or re-defined into small groups. In fact, they were only ever defined very loosely and even then usually with respect to how they could, as individuals, fit into either one of the recognized groups – white or Indian. The most recent attempt to accomplish this was in the *Daniels* case where the Fed-

⁴ Father G.A. Belcourt, "Prince Rupert's Land", trans. by Mrs. Letitia May in J.B. Bond, *Minnesota and Its Resources* (Chicago: Keen and Lee, 1856) at 346 as cited in Ron Rivard and Catherine Littlejohn, *The History of the Métis of Willow Bunch* (Saskatoon: Rivard and Littlejohn, 2003) p. 37.

eral Court judge effectively eliminated the Métis as a separate aboriginal people.

With some notable exceptions, Canada treated the Métis as individuals, sometimes understood to be aboriginal, sometimes understood to be ‘white,’ but generally Canada denied that the Métis were an aboriginal ‘people’ with any collective rights. The treaty commissioners repeatedly informed the Métis that they were not empowered to deal with the Métis as a collective and that they could only chose to identify individually as Indians or white. It is clear that there was no choice to identify as Métis in the treaty process. Historically, Métis, as groups, were only permitted to take treaty if they agreed to become ‘Indians.’ This is what happened with the 1875 Half Breed Adhesion to Treaty 3. At other times, Métis were told they had to choose. The available choices were to identify as ‘Indian’ or ‘white.’ If they chose to identify as Métis collectives, they were generally denied participation in treaty. They were either not ‘real Indians’ or were ‘degraded whites.’

All of this is evidence of the discomfort Euro-Canadians had with the Métis. The treaty process was used not only to contain and define Indians it was also used to preclude the possibility of the Métis continuing to act as a polity. After 1870, this process was continued when Canada decided to implement a land grant and scrip process to extinguish any Indian title individual Métis might possess. The scrip process finally was implemented beginning in 1885. It is notable because even though Canada created no bureaucracy comparable to the Department of Indian Affairs to regulate the Métis as a people, the scrip record contains a thorough record of the Métis who lived in, used and occupied the Northwest. After the scrip process was completed, the Métis virtually disappear from the historic record. In the eyes of the state, the Métis people had been extinguished thru the scrip process and were henceforth invisible.

1.3.2 The Erasure of the Historic Northwest Métis Geography

Beginning in the late 18th century, British North America expanded its territory. It would eventually grow into a country – Canada – that would include many new provincial and territorial boundaries. It is the expansion of British North America after 1770 into the Upper Great Lakes and then gradually over the next century into the Northwest that erased the pre-existing aboriginal geographic boundaries from the map of Canada. The new definition of Canada, with its arbitrary international, provincial and territorial boundaries, was created to facilitate Euro-Canadian settlement and development. In the process of its expansion, surveying and mapping Canada buried the old aboriginal geographic boundaries. Thus, the old

aboriginal geographic boundaries, including the territories the Métis recognized, lived in, used and occupied, became invisible.

In this way the dominant culture makes its geography in keeping with its own concepts of space and time. The new maps put the old aboriginal mobility into the settler's perspective. While some more modern maps show treaty territories, there is no official map that shows Métis geography. Thus, Métis territory and mobility came to be seen as trespassing and border crossing, although their mobility came first and the states claims to the land and the creation of the borders came afterwards. Mobile peoples, such as the Métis who continue to travel and describe themselves according to these old cultural geographies are invisible to those whose vision is bounded by the new geographies.

1.3.3 Michif, the Hidden Language of the Northwest Métis

The Métis formed a separate identity from their Indian (mostly Cree, Ojibway or Dene) mothers and also separate from their Euro-Canadian (mostly French but also Scottish and English) fathers. As a group they were marginalized by both of their parent's cultures. They created an *otipêyimisowak* (independent) identity. The mixture of cultures and the independence from the cultures of their parents became the basis of their group identity and also their name. The same names - Michif and Métis - are used to describe the people and Michif is the name of their language. Their language, Michif, is spoken only among themselves and until the later half of the 20th century was not known to outsiders at all.

Michif carries some of the features of mixed-race languages that arise in other nomadic or trading cultures. While Michif is clearly a mixed language that is associated with the fur trade (because the Métis are the children of the fur trade), the language itself is not a trade language. Cree was the lingua franca of trade on the Prairies. Michif is an 'in-group' language: it was spoken by the Métis only among themselves and not generally spoken in front of strangers. Michif was obviously not used to solve a communication gap in contacts between people who speak different languages. As an in-group language, it is the utmost language of solidarity for the group members and a distancing language for non-group members

Language creates one of the most readily identifiable social boundaries of a community. However, few communities keep their language secret. As Bakker has noted, this is a feature of nomadic traders. The Roma (Gypsies) are perhaps the only other people besides the Métis who are known to have kept their language in-

accessible to outsiders. While Michif served to bind the Métis together as a group, the fact that it was kept secret has contributed to the difficulties outsiders have had in recognizing that the Métis are a people. This is because language is one of the key markers used to identify a culture. If the very existence of the language is unknown to outsiders, the collective is difficult to identify. This was the case with the Métis of the Northwest.

1.3.4 Métis are not Phenotypically (Visually) Distinct

Another factor that has contributed to the difficulties in recognizing the Métis as a collective is the fact that the Métis are not phenotypically distinct. Any individual Métis can be seen physically as either Indian or non-aboriginal. The inability to visually distinguish between Métis, Indians and non-aboriginal people has had significant implications. For example, at the time of the negotiation of the treaties in the Northwest, the Treaty Commissioners could not always distinguish between Indian and Métis peoples. This contributed to the policy of the Government that the Métis were dealt with as individuals and were not dealt with as a collective. The inability to distinguish visually between Métis and Indians has also affected the external relations of the Métis community, which has often been forced to deal through the institutions of Indians. In the 21st Century it is more common to have trouble distinguishing between Métis and non-aboriginal people. It has always been difficult to identify the Métis because they appear, to outsiders, to have been assimilated into either the Amer-Indian or Euro-Canadian culture. The lack of a distinct phenotype has contributed to the invisibility of the Métis as a collective.

1.3.5 Danger in Publicly Identifying as Métis after 1870

Another element that contributes to the invisibility of the Métis is that following the Métis uprisings at Red River in 1870 and in Saskatchewan in 1885 it became impolitic and sometimes dangerous for Métis to self-identify publicly. In 1872, the Ontario legislature passed a \$5,000 bounty on the head of Louis Riel. The atmosphere in Winnipeg after 1870 has been called a “reign of terror” which was designed to discourage public identification as Métis. This disinclination to publicly identify as Métis only increased following the events of 1885. Many Métis grew ashamed to identify in public. In this way, the Métis survived like other beings in nature, by being invisible. This survival mechanism served the Métis until the 1960s, when the Métis, along with other aboriginal peoples in North America began to reclaim their identity and rights in an increasingly public manner.

1.3.6 Métis Mobility within the Northwest

Historians are in agreement that the Métis were highly mobile.

As the buffalo diminish and go farther away towards the Rocky Mountains, the half-breeds are compelled to travel much greater distances in search of them, and consume more time in the hunt; it necessarily follows that they have less time to devote to farming and many of them can be regarded in no other light than men slowly subjecting themselves to a process of degradation, by which they approach nearer and nearer to Indian habits and character, refusing to adopt or relinquishing the tame pursuit of agriculture, for the wild excitement and precarious independence of a hunter's life. The fascination of a camp in the high prairies, compared with the hitherto almost hopeless monotony of the farms of Red River, can easily be understood by those who have tasted the careless freedom of prairie life. I was often told that the half-breeds generally sigh for the hunting season when in the settlements, and form but a feeble attachment to a permanent home, which cannot offer to the majority a comfortable maintenance under present circumstances ... There are several hundred half-breeds who, like their ancestors, pass their lives on the prairies, visiting the settlements occasionally, according as they may be in want of ammunition or clothing. It is impossible to arrive at an accurate estimate of their numbers, but there is not doubt that collectively they form a numerous and influential body. The half-breed hunters, with their splendid organisation when on the prairies, their matchless power of providing themselves with all necessary wants for many months together, and now, since trade with the Americans has sprung up, if they should choose, for years; their perfect knowledge of the country, and their full appreciation and enjoyment of a home in the prairie wilds during winter or summer would render them a very formidable enemy in case of disturbance or open rebellion...⁵

The Métis of the Northwest transacted routinely with settlers and Indians, and used fixed settlements such as Red River, Fort Benton and Fort Edmonton as bases. Where a fixed settlement was a base of operations for the Métis and their numbers were high, their movement in and out of the settlement was a notable event. *Le Métis*, the French language newspaper at Red River in the 19th Century, frequently reported on the arrivals and departures of the Métis hunters. However, as others began to settle in these settlements in larger numbers, the movement in and out by the Métis became less noticeable. Over time it became possible for those who permanently resided in the fixed settlement to believe that the Métis were gone or assimilated.

The Métis have long asserted, and observers confirm, that they lived in, used and occupied a vast area - east to west from Ontario to the Rocky Mountains and north to south from the Northwest Territories to the central northwest plains of the United States. The evidence suggests that the Métis who lived in, used and occupied this vast area, the Northwest, were connected and formed one large historic

⁵ H. Y. Hind, *Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858* (London: Longman, Green, Longman, and Roberts, 1860; reprinted by Greenwood Press, New York, 1969), 180-181.

society founded on kinship, a shared economy and a common way of life. Mobility, one of the primary characteristics of this Métis community, was the glue that kept the people connected throughout this vast territory.

Mobile peoples do not tread heavily on the earth and the Métis are one of these peoples. They left few historical markings, built no monuments or permanent buildings, and their constant movement meant they could be overlooked by the Euro-Canadian culture that invested more heavily in settlement, infrastructure and possessions. Métis culture prized freedom first. The theme of independence has been a self-ascribed attribute of the Métis since their ethnogenesis (the birth of their culture in the late 1700s to the early 1800s); an attribute they continue to this day with their continued use of the term *otipêyimisowak*. The cry of freedom from restraint echoes throughout Métis history. In a description of the life Métis led in the late 1800s, Marie Rose Smith gave voice to that love of freedom that was so deeply ingrained in the Métis.

It took about three months' travelling every day to reach Winnipeg where we would dispose of the buffalo robes and furs. Oh but that was the life! Free life, camping where there was lots of green grass, fine clear water to drink, nothing to worry or bother us. No law to meddle with us.⁶

Their possessions of value were those that permitted and enhanced their mobility – their guns, tools, horses and their carts. Such mobile peoples do not invest their time and energy in building permanent homes or cities. To other more material cultures, this kind of mobile culture is largely invisible.

The historians and experts all agree that the mobility of the Métis, based on spatially extensive family networks and economies, was the foundation of their culture. Métis mobility appears to be of two different kinds – (1) migration; and (2) by engaging in a nomadic life-style based on trading and hunting.

Migrations have occurred for two basic reasons. First, the Métis were economic migrants. They migrated in order to access animals on which they relied for their economy. With respect to the fur trade, as it shifted away from the Great Lakes after 1815 and moved further west in the northern boreal forest in the Northwest, the Métis followed. As Dr. Arthur Ray has noted, as the Métis moved west they also diversified their economy to include the buffalo, an activity that expanded

⁶ Marie Rose Smith, *The Adventures of the Wild West of 1870*. Undated manuscript in the Glenbow Archives, Mary Rose Smith papers, M1154, file 3, pages 1 - 6.

their range out of the boreal forest and into the parklands and grasslands.⁷

Second, the Métis migrated for political reasons. For example, after 1870 and the events at Red River many Métis migrated west to evade the ‘reign of terror’ and in the hopes of maintaining their lifestyle. Finally, Métis migrated in response to natural events such as floods and fires. It should be emphasized that when these migrations occurred, the entire Métis population did not vacate any of these areas. For example, the evidence in *Powley* showed that after 1815 and the economic migration from the Great Lakes to the Prairies, a significant Métis population remained in the Great Lakes-Boundary Waters region of Ontario. The evidence in *Goodon*⁸ showed that while many Métis were forced to move out of North Dakota in the early 1900s, they did not all leave the Turtle Mountain area. Similarly, not all Métis left Red River after 1870 and not all Métis left Saskatchewan after 1885. Further, the migrations were not all east to west. The evidence of the migrations and the economic territorial use, taken together, show consistent use of the same large geographic area that stretches east to west from the Great Lakes to the Rocky Mountains and north to south from Great Slave Lake and the Mackenzie District to Montana and North Dakota. While there is certainly evidence that the Métis crossed the Rocky Mountains and into British Columbia, the evidence as to whether they established communities there is unknown.

The many migrations of the Métis are one of the facts that have contributed to the invisibility of the Métis community. In fact, the migrations have led some historians to erroneously conclude that the Métis community itself disappeared from various areas. The evidence does not support this. It is suggested that a more nuanced examination supports a conclusion that the migrations of an already mobile people, far from acting to break up a collective identity, simply serve to embed their pre-existing identity as a mobile people with a network of relationships that exists over a vast landscape. Further, the migrations are internal in the sense that they are not migrating to unknown lands. They are migrating to known areas within the lands they lived in, used and occupied. The evidence does show that the people migrate from time to time. However, they do not leave their home and migrate to a new home. Their migrations simply serve to center their activities in another part of their homeland.

The Métis today continue to be highly mobile in some parts of the Northwest. The 2006 Canadian census shows that Métis in Alberta in particular remain highly

⁷ Arthur Ray, *Métis Economic Communities in the 19th Century*, June 2009, expert historical report prepared for *R. v. Hirsekorn*
⁸ *R. v. Goodon* [2008] MBPC 59 CanLII

mobile:

- Mobility rates within large urban centers are 35-40% higher than non-aboriginal population.
- Alberta over a 5-year period - Métis are 11% more mobile than the non-aboriginal population; 16% more mobile than registered Indians.
- Alberta 1-year migration – Métis are 24% higher than the non-aboriginal population.
- Métis migration rates tend, with the exception of the Province of Saskatchewan, to be higher than those of the overall aboriginal population in all of the regions, especially in British Columbia, Alberta and the Northwest Territories.

1.4 Métis and the *Indian Act*

Changes to the definition of the term ‘Indian’ in the *Indian Act* have affected Métis identification. Because of these changes ‘non-status’ Indians (individuals who have, for one reason or another, lost their registration under the *Indian Act*) are often identified as Métis even if they have no connection to Métis societies. In so identifying, such individuals are usually referring solely to their mixed genetic ancestry rather than a cultural association with a Métis collectivity.

Prior to the creation of reserves, Indians and Métis shared territory, usually (with a few exceptions such as the Blackfoot and the Sioux) peacefully. Although their cultures were distinct, they shared harvesting areas and family ties. After treaties were entered into, some Métis individuals moved onto the new Indian reserves and became part of the Indian culture. Some maintained their identity as Métis despite being legally registered as ‘Indians.’ At some subsequent point these families were removed from the reserves and lost their status under the *Indian Act*. They often returned to the off-reserve Métis society that persisted in the vicinity.

Historically, Métis individuals could choose to take treaty or not. Under the 1886 *Indian Act* a Métis individual who chose not to take treaty might have been considered a ‘non-treaty Indian’ which the Act defined as a person of Indian blood who either belonged to an irregular band or followed the Indian mode of life, even if only temporarily resident in Canada. If a Métis individual chose to take a land grant under the *Manitoba Act* or scrip under the *Dominion Lands Acts*, he or she was not legally an Indian. If a Métis individual chose to take treaty, he or she would be entered on the band pay list and, on the creation of the centralized *Indian Act* Registry after 1951, all such individuals were henceforth considered in law to be ‘status Indians.’

The *Indian Act* is a statutory enactment of the federal government pursuant to its powers under s. 91(24) of the *Constitution Act, 1867*, which provides that the federal government has jurisdiction with respect to “Indians, and Lands reserved for the Indians.” It is an ‘ambulatory’ statute, which simply means that its terms, including the definition of ‘Indian’ are subject to change from time to time.

It is important to understand that the term ‘Indian’ in s. 91(24) of the *Constitution Act, 1867* and in the *Indian Act* is not to be confused with cultural identity. ‘Indian’ in s. 91(24) and in the *Indian Act* is a legal term. ‘Indian’ in the *Indian Act* is a basket term that prior to 2013 included some fifty-four First Nations. Since the 2013 Federal Court decision in *Daniels*, the legal term ‘Indian’ in s. 91(24) now also includes non-status Indians and the Métis. The changes to the definition of ‘Indian’ in the *Indian Act* over time have been inconsistent with respect to the inclusion of all aboriginal peoples. There is one historical fact worth mentioning up front – Métis have not always been excluded from the *Indian Act*.

Prior to 1927, Métis (half-breeds) were included in the definition of ‘Indian’ in the *Indian Act*. In the 1927 Act we see the express exclusion of some Métis. It excluded a “half-breed in Manitoba who has shared in the distribution of half-breed lands” from being defined as an ‘Indian’ but did not exclude those same half-breeds from being defined as a ‘non-treaty Indian.’ It also did not exclude two groups of Métis: (1) half-breeds who did not ‘share’ in the land distribution in Manitoba; and (2) half-breeds in other provinces whether or not they shared in half-breed land distribution. As a result, in the 1927 Act, there were Métis who were ‘Indians’ under the *Indian Act* and Métis who were not. That Act remained unchanged until 1951.

In the 1951 *Indian Act*, many more Métis were expressly excluded. Previously, only Métis who had “shared in the distribution of half-breed lands” in Manitoba were expressly excluded. The 1951 *Indian Act* then also excluded Métis scrip recipients and their descendents from other provinces.

While ‘Eskimos’ were added to the definition of ‘Indian’ in s. 91(24) following a Supreme Court of Canada decision in 1939, they were not included as ‘Indians’ under the *Indian Act*.⁹ Many individuals who self-identify as Métis are today registered as ‘Indians’ under the Act, the logical conclusion is that the definition of

⁹ *Re Eskimos* [1939] S.C.R. 104

‘Indian’ in the *Indian Act* is illogical, arbitrary and ambiguous. It has had to be repeatedly amended to bring it in line with human rights and constitutional principles.

As Wright J noted:

These definition sections [in the Indian Act] cannot stand too much analysis before confusion and irreconcilability reigns. Gently put, the drafting of these and other parts ... leave a lot to be desired.¹⁰

The *Indian Act* also reflects the assumption that men were the heads of the household and that the legal status of the women was determined by the status of the male. In practice, women and their children lost their ‘Indian’ status when they married Métis or non-aboriginal men (Indian men did not lose their status when they married non-Indian women).

In the early 1970s, aboriginal women’s organizations began to campaign to change the law. In 1974, the Supreme Court of Canada upheld the ‘marrying out’ provisions in the *Indian Act* in *Lavell v. Canada (AG)*.¹¹ Sandra Lovelace joined the campaign in 1977 and took her case to the Human Rights Committee of the United Nations. In 1981, the UN Human Rights Committee found Canada in breach of the *International Covenant on Civil and Political Rights*.¹²

In 1985, *Bill C-31* amended the *Indian Act* so that Indian women who had married non-Indians could regain their status. This amendment to the *Indian Act* reinstated many thousands of Indians.

Recently the BC Court of Appeal ruled in *McIvor v. Canada*,¹³ that under *Bill C-31* men who married non-

In 2011, Indian Act amendments were made to address the *McIvor* case. The federal government passed the *Gender Equity in Indian Registration Act*. The act re-instates an applicant whose grandmother lost her entitlement to registration as a Status Indian as a result of marrying a non-Indian if one of the applicant’s parents was entitled to registration pursuant to s. 6(2) of the *Indian Act* and the applicant was born on or after September 4, 1951.

¹⁰ *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 at 155

¹¹ *Lavell v. Canada (AG)* [1974] S.C.R. 1349

¹² In 1981, in *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166, the United Nations Human Rights Committee considered arguments that the *Indian Act* violated provisions of the *International Covenant on Civil and Political Rights*. Ms. Lovelace had lost her Indian status in 1970 on marrying a non-Indian. The marriage eventually broke down, and Ms. Lovelace wished to return to live on reserve, but was denied the right to do so because she no longer had Indian status. The Committee found the denial to be unreasonable in the particular situation of the case, and to violate the applicant’s rights to take part in a minority culture.

¹³ *McIvor v. Canada (Registrar, Indian and Northern Affairs)* [2007] B.C.J. No. 1259; aff’d in part [2009] BCCA 153 (CanLII); leave to appeal to the SCC denied Nov. 5, 2009

Indian women were treated better because they could pass on their status to their children whereas women who married non-Indian men could not. The court held that this was clearly discrimination based on sex because *Bill C-31* enhanced the status of men who married non-Indian women and their descendants while it perpetuated the discrimination with respect to women who married non-Indian men by limiting their ability to transmit status to their children. The court declared parts of the *Indian Act* invalid and suspended its ruling to permit the federal government to amend the Act.

In August of 2009, the federal government announced that it was undertaking a national consultation about this issue. On July 2, 2010, the Court of Appeal for British Columbia granted an additional extension of the suspension of the declaration of invalidity that resulted from the *McIvor* ruling. The amendments were made in 2011 in the *Gender Equity in Indian Registration Act*.¹⁴

In addition to this confusion, many mixed ancestry individuals who had previously identified as ‘Métis’ sought registration as ‘Indians’ under *Bill C-31*. As a result, *Bill C-31* had a profound effect on the identity of Indians and Métis in Canada. At least for the first generation, it substantially increased the numbers of status Indians. Statistics show that over 100,000 individuals obtained *Indian Act* registration pursuant to *Bill C-31*. The federal government estimates that approximately 45,000 individuals would be newly entitled to registration following *McIvor*.

The issue of whether Métis can be registered as Indians under the *Indian Act* has also had repercussions on the Alberta Métis settlements. In 2011, the Supreme Court of Canada in *Cunningham*,¹⁵ held that individuals who identify as Métis and are registered as Indians under the *Indian Act* can be removed from settlement membership and be refused membership. The court noted that there were historic differences between the Métis and Indians and that the right of the Métis to their own “non-Indian culture” is confirmed by the *Constitution Act, 1982*.

The fact that some people may identify as both Métis and Indians does not negate the distinction between the two groups.¹⁶

This distinction has largely been undermined by the 2013 Federal Court decision in *Daniels*. Nevertheless, the evidence seems to indicate that Métis rarely take on

¹⁴ *Gender Equity in Indian Registration Act*, S.C. 2010, c.18.

¹⁵ *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2011 SCC 37, rev’g 2009 ABCA 239 (CanLII) rev’g *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2007 ABQB 517 (CanLII).

¹⁶ *Cunningham*, supra, at para. 76.

Indian status in order to become ‘Indians’ culturally. Rather, they choose to adhere to the legal status of ‘Indian’ in order to take advantage of the benefits that are available to those recognized as ‘Indians.’ In *Sinclair*,¹⁷ *Powley* and *Cunningham* it was to obtain health benefits.

In *Powley*, Olaf Bjornaa gave a poignant illustration of this choice. When asked why he finally chose *Bill C-31* status when he said he would identify as Métis until the day he died, Mr. Bjornaa told the court that he had been a commercial fisherman all his life but he had an accident on his boat and he could not fish any more. He could no longer make a living from his fishing. Unfortunately, while he retained his commercial fishing licences he was denied welfare. Since fishing licences can be inherited, he did not want to give them up. Mr. Bjornaa was raising his grandchildren and he now required over \$300 a month in medicine. Taking *Bill C-31* was a pragmatic necessity. Mr. Bjornaa needed access to the health benefits available to status Indians but denied to Métis. Similar evidence about taking *Indian Act* registration for health benefits was before the court in *Cunningham*.

The issue of whether Métis are ‘Indians’ within the meaning of s. 91(24) of the *Constitution Act, 1867* is dealt with in Chapter 4.2.

Despite the confusion and overlap with respect to some individual identification, the fact remains that there are two readily identifiable and distinct groups – Indians and Métis.

1.5 Métis Identity FAQs

Are Métis ‘Indians’?

Before the 2013 *Daniels* decision, the short answer to this question was no. Mere self-identification was not sufficient for the purposes of claiming s. 35 constitutional rights or for the purposes of being identified as an aboriginal person in Canada. However, the *Daniels* decision throws this into confusion because the Federal Court defined Métis as “a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status.” This removed everything but the self-identification qualification. For the purposes of being considered an ‘Indian’ for s. 91(24) and thus under federal jurisdiction, the *Daniels* court has separated individuals from aboriginal collectives. Thus, it appears that any individual in Canada who can demonstrate any aboriginal ancestry can now self-identify

¹⁷ *Canada (Registrar, Indian Registrar, Indian and Northern Affairs) v. Sinclair* [2001] FCT 319 (CanLII); [2001] FCT 1418 (CanLII); both rev'd by [2003] FCA 265 9CanLII; leave to appeal to SCC dismissed with costs on April 22, 2004.

as Métis. The *Daniels* court held that s. 35 of the *Constitution Act, 1982* is reserved for collectives – the “aboriginal peoples of Canada” but s. 91(24) relates to individuals. The Federal Court in *Daniels* also held that there was no need for any ancestral connection to any group and no need for community acceptance. There is also, according to that court, no need for any Métis ancestry at all. This means that an individual may self-identify as Métis and be accepted as such for the purposes of federal recognition under s. 91(24). Because the Federal Court held that s. 35 does not inform s. 91(24), unless he or she can also prove to be a member of a Métis rights-bearing collective, such an individual may be able to access federal programs and services (if the federal government includes Métis in those programs and services) but such an individual will not likely be able to claim s. 35 protection.

Alexander Morris, the Treaty Commissioner for several of the historic treaties in Western Canada observed in the 19th Century that there were Métis “who are entirely identified with the Indians, living with them, and speaking their language.” There were, according to Morris, two other groups of Métis who were not considered to be Indians – those who had farms such as those at St. Laurent and those who lived by the pursuit of the buffalo and the chase.¹⁸ This historic evidence that some Métis were seen to be Indians, appears to be somewhat at odds with the finding of the Manitoba Court of Appeal in the *MMF case*.¹⁹ Although it may be that the evidence before the court in *MMF* was restricted to those who fit into Morris’ second group – those who had farms and lived in the settlement of Red River.

The confusion between Indians and Métis has led some to ask whether one can claim to be both Métis and Indian? If one had a Métis mother and an Indian father, one might, with some justification, claim to be both Métis and Indian. For some purposes – harvesting – an individual claim to dual heritage might be relatively insignificant. After all, one individual still consumes the same amount of deer meat, whether that person identifies as Métis, Indian, or both. However, when one looks to political rights or access to programs and services, it becomes a more complex story. While one might be able to claim dual ancestral heritage, Indian and Métis, one would likely be prohibited from exercising rights in both societies concurrently. Such an individual has in the past had to choose to exercise political rights and benefits under one identification only. It should be possible to switch, but the rule, certainly as we have seen it develop in land claims agreements, is one enrolment at a time.

¹⁸ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Prospero Books, 2000) p. 294-295.

¹⁹ *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al*, 2010 MBCA 71 (CanLII), paras. 34 and 243.

The theory that individuals must make a single choice was highlighted in *Cunningham* where the Supreme Court of Canada held that an individual had to choose between registration as an ‘Indian’ under the *Indian Act* and membership as Métis in the Alberta Métis Settlements. In response to the argument that excluding registered Indians from Métis Settlement membership furthered the legitimate goal of enhancing Métis culture, the Supreme Court of Canada held that:

The object of the MSA [*Métis Settlements Act*] ... is to promote Métis identity, culture and self-governance in recognition of their unique status – aboriginal, yet neither Indian nor Inuit. This object corresponds to historic differences between Métis and Indians ... [The Métis] have persistently distinguished themselves as a people from the other dominant Aboriginal group in their territory — Indians. The obverse side of the struggle of the Métis to preserve their distinct identity and culture is the fear that overlap and confusion with the larger Indian cultures would put their identity and culture at risk. The right of the Métis to their own non-Indian culture is confirmed by the *Constitution Act, 1982*, s. 35. Line drawing on this basis, far from being irrational, simply reflects the *Constitution* and serves the legitimate expectations of the Métis.²⁰

The issue of Métis identity has always been complicated. Identity is sensitive, complex and personal. Identity can also mean different things in different contexts. Regardless of the purpose of the identification, being Métis as a member of a distinct Métis people, such as the Métis of the Northwest, cannot be reduced to blood quantum or to a genealogical connection.

So with all of the above in mind we can ask the question, who are the Métis? There appear to be three answers to this question:

1. The individual/genealogical answer – Métis are individuals with mixed European and aboriginal blood;
2. The culture answer – Métis are an aboriginal people; or
3. The legal answer – Métis are aboriginal groups who describe themselves as Métis in order to claim the protection of s. 35 of the *Constitution Act, 1982*.

Can the term “Métis” in s. 35 of the *Constitution Act, 1982* be defined simply in genealogical terms?

Prior to the Federal Court of Appeal 2013 decision in *Daniels*, the short answer to this question was no. Any individual with some aboriginal ancestry can self-identify as Métis. However, mere self-identification is not sufficient for the purposes of claiming s. 35 constitutional rights. This is because the recognition and affirmation of aboriginal rights under s. 35 of the *Constitution Act, 1982* is reserved for

²⁰ *Cunningham*, *supra* at para. 75.

collectives – the “aboriginal peoples of Canada.” This means that while an individual may self-identify as Métis, unless he or she can also prove to be a member of a Métis rights-bearing collective, such an individual will not likely be able to claim s. 35 protection.

This s. 35 line of reasoning can be seen in several cases from New Brunswick – *Caissie*,²¹ *Hopper*,²² *Daigle*,²³ *Chiasson*,²⁴ *Vautour*²⁵ and *Castonguay*.²⁶ The court in *Vautour* noted that the Vautours had to go back ten generations to find a Mi’kmaq ancestor.

The facts of this case provide an example where an over-reliance on genealogy coupled with a period of recent self-identification as ‘Métis’ have largely served to obscure the true legal issue this court must determine.

The Ontario court in *Paquette*²⁷ held that an individual with Quebec ancestry, whose family moved to Ontario between 1856-1902 had not proved that he was ancestrally connected to an historic Métis community on the Sturgeon Falls area of Ontario. Further, Mr. Paquette had been denied a Harvesters Card from the contemporary Métis Community. The court found that he had not proved s. 35 hunting rights in light of these failures.

It has also been affirmed by the Supreme Court of Canada in *Powley*.

The term “Métis” in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent.²⁸ (par. 10)

While this is so for the purposes of s. 35, the *Daniels* court appears to suggest that the term ‘Métis’ for the purposes of s. 91(24) does encompass all individuals with mixed Indian and European heritage.

²¹ *R. v. Caissie* 2012 NBPC 1

²² *R. v. Hopper* [2004] N.B.J. No. 107; [2005] NBJ No. 477 (QB); [2008] 3 CNLR 337 (NBCA)

²³ *R. v. Daigle* [2003] 3 C.N.L.R. 232 (N.B. Prov Ct); 2004 NBQB 79 (CanLII)

²⁴ *R. v. Chiasson* [2002] 2 C.N.L.R. (N.B.P.Ct.); 2004 NBQB 80 (CanLII); leave to appeal to the Court of Appeal denied 2005 NBCA 82 (CanLII).

²⁵ *R. v. Vautour* 2010 NBPC 39.

²⁶ There are three Castonguay cases: *Castonguay and Faucher*, R. v., 2002 NBJ 447; aff’d 2003 NBQB 325 (CanLII); aff’d 2006 NBCA 43 (CanLII) ; 2012 NBJ 442; *Castonguay et al. and Faucher*, R. c., [2004] NBPC 8 (CanLII); *Castonguay, Jean-Denis*, R. v., [2002] CanLII 49690 (NB PC)

²⁷ *R. v. Paquette*, North Bay Court File No. 2561-110170, 2012.08.15 (OCJ)

²⁸ *Powley*, (SCC), *supra*, at para. 10

What groups would be considered “Métis peoples” for the purposes of s. 35 of the *Constitution Act, 1982*?

In *Powley*, the Supreme Court of Canada discussed the fact that there may be more than one Métis people in Canada.

The Métis 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 Métis.” However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis “peoples,” a possibility left open by the language of s. 35(2), which speaks of the “Indian, Inuit and Métis peoples of Canada.”

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. 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.²⁹

The Supreme Court suggests in this passage that one does not always need to prove the existence of a larger group or ‘peoples’ in order to claim the protection of s. 35. One needs only prove the historical and contemporary existence of a ‘group’ or a ‘community’ of Métis with a collective identity, living together in the same geographic area and sharing a common way of life.

The group that previously self-identified as Métis in Labrador has determined that it is not Métis and is in fact an Inuit culture. Six separate courts have found that there are no Métis in New Brunswick. The *Corneau*³⁰ case in Quebec has delivered no judgments on the question at this time, so whether or not there are Métis in Quebec is undetermined. *The Report of the Royal Commission on Aboriginal Peoples*³¹ noted that at least one of the Métis ‘peoples’ in Canada

**Since the Métis Nation of Labrador has decided that it is an Inuit culture and not Métis there have been no other Métis peoples found in Canada other than the Métis Nation of the Northwest.
- MLIC Editor’s Note**

²⁹ *Powley* (SCC), *supra*, at para. 11-12.

³⁰ *Québec (Procureur général) c. Corneau*, 2008 QCCS 1205; 2008 QCCS 1133 (CanLII); aff’d 2011 QCCS 781; [2012] OJ No. 1334

³¹ Canada. Report of the Royal Commission on Aboriginal Peoples. Ottawa: Minister of Supply and Services Canada, 1996.

da is the Métis Nation of the Northwest, which arose in the 1700s across central, northwestern North America. To date the only Métis ‘peoples’ in Canada identified by the courts is the Métis Nation of the Northwest.

Will the courts agree that the constitutional protection of the terms “Indian” and “Métis” is available to those who are not culturally identified with the legal terms?

Since the inclusion of the Métis as one of the “aboriginal peoples of Canada” in s. 35 of the *Constitution Act, 1982*, the term ‘Métis’ is now a legal term, much like the term ‘Indian.’ Recent case law shows that some aboriginal people who do not culturally identify as Métis have claimed the s. 35 constitutional protection of the term ‘Métis.’ In this they are acting in a manner similar to some Métis who claim the constitutional protection of the legal term ‘Indians’ in s. 91(24) of the *Constitution Act, 1867* and in the *Natural Resources Transfer Agreements*. An example of this kind of claim can be seen in the factum of the Intervener, the former Labrador Métis Nation, at the Supreme Court of Canada in *Powley*, which stated that the,

“Labrador Métis” remains a continuing manifestation of an authentic Inuit culture ... The Métis-Inuit are not a society separate and distinct from other Inuit. It is an Inuit culture, which uses the constitutional descriptor of “Métis.”

In 2010, the Labrador Métis Nation changed its name to Nunatukavut to better reflect its Inuit heritage. It now no longer claims rights as Métis.

The Supreme Court of Canada addressed this issue in *Blais*.³² The question was whether Métis were ‘Indians’ for the purposes of the *Natural Resources Transfer Agreements*.³³ The Court said that the Métis are not included in the legal term ‘Indians’ in the *NRTA*. The Court looked to the common language understanding of the term ‘Indian’ and how it was understood at the time the *NRTA* was enacted, which was 1930. The Court said very clearly that it would not ‘overshoot’ the actual purpose of the right and that the constitutional provision was not to be interpreted as if it was enacted in a vacuum.

... the terms ‘Indian’ and ‘half-breed’ were used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through the period in which the *NRTA* was negotiated and enacted.³⁴

³²R. v. *Blais*, 2003 SCC 44 (CanLII). (“*Blais, Mb*”)

³³*Manitoba Natural Resources Act*, S.C. 1930, c. 29; *Saskatchewan Natural Resources Act*, S.C. 1930, c. 41; *Alberta Natural Resources Act*, S.C. 1930, c. 3.

³⁴*Blais, Mb* (SCC), supra, at para. 31.

In view of this analysis, it seems likely that groups who were not commonly understood to be ‘Métis’ in 1982 would not meet the plain language test set out by the Supreme Court of Canada in *Blais*.

The Newfoundland Court of Appeal held that it was not necessary for the claimant group to select whether it was Indian, Inuit or Métis in order to trigger the Crown’s duty to consult. In *Newfoundland and Labrador v. Labrador Métis Nation*³⁵ the aboriginal claimants successfully triggered the Crown’s duty despite the fact that they had not established whether they were an Inuit or a Métis community because they were clearly an aboriginal community.

Does membership in an aboriginal organization establish Métis identity?

The courts have been very clear that simply being a member of an aboriginal organization is not sufficient to prove that one has constitutional rights. The Supreme Court of Canada in *Powley* said it is relevant but not sufficient on its own.

Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community’s identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant’s connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.³⁶

The New Brunswick Court had the following to say:

I must conclude therefore that I find Mr. Acker’s self-identification as a Mi’kmaq to be hollow and unconvincing. He has presented no real evidence that he considers himself to be Mi’kmaq beyond his assertion in a courtroom setting and his application to the New Brunswick Aboriginal Peoples’ Council. It is a bold assertion without factual support.³⁷

1.6 A Brief Political & Legal History of the Métis of the Northwest

History shows that Métis communities were evolving throughout the Northwest

³⁵ *Newfoundland and Labrador v. Labrador Métis Nation* 2007 NLCA 75

³⁶ *Powley*, *supra*, at para. 33.

³⁷ *R. v. Acker* [2004] N.B.J. No. 525 at para. 65; *aff’d* 2006 NBQB 77

during the 1700s and that Métis often acted together with Indians to protect their lands and resources. The earliest records of Métis participating in such political activities with Indians are found in the Great Lakes when the Pontiac Uprisings began in the summer of 1763.

In 1763, at the end of the Seven Years War, New France was ceded to the British Crown in the Treaty of Paris. With the formal capitulation by France, Britain inherited a growing discontent among the aboriginal peoples of the Great Lakes. The British had recently discontinued the French practice of reaffirming peaceful relations with the aboriginal peoples by means of the symbolic giving of presents. In particular, they had discontinued giving guns and ammunition. The withdrawal of weapons fed suspicions among the aboriginal peoples that the British were about to implement a military takeover and that they would lose their lands.

This led to uprisings, which were led by an inspirational Ottawa Chief named Pontiac. The British were particularly concerned about the Métis in the Great Lakes area because of their French background and because they were formerly the allies of the French. General Amhurst, the British military commander in North America, believed that the Métis, in seeking to protect their lands and resource access, were inspiring the uprising. While the Pontiac Uprisings ended rather peacefully, they contributed to the development of British policies respecting aboriginal people and representatives of the British Crown.

In order to quell the discontent, the British called a meeting at the Crooked Place (Niagara) in the summer of 1764, which was intended to secure peace, friendship and trust with the aboriginal people and in particular with France's former allies, including the Métis. The intention was to assure aboriginal people that the British would respect aboriginal territories and resources. The meeting was also intended to impress the aboriginal people with an unprecedented show of wealth. The Crown distributed over £20,000 worth of presents. Over 2,000 aboriginal people, many from thousands of miles away, attended the meeting that summer. Most of the aboriginal people from the Great Lakes attended the meeting.

It was at the Niagara meeting that the British 'proclaimed' the policy with respect to aboriginal people in the *Royal Proclamation*.³⁸ The policy recognized aboriginal peoples as autonomous political units capable of entering into negotiations

³⁸ *Royal Proclamation 1763*, R.S.C., 1985, App. II, No. 1.

and agreements with the Crown. It also recognized that aboriginal peoples were entitled to continue in possession of their territories, including their hunting and fishing grounds, unless or until they ceded them to the Crown. The *Royal Proclamation* and the Royal Instructions that followed set out the equitable principles under which aboriginal territories could be ceded. These equitable principles subsequently guided Canadian policy, law and treaty-making with respect to aboriginal peoples. Even in 1763, the equitable principles in the *Royal Proclamation* were not new. They were the consolidation of previous British and French practices. However, the meeting at Niagara was the occasion for the official announcement of the policy to the aboriginal peoples.

The practice of giving presents, begun by the French and re-established by the British at Niagara in 1764, then became an important annual event. This ceremony reaffirmed the Crown's commitment to the principles of the *Royal Proclamation* and to the protection of aboriginal peoples. Presents were distributed annually to all aboriginal peoples who attended, including the Métis.

The Northwest Métis were also active in Red River from 1812-1816. It is here that the Métis first began to self-identify as the Métis Nation and it was at this time that the first Métis Nation flag was hoisted. The cause that spurred this self-identification was the need to assert themselves to protect their livelihood. The newly arrived Selkirk settlers were seen as a threat because they were farmers, an activity that would severely impact the Métis who were dependent on the fur trade and the buffalo. The interests of the Métis coincided with the aims of the North West Company and together they sought to actively discourage settlement. Later, the Métis leader, Cuthbert Grant, disassociated his loyalties from those of the North West Company and pursued the ideal of the new Métis Nation.

In 1815, the Hudson's Bay Company signed an agreement with the Métis. It appeared at first to resolve the issues. The settlers left and the Métis returned to the buffalo hunt. However, in the fall a new governor arrived and matters deteriorated rapidly. The Selkirk settlers returned and began to rebuild the colony; tensions increased between the Métis and the settlers. In June of 1816, Grant and a contingent of Métis met Governor Semple and a group of settlers. Within 15 minutes virtually all of the settlers, including the new governor, were killed. The colony was dissolved again and all colonists left. The battle, known as the Battle of Seven Oaks, is the subject of a famous song composed by the Métis minstrel Pierre Falcon.

Several unsuccessful attempts were made to arrest Grant for the murder of Semple. Finally, Grant voluntarily surrendered and was taken to Lower Canada for trial. There a Grand Jury found no cause to try him for murder and he was released and returned to Red River. Later, Grant was tried again by proxy in the Courts of Upper Canada. Once again he was cleared of any charges.

By 1830, there are records of the Métis meeting in council at Sault Ste Marie to protest attempts by the Crown to cut them out of the distribution of presents. They joined forces with the Ojibway to promote their cause. However, the government was deeply concerned about the Métis. In general, the Métis in the Great Lakes were seen to be 'too Indian, too French and too Catholic.' The government sought to remove the Métis from their lands and by the mid 1840s it was aided by mining and timber speculators who wanted exclusive control over the land and resources of the lands around Sault Ste Marie. The area was surveyed in 1848 and by 1849 initial discussions were started to investigate the willingness of the Ojibway to enter into treaty negotiations. While the government maintained its optimism that a treaty could be effected, the general air of optimism masked a serious rupture in relations.

On November 9th 1849, an armed party of Métis and Ojibway from Sault Ste Marie took over a mining camp at Mica Bay on Lake Superior. The mine was taken without bloodshed and the miners were evacuated safely within a week. Soldiers were sent to Sault Ste Marie but the ringleaders voluntarily turned themselves in and were arrested and sent to Toronto to stand trial. These included Pierrot Lesage (the great, great, grand-uncle of Steve Powley) and Charles Boyer, two influential Métis leaders from Sault Ste Marie. The charges were dismissed on procedural grounds. But while events were unfolding in Toronto, the situation at Sault Ste Marie remained tense and rumors abounded that 2,000 Red River half breeds were coming to act as allies. Instructions were soon issued to William Robinson to negotiate a treaty. The Métis in Sault Ste Marie asked to participate as a separate group, and when this request was denied they asked to have their lands protected in a separate clause in the treaty. Robinson denied that he had any authority to deal with the Métis and they were not included in the treaty as a separate people.

The land speculation that followed the 1850 Robinson Treaties, combined with the move west of the main fur trade and contributed to the dispersal of many Métis from the Upper Great Lakes to points further west. While the Sault Ste Marie

community in particular remained a central Métis community in the Upper Great Lakes, it diminished in size.

The Métis in Red River asserted their economic rights during the Sayer trial of 1849. Sayer was tried on charges of violating the Hudson's Bay Company monopoly by illegally trafficking in furs. In other words, he was trading his furs with other companies than the HBC. Led by Louis Riel Senior, some 300 armed Métis assembled outside the court in silent protest. The jury found Sayer guilty but declined to impose any sentence. When Sayer emerged from the courthouse, the cry went out from the Métis that "le commerce est libre!" The Hudson's Bay Company monopoly was broken and afterwards the Bay had to deal with the Métis free-traders in the market place and not in the courts.

The Métis also fought with the Sioux about the control of the grazing lands and the buffalo. In 1851, after generations of fighting, a crucial battle took place at the Grand Couteau. The Métis were victorious and thereafter became known as the undisputed 'masters of the plains.'

Perhaps the best-known events associated with the Métis of the Northwest surround the activities of Louis Riel. In 1869, a provisional government was formed to negotiate the terms of Manitoba's entry into Canada. The events at Red River led to the inclusion of the Métis in the *Manitoba Act*. This event, which should have heralded a new relationship with the Métis, in fact led to a tragically flawed system of land grants and a scrip process intended to extinguish the aboriginal land rights claimed by the Métis. The Métis were overwhelmed by the brute power and numbers of eastern financial interests. New settlers from Ontario were anti-Catholic, anti-French and anti-aboriginal. The execution of Thomas Scott by the provisional government had whipped up hatred of the Métis and many of the new settlers were bent on revenge. Riel, the revolutionary democrat of the plains and symbol of Métis national sentiment, was forced into exile by the Canadian government.

Physical and psychological abuse of the Métis went unpunished in Red River. Thus began what historians have called the "reign of terror."³⁹ The government delayed the distribution of the 1.4 million acres promised to the Métis. The land speculation that followed was a repeat of the earlier events in Sault Ste Marie and led to

³⁹ Giraud, Marcel. *The Métis in the Canadian West*, Volume II, English Translation (University of Alberta Press, Edmonton; 1986)p. 377

the relocation of many Métis to points even further west and north. Some went to the United States, some to the Fort Edmonton area and some to settlements on the South Saskatchewan River.

Meanwhile, perhaps in response to the events at Red River, in 1875, the government agreed to let the Métis of Rainy Lake and Rainy River adhere to Treaty 3. This unique example of a Métis 19th century treaty adherence guaranteed the Métis lands and harvesting rights but also enrolled them as 'Indians' under the *Indian Act*.

By 1885, increased immigration, encroachments on lands and resources, and the loss of the buffalo, led to serious unrest with the Indians and Métis. Indians and Métis took up arms to protect their lands, families and livelihood. It was an economic struggle for land carried out by an alliance of Métis workers and plains hunters and some Cree bands. A strong element of national liberation motivated the Métis. Batoche, Duck Lake and Fish Creek are names that evoke the battles in Saskatchewan in 1885.

Many Métis and Indians who participated in the battles were found guilty of treason and sentenced to terms of imprisonment. Seventy-one men were charged with treason-felony for partaking in the uprising in 1885, including Big Bear, Wandering Spirit and Poundmaker. In the end, nine Indians were hanged and fifty were sentenced to penitentiary terms for participating in the uprising. Eleven Métis councilors were sentenced to prison and received sentences of seven years. Three others were sentenced to three years in prison, four got one year sentences and seven prisoners were discharged conditionally. The cases of some of the Métis participants were not litigated. Gabriel Dumont escaped to the United States, but Riel himself was captured, tried and convicted of high treason. He was hanged in Regina on November 16, 1885.

As can be seen from this all too brief Métis history, as early as 1763 the Métis were beginning to take action to defend their livelihood. This activity culminated sadly in the events of 1885 and from that time until the 1960s the Métis lived quietly in the margins of society between Indian and Canadian cultures. From being the 'masters of the plains' and the 'diplomats and culture brokers' of emerging Canadian society, the Métis who lived in the southern and central parts of the Prairie

Provinces became marginalized, poverty-stricken and known as the “road allowance people.”⁴⁰

During the late 1800s and early 1900s some Métis attempted to challenge the land grant system that disentitled them from their lands. While a couple of these cases document individual Métis attempting to reclaim their lost scrip, most of the cases are about the non-Métis purchasers trying to realize on the scrip they acquired from half-breeds.

Some activity does take place on other fronts as well. In 1887, in St. Vital, Manitoba, Métis gather together to form the first modern Métis organization – L’Union Nationale Métisse Saint-Joseph du Manitoba.

Beginning in 1902 the Federal Government began to establish some Métis townships in Saskatchewan at Green Lake. The creation of these townships and farms continued over the next four decades.

In 1909 the L’Union Nationale Métisse St-Joseph du Manitoba began to retrieve their histories from Métis documents and those who had participated in the events of 1869-70 and 1885. These were published in A. H. de Tremaudan’s *History of the Métis Nation in Western Canada in 1936*.⁴¹

In the 1930s, the Alberta government set aside lands that became the Métis Settlements. From the 1930s to the 1960s, organizational work was carried out in the Prairie communities by many Métis leaders including Jim Brady and Malcolm Norris. By the 1960s and 1970s, provincial and national Métis organizations had been established. The political work of the Métis organizations reached a high point in 1982 with the inclusion of Métis in the *Constitution Act, 1982*. Since then, the Métis, in a series of cases, have sought to establish their land and resource rights in the courts. *Manitoba Métis Federation, Hirsekorn*,⁴² *Powley* and *Blais* are just some of the case names that are now familiar to Métis across Canada.

The Saskatchewan Métis settlements are largely lost and the Green Lake townships are now the subject of litigation. The Alberta settlements have continued, although there are less of them than there used to be.

⁴⁰ See Maria Cambell’s *Stories of the Road Allowance People : The Revised Edition*(Gabriel Dumont Institute, 2010)

⁴¹ A. H. de Tremaudan, *History of the Métis Nation in Western Canada* (Montreal: Editions Albert Levesque, 1935, Translated by Elizabeth Maguet as *Hold High Your Heads*. Winnipeg: Pemmican Publications, 1982)

⁴² *R. v. Hirsekorn*, [2011] A.J. No. 1217, rev’g in part 2010 ABPC 385.

The purpose of the above history is not to attempt to tell the whole complicated history of the Métis of the Northwest. Rather, it is intended to show that the Métis of the Northwest have been part of the political, social and legal fabric of Canada since at least 1763. The recognition of the Métis and their inclusion in the *Constitution Act, 1982* is therefore not a new recognition. It is part of a long history of government recognition of the Métis.

In 1992, both the House of Commons and the Senate passed unanimous resolutions that promised to act to recognize the Métis. The House of Commons and the Provinces of Saskatchewan and Ontario all declared 2010 to be the Year of the Métis. With unanimous support from all parties, the House of Commons also called on the Government of Canada to make 2010 a year to celebrate the invaluable contributions of the Métis Nation that have enriched the lives of all Canadians.

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

- 1992 unanimous resolution by the House of Commons and the Senate

1.7 What is a Métis Community?

A community can be defined at many levels. Clearly, there can be a national, provincial, regional or local community. A community can be defined simply as a group of people who live in the same area. A community can also be defined simply as people with some shared element, which can vary widely: a situation, an interest, lives or values. Whatever the shared element, the term ‘community’ is generally used to describe a collective.

The Supreme Court of Canada in *Powley* defined a Métis community as follows:

A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.⁴³

Since *Powley*, identification of a Métis community has become a major issue. In large part this stems from the

The trial judge in *Powley* made reference to communities and areas surrounding Sault Ste Marie including Batchawana, Goulais Bay, Garden River, Bruce Mines, Desbarates, Bar River, St. Joseph's Island, Sugar Island and into Northern Michigan. The area (seen in the map to the left) covers approximately 100 km north and west of Sault Ste Marie and 100 km south and east of Sault Ste Marie.

⁴³ *Powley* (SCC), *supra*, at para. 12.

facts of *Powley* and the tendency of most readers to read only the Supreme Court of Canada judgment and ignore the fact that in issuing its judgment, the Supreme Court upheld the trial judge's findings of fact.

The Supreme Court of Canada, in *Powley*, said that it was necessary to determine if a Métis community existed and whether the harvesting took place in a location that is within that community's traditional territory. For the purposes of any given case, it is not necessary to define the outer limits of the traditional territory of a particular Métis settlement. Nor is it necessary to determine the outer parameters of a larger Métis community.

In *Powley*, the Supreme Court of Canada declined to speak to the issue of whether the Sault Ste Marie Métis settlement was part of a larger political 'nation' or 'people.' It was not necessary for the purposes of determining whether the Métis in Sault Ste Marie had a s. 35 harvesting right.

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary ... to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right ... The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. 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.⁴⁴

In *Powley*, it was not necessary for the court to determine whether the Métis community at Sault Ste Marie formed part of a larger Métis people that extended over a wider area such as the Great Lakes because the Powley/LaSage family had always lived in the environs of Sault Ste Marie and because Steve Powley shot his moose within minutes of Sault Ste Marie. In addition, Sault Ste Marie was a fixed settlement and well known historically as a Métis settlement. Nevertheless, the Supreme Court of Canada did not limit the right to the settlement of Sault Ste Marie. Instead, they referred to "the environs of Sault Ste Marie," a territory that was left undefined.

What are the "environs of Sault Ste Marie"? In order to ascertain this, one must look at the trial judgment, in which Mr. Justice Vaillancourt stated as follows:

⁴⁴ *Ibid.*

The Crown has gone to great pains to narrow the issues in this trial to Sault Ste Marie proper. I find that such a limited regional focus does not provide a reasonable frame of reference when considering the concept of a Métis community at Sault Ste Marie. A more realistic interpretation of Sault Ste Marie for the purposes of considering the Métis identity and existence should encompass the surrounding environs of the town site proper.⁴⁵

This is the area that the Supreme Court of Canada described as the Sault Ste Marie Métis community. While it takes its name from the well-known fixed settlement of Sault Ste Marie, it is a descriptor of an area much larger than the city itself.

The Supreme Court noted that despite the displacement of many of the community's members following the 1850 *Robinson Huron Treaty*, the Sault Ste Marie Métis community persisted. The Court was not troubled by the fact that some Métis may have moved onto Indian reserves or that others moved into areas outside of the town. The Supreme Court concluded that the trial judge's finding of a contemporary Métis community in and around Sault Ste. Marie was supported by the evidence and must be upheld.

Clearly, based on the evidence and the trial judge's findings of fact, a Métis community is not defined as a fixed settlement. In other words, a Métis community may not be limited to a single city, town or village.

In *Willison*, the British Columbia Supreme Court upheld the finding that a Métis community does not require the finding of a Métis settlement. In finding that there was no Métis community in the area in question, the appeal judge held that,

I am persuaded, as submitted by Mr. Willison, that the finding of a Métis community does not require evidence of a "settlement" in the given area. However, there must be evidence of a community "on the land"... In considering this question, [how to determine whether the evidence shows the existence of a historic Métis community in the relevant area] one must be conscious of the compelling argument made by counsel for Mr. Willison that it is essential to be careful when defining "community" as it pertains to a people who, as she put it, are "mobile." Indeed, she submitted that mobility is one of the key characteristics of a Métis community.⁴⁶

Section 35 must be interpreted in light of its purpose. If the Métis are characterized by mobility, a requirement that one find a Métis settlement before an aboriginal right to hunt can be established is to put a significant obstacle in the way of any finding of a Métis right. It is difficult to conclude that the framers of the *Constitu-*

⁴⁵ *R. v. Powley*, [1998] O.J. No. 5310 at para. 68.

⁴⁶ *R. v. Willison* [2005] B.C.J. No. 924 (BC Prov Ct.) at para. 24; rev'g [2006] B.C.J. No. 1505 (BCSC).

tion intended that mobility, which is a key characteristic of Métis people, should at the same time be a bar to them exercising their s. 35 rights.

In *Willison*, the appeal judge found that the evidence demonstrated that there were a small number of Métis present in the area for a relatively short period of time and that they were employees of the Hudson's Bay Company who were in the area only as long as the company required them. Once the USA/Canada border was established and fur trade activity diminished, most of them went elsewhere. In the result, the appeal judge found that the evidence was sparse and equivocal and did not support the existence of an historic Métis community as that concept was articulated in *Powley*.

In *Lavolette*,⁴⁷ the trial judge disagreed with the Crown's definition of 'community.' The Crown proposed that it should be defined according to the common understanding of the word: as a specific village, town or city. The trial judge held that a Métis community did not necessarily equate to a single fixed settlement. He noted that the Métis had a regional consciousness and were highly mobile. The regional unity was based on trade and family connections. He identified the community in this case as Northwest Saskatchewan, generally as the triangle of fixed communities of Green Lake, Île-à-la Crosse and Lac la Biche, including all of the settlements within and around the triangle, including Meadow Lake. The trial judge found that the Métis community had existed in Northwest Saskatchewan since at least 1820.

The trial judge in *Lavolette* listed many settlements that form part of the extensive kinship connections between the "community" and Ile a la Crosse, Buffalo Narrows, Beauval, Jackfish Lake, Jans Bay, Pinehouse, Patuanak, Turnor Lake, Victoire, St. George's Hill, Michel Village, Duck Lake, La Loche, Keely Lake, Canoe Lake, Smooth Stone, Kikino (Alberta), Dore Lake, Lac la Biche (Alberta) and Red River Settlement (Manitoba).

In *Belhumeur*,⁴⁸ the defendant claimed that the regional community at issue was the "historic parklands/grasslands Métis community." The court did not accept what it called a "sweeping approach." It adopted instead the regional approach set out in *Lavolette*. The community was defined as "the Qu'Appelle Valley and environs, which extends to the City of Regina." The case is an example of the difficulties that present when the community is so arbitrarily defined. Note that the court-defined community includes the city of Regina (because the defendant lived

⁴⁷ *R. v. Lavolette* 2005 SK.P.C. 70.

⁴⁸ *R. v. Belhumeur* 2007 SKPC 114.

there) but does not include the community of Yorkton, which is approximately the same distance the other way from the Qu'Appelle Valley.

In *Goodon*,⁴⁹ the court held that the historic rights-bearing community includes all of the area within the present boundaries of southern Manitoba from the present day City of Winnipeg and extending south to the United States and northwest to the Province of Saskatchewan including the area of present day Russell, Manitoba. The community also includes the Turtle Mountain area of southwestern Manitoba.

The trial judge agreed with the experts who testified at trial that the Métis were highly mobile. He used the word “transient” to describe the Métis and noted that they led a “nomadic life” on the prairies returning to established settlements such as Pembina and Red River (present day Winnipeg) for marriages, baptisms and to bury their dead. There was constant interaction between the families in various settlements. The trial judge noted in particular that the Métis community included such settlements as Pembina, Fort Ellice, Fort Brandon, Oak Lake, Red River, etc. He agreed with the experts that mobility was a central feature of Métis culture. The trial judge found that the historic Métis community in southwestern Manitoba was more extensive than the Métis community described in *Powley*.⁵⁰

The case law to date indicates that there must be strong evidence at trial to prove an historical Métis community in any given area. The British Columbia Supreme Court, in *Willison*, held that the evidence must show a distinct group of Métis “on the land, participating in a distinctive culture for generations” prior to effective control.⁵¹

Since 1982, when aboriginal and treaty rights were given constitutional protection, the Supreme Court of Canada has heard more than forty aboriginal and treaty rights cases. With the exception of *Powley* and *Blais (Mb)* most of these cases concerned the aboriginal and treaty rights of First Nations. For First Nations in these many court cases, defining the rights-bearing entity has largely been a non-issue. The cases were, by and large, brought by an individual status Indian as a representative of a band within the meaning of the *Indian Act*. The evidence called in those cases was largely concerned with proving the historic practices. The rights-bearing entity was assumed. While the court routinely acknowledged the existence of an

⁴⁹ *R. v. Goodon*[2008] MBPC 59 (CanLII)

⁵⁰ *Goodon*, *supra* at paras. 46-48.

⁵¹ *Willison*, *supra*, at para. 30.

aboriginal people the final determination was restricted in its application to the band.

In applying these Supreme Court of Canada decisions, for the most part, governments across this country have recognized that, for Indians, the rights reside in the larger group. Thus, when Ronald Sparrow won a food fishing right for the Musqueam in *R. v. Sparrow*,⁵² it was recognized by government that the right was applicable to the Coast Salish peoples. In fact, the principles were generally applied throughout Canada to all Indians recognized under the *Indian Act*. Whether or not their bands had treaty rights was irrelevant. The decision was widely applied in policy and on the ground.

The idea that the rights-bearing entity is the larger aboriginal people has been supported by the BC Court of Appeal in *Tsilhqot'in Nation v. British Columbia*.⁵³ This case contains a thorough discussion of the issue but ultimately states that,

... the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself ... the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot'in people. The Tsilhqot'in Nation, therefore, is the proper rights holder.⁵⁴

The court recognized that its decision not to find that the band was the proper rights holder would cause some difficulties, but held, at para. 151, that

It will, undoubtedly, be necessary for First Nations, governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in the area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.⁵⁵

The court also noted that it was permissible for the proper rights holder to determine that one of its sub-groups might administer and protect its rights within a particular area.

the Xení Gwet'in is the custodian of land-based Aboriginal rights within the Claim Area –

⁵² *R. v. Sparrow* [1990] 1 S.C.R. 1075 (S.C.C.)

⁵³ *Tsilhqot'in Nation v. British Columbia* 2012 BCCA 285

⁵⁴ *Tsilhqot'in Nation*, *supra*, at paras. 149-154.

⁵⁵ *Ibid.*, at para. 151.

indeed, several witnesses used the word “custodian” to describe the relationship between the Xení Gwet’in and the Claim Area. Thus, though the rights are held on behalf of the entire Tsílhqot’in Nation, it is the Xení Gwet’in that administers and protects those rights.

One might have expected similar understanding for the Métis following *Powley*. However, a liberal application of the *Powley* principles has been resisted. Instead, most provinces have insisted that the Métis must prove the existence of an individual Métis rights-bearing community in court before they will apply *Powley*. Indeed, in Saskatchewan the Métis have been to court twice since *Powley* in the cases of *Lavolette* and *Belhumeur* and it is only after those two cases were successful that the Saskatchewan provincial government agreed to enter into negotiations with the Métis towards a province-wide agreement that recognizes Métis harvesting rights in that province. In Manitoba, the provincial government only agreed to negotiate an agreement after *Goodon* and *Beer*.⁵⁶

The Supreme Court’s definition of a local, stable and continuous community as the applicable rights-bearing entity seems to be at odds with the historic reality of almost all aboriginal peoples in Canada. The courts have described many of the approximately forty-seven separate and distinct aboriginal peoples in Canada today as mobile, wandering, wide ranging, nomadic, moderately nomadic or semi-nomadic. The courts have also noted the extremely large territory occupied or ceded in treaty by these mobile peoples.

While many Indian reserves have been created, most aboriginal peoples who are members of those communities do not live on reserve. Therefore, if a community is to be the rights-bearing entity, how is one to define it in a meaningful way that reflects both the aboriginal and the Canadian perspective? Certainly bands living on reserves do not reflect the historic Indian perspective. The question is particularly pertinent now for the Northwest Métis, one of the aboriginal peoples of Canada that did not organize themselves into bands, did not live on reserves and who were highly mobile over a vast territory.

The Supreme Court’s decision in *Powley* appears to be based on the assumption that the Métis lived in stable, continuous settlements and hunted primarily in the immediate environs of that community. It is a test that reflects non-Métis concepts about the nature of the Métis society and does not reference any of the past twenty-five years of social science analysis about how to define community. The

⁵⁶ *R. v. Beer* [2011] M.J. No. 405; supplementary reasons [2012] M. J. No. 158

Supreme Court of Canada's test for community requires a geographically localized, stable group with recognizable political institutions and more or less uniform ancestry.

Instead, it is suggested that the Northwest Métis society requires a more nuanced understanding because it is a social organization that consists of a changing social network of relations based on marriage, political influence and dependence on mobile, economic resources. In the end it is suggested that the court in *Baker Lake*⁵⁷ got it right when it acknowledged that despite the fact that smaller units that were organized for various purposes might have been established from time to time, the rights-bearing entity is the larger society. Any sub-units that interact are interdependent and mutually dependent upon the larger community. As such, it would be artificial to identify any smaller units as individual rights-bearing entities when the people did not perceive themselves to be identified with those small units.

The *Powley* test requires that the Métis must now prove the prior existence and continuity of individual communities. These fictional court-created Métis communities such as we have seen in *Powley*, *Laviolette*, *Belhumeur* and *Goodon* are incompatible with the nature of the historic Métis society.

Where then does the court's theory find its legal base? It is suggested that the foundation of this theory lies in the idea that the community must demonstrate an attachment to a determinate piece of land. With deep roots in English property law concepts, this theory appears to attach user rights to lands within an identifiable radius of a settlement. It is akin to taking individual property rights and attaching them to a settlement.

The Supreme Court of Canada in *Calder*⁵⁸ and *Delgamuukw*⁵⁹ has held that proof of use and occupation can establish aboriginal title. The court, in *Adams*⁶⁰ has also clearly stated that aboriginal groups seeking to establish harvesting rights do not need to meet the standard of proof required to prove title.

Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of

⁵⁷ *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 1 F.C. 487

⁵⁸ *Calder et al. v. A.G. B.C.* [1973] SCR 313 (S.C.C.)

⁵⁹ *Delgamuukw v. B.C.* [1997] 3 SCR 1010

⁶⁰ *R. v. Adams* [1996] 4 C.N.L.R. 1 (S.C.C.)

title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet*⁶¹ test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.⁶²

It is a peculiar and most unwelcome twist of logic if a highly mobile hunter/gatherer/trader society that never lived in small, stable, continuous, localized settlements is now required to prove the existence of just such an 'community' in order to exercise harvesting rights in the near vicinity. It is suggested that this confounds the concept that harvesting rights are user rights. Such a test requires sufficiency of proof that is more appropriate to the proprietary test for aboriginal title. Instead of identifying a practice that helps to define the distinctive way of life of the community as an aboriginal community, the Métis must now invent a community that helps define the practice.

Prior to *Powley* the prevailing legal theory did not acknowledge that the Métis were an aboriginal collective with existing aboriginal rights. *Powley* is important because it establishes the legal recognition that the Métis are indeed a rights-bearing collective. Since *Powley*, the courts have minimized the Métis rights-bearing collective. The post-*Powley* search for stable, small, continuous Métis communities is misguided and is yielding unfortunate results. Specifically, it has resulted in a proliferation of litigation as governments and courts try to put geographic boundaries on these fictional, individual Métis communities. This theory, that Métis communities must be localized, bounded geographic areas was challenged in an Alberta case *Hirsehorn*. The case was heard by the Alberta Court of Appeal in February of 2012.

The Alberta Court of Appeal noted that there was evidence to support the proposition that the historic rights-bearing Métis community should be defined on a regional basis, rather than as a discrete settlement. Given the mobile nature of the plains Métis, the court held that it would be inappropriate to describe the historic rights-bearing community in terms of settlements. The court noted that the evi-

⁶¹ *R. v. Van der Peet* [1996] 4 C.N.L.R. 177 (S.C.C.)

⁶² *Adams, supra*, at para. 26

dence in *Hirsehorn* was similar to that presented regarding the Manitoba Métis in *Goodon*, where the trial judge concluded at that the Métis created a large, inter-related community that included numerous settlements. The court, however held that it was not clear on the evidence, whether there was essentially one regional Métis community across the prairies at this point in history or more than one community encompassing slightly smaller regions.

All three levels of court in *Hirsehorn* declined to made findings as to which Métis made up the historical rights-bearing community, because all three concluded that no Métis community had a sufficient presence in the Cypress Hills area to ground the asserted right to hunt there. At the Court of Appeal, the court referred to the people as Métis or the plains Métis.



Chapter Two: Métis Harvesting Rights

2.1 The Law of Aboriginal Rights

The law of aboriginal rights is based on a fundamental principle of fairness. For thousands of years, going back at least as far as Roman times, western law has protected the rights of Indigenous peoples. To most people it seems fair that those who lived on the land first, before a newer legal regime was created, have some rights that the law should protect. At this most fundamental level, fairness means that the Indigenous peoples (in Canada we use the term ‘aboriginal peoples’) have a right to continue to exist — as a people. The common law of aboriginal rights is the legal mechanism whereby aboriginal peoples’ existence and rights are recognized and protected by law.

In Canada we took an unprecedented step when we protected aboriginal rights in our highest law – the *Constitution Act, 1982*.

- s. 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis of Canada.

The law of aboriginal rights is ancient and new all at the same time. It is ancient because since 1492 the colonizers have justified their right to assert sovereignty over the aboriginal peoples of North America. The Spanish justified their assertion of sovereignty on the basis that the aboriginal peoples were heathens and it was their duty to bring Christianity to them. While this evangelical justification for the assertion of sovereignty is no longer politically correct, the ancient assumption that a sovereign must justify the use of its power over aboriginal people has held ever since.

We say that the law of aboriginal rights is new because until 1960 Indians had no lawful means of claiming their aboriginal rights (Métis did legally pursue some scrip claims). It was not until the *Calder*¹ case in 1973 that the courts recognized that aboriginal title was a legal right that could be enforced. Prior to 1973, the government had successfully argued that aboriginal title was a moral and political

¹ *Calder et al. v. A.G. B.C.* [1973] SCR 313 (S.C.C.)

obligation only. Thus, aboriginal rights as a legal protection for aboriginal peoples in Canada are also new in that they are just over 30 years old.

What is included within the concept of aboriginal rights?

Theoretically the concept of aboriginal rights contains the protection for activities necessary to ensure the survival of aboriginal peoples. This includes such basic rights as the right to hunt, fish, trap, gather, language rights and the exercise of aboriginal religions and culture. In addition, it includes the right to self-government and to occupy, possess and have the economic benefit of the lands on which the aboriginal people historically depended.

This protection is not a temporary measure that governments could abandon when the balance of power shifted due to increased non-aboriginal settlement and development. On the contrary, the Crown has agreed to be bound by its ‘honor’ to continue to protect aboriginal peoples. In *Van der Peet*, the Supreme Court of Canada said that:

These arrangements [in the Royal Proclamation] bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding – the grundnorm of settlement in Canada – was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them.²

The aboriginal right to harvest is usually described only as the right to hunt and fish. In fact, it encompasses much more than this. The right concerns the ability of aboriginal people to use and rely on their lands to sustain themselves as a people. This means all parts of the lands. Therefore, it is more correct to say that aboriginal people have a right to harvest that includes the right to hunt and fish. The right also includes, among other things, the right to harvest food from plants and use trees for wood. The theory is that if aboriginal people have a right to harvest, they must also have the right to do all the things necessary to participate in that harvest, including transportation to and from the harvesting area, access to the land, the ability to build camps, cabins and the use of firearms.

²R. v. *Van der Peet*[1996] CanLII 216 (SCC), [1996] 2 SCR 507

No rights are absolute, and aboriginal rights are no exception to this rule. Aboriginal rights can be limited by justifiable government regulation or legislation. In other words, governments may recognize and affirm an aboriginal right but still limit the exercise of the right. An aboriginal right may be limited by, among other things, health, conservation or safety. Several cases have held that hunting at night with lights is unsafe. In *McCoy*³ the court held that treaty rights must be exercised in a safe manner.

Barring these reasons, an existing aboriginal right to hunt and fish for food has priority over all other harvesting. According to the Supreme Court of Canada in *Delgamuukw*,⁴ federal and provincial governments must consult with aboriginal peoples before making regulations that limit their harvesting rights. Some situations may even require aboriginal consent before the government can proceed.

What is the test for determining whether or not an aboriginal right exists?

The courts have said that the onus is on the claimant to prove the existence of the right claimed. Therefore, if aboriginal people believe they have a right they must prove it. The test for proving aboriginal rights to date has mostly been set out by the Supreme Court of Canada in Indian case law. The cases of *Sparrow*⁵ and *Van der Peet*⁶ set out the basic test for aboriginal harvesting rights while *Delgamuukw* sets out the test for aboriginal land rights and title. Recently, the Supreme Court of Canada set out the test for proving Métis rights in *Powley*. The *Powley* test follows the basic principles set out in *Sparrow* and *Van der Peet*, with necessary modifications for the unique circumstances of the Métis.

The law of aboriginal rights will only protect, as aboriginal rights, those crucial elements of a distinctive aboriginal society that are aboriginal. The test to determine the existence of those crucial elements is called the “integral to their distinctive society test.” The gist of the test is that the claimant aboriginal group must prove that:

1. the activity it seeks to protect is integral to its distinct society;
2. Indians exercised the practice, tradition or custom before contact with Europeans;
3. Métis exercised the practice, tradition or custom post contact and pre-con

³ *R. v. McCoy* [1992] CanLII 6298 (NB QB); [1994] 2 C.N.L.R. 129 (N.B.C.A.)

⁴ *Delgamuukw v. B.C.* [1997] 3 SCR 1010

⁵ *R. v. Sparrow* [1990] 1 S.C.R. 1075 (S.C.C.)

⁶ *R. v. Van der Peet* [1996] CanLII 216 (SCC), [1996] 2 SCR 507

- trol by Europeans; and
4. They have continued to practice it ever since (although perhaps in modernized form).

Characterization of the Right Claimed

In this part of the test the nature of the particular practice, tradition or custom must be determined. With respect to harvesting activities, the usual distinction is whether the harvesting practice is for food, exchange or commercial purposes. In addition, the significance of the practice, tradition or custom is a factor to be considered. Courts must also consider:

- the nature of the action which the applicant is claiming was done pursuant to an aboriginal right,
- the nature of the governmental regulation, statute or action being impugned,
- the practice, custom or tradition being relied upon to establish the right,
- sensitivity to the Métis perspective on the meaning of the rights at stake;
- the geographic or 'site-specific' area at issue; and
- the context.

Periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.
-SCC in *Powley*

Activities must be analyzed at a general rather than a specific level. Courts must recognize modern forms of practice, tradition or custom. The Supreme Court of Canada affirmed, in *Powley*, that the right is not species-specific.

What if the harvesting was done very publicly and supported by a Métis organization?

In *Hirsehorn* the Métis Nation of Alberta passed an action plan to exercise Métis food hunting rights as a means of obtaining a judicial ruling that would secure Métis food hunting rights in southern Alberta. The plan was carried out with a great deal of publicity. At trial, the judge dismissed the case saying that such political activity had the effect of nullifying any claim that the harvesting was for food. The Alberta Court of Queen's Bench, at para. 89, held differently.

I agree with the Appellant's argument that the fact that an individual engaged in an activity in order to challenge the law does not prohibit a constitutional challenge. While the Appellant's actions were done by way of political means, the purpose was to secure the Métis right to hunt for food and, therefore, the event that gave rise to the litigation is that the Appellant was hunting for food pursuant to the MNA action plan.⁷

⁷ *Hirsehorn* (QB), supra, at para. 89.

Aboriginal perspective

Courts must be sensitive to the aboriginal perspective in relation to the meaning of the rights at stake. In *Marshall/Bernard* the Supreme Court of Canada held that:

Taking into account the aboriginal perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criterion. The group's relationship with the land is paramount. To impose rigid concepts and criteria is to ignore aboriginal social and cultural practices that may reflect the significance of the land to the group seeking title. The mere fact that the group travelled within its territory and did not cultivate the land should not take away from its title claim.⁸

In *Tsilhqot'in Nation*, the BC Court of Appeal held that the identification of the proper rights-bearing entity "is a matter to be determined primarily from the viewpoint of the aboriginal collective itself."⁹

In *Hirsehorn*, the Court of Queen's Bench judge cited a Métis Elder, Eli Guardipee, and an 1878 petition from the Métis "living in the vicinity of Cypress Hill" for evidence of the Métis perspective:

It was truly a happy life that these people were living. The camp was in the midst of the buffalo herds and they hunted and worked hard during the day but when night came they danced and sang the old French songs, until the late hours, arranged for many and divers horse races for the following day, - - then slept the sleep of people who had no cares for the moment. [Eli Guardipee]¹⁰

For a number of years we have always been in the habit of roaming over the prairies of the North West, for the purpose of hunting above all other animals the buffalo, thereby sustaining our families. [1878 Métis of Cypress Hills petition]¹¹

The QB Appeal judge found that the Métis perspective that needed to be taken into account in assessing the aboriginal right in this appeal was the love they had of the life on the prairies: the travelling life and the hunt.

Central significance

The practice, tradition or custom must be proved to be "one of the things that truly made the society what it was." In *Adams* the Supreme Court of Canada held that reliance on fish to feed a war party was sufficient to meet the test.¹² This falls

⁸ *R. v. Marshall; R. v. Bernard*, 2005 S.C.C. 43, par. 137

⁹ *Tsilhqot'in Nation v. British Columbia* 2012 BCCA 285, at para. 149.

¹⁰ "Eli Guardipee's Story, as told to John B. Ritch", 27 September 1940, MHS SC772, 1-10.

¹¹ David Laverdure and others to the President and the Honorable members of the Privy Council for the North West Territories, undated, attached to David Laird to Minister of the Interior, 30 September 1878, LAC, RG15, Series D-II-1, Vol. 341, file 89435.

¹² *R. v. Adams* [1996] 4 C.N.L.R. 1 (S.C.C.), at para. 45.

somewhat short of answering the question of whether, without the activity, the society would be what it was. It may be that the *Adams* test reflects the fact that the case was about food fishing, whereas *Van der Peet* reflects the strict scrutiny that courts will give to rights to harvest for commercial or exchange purposes. In *Powley* the Supreme Court of Canada referred to the fact that subsistence hunting was an “important aspect of Métis life and a defining feature of their special relationship to the land.”¹³ In *Sappier/Gray* the court re-examined this part of the test.

... these cases stand for the proposition that the traditional means of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people ... the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it. This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question, pre-contact. Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival. Although this was affirmed in *Sparrow*, *Adams* and *Côté*, the courts below queried whether a practice undertaken strictly for survival purposes really went to the core of a people’s identity. Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a “core identity” may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society’s identity, i.e. its single most important defining character. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society’s pre-contact distinctive culture ... The notion that the pre-contact practice must be a “defining feature” of the aboriginal society, such that the culture would be “fundamentally altered” without it, has also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights ... courts should be cautious in considering whether the particular aboriginal culture would have been fundamentally altered had the gathering activity in question not been pursued.¹⁴

Time period

The test set out for Indians in *Van der Peet* held that the practice, tradition or custom must be shown as integral to the aboriginal community in the period prior to ‘contact’ between aboriginal and European societies. Evidence to prove this may relate to aboriginal practice, tradition or customs post-contact that demonstrate pre-contact origins. In *Adams*, the Supreme Court of Canada modified the test somewhat and held that ‘contact’ was when the Europeans established ‘effective control.’ It should be noted that the difference in time in *Adams* is quite signifi-

¹³ *R. v. Powley*, 2003 SCC 43 (CanLII) at para. 41

¹⁴ *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, at paras. 35-41.

cant. There are almost 70 years between contact (the visit of Cartier in 1535) and effective control (the arrival of Champlain in 1603).

In *Powley* a new time period was articulated for Métis. The Court noted that Métis societies arose after contact and matured in the period after contact but before control was established by European law and customs, and articulated a new ‘pre-control’ test.

The test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis 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. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.¹⁵

In *Vautour*, at paragraph 34, the New Brunswick provincial court applied the ‘effective control’ test as follows:

There is compelling evidence that by 1670 the French had effectively established administrative, military and political control in ‘Acadia’. While each succeeding decade may provide evidence of increased control as more settlers arrive and the British take over in 1713 (they passed laws, administered justice and signed treaties with the natives for example) I am satisfied on the basis of Dr. Patterson’s evidence that by 1670 effective political and legal control over the new colony as understood in *R. v. Powley*, supra had been attained.¹⁶

Continuity

The aboriginal claimant must demonstrate that the connection with the practice, tradition or custom has continued to the present day. Note that the time, method and manner of the exercise of the practice, tradition or custom may have changed over time. The evidence of continuity does not have to be an unbroken chain. In *Powley*, the Supreme Court of Canada noted that the focus of the continuity practice should be on the practice that is at issue rather than on the continuity of the community itself.¹⁷ Further, with respect to the continuity of the community, the Court noted that it was only necessary to prove a basic degree of continuity and stability in order to support an aboriginal rights claim.¹⁸

¹⁵ *Powley* (SCC), supra, at para. 37.

¹⁶ *R. v. Vautour*, 2010 NBPC 39, at para. 34.

¹⁷ *Powley* (SCC), supra, at para. 27.

¹⁸ *Ibid*, at para. 23.

Geographically Specific

Courts must focus on the specific aboriginal group claiming the right. Aboriginal rights are not nationally applied. If one aboriginal people or group has established in the courts that it possesses a right to harvest, it does not mean that all aboriginal people or groups have the same right. Having said this, the geographic description of the area where the right is claimed is determined by the practice at issue. For example, aboriginal peoples who hunted migratory herds such as the buffalo or the caribou might reasonably claim a right to hunt that covers a very large area.

While this may be the theory, in fact the courts have been reluctant to look to larger geographic territories. In *Hirse Korn*, the defendant sought to have ‘the plains’ or ‘central and southern Alberta’ identified as the geographic territory at issue. This is because the historic Métis buffalo hunters hunted throughout the plains. However, the Court of Queen’s Bench judge noted that Mr. Hirsekorn was hunting in the Cypress Hills area. He found that central and southern Alberta or the plains were not site-specific enough. The appeal judge held that the Cypress Hills area was where Mr. Hirsekorn was hunting and that it was included in the region identified by the Appellant and met the site-specific area requirement. In the result, he reduced the geographic territory to the Cypress Hills.

The Court of Appeal upheld the lower courts’ characterization of the right claimed as “the right to hunt for food in the environs of the Cypress Hills”. Despite the problems associated with so narrowly defining the geographic area by limiting it to the area where the Métis wintered, not where they hunted and despite the fact that so limiting the geography was problematic for a people who hunted a migratory herd, this was the area the Court determined as the site-specific area. The court held that characterizing the right as the right to hunt in central and southern Alberta or, even more broadly, as the right to hunt on “the plains,” would present practical problems and worried about the limits on such a right. The Court of Appeal held that it would be inappropriate to grant a constitutional right to hunt that is abstract and exercisable anywhere.

Independent Significance

The right claimed cannot be incidental to another practice, tradition or custom. If something is ‘merely incidental’ to an integral practice, tradition or custom it will not be protected as a s. 35 right. Note that the building of cabins has been held to

be necessarily incidental to harvesting rights in some circumstances.

Distinctive not Distinct

The right claimed does not have to be unique, but it must be a distinguishing characteristic. As the Supreme Court of Canada in *Sappier/Gray* has acknowledged:

Culture, let alone “distinctive culture”, has proven to be a difficult concept to grasp for Canadian courts. Moreover, the term “culture” as it is used in the English language may not find a perfect parallel in certain aboriginal languages ... Ultimately, the concept of culture is itself inherently cultural ... What is meant by “culture” is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word “distinctive” as a qualifier is meant to incorporate an element of aboriginal specificity. However, “distinctive” does not mean “distinct”, and the notion of aboriginality must not be reduced to “racialized stereotypes of Aboriginal peoples” ... To hold otherwise would be to fall in the trap of reducing an entire people’s culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes. Instead, the Court must first inquire into the way of life of the Maliseet and Mi’kmaq, pre-contact ... The Court must therefore seek to understand how the particular pre-contact practice relied upon relates to that way of life ... I have already explained that we must discard the idea that the practice must go to the core of a people’s culture.¹⁹

Influence of Europeans

Aboriginal rights will not be protected under s. 35 if they only exist because of the influence of European culture. A practice, tradition or custom may have modified and adapted in response to European arrival. In *Van der Peet* the Supreme Court of Canada held that:

The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community’s culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.²⁰

Unfortunately, in *Hirse Korn*, the courts have turned this on its head. The issue

¹⁹ *Sappier/Gray*, *supra*, at paras. 44-46.

²⁰ *Van der Peet*, *supra*, at para. 73.

in *Hirsehorn* was whether the Métis had a hunting right in central and southern Alberta, specifically in the Cypress Hills and Blackfoot territory (Treaty 7). The Queen's Bench judge held, erroneously, that the Cypress Hills were in Blackfoot territory and that the Métis were only able to access that area after the arrival of the Northwest Mounted Police in 1874.²¹ As a result both judges found that the Métis right was invalid because it was geographically able to be practiced in the Cypress Hills only as a result of European influences.

This is not supported on the facts, which clearly show the Métis had a practice of hunting buffalo and that this was integral to their distinct culture prior to effective control. The practice adapted for many reasons: according to weather, the decline of the herds, the inability of the Blackfoot to keep Métis and others out of their territory, diseases that decimated the First Nations and the arrival of the NWMP. However, this last factor should not be relevant to the determination of the claim. The arrival of the NWMP should not be used to deprive the Métis of their valid claim to hunt.

In *Tsilhqot'in Nation*, the BC Court of Appeal looked at the issue of whether the Tsilhqot'in could claim that capturing and using wild horses was an aboriginal right. Of course, horses were introduced into North America by Europeans about 250 years before contact with the Tsilhqot'in. The facts showed that the Tsilhqot'in were using horses and capturing them prior to their own contact with Europeans. The court held that capturing and using wild horses was an aboriginal right.²²

Relationship to the Land

Courts must examine the claimant group's relationship to the land and the practice, tradition or custom. Note that in *Adams* the Supreme Court of Canada held that whether or not land title has been extinguished, there may still be harvesting rights in that territory.²³ In *Powley*, the Supreme Court of Canada made a point of stressing that the harvesting practices of the Métis were "a defining feature of their special relationship to the land."²⁴

Do aboriginal rights exist if they have not been proven in court?

Yes they do exist. The problem is in determining exactly what they are when not

²¹ *Hirsehorn* (QB), *supra*, at para. 164.

²² *Tsilhqot'in Nation*, *supra*, at paras. 261-268

²³ *Adams*, *supra*, at para. 26.

²⁴ *Powley* (SCC), *supra*, at para. 41.

articulated in a treaty or by a court. This question is often called the empty or full box question. The s. 35 box is said to contain aboriginal and treaty rights. Governments across Canada seem prepared to recognize that specifically identified treaty rights are in the s. 35 box. An example of a specifically identified treaty right is found in the *Robinson Huron Treaty*:

to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing.²⁵

Is s. 35 an empty box that only holds treaty and aboriginal rights after a court affirmation?

There are two perspectives on this question. Government tends to see s. 35 as a box that is empty of aboriginal rights unless and until they are proven in court. Aboriginal people tend to see the box as full and think that the courts should be looking, not to the question of their existence, but to the proper affirmation and recognition of those rights.

The B.C. Court of Appeal in *Haida*²⁶ and *Taku River*²⁷ held that there are affirmative fiduciary and constitutional obligations on government before the right has been proven in court. The court noted that the *Constitution Act, 1982* is supposed to protect aboriginal rights from provincial actions. The court found that the BC government's argument that it has no obligation until there is a court finding, was "wholly inconsistent" with the previous decisions of the Supreme Court of Canada. The Court of Appeal said that the Ministers had to be "mindful of the possibility that their decision might infringe aboriginal rights."²⁸

In my opinion, nothing ... provides any support for the proposition that aboriginal rights or title must be established in court proceedings before the Crown's duty or obligation to consult arises.²⁹

The obligation was stated more forcefully by the BC Court of Appeal in *Haida*.

So the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and the aboriginal peoples on the other. One manifestation of the fiduciary duty of the Crown to the aboriginal peoples is that it grounds a general guiding principle for s. 35 (1) of the *Constitution Act, 1982*.

²⁵ Robinson-Huron Treaty in Woodward, *Jack's Consolidated Native Law Statutes, Regulations and Treaties 2011*, (Thomas Reuters, Ontario, 2011) pg. 940

²⁶ *Haida Nation v. B.C. (Minister of Forests)* [2004] 3 S.C.R. 511

²⁷ *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* [2004] 3 S.C.R. 550

²⁸ *Tlingit First Nation v. Tulsequah Chief Mine Project* [2002] B.C.J. No. 155 (B.C.C.A.), at para. 193.

²⁹ *Taku River (SCC)*, at para. 171.

It would be contrary to that guiding principle to interpret s. 35(1) ... as if it required that before an aboriginal right could be recognized and affirmed, it first had to be made the subject matter of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction; and finally made the subject of a declaratory or other order of the court. That is not what s. 35(1) says and it would be contrary to the guiding principles of s. 35(1), as set out in *Sparrow* to give it that interpretation.³⁰

Similar opinions were expressed by the Ontario Court of Appeal in *Powley*. In that case Mr. Justice Sharpe said,

I do not accept that uncertainty about identifying those entitled to assert Métis rights can be accepted as a justification for denying the right. ... The basic position of the government seems to have been simply to deny that these rights exist, absent a decision from the courts to the contrary. ... The government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain.³¹

The Supreme Court of Canada in *Powley* referred to the identification problems raised by the Crown and said that,

the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.³²

In November of 2004, the Supreme Court of Canada handed down its reasons for judgment in *Taku River* and *Haida*. In those cases both the provincial and federal governments argued that they had no duty to consult or accommodate asserted aboriginal rights prior to a final court or treaty determination of the scope and content of an aboriginal right. The Court called this an “impoverished view” of the honour of the Crown.³³ Therefore, a proven right is not the only trigger for the legal duty to consult or accommodate and reconciliation is not to be limited to proven rights or title. The Court noted that this kind of narrow thinking would mean that when proof is finally reached, by court determination or treaty, aboriginal peoples might find their lands and resources changed and denuded. This approach, the Court said, was not reconciliation, and it was not honourable.

Why does s. 35 only recognize and affirm ‘existing’ aboriginal rights?

It doesn’t. The fact is that adding the word ‘existing’ to this clause was the compromise reached by the premiers and the federal government in drafting this part

³⁰ *Haida Nation v. B.C. (Minister of Forests)* 2002 BCCA 147, at para. 34.

³¹ *R. v. Powley*, [2001] O.J. No. 607 (CA), at para. 166.

³² *Powley* (SCC), *supra*, at para. 49.

³³ *Taku River* (SCC), *supra*, at para. 24.

of the *Constitution*. The addition of ‘existing’ gave some comfort to the premiers that inserting protection for aboriginal and treaty rights would not undermine the lands and resources tenure of the provincial governments. That said, it is interesting to note that in the first conference held after 1982, s. 35(3) was added. Section 35(3), in effect, contradicts the word ‘existing’ because it amended the constitution to include constitutional protection for rights that may be negotiated by way of modern land claim agreements. Therefore, s. 35 does not only protect rights that existed as of 1982.

Existing means unextinguished. Prior to 1982, aboriginal rights could be extinguished in three ways: (1) by surrender; (2) by constitutional enactment; or (3) by validly enacted federal legislation. The law has always presumed that aboriginal rights can be surrendered or sold to the Crown. This theory has never changed and is still reflected in the modern land claims agreements. In order to extinguish aboriginal rights by way of the constitution or federal legislation, the standard to be met is called the “clear and plain extinguishment” test.

There appear to be two constitutional provisions that may have extinguished aboriginal rights. The first is the *Manitoba Act, 1870*, which states that its purpose is “to extinguish the Indian title preferred by the Half-Breeds.”³⁴ The second is the Natural Resources Transfer Agreements³⁵ (NRTAs), which have been interpreted by the Supreme Court of Canada in *Horseman*³⁶ as extinguishing commercial harvesting rights.

Federal legislation, passed prior to 1982, must also have clearly stated that its purpose was to extinguish aboriginal rights. If the legislation did not clearly and plainly state its intention, then the courts will not presume that the legislation accomplished the extinguishment. There is also a theory that aboriginal rights can lose their constitutional protection by non-usage. This is reflected in the continuity discussion above. If the aboriginal people no longer rely on or practice a particular right for a lengthy period of time, then the courts might find that the right no longer is an ‘existing’ right. In such a case the right would not have been ‘extinguished’ but it might not be in existence either.

Since 1982, aboriginal rights can be extinguished only by way of surrender or

³⁴ *Manitoba Act, 1870*, R.S.C. 1970, App. II, No. 8, s. 31.

³⁵ *Manitoba Natural Resources Act*, S.C. 1930, c. 29; *Saskatchewan Natural Resources Act*, S.C. 1930, c. 41; *Alberta Natural Resources Act*, S.C. 1930, c. 3.

³⁶ *R. v. Horseman* [1990] 3 C.N.L.R. 95.

constitutional enactment. Neither federal nor provincial legislation can now extinguish aboriginal or treaty rights. Most recently, the Supreme Court of Canada has also said that aboriginal rights are not protected by the common law prior to 1982 or the *Constitution Act, 1982* if they are incompatible with the Crown's assertion of sovereignty. This theory of sovereign incompatibility comes from the *Mitchell*³⁷ case, which was about the right of Mohawks to bring goods purchased in the United States across the US-Canada border without paying customs duties. In that case, the majority of the court found that the Mohawks had not proved that they had an aboriginal right to trade across the border. The majority, therefore, did not address the sovereign incompatibility argument. However, in his concurring judgment Mr. Justice Binnie held that the Mohawk right was extinguished by Canada's establishment of border controls prior to 1982. In other words, the Mohawk right was incompatible with the assertion of sovereignty by Canada over its borders.

What is the geographic extent of the right to harvest?

Aboriginal rights arise out of the use and occupation of a particular aboriginal people's traditional territory. Many aboriginal people consider that their traditional territory spreads across Canada. They hold to this belief because they understand the history of their ancestors. They know that their grandfathers and grandmothers traveled widely in pursuit of the hunt. However, the courts are unlikely to have the same perspective. Courts to date have viewed harvesting rights as arising in a restricted geographic territory.

Further, provincial courts have no jurisdiction to declare aboriginal rights across provincial boundaries. In *Powley*, the Supreme Court of Canada said that the right belonged to the community and defined the right as a "right to hunt in the traditional hunting grounds of that Métis community."³⁸ To date there are no court decisions that determine the extent of "traditional hunting grounds." The issues of the extent of the hunting grounds did not arise in *Powley* because Steve and Roddy Powley were hunting very close to Sault Ste Marie and both sides conceded that if there was a right to hunt in the Sault Ste Marie Métis community, and the Powleys were found to be members of the community, they were clearly hunting within the traditional territory. It may never be necessary to determine the outer boundaries of any traditional territory or traditional hunting grounds because it is only necessary to prove that the harvesting took place within the traditional territory. This does not require proof of the full extent of the area.

³⁷ *Mitchell v. Canada (Minister of National Revenue-M.N.R.)* [2001] S.C.J. No. 33 (S.C.C.)

³⁸ *Powley* (SCC), *supra*, at para. 19

Why is safety a limitation on the right to harvest?

Several cases have now held that safety is a valid limitation on harvesting rights. See *Bernard*,³⁹ *Simon*,⁴⁰ *Seward*,⁴¹ *Myran*,⁴² *Morris*,⁴³ etc. The issue has come up mainly with respect to two issues – hunting on road corridors and night hunting. In both situations the courts have held that public safety overrides a traditional harvesting practice whether that practice is protected by a treaty or not. While the courts recognize that the defendants in these cases may have an aboriginal or treaty right to hunt, they have fairly consistently held that the right does not protect a particular method or style of hunting that is unsafe. The general theory is that treaty and aboriginal rights may evolve with time. With changed methods of hunting and changed competing uses of unoccupied land comes the need for changes in the rules governing the safety of the hunt. The effect is that treaty and aboriginal rights must be “updated for their modern exercise” (*Marshall*,⁴⁴ *Sundown*⁴⁵). The courts, therefore, will determine the core right and then determine the modern practices reasonably incidental to that right. With some exceptions, night hunting and hunting along road corridors have been held to be incompatible with public safety. However, in *Morris*⁴⁶ the Supreme Court of Canada determined that some night hunting can be done safely and that blanket prohibitions infringed the right to hunt.

What are incidental cabins?

The issue of incidental cabins has been developing for several years. In 1998 the Supreme Court of Canada affirmed in *Sundown*⁴⁷ that aboriginal people could build a cabin on crown land if the right to build shelters was “reasonably incidental” to the right to hunt, fish or trap. The court held that a “small log cabin” was an appropriate shelter for what it described as “expeditionary hunting.” Building a permanent structure was not asserting a proprietary right in the park land. Any interest in the cabin was a collective right and belonged to the band as a whole not to an individual member of that band. Limitations on the right to build cabins related to conservation and were subject to the justification test in *Sparrow*. The court also held that there must be compatibility between the Crown’s use of the

³⁹ *R. v. Bernard*, [2002] 2 C.N.L.R. 200 (N.S.C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 123

⁴⁰ *R. v. Simon* [1985] 2 S.C.R. 387

⁴¹ *R. v. Seward* [1999] 3 C.N.L.R. 299 (B.C.C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 238

⁴² *R. v. Myran*, [1976] 2 S.C.R. 137

⁴³ *R. v. Morris*, [2004] B.C.J. No. 400 (B.C.C.A.), [2006] 2 S.C.R. 915.

⁴⁴ *R. v. Marshall*, [1999] 3 S.C.R. 456.

⁴⁵ *R. v. Sundown*, [1999] 1 S.C.R. 393.

⁴⁶ *R. v. Morris*, [2006] 2 S.C.R. 915.

⁴⁷ *Sundown*, *supra*.at paras. 28-33..

land and the treaty right claimed. Finally, the treaty at issue, Treaty 6, restricted the right to hunt to lands not “required or taken up for settlement.”⁴⁸ Another issue in *Sundown* was whether s. 88 of the *Indian Act* referentially incorporated the laws of general application and thereby negated the hunting right under Treaty 6.⁴⁹ The court said no. Regulations that conflicted with the Treaty 6 right to build a cabin as an activity that was reasonably incidental to the right to hunt were inapplicable via s. 88 of the *Indian Act*.

In 2005, the Ontario Superior Court of Justice addressed the same issue of incidental cabins in *Baker*.⁵⁰ In this case a member of the Couchiching First Nation, signatories to Treaty 3, began construction of a cabin on public land without a work permit at Otukamamoen Lake in 2001. A stop work order was issued, but the defendant continued construction. The court held that Otukamamoen Lake was in the traditional hunting and fishing territory of another First Nation, not Couchiching First Nation. Therefore construction of the cabin was not reasonably incidental to the defendant’s treaty rights. The court also held that the permit requirement was not unreasonable because it was aimed at ensuring public health and safety, protecting the environment and preventing land use conflicts.

In 2008, the Ontario Court of Justice had occasion to address the issue again in *O’Sullivan Lake Outfitters*.⁵¹ The Crown claimed that the Meshakes built the cabin for a commercial purpose and not for their personal use. The Crown also claimed that its laws and policies did not unjustifiably infringe on the treaty right. This was an appeal of a decision of a Justice of the Peace to enter a stay of charged against members of the Aroland First Nation who had begun construction of a cabin on a lake near Thunder Bay in 2003. The defendants were charged under a draft policy for unlawfully constructing a building on public land without a work permit and unlawfully continuing activity while a stop work order was issued, all contrary to the *Ontario Public Lands Act*.⁵² The court held that the cabin was part of the rights promised under Treaty 9 and that the permit requirement infringed those right rights. At the time of the construction activity the Ministry of Natural Resources had not consulted with the Aroland First Nation with respect to the intent and application of the draft policy and procedure entitled Work Permits for Inci-

⁴⁸Treaty No. 6 in Woodward, *Jack’s Consolidated Native Law Statutes, Regulations and Treaties 2011*, (Thomas Reuters, Ontario, 2011) pg. 967

⁴⁹ Incorporation by reference is a means by which legislators adopt a rule or law simply by referring to it. Section 88 of the *Indian Act* refers to laws of general application and applies them to status Indians. In *Sundown*, the court held that treaties prevail over referentially incorporated laws if those laws infringe treaty rights.

⁵⁰ *R. v. Baker*[2005] ONJC 38 (CanLII)

⁵¹ *R. v. O’Sullivan Lake Outfitters Inc.* [2011] 2 C.N.L.R. 307

⁵² *Ontario Public Lands Act*, R.S.O. 1990, Ch. P.43

dental Buildings on Public Lands, which was treated as ‘in force’ by ministry staff. The court held that the work permit process had an adverse impact on people like Elsie Meshake who are illiterate, whose second language is English and who would have to travel some 70 kilometers to the Ministry office. The court found that the cabin built by the Meshakes had a communal aspect in terms of the contributions in materials and labour by others, that it was built for the personal use of the Meshakes and their extended family (which he calculated to be at least 30 people), that the cabin was needed to exercise their rights to hunt, fish and trap in the area, and he referred to the support of the community which was demonstrated by a resolution of the Nishnawbe-Aski supporting the construction of the cabin. The court upheld the finding of the Justice of the Peace that the cabin was for personal use and part of the treaty rights promised by Treaty 9.

How do treaty rights relate to aboriginal rights?

One easy way to understand the relationship between aboriginal rights and treaty rights is to think of them both in terms of the protection they provide. Both are separate legal mechanisms for protecting the collective practices, customs and traditions of aboriginal peoples. Both can be thought of as blankets of protection. A treaty right is the legal blanket that protects practices, customs and traditions that have been specifically articulated or defined in an agreement between a particular aboriginal people and the Crown. While the modern land claims agreements and self-government agreements are fairly comprehensive in the matters they protect, historic treaties typically were not so comprehensive. For example, as noted above, the Robinson Treaties deal with hunting and fishing but do not deal with harvesting of other resources such as trees. The general understanding is that if the historic treaty is silent with respect to a specific practice, custom or tradition, that practice may still be protected as an aboriginal right. For those aboriginal peoples who were not included in treaties, their rights still may have a blanket of protection as an aboriginal right.

Can Métis rights exist in the same area that is covered by a treaty with First Nations?

In a word, yes. One of the fundamental determinations of the Supreme Court of Canada in *Powley* concerned the relationship of the Métis of Sault Ste Marie to the Robinson Huron Treaty. The Court found that the Treaty did not extinguish the aboriginal rights of the Métis who lived within the area covered by the Treaty. There was no extinguishment of Métis rights because Métis were specifically

denied participation in the Treaty negotiations.⁵³ The result of this finding is that Métis can have existing aboriginal rights that co-exist with the Treaty rights of Indians.

The second treaty-related finding of the Court in *Powley* concerned the fact that while Steve and Roddy Powley asserted that they were ancestrally connected to the historic Sault Ste Marie Métis community. They were also ancestrally connected to individuals who were registered under the *Indian Act* and beneficiaries of the Robinson Huron Treaty. The result is that having an ancestral connection to a Treaty (in addition to an ancestral connection to the historic Métis community) does not disentitle a claim to Métis identity and the exercise of the aboriginal rights of the Métis.

Who can assert aboriginal and/or treaty rights?

The Supreme Court of Canada in *Behn v. Moulton Contracting*⁵⁴ held that individuals asserting a collective right require the authorization of the community.

2.2 Métis Harvesting Rights

The law in relation to aboriginal rights and s. 35 has been developed by the Supreme Court of Canada. To date, this body of law has largely been developed for one of the three aboriginal peoples of Canada – Indians. *Powley* was the first, and to date the only case before the Supreme Court that dealt with how to adapt this law for the Métis.

In *Powley*, the Supreme Court of Canada followed the general interpretive principles that apply to the claims of Indians, with a few necessary modifications to accommodate the unique history of the Métis.⁵⁵ The Court confirmed that s. 35 rights claimed by Métis, like other constitutional rights, are to be interpreted purposively. In other words, they are to be interpreted in light of the interests they are meant to protect.

The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communi-

⁵³ *Powley*, (SCC) *supra*, at para. 46.

⁵⁴ *Behn v. Moulton Contracting*, [2013] S.C.J. No. 26

⁵⁵ *Powley*, (SCC) *supra*, at para.14..

ties and that persist in the present day as integral elements of their Métis culture.⁵⁶

Are Métis rights dependent on the practices of their Indian ancestors?

No. The Crown argued in *Powley* that the aboriginal rights of the Métis are derivative of and dependent on the pre-contact practices of their Indian ancestors. The Métis to date have argued that they are a distinct aboriginal people and that the practices and culture of the Métis people are the source of Métis rights. The Supreme Court of Canada has now confirmed that Métis rights do not originate with their Indian ancestors.

We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The right claimed here was a practice of both the Ojibway and the Métis. However, as long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.⁵⁷

What about the 'contact' test – does it apply to Métis?

In *Van der Peet*, the Supreme Court of Canada held that for a practice, custom or tradition to be given the protection of s. 35, it had to be practiced prior to 'contact' with European peoples, but recognized that this test was not necessarily applicable to Métis claims.⁵⁸ This part of the *Powley* test is about whether the practice at issue (eg: hunting or fishing) was being exercised at the time of contact (for Indians) between Euro-Canadians and the specific aboriginal group who's rights are at issue. For Métis, the time is not contact but rather 'effective control,' which is when Euro-Canadians began to take over control of the area from the aboriginal people.

One important point with respect to the contact test or the 'effective control' test is that it applies not to the existence of the claimant community, but rather to the practice that is claimed. It is wrong to apply the time test to the existence of the community. As the Supreme Court of Canada noted in *Powley*,

the "continuity" requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself, as indicated below.⁵⁹

⁵⁶ *Powley*, (SCC) *supra*, at para. 13 and 18.

⁵⁷ *Powley*, (SCC) *supra*, at para. 38.

⁵⁸ *Van der Peet*, (SCC), *supra*, at para. 67

⁵⁹ *Powley*, (SCC) *supra*, para. 27.

Having said that the ‘effective control’ test does not apply to the community, it is clear that there must be some evidence that the Métis were exercising the practice on the land in that general area at the time.

The Supreme Court has never used a strict application of the contact test and in fact in *Adams*⁶⁰ and *Côté*⁶¹ it has applied the test purposively and with flexibility in two respects – with respect to the date of contact and with respect to the actual people contacted. The Mohawks were the claimant group in *Adams*. However, the facts showed that first contact in 1535 by Cartier was with a different people. The Mohawks struggled for control of the area over the next 50 years. For the purposes of the contact test, this Court instead used 1603, with the arrival of Champlain.⁶² In *Mitchell* the trial judge used 1609, even though the Mohawks, whose rights were before the court, didn’t settle in the area until over 140 years later.⁶³

At the Supreme Court of Canada the Powleys argued that the relevant time to determine the rights of a Métis community should reflect the purpose for including Métis within s. 35 – to recognize their existence, as a people in possession, when the Crown’s obligations arose pursuant to the Royal Proclamation. The Supreme Court in *Powley* did modify the contact test to a “post contact but pre-control” test, but did not address the issue of the Crown’s obligations under the Royal Proclamation. The Court said that the test had to be modified to reflect the constitutionally significant feature of the Métis as peoples who emerged between first contact and the effective imposition of European control.

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 Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis 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 Euro-Canadians effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of Euro-Canadian laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.⁶⁴

⁶⁰ *R. v. Adams*, [1996] 3 S.C.R. 101.

⁶¹ *R. v. Côté*, [1996] 3 S.C.R. 139.

⁶² *Adams*, *supra*, paras. 37-46.

⁶³ *Mitchell v. Canada (Minister of National Revenue (M.N.R.))* [2001] S.C.J. No. 33, para. 98.

⁶⁴ *Powley* (SCC), *supra*, at para. 37.

The date of effective control (after the Métis community's practices arose but before the community came under the influence of European laws and customs) will be different across the country. In *Powley* the Court looked to see what the evidence showed with respect to the facts of history.

The historical record indicates that the Sault Ste. Marie Métis 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 “effective control [of the Upper Great Lakes area] passed from the aboriginal peoples of the area (Ojibway and Métis) to European control” in the period between 1815 and 1850.⁶⁵

In *Vautour*, the New Brunswick provincial court judge looked for evidence that the French had established administrative, military and political control in Acadia.⁶⁶ The Newfoundland Court of Appeal in *Labrador Métis Association v. Minister of Fisheries and Oceans*⁶⁷ upheld the use of two distinct time tests for Métis (effective control) and First Nations (contact).

What are the dates of effective control across the country?

To date we have nine (9) court-determined dates of effective control.

1. New Brunswick (*Vautour*) – 1670
2. Ontario, Sault Ste Marie (*Powley*) - 1815-1850
3. Saskatchewan, northwest (*Laviolette*) - 1912
4. Saskatchewan, Qu'Appelle Valley (*Belhumeur*) - 1882 to the early 1900s
5. Manitoba, inside the Postage Stamp Province (*Goodon*) – 1870
6. Manitoba, south-west outside the Postage Stamp Province (*Goodon*) – 1880
7. Manitoba, San Clara and environs, west-central (*Langan*) – 1885
8. Alberta, southern (*Hirse Korn*) – 1874-1878
9. British Columbia, Okanagan area (*Willison*) - 1858-1864

Where can Métis exercise their harvesting rights?

Generally, Métis can exercise the harvesting rights of their community within that community's traditional harvesting territory. This begs two questions. First, what is the definition of a Métis community? (see discussion in Chapter One) Second,

⁶⁵ *Powley* (SCC), *supra*, at para. 40.

⁶⁶ *Canada v. Vautour*, 2010 NBPC 39 at para. 34

⁶⁷ *Labrador Métis Association v. Minister of Fisheries and Oceans*, 1997 CanLII 4864 (F.C.)

what is the definition of traditional harvesting territory?

Some Métis believe they should be able to exercise their harvesting rights in the traditional territory of their Indian ancestors. This theory contradicts the assertion that the Métis are an independent aboriginal people with their own rights and culture. This issue was before the Supreme Court of Canada in *Powley*, which held that Métis rights are determined by the practices of the historic Métis community. They are not to be determined by the practices of Indian ancestors. The Supreme Court of Canada held that “the recognition of Métis rights in s. 35 is not reducible to the Métis’ Indian ancestry.”⁶⁸ This theory would apply to any determination of the extent of the Métis traditional hunting grounds and would seem to indicate that Métis could not claim a right to harvest in their Indian ancestors’ hunting grounds. The Court said that the right to hunt was “within the traditional hunting grounds” of the Métis community.

What is the extent of the traditional hunting grounds of the Métis community?

This is a question that has not been explored by the courts to date. Instead, the courts have looked to specific sites. In order to prove in court whether a Métis person can harvest on a specific site, the evidence must show that historically the Métis community harvested in the area of the specific site.

Determining the geographic extent of the traditional harvesting territory of a Métis community is usually done by a process known as land-use mapping. This process involves mapping out the particular harvesting, cultural, transportation and occupancy sites for several individual members of an aboriginal community. The individual maps are stacked on top of each other and the outer limits of the general use and occupation area can usually be identified. This establishes the area that an aboriginal people uses and relies on for its sustenance. This area then is known as the traditional territory. While land-use mapping is being undertaken in Manitoba, Ontario and Saskatchewan, none of it has been published and these studies are only now beginning to be introduced as evidence in court (*Lavolette*,⁶⁹ *Belhumeur*,⁷⁰ *Goodon*⁷¹).

It is clear that some things cannot be used to identify a traditional territory. Provincial boundaries that were determined after effective control and arbitrary

⁶⁸ *Powley* (SCC), *supra*, at para. 36

⁶⁹ *R. v. Lavolette* 2005 SK.P.C. 70

⁷⁰ *R. v. Belhumeur* 2007 SKPC 114

⁷¹ *R. v. Goodon* [2009] 2 CNLR 278

administrative schemes set out by provincial or federal governments cannot determine the extent of the traditional territory of an aboriginal people. For example, in *Lavolette*, the Saskatchewan Provincial Government argued that only Métis who lived within its Northern Administration District could exercise harvesting rights. Métis who lived even a few miles south of the District, the Saskatchewan government asserted, had no harvesting rights.⁷² Another rejected proposal was that a Métis traditional territory could be identified as the old Hudson's Bay Company districts. Any such ideas should be discouraged. It cannot be correct to define an aboriginal people's traditional territory by reference to arbitrary districts defined by a British commercial enterprise or by an administrative district defined by a provincial government in the 20th Century for its own purposes. The better view is to define traditional territories by reference to the land use and occupancy of the aboriginal people at issue.

In *Hirsehorn* the issue of the traditional territory was before the court because the defendant was a descendant of the historic Métis buffalo hunters.⁷³ The evidence at trial was that the Métis followed the buffalo wherever they went. The buffalo were on the Plains, which is a very large geographic area. It spans three provinces and the international border. Despite the fact that the Plains is not a small area it can be defined.

2.2.1 The *Powley* test to determine s. 35 harvesting rights.

The Supreme Court said that the appropriate way to define Métis rights in s. 35 is to modify the test used to define the aboriginal rights of Indians (the *Van der Peet* test). This Métis test is now called the *Powley* test. The test is set out in ten parts:

(1) Characterization of the right

This used to be a simple part of the *Powley* test. It used to be a simple determination of the ultimate use of the harvest. Is it for food, exchange or commercial purposes? This part is now much more detailed and includes the following:

- the nature of the action which the applicant is claiming was done pursuant to an aboriginal right – this is the determination of whether the harvested fish or animal is to be used for food, social, ceremonial, exchange or commercial purposes

⁷² *Lavolette*, *supra*, para. 13

⁷³ *Hirsehorn*, [2010] A.J. No. 1389; rev'd in part [2011] A.J. No. 1217

- the nature of the governmental regulation, statute or action being impugned – this is an examination of the regulatory scheme and whether it recognizes Métis harvesting rights. It may now include a discussion of the fact that following the release of *Powley* the federal Cabinet adopted new Federal Interim Guidelines to accommodate Métis harvesting. Pursuant to the Federal Interim Guidelines, the enforcement arm of the Federal Government will not apply federal harvesting regulations to Métis who meet certain identification criteria. The guidelines are intended to facilitate Métis harvesting by assisting in the identification of Métis harvesters. The guidelines recognize certain Métis membership cards that have objectively verifiable genealogy requirements. As a result of the Federal Interim Guidelines, the Métis are subject to charges depending on who happens to be the enforcement officer and where and what they hunt. For example, if Métis were hunting on lands subject to federal jurisdiction such as the Cold Lake Air Weapons Range or in a National Park they would not likely be charged. If the Métis hunt a migratory bird and were confronted by a federal officer such as the RCMP or a federal game warden, they would likely not be charged. It is suggested that it cannot be correct that Métis constitutionally protected rights are vulnerable to charges if the enforcement officer is a provincial officer but their hunting is protected from charges if the enforcement officer is an RCMP officer. The Supreme Court of Canada in *Adams* confirmed that legislation that does not provide guidance or directions with respect to the recognition and protection of aboriginal rights is per se unconstitutional with respect to its application to aboriginal peoples.⁷⁴
- the practice, custom or tradition being relied upon to establish the right – this part of the test requires that evidence show that the Métis have a modern day practice that is similar to a historic practice, custom or tradition.
- sensitivity to the Métis perspective on the meaning of the rights at stake – evidence should be added to show how Métis historically understood their rights. For example if the Métis historically saw their rights as something that they practiced over a large territory, that should be considered. In fact, the Supreme Court of Canada has said that it is ‘crucial’ to consider the aboriginal perspective.⁷⁵

⁷⁴ *R. v. Adams*, [1996] 3 S.C.R. 101, para. 54

⁷⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 para. 69

- the geographic or ‘site-specific’ area at issue – this is often interpreted as limiting the harvesting to a specific tract of land. However, this is not always the case. This geographic requirement may not be relevant.⁷⁶ Also the size of the geographic requirement will vary depending on the practices of the Métis. Courts are to look at the “actual pattern of exercise of such an activity.”⁷⁷ It is important to separate the geographic requirement for the practice from the principle that an identifiable historic and contemporary Métis community must be found.
- the context – the context for Métis harvesting is usually considered to require evidence about their mobility, which has been described by some as their nomadic lifestyle.

To sum it up, the characterization of the right must take into account the perspective of the Métis people claiming the right; reflect the actual pattern of exercise of Métis hunting prior to effective control; characterize the practice in accordance with the highly mobile way of life of the Métis of the Northwest; give legal force to the Métis people’s traditional relationship to the land they lived on, used and occupied; and reconcile the hunting rights of the Métis of the Northwest in a way that provides the basis for a just and lasting settlement of their aboriginal claims.

Finally, the characterization of the right is not limited to a specific species. The Court in *Powley* said that the Métis right to hunt is not limited to moose just because that is what the Powleys were hunting.⁷⁸ Métis do not have to separately prove a right to hunt every species of wildlife or fish they depend on. The right to hunt is a general right to hunt for food in the traditional hunting grounds of the Métis community.

the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community’s distinctive existence and relationship to the land.⁷⁹

(2) Verification of membership in the contemporary Métis community

According to the Supreme Court of Canada in *Powley*, there must be an “objec-

⁷⁶ *R. v. Sappier; R. v. Gray*, [2006] S.C.J. No. 54, paras. 50-53

⁷⁷ *R. v. Côté*, [1996] S.C.J. No. 93, para. 39

⁷⁸ *Powley* (SCC), *supra*, at para. 20.

⁷⁹ *Powley* (SCC), *supra*, at para. 37.

tively verifiable process” to identify members of the community.⁸⁰ This means a process that is based on reasonable principles and historical fact that can be documented. Difficulty in determining membership in the Métis community does not mean that Métis people do not have rights.

The Court did not set out a comprehensive definition of Métis for all purposes. It did, however, set out the basic means to identify Métis rights-holders. The Court identified three broad factors: self-identification, ancestral connection to the historic Métis community and community acceptance.

Self-identification – The individual must self-identify as a member of a Métis community. It is not enough to self-identify as Métis. The individual must also have an ongoing connection to an historic Métis community. This self-identification should not be “of recent vintage.”⁸¹

Ancestral Connection – There is no minimum ‘blood quantum’ requirement, but Métis rights-holders must have some proof of ancestral connection to the historic Métis community whose collective rights they are exercising. The Court said the “ancestral connection” is by “birth, adoption or other means.” ‘Other means’ of connection to the historic Métis community did not arise with the Powleys and will have to be determined in another case.⁸²

In *Hirsehorn* the trial judge held that ancestral connection to the Métis Nation of the Northwest was insufficient and that the defendant had to have an ancestral connection to the community in the vicinity where the hunting took place.⁸³

Community Acceptance – There must be proof of acceptance by the modern community. Membership in a Métis political organization may be relevant but the membership requirements of the organization and its role in the Métis community must also be put into evidence. The evidence must be ‘objectively verifiable.’ That means that there must be documented proof and a fair process for

In our opinion, *Hirsehorn* is wrongly decided on this issue. In Indian cases the rights-bearing entity is the larger nation, for example – the Mohawks, not the Akwesasne band. Therefore, ancestral connection to the larger rights bearing entity should suffice.
-MLIC Editor’s Note

⁸⁰ Powley (SCC), *supra*, at para. 29.

⁸¹ Powley (SCC), *supra* para. 31

⁸² Powley (SCC), *supra* para. 32

⁸³ R. v. *Hirsehorn*, [2010] A.J. No. 1389, at para. 149

community acceptance. In *Acker*, the New Brunswick court applied this test to determine whether a non-status Indian was a member of the local Mi'kmaq community and had this to say:

I must conclude therefore that I find Mr. Acker's self-identification as a Mi'kmaq to be hollow and unconvincing. He has presented no real evidence that he considers himself to be Mi'kmaq beyond his assertion in a courtroom setting and his application to the New Brunswick Aboriginal Peoples' Council. It is a bold assertion without factual support. There is absolutely no evidence that subsequent to his discovery of his aboriginal heritage he adopted an aboriginal lifestyle or way of life. There was in fact no evidence that he, his father or brother lived an aboriginal lifestyle or associated with aboriginals. There is no evidence that the defendant himself said anything to the people in his immediate community or indeed to the members of his family in acknowledgement of that heritage. There is no evidence that the defendant made any effort to understand or appreciate an Indian way of life. There is no evidence that the defendant has associated with or been recognized by any native community in the province or elsewhere.

In effect, the defendant has presented no evidence of an "ongoing participation in a shared culture" or in any of the "customs and traditions" that make up any particular community's identity, as distinguished from other groups. That is how *Powley* defines membership criterion. Even on the basis of his membership in the New Brunswick Aboriginal Peoples' Council, which in and of itself would not be sufficient, the defendant has woefully little evidence to present of his participation in any activity involving a shared culture, customs or traditions with others in his community. There is in fact no evidence of that whatsoever, excepting the few meetings he attended in Miramichi on the topic of fishing.⁸⁴

In *Powley*, the Supreme Court of Canada said that the core of community acceptance is about past and ongoing participation in a shared culture, and in the customs and traditions that reveal a Métis community's identity. Other evidence might include participation in community activities and testimony from other community members about a person's connection to the community and its culture. There must be proof of a "solid bond of past and present mutual identification" between the person and the other members of the Métis community.⁸⁵

What can be understood from this community acceptance requirement is that in order to claim s. 35 rights it is not enough to prove a genealogical connection to a historic Métis community and then join a Métis organization.

(3) Identification of the historic rights bearing community

An historic Métis community was a group of Métis with a distinctive collective

⁸⁴ *R. v. Acker* [2004] NBJ No 525 at paras. 65, 72 and 73; aff'd [2006] NBJ No. 608

⁸⁵ *Powley* (SCC), *supra*, at para. 33.

identity, who lived together in the same geographic area and shared a common way of life. The historic Métis community must be shown to have existed as an identifiable Métis community prior to the time when Euro-Canadians effectively established political and legal control in a particular area. This does not equate to a requirement that there be a settlement established in that area. In *Willison*, the court held that, rather than a requirement that there be a Métis settlement, there is a requirement for a presence on the land.⁸⁶

In *Hirsehorn*, the Queen’s Bench judge held that there is no requirement that the historic rights-bearing community’s particular practice, custom or tradition need have occurred around, or close to, where their settlement or village was situated. At paragraph 134, the Appeal Judge stated:

In my view, if the evidence presented at trial showed that a Métis group who did not live in the environs, hunted in the area of Cypress Hills and that this practice was integral to the distinctive culture of that Métis group claiming the right, there would be no reason not to recognize the Métis group as a historic rights-bearing community. Section 35 should not be interpreted as excluding protection for aboriginal peoples who adopted a mobile or nomadic way of life.⁸⁷

(4) Identification of the contemporary rights bearing community

Métis contemporary community identification requires two things. First, the contemporary community must self-identify as Métis. Second, there must be proof that the contemporary Métis community is a continuation of the historic Métis community.

(5) Identification of the relevant time

In order to identify whether a practice was ‘integral’ to the historic aboriginal community, the Court looks for a relevant time. Ideally, this is a time when the practice can be identified and before it is forever changed by European influence. For Indians, the Court looks to a ‘pre-contact’ time. The Court modified this test for Métis in recognition of the fact that Métis arose as an aboriginal people after contact with Europeans. The Court called the appropriate time test for Métis the “post contact but pre-control” test and said that the focus should be on the period after a particular Métis community arose and before it came under the effective control and influence of European laws and customs.⁸⁸ The time referred to is not

⁸⁶ *R. v. Willison*, [2006] B.C.J. No. 150 (QB), para. 24.

⁸⁷ *Hirsehorn* (QB), *supra*, para. 134.

⁸⁸ *R. v. Hirsehorn*, 2011 ABQB 682 (CanLII) para 144

a pinpoint date. It is usually a range of years with the court selecting the earliest year that can be considered ‘effective control.’ The control is not legal. This can be seen in the many cases where there was law in effect in the territory. The control refers to when the aboriginal people can no longer control their territory and live the lives they were accustomed to living. Thus, the search is for actions such as land surveys, development and settlement that significantly change land use.

(6) Was the practice integral to the claimant’s distinctive culture

The Court asks whether the practice is an important aspect of Métis life and a defining feature of their special relationship to the land. In *Powley*, the Court found that, for the historic Sault Ste Marie Métis community, hunting for food was an important and defining feature of their special relationship with the land.

In *R. v. Sappier; R. v. Gray* the Supreme Court of Canada returned to this question because statements in *Van der Peet* and *Mitchell* “may have unintentionally resulted in a heightened threshold for establishing an aboriginal right.”⁸⁹ Those cases held that the pre-contact practice must be a ‘defining feature’ of the aboriginal society, such that the culture would be ‘fundamentally altered’ without it. The court in *Sappier/Gray* noted that these statements have created artificial barriers to the recognition and affirmation of aboriginal rights. For this reason, the court in *Sappier/Gray* discarded the notion that the pre-contact practice upon which the right is based must go to the core of the society’s identity, i.e. its single most important defining character. The court affirmed that this has never been the test for establishing an aboriginal right. A claimant need only show that the practice was integral to the aboriginal society’s pre-contact distinctive culture.

The Court of Appeal in *Hirsehorn* concluded that it was correct to require Mr. Hirsekorn to establish that the practice of hunting on the prairies was of central significance to the culture of the plains Métis but that there was a danger in imposing an additional requirement that he must prove that hunting on a particular tract of land was of central significance. The court noted that there was a danger of creating an artificial barrier to the recognition of the rights of nomadic people whose ancestral lands are vast if they always have to prove that hunting on a particular tract of land was of central significance to their culture. The Court of Appeal took what it called a territorial approach to the issue. Instead the court asked whether the historic Métis community included the disputed area within its ancestral lands

⁸⁹ *R. v. Sappier; R. v. Gray*, 2006 SCC 54, at para. 40

or traditional hunting territory? In other words, did they frequent the area for the purpose of carrying out a practice that was integral to their traditional way of life? That threshold, in the Court of Appeal's view, better captured the territorial nature of the practices and traditions of a nomadic people. The court concluded that the Cypress Hills did not meet this threshold and were not part of the plains Métis traditional territory.

(7) Continuity between the historic practice and the contemporary right

There must be some evidence to support the claim that the contemporary practice is in continuity with the historic practice. Aboriginal practices can evolve and develop over time. It is not necessary to have evidence for every year.

(8) Extinguishment

The doctrine of extinguishment applies equally to Métis and First Nation claims. Extinguishment means that the Crown has eliminated the aboriginal right. Before 1982, this could be done by constitutional enactments (eg: the *Manitoba Act*, 1870), federal legislation or by agreement with the aboriginal people. In the case of the Sault Ste Marie Métis community, there was no evidence of extinguishment by any of these means. The Robinson Huron Treaty with the First Nation did not extinguish the aboriginal rights of the Métis because they were, as a collective, explicitly excluded from the treaty. In *Goodon*, the Crown argued that the *Manitoba Act*, 1870 extinguished Métis harvesting rights in Turtle Mountain (southwestern Manitoba). The court did not agree and held that the *Manitoba Act*, 1870 did not apply outside the postage stamp province and therefore did not extinguish rights outside that area.⁹⁰

(9) Infringement

No rights are absolute and this is as true for Métis rights as for any other rights. This means that Métis rights can be limited (infringed) for various reasons. If the infringement is found to have happened, then the government may be able to justify (excuse) its action. The Supreme Court of Canada has repeatedly said that the total failure to recognize any Métis right to hunt for food or any special access rights to natural resources was an infringement of the Métis aboriginal right.⁹¹

(10) Justification

⁹⁰ *R. v. Goodon*, [2009] M.J. No. 3, paras 75-78.

⁹¹ *Powley (SCC)*, *supra* at para. 48.

Conservation, health and safety are all reasons that government can use to justify infringing an aboriginal right. But they have to prove that there is a real threat. In *Powley*, there was no evidence that the moose population was under threat. Even if it was, the Court said that the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *Sparrow*.⁹² Any blanket denial of any Métis right to hunt for food will not be justifiable.

Directions from the Supreme Court in *Powley*

The Supreme Court of Canada gave several specific directions with respect to Métis. The first is that the identification of Métis rights holders is an ‘urgent priority.’ Both the provincial and federal governments said that they could not recognize Métis rights because they were uncertain as to who the Métis were. The Court did not accept this excuse and said that it is not an “insurmountable task” to identify Métis rights-holders and that the difficulties are not to be exaggerated in order to deny Métis constitutional rights.⁹³ The Court also said that regulatory regimes that do not recognize and affirm Métis rights and afford them a priority allocation equal to First Nations are unjustifiable infringements of Métis rights.⁹⁴ The Court said that membership requirements in Métis organizations must become more standardized. While the Court did not order negotiations, it gave clear directions that it expects a combination of negotiation and judicial settlement to more clearly define the contours of the Métis right to hunt.

2.3 Commercial Harvesting Rights

On the issue of commercial exploitation of game and fish, the courts have been very clear that an aboriginal right to hunt and fish for food does not necessarily include commercial activity. In fact, in *Horseman*, the Supreme Court of Canada found that while Treaty 8 (1899) did protect commercial activity, the later imposition of the Natural Resources Transfer Agreement in 1930 limited harvesting to subsistence hunting, fishing and trapping.⁹⁵

The Supreme Court of Canada decisions in *Van der Peet* and *Gladstone*, confirm that aboriginal commercial harvesting rights can be recognized and affirmed within

⁹² *Sparrow* (SCC), *supra* at para. 48.

⁹³ *Powley* (SCC), *supra*, at para 29

⁹⁴ *Powley* (SCC), *supra*, at para 48

⁹⁵ *R. v. Horseman* [1990] S.C.J. No. 39, para 66

the meaning of s. 35.⁹⁶ The Supreme Court decided in *Marshall*⁹⁷ that treaties can be read to include a commercial harvesting right. The Supreme Court has also considered the commercial aspects of trading goods across the US-Canada border in *Mitchell*.⁹⁸ In that case the court declined to find that the Mohawks have an aboriginal right to trade across the border.

In *Blais (Ont)*, the Ontario Court of Justice also declined to find that Mr. Blais, who claimed a commercial right to log but without the authorization or approval of the Métis community, had a right to commercially harvest logs.⁹⁹

2.4 Aboriginal Communal Fishing Licenses

On May 12, 1994, the Supreme Court of Canada, in the case of *Howard*¹⁰⁰ held that the seven Williams Treaty First Nations had surrendered their traditional right to fish for food when they signed the Williams Treaty in 1923. This decision meant that the province of Ontario resumed normal enforcement activities consistent with Ontario and federal law regarding hunting and fishing carried out off the reserve by members of these seven First Nations communities.

In an attempt to provide a legal framework which would permit the seven Williams Treaty communities to exercise the same aboriginal right to fish for food enjoyed by the other First Nations in Ontario, and to provide a conservation framework for the community harvest, Ontario proposed to enter into regulations with the Federal Department of Fisheries and Oceans respecting fishing carried on in accordance with the aboriginal Communal Fishing Licences.¹⁰¹

These communal licences permitted the Federal Minister of Fisheries and Oceans, or any provincial minister designated in the regulations, to issue licences to the Williams treaty communities. As part of the communal licences, Community Harvest and Conservation Agreements would be entered into between the Ministry of Natural Resources and the First Nations. These Community Harvest and Conservation Agreements would facilitate hunting and fishing by the Williams Treaty First Nations. These licenses were later terminated by the Ontario provincial government.

⁹⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Gladstone* [1996] 2 S.C.R. 723.

⁹⁷ *R. v. Marshall* [1999] S.C.J. No. 55; [1999 R. v. Marshall] [1999] S.C.J. No. 55; [1999] S.C.J. No. 66 (S.C.C.)] S.C.J. No. 66 (S.C.C.)

⁹⁸ *Mitchell v. Canada (Minister of National Revenue-M.N.R.)* [2001] S.C.J. No. 33.

⁹⁹ *R. v. Blais* (unreported, Ontario Court of Justice, May 2, 2013) "Blais (Ont)"

¹⁰⁰ *R. v. Howard*, [1994] S.C.J. No. 43

¹⁰¹ Aboriginal Communal Fishing Licences Regulations, P.C. 1993-1318 (SOR/93-332, p. 2899, June 30, 1993)

Aboriginal communal fishing licences are available pursuant to federal regulations under the *Fisheries Act*.¹⁰² Section 4 states that “The Minister may issue a communal licence to an aboriginal organization to carry on fishing and related activities.” In addition there is a Department of Fisheries and Oceans Interim National Policy, with respect to the management of aboriginal fishing, which is as follows:

5. For the purposes of this policy “First Nation” includes any organization which represents a group of aboriginal people who have continuously used the resource in the area in question from pre-European contact to the coming into effect of the *Constitution Act, 1982*. Such organizations include groups representing Indians registered or entitled to be registered under the *Indian Act*, Inuit, non-status Indians and Métis. Department of Fisheries and Oceans may require that the First Nation produce evidence of historical use of the resource in the area.¹⁰³

2.5 Provincial Harvesting Agreements¹⁰⁴

2.5.1 Manitoba – Memorandum of Understanding

In 2012, the Manitoba Métis Federation entered into an agreement with the Manitoba provincial government. The Harvesting Agreement recognizes that Métis have harvesting rights in a very large specified area, which amounts to approximately 2/3rds of the province. Individuals who hold a valid MMF Harvesters Card will be recognized as Métis rights-holders. Métis harvesting rights will be exercised consistently with the MMF’s Métis Laws of the Hunt.

2.5.2 Ontario – July 7th 2004 Points of Agreement

In July of 2004, the Métis Nation of Ontario and the Ministry of Natural Resources entered into an interim agreement. The Ministry agreed to recognize and respect MNO harvester cards and apply its Interim Enforcement Policy to those MNO citizens who held valid cards. MNO agreed to issue no more than 1250 cards annually during the term of the agreement. The agreement also set out plans for joint research in the southern and eastern parts of the province, a commitment to work towards a long-term agreement and an independent evaluation of the MNO Registry. The July 7th 2004 Agreement was subsequently interpreted by the Ministry to apply only to an area of the province north and west of a Sudbury-Temiskaming line. The MNO interpreted the agreement as applying to all validly issued Harvest Card holders and that there was no geographic limitation other than the traditional harvesting territory on the harvester’s card. The matter was litigated in *Laurin*

¹⁰² *Fisheries Act*, R.S.C. 1985, c. F-14

¹⁰³ *Principles and Procedural Guidelines for the Management of the Aboriginal Peoples Food Fishery*, May 1, 1991 and another dated February 21, 1993 (repeated again on October 3, 1994), s. 5.

¹⁰⁴ Most agreements discussed in the following section are unpublished.

where the court held that the Province had violated the July 7th 2004 Agreement and was honour bound to implement it. The Crown subsequently withdrew the charges against MNO harvest card holders. Since that time the Province has implemented the agreement.

2.5.3 Saskatchewan – Memorandum of Understanding

In 1995 the Métis Nation-Saskatchewan entered into an MOU with Saskatchewan Environmental Resource Management. The purpose of the MOU was to establish a process that would result in a relationship with respect to Métis harvesting. In 2010 another MOU was entered into between these parties.

2.5.4 Alberta – Interim Métis Harvesting Agreement

In September of 2004, the Métis Nation of Alberta entered into an Interim Métis Harvesting Agreement with the Province of Alberta. The IMHA gave Métis who were members of the Métis Nation of Alberta, or who were eligible for membership, the right to harvest for food at all times of the year without a licence on all unoccupied Crown lands throughout the Province. Alberta subsequently terminated the IMHA on July 1st, 2007. The negotiations broke down and Alberta has since implemented a unilateral harvesting policy that recognizes 17 Métis communities in parts of Alberta north of Edmonton. Some individual members those communities are permitted, pursuant to this policy to harvest within a 160 km radius surrounding the community. No Métis communities were recognized south of Edmonton.

2.6 Harvesting Policies and Guidelines

Federal Guidelines for Métis Harvesting

On January 10th, 2005, the Federal Cabinet adopted its Federal Interim Guidelines for Métis Harvesting. The provincial governments are primarily responsible for the management and regulation of most natural resources within their boundaries. However, the Government of Canada is responsible for the management and regulation of those natural resources under its control. Areas of federal jurisdiction include federal lands, National Parks and other federally protected areas, military bases and ranges, and migratory birds and coastal fish species.

The federal government has many acts, regulations and policies that apply at a national level to its resources, which are enforced by federal departments and provin-

cial governments. The federal departments include Fisheries and Oceans, Environment Canada, Canadian Wildlife Service, Parks Canada, National Defence, Natural Resources Canada and the RCMP.

Many of these federal departments already had policies to accommodate First Nation harvesting. The new guidelines by the Federal Government now include Métis within their many policies that previously recognized First Nation harvesting on federal lands or harvesting of federal resources. For this purpose, the enforcement arm of the Federal Government will not apply federal harvesting rules and regulations to Métis who meet the identification criteria. One example of this new guideline will be that the Canadian Wildlife Service and the RCMP will not charge members of the Métis Nation (because they have registries that meet the identification criteria) if they are harvesting migratory birds.

While it may be the intention of the Federal Guidelines to ensure a consistent national application of harvesting policies, in fact application is not consistent because provincial enforcement officers are also “guided” by provincial policies and may choose to implement those policies instead of the federal guidelines.

-MLIC Editor’s Note

The guidelines are intended to facilitate Métis harvesting by assisting in the identification of Métis harvesters. The guidelines recognize certain Métis membership cards where the organization has genealogy requirements with evidence that is objectively verifiable. The guidelines note that there is an obligation on the federal government to take steps to accommodate the existence of Métis rights to harvest. The purpose of the guidelines is to ensure that there is a consistent application across the country when accommodating Métis access to federal lands and resources for the purpose of harvesting, where such harvesting is permitted.

Domestic Timber Harvest for Aboriginal/Treaty Rights Holders – Manitoba 2010

The policy states its purpose as being to manage provincial timber resources while facilitating aboriginal and treaty rights holders access to timber for domestic use at no charge. The policy is intended to be consistent with *Goodon* and research conducted by Manitoba Justice, which recognized an historic Métis regional community in southern Manitoba and a contemporary Métis community in southwest Manitoba that is a continuation of that historic community. The policy applies to Métis who hold a Harvester Identification Card and are resident in a recognized Métis community zone. Approved domestic uses of timber include fuel wood,

docks, fences, furniture, homes and shelters required for expeditionary hunting/fishing/gathering. Such timber cannot be sold, traded or used for commercial purposes. The Crown will issue an “Own-use Crown Timber Permit” free of charge. In order to obtain such a permit an individual must provide a valid Métis Harvester Identification card issued by the Manitoba Métis Federation or otherwise be formally recognized by the Province as having a constitutional right to harvest in a particular area.

2.7 Migratory Birds

Does the federal or provincial government have jurisdiction to enforce provincial conservation laws in light of the new federal policy to recognize Métis harvesters who are harvesting for food on federal lands and within federal jurisdiction? Who enforces bird laws? Who has jurisdiction – the federal government or the province? The short answer to these questions is that in Canada jurisdiction over birds is divided between the federal and provincial governments.

Migratory Birds Convention Act, Article II

4. ... respecting aboriginal and indigenous knowledge and institutions:

In the case of Canada, subject to existing aboriginal and treaty rights of the aboriginal peoples of Canada under section 35 of the Constitution Act, 1982, and the regulatory and conservation regimes defined in the relevant treaties, land claims agreements, self-government agreements, and co-management agreements with aboriginal peoples of Canada:

(i) Migratory birds and their eggs may be harvested throughout the year by aboriginal peoples of Canada having aboriginal or treaty rights...¹⁰⁵

The *Migratory Birds Convention Act* was updated in June 1994. The 1994 Act strengthened the enforcement provisions and significantly increased the penalties. The original Act was passed in 1917 to meet the terms of an agreement signed with the United States to protect birds, such as waterfowl and shorebirds which, at that time, were being subjected to uncontrolled hunting. Also included were ‘good’ birds such as most songbirds, considered beneficial to humans because they eat insects and weed seeds. However, birds deemed at that time to be ‘bad’ birds, vermin or harmful to humans such as hawks, owls, crows and cormorants were left under provincial jurisdiction.

¹⁰⁵ *Migratory Birds Convention Act, S.C. 1994, c. 22*

The name ‘migratory’ is misleading because some migratory birds (the Merlin) are not protected by the Act, while some non-migratory species (the Downy Woodpecker) are. The Act does not protect introduced species such as the House Sparrow. Except under the authority of a permit, the *Migratory Birds Convention Act* prohibits the hunting, collecting, trapping, banding of birds, collecting eggs and nests, the possession of birds found dead and the keeping of captive birds.

Enforcement of the *Migratory Birds Convention Act* is handled jointly by the Canadian Wildlife Service, the provincial Ministries of Natural Resources, the Ontario Provincial Police and the RCMP. All birds in provincial parks are fully protected by the Migratory Birds Convention Act and the provincial acts. Birds like crows, cowbirds and House Sparrows that are not protected elsewhere, are protected in provincial parks and Crown game preserves. Enforcement in provincial parks is the responsibility of provincial Park Wardens and Conservation Officers. Provincial conservation officers also enforce the *Migratory Birds Convention Act*.

Can provincial officials continue to charge Métis who harvest migratory birds on provincial lands when federal officials will not?

The short answer is yes. The Federal Interim Métis Harvesting Guidelines are not law or regulation and do not bind the provinces. It is still open to the provincial governments to enforce the *Migratory Birds Convention Act* against Métis who harvest on provincial lands.

Cooperative Migratory Birds Management Agreements

The Canadian Wildlife Service, a federal agency with responsibility for migratory birds entered into agreements with Métis provincial governing bodies. The purpose of the agreements is to gather information for management purposes not for enforcement purposes. These agreements collect data about harvesting only.



Chapter Three: Métis Title and Land Claims

3.1 Aboriginal Title

The Supreme Court of Canada has looked at the issue of aboriginal title to land in four cases – *Calder*,¹ *Delgamuukw*,² *Marshall (#3)* and *Bernard*³ and *Tsilhqot'in Nation*.⁴ *Calder* recognized that aboriginal title was an existing legal right, but there was no finding that the Nisga'a actually possessed aboriginal title. *Delgamuukw* established a test for determining whether aboriginal title exists, but again in that case the court failed to find that the claimants actually possessed aboriginal title. In *Marshall #3* and *Bernard* the court failed to find that the claimants actually possessed aboriginal title. In the most recent case, *Tsilhqot'in Nation*, the trial judge also declined to make a finding as to whether or not the Tsilhqot'in had aboriginal title, largely because of procedural failures in the trial. He did however, provide an 'opinion' that he would have found aboriginal title had these procedural difficulties not precluded such a finding.⁵ The BC Court of Appeal however, held that because the claim had been advanced on a territorial basis there could be no finding of aboriginal title. That was because, according to the Court of Appeal, aboriginal title was site specific and could not be advanced on a territorial basis.⁶

To date there is no land in Canada that has court declared aboriginal title. As noted by the Inter-American Commission on Human Rights,

The Commission notes that the judgments cited by the State recognize the existence of the aboriginal title, the communal nature of indigenous property and the right to consultation in the Canadian legal system. But, the amicus briefs show that none of those judgments has resulted in a specific order by a Canadian court mandating the demarcation, recording of title deed, restitution or compensation of indigenous peoples with regard to ancestral lands in private hands. Not having obtained any legal certainty with regard to their ancestral lands through any of the judgments, those indigenous peoples contend that they have incurred excessive expenses in order to pursue their legal claims which have experienced many delays due to procedural questions and to the various appeals filed by the State, which, the petitioners argue, have resulted in a situation where their lands are left unprotected against the actions of third parties.

¹ *Calder et al. v. A.G. B.C.* [1973] SCR 313 (S.C.C.)

² *Delgamuukw v. B.C.* [1998] 1 C.N.L.R. 14 (S.C.C.)

³ *R. v. Marshall; R. v. Bernard*, 2005 S.C.C. 43, para. 137

⁴ *Tsilhqot'in Nation v. British Columbia et al* 2012 BCCA 285; [2007] B.C.J. No. 2465 (BCSC)

⁵ *Tsilhqot'in Nation*, (BCSC) *supra*, para. 1375

⁶ *Tsilhqot'in Nation*, (BCCA) *supra*, para. 344

It bears recalling that the jurisprudence of the inter-American System has clearly indicated that only those remedies that are suitable and effective, if pertinent, to the resolution of the matter in question must be exhausted. Although the State contends that it is possible to exhaust a series of legal remedies, based on the information contained in the case file, there is no evidence to support that claim.⁷

It bears pointing out that, the jurisprudence of the IACHR has established that a petitioner may be exempt from the requirement of having to exhaust domestic remedies with regard to a complaint, when it is evident from the case file that any action filed regarding that complaint had no reasonable chance of success based on the prevailing jurisprudence of the highest courts of the State. The Commission notes that the legal proceedings mentioned above do not seem to provide any reasonable expectations of success, because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds to lands of indigenous peoples, and, therefore, in the case of HTG, those remedies would not be effective under recognized general principles of international law.

Delgamuukw began in the early 1980s and concerned the aboriginal title and self-government rights of the Gitksan and Wet'suwet'en peoples who claimed ownership and jurisdiction over 58,000 square kilometres in northwest B.C. The Supreme Court made no determination as to whether or not the Gitksan or Wet'suwet'en had aboriginal title. They sent it back to trial. However, the SCC did set out several important tests in the judgment including the test for the admissibility of aboriginal oral history as evidence, the nature of aboriginal title, the test for proving aboriginal title and the test for proving infringement and extinguishment of aboriginal title. The Supreme Court held that:

In order to establish a claim to aboriginal title, the claimant group must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land.

Three aspects of aboriginal title are relevant ... First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.⁸

In 2012, the BC Court of Appeal, in *Tsilhqot'in Nation*, looked at aboriginal title. In this case, the court again declined to make a finding that the Tsilhqot'in had

⁷ *Hul'qumi'num Treaty Group v. Canada*, Inter-American Commission on Human Rights, Report No. 105/09, paras. 39-41

⁸ *Delgamuukw*, *supra*, para. 166

aboriginal title. The court held that the claim was made on a ‘territorial claim’ basis and that this was contrary to the legal tests set out by the Supreme Court of Canada in *Delgamuukw* and in *Marshall (#3) and Bernard*, which established a site-specific aboriginal title test. At para 219, the court held that:

... a territorial claim for Aboriginal title does not meet the tests in *Delgamuukw* and in *Marshall; Bernard*. Further, as I will attempt to explain, I do not see a broad territorial claim as fitting within the purposes behind s. 35 of the *Constitution Act, 1982* or the rationale for the common law’s recognition of Aboriginal title. Finally, I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.⁹

What is the Test for Title?

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria:

- (i) the land must have been occupied prior to sovereignty,
- (ii) there must be a continuity between present and pre-sovereignty occupation, and
- (iii) at sovereignty, that occupation must have been exclusive.

According to *Tsilhqot’in Nation*, these criteria must now specifically be with respect to “a definite tract of land the boundaries of which are reasonably capable of definition.” According to the court this might be village sites, enclosed or cultivated fields or land that was the subject of intensive use.¹⁰

Date for the Assertion of Sovereignty – This date varies across the country. It will be a matter of establishing the historical facts that are relevant to a particular region.

The Supreme Court of Canada held that sovereignty was the appropriate date for three reasons. First, sovereignty is the appropriate date because aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is said to be a ‘burden’ on the Crown’s underlying title. However, the Crown did not gain its title until it asserted sovereignty over the land in question.

⁹ *Tsilhqot’in Nation*, *supra*, para. 219.

¹⁰ *Tsilhqot’in Nation*, *supra*, para. 230

Because it does not make sense to speak of a burden on the underlying Crown title before that underlying title existed, aboriginal title (the burden) crystallizes at the time sovereignty (the underlying title) was asserted.

Second, the court held that the assertion of sovereignty was the appropriate time because, unlike aboriginal rights, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact.

Finally, the court held that the date of sovereignty is more certain than the date of first contact. For these reasons, occupation of the land must be established from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title. The court went on to emphasize that circumstances after sovereignty may sometimes be relevant to title or compensation, for example, where aboriginal peoples have been dispossessed of traditional lands after sovereignty.

Traditional Laws - The aboriginal perspective on the occupation of their lands can be shown, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples. If, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands that are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.

Physical Occupation - The fact of physical occupation is proof of possession at law that will ground title to the land. Physical occupation may be established in a variety of ways, including the construction of dwellings, cultivation and enclosure of fields and regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. In considering whether occupation sufficient to ground title is established, one must take into account the group's size, manner of life, material resources and technological abilities and the character of the lands claimed.

Under common law, the act of occupation or possession is sufficient to ground aboriginal title, and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans.

Substantial Connection - Substantial connection refers to land that was occupied

pre-sovereignty and with which the aboriginal group has maintained a substantial connection. These lands will then be considered by a court to be sufficiently important to be of central significance to the culture of the claimants.

Proof of Present Occupation - An aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation. Evidence must be provided of continuity between present and pre-sovereignty occupation because the relevant time for the determination of aboriginal title is at the time before sovereignty.

The Nature of the Occupation May Have Changed - The fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land has been maintained.

Exclusive Occupation - At sovereignty, occupation must have been exclusive. This does not mean what it appears to mean at face value. Exclusive occupation can in fact be demonstrated even if other aboriginal groups were present or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by “the intention and capacity to retain exclusive control.”¹¹

Delgamuukw confirms that aboriginal title is established based on evidence of use and occupation.¹² The Supreme Court, in *Delgamuukw*, also held that aboriginal title has an economic component and contains rights to participate in decisions regarding the use of that land.¹³

The BC Court of Appeal’s assertion that aboriginal title and rights are to be respected “without placing unnecessary limitations” on the Crown turns the idea of minimal infringement on its head. Prior to this the courts have always held that it is the Crown that cannot place unnecessary limitations on aboriginal rights.

-MLIC Editor’s Note

Can nomadic and semi-nomadic peoples ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways?

Whether a nomadic people enjoyed sufficient physical possession to give them title to the land is a question of fact, depending on all the circumstances, in particular, the nature of the land and the manner in which it is commonly used. In each case, the question is whether a degree of physical occupation, possession or use equivalent to common law title has been made out.

¹¹ *Delgamuukw*, *supra*, para. 70.

¹² *Delgamuukw*, *supra*, para. 149.

¹³ *Delgamuukw*, *supra*, para 166.

Continuity - the requirement of continuity means that claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices.

3.2 Métis Title

In general, it seems likely that the principles established in *Delgamuukw* and more recently in *Marshall (#3) and Bernard* with respect to proof of aboriginal title, will be applied, with some modifications, to any Métis claims. The issues that will likely be important in Métis land claims will be similar to those in *Marshall (#3) and Bernard*; sufficiency of use and occupation, exclusive occupation and continuity.

In *Delgamuukw*, the Supreme Court of Canada held that in order to prove aboriginal title the aboriginal group must prove that at sovereignty their occupation was exclusive. This was qualified somewhat when the court said that exclusive occupation can be demonstrated even if other aboriginal groups were present or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by “the intention and capacity to retain exclusive control.”¹⁴ Lamer J and LaForest J noted that joint occupancy was not precluded where two or more aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. The concept of joint occupancy has been accepted by the Supreme Court of the United States in *US v. Santa Fe Pacific Railroad*¹⁵ and in *Turtle Mountain Band v. US*.¹⁶

It is doubtful that any Métis group will ever be able to meet a test of exclusive occupancy. It is also doubtful that any Métis can show an intention and capacity to retain exclusive control. Such theories contradict the facts of Métis history. With the exception of the Métis battles with the Blackfoot and the Sioux, Métis history is a story of sharing, not exclusion. Métis co-existed, usually peacefully, with their Indian cousins. Based on this history, it seems that the Métis must make out a claim, not to exclusive occupation, but rather aboriginal title based on joint occupancy. Such a claim has never before been made out in a Canadian court.

Joint occupancy means that all of the aboriginal peoples would be holders of title.

¹⁴ *Delgamuukw*, *supra*, para, 70.

¹⁵ *U.S. v. Santa Fe Pacific Railroad* (1941) 314 US 339

¹⁶ *Turtle Mountain Band v. U.S.* (1974) 490 F. 2d 935 at 944

It does not necessarily mean that they have equal title. It is likely that the determination of how the title would be split would be based on the facts at sovereignty. This is the question: at of the assertion of sovereignty, who used the territory and for what purposes? What was the population and geographic breakdown of aboriginal peoples?

The issue of sufficiency of evidence arises in the context of Métis mobility. To establish aboriginal title, Métis claimants must establish occupation that goes beyond occasional entry or seasonal use. In fact, the result of the Supreme Court of Canada decision in *Marshall (#3) and Bernard* appears to make aboriginal title virtually indistinguishable from common law fee simple title. The BC Court of Appeal in *Tsilhqot'in Nation* confirms this trend, when that court held that aboriginal title cannot be asserted on a territorial basis.

It now seems that exploiting the land, rivers or seaside for hunting, fishing or other resources by highly mobile peoples will only, with great difficulty, translate into aboriginal title to the land because the evidence will not “comport with title at common law.”¹⁷

To date, there are only four Métis cases before the courts that have dealt or are dealing with Métis claims to land: *MMF*¹⁸, *Morin*¹⁹ and *Clem Paul*²⁰ and the *NSMA* case. Of these four cases, only *Clem Paul* and *Morin* seek court declarations that Métis have aboriginal title to land. *MMF* sought a declaration that Métis were unjustly deprived of their lands. The *NSMA* case (now discontinued) sought an injunction to stop the Dogrib (Tłı̄cho) treaty negotiations so that the North Slave Métis could participate in the Tłı̄cho negotiations.

3.3 Métis Land Rights Case Law

The Manitoba Métis Federation and the Native Council of Canada filed what is usually referred to as a ‘land claim’ case in 1981 (the *MMF* case).²¹ As of 2003, the Native Council of Canada (now known as the Congress of Aboriginal Peoples) was no longer a plaintiff in the case. The *MMF* case did not actually claim any land.

¹⁷ *R. v. Marshall; R. v. Bernard*, 2005 S.C.C. 43, para. 58

¹⁸ *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al*, 2010 MBCA 71 (CanLII)

¹⁹ *Morin v. Canada & Saskatchewan* (Q.B. File No. 619-1994)

²⁰ *Paul v. Canada*, 2002 FCT 615 (CanLII)

²¹ On the merits see: *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2007 MBQB 293 (CanLII); 2008 MBCA 131 (CanLII); 2010 MBCA 71 (CanLII). Preliminary motions: *Dumont v. AG Canada* [1990] 2 C.N.L.R. 19 (S.C.C.); rev'g (sub nom *Manitoba Métis 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.). See also *Dumont v. AG Canada* [1992] 2 C.N.L.R. 34 (Man. C.A.); rev'g [1991] 3 C.N.L.R. 22 (Man. Q.B.). See also [2002] M.J. No. 57. Intervention applications at Court of Appeal are at: *Manitoba Métis Federation v. Canada*, 2009 MBCA 17; *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2008 MBCA 131 (CanLII).

Instead, it asked for a series of declarations that Métis were unjustly deprived of land that they had rights to under the *Manitoba Act, 1870*. The Manitoba Métis Federation and seventeen individual Métis sought a declaration that Canada breached the fiduciary obligation it owed to the Métis of Manitoba by the manner in which it implemented ss. 31 and 32 of the *Manitoba Act*. They claimed that the federal Crown had a fiduciary obligation to act in the best interests of the Métis and that this obligation was breached because: (1) land grants were not made promptly and were not grouped according to family; (2) children received land grants before gaining their majority and those lands were not protected from speculators; and (3) Canada stood ‘idly by’ while Manitoba passed various legislation that was unconstitutional which enabled and facilitated the sale of the children’s grants.

Contrary to many claims in the press, this case was not a claim for ‘half of Winnipeg.’ The law is clear. No court will deprive innocent third parties of their lands, especially if they (or previous innocent third parties) have held those lands for generations. The court’s unwillingness to upset innocent third party landholders for aboriginal claims has been affirmed by the Ontario Court of Appeal in the *Chippewas of Sarnia* case.²²

The *MMF* case is a claim that the Manitoba Métis were unjustly deprived of 1.4 million acres of land which they were promised in the *Manitoba Act, 1870*. Since the Supreme Court of Canada upheld the *MMF* claim that the honour of the Crown was breached when they were deprived of this land, the question is what next? The *MMF* certainly hopes that this will lead to negotiations for land, money and self-government. However, it remains to be seen how Canada will respond.

At the Manitoba Court of Appeal, five Judges (instead of the usual three) heard the *MMF* case and handed down a unanimous decision with reasons for judgment in July of 2010. The Court of Appeal agreed with the trial judge’s disposition of the action and dismissed the appeal. They found the following:

1. The entire action is barred by the combined operation of the limitation period/laches/mootness (laches = unreasonable delay; moot because the legislation had already been repealed);
2. The trial judge’s determination not to grant the declarations sought should not be interfered with. They were, for the most part, not clearly wrong and were supported by the evidence;

²² *Chippewas of Sarnia Band v. Canada (AG)*, [2000] O.J. No. 4804 (Ont. C.A.); leave to S.C.C. denied.

3. There is a fiduciary relationship between the Métis and the Crown. That is not the same as a fiduciary duty. The Court of Appeal did not determine whether a fiduciary duty was owed by Canada with respect to s. 31 of the *Manitoba Act*; but even if the duty existed, the MMF failed to prove that there was a breach of that duty;
4. No fiduciary duty was owed pursuant to s. 32 of the *Manitoba Act*.

With respect to the aboriginal title issues in the case, the trial Judge assumed that the specific aboriginal interest had to be aboriginal title, which the Métis had not proven. The Court of Appeal disagreed and noted that even in Indian case law, the Supreme Court of Canada has recognized a fiduciary duty could arise with respect to interests in land that are not aboriginal title. The Court of Appeal also found, following *Guerin*, that language such as “for the benefit of” in a statute does not create a fiduciary duty, but rather recognizes the existence of such a duty.²³

The Court of Appeal declined to decide what might be a specific Métis interest in land that might ground a fiduciary duty, noting that this was the first time such an issue had come before the courts, that there was little guidance to be found, and that there had been no ‘focused argument’ on this component of the fiduciary duty test. Previous cases looking at the specific interest required to found a fiduciary duty had all dealt with Indian Bands, usually reserve lands. Because the Court of Appeal held that it was not necessary for the Métis interest in land to be aboriginal title, they declined to decide whether Métis had aboriginal title.

The Métis are aboriginal people, some of whom were being allocated land in a process that was at the discretion of the Crown. ... what the Métis have ... is the statement in s. 31 of the Act that it was enacted “towards the extinguishment of the Indian Title to the lands in the Province...” Some significance might be accorded to the fact that that section purports to give the Métis children land grants in return for the extinguishment of Indian title. It is far from clear what interest the Métis of Red River actually had prior to s. 31 being enacted, if any, but their ability to claim aboriginal title was lost (or at least seriously impeded) through its enactment. The Métis of Red River had an interest of some kind sufficient to be recognized, at least for political purposes, as having been extinguished through the Act. Nor should it be forgotten that the Act was enacted in the process of nation-building, and evolved from negotiations between Canada and the delegates... this means that it is possible that the Métis could have an interest in land sufficient to ... establishing a fiduciary duty... The question of exactly what does constitute a cognizable Métis interest, and whether one exists in this truly unique case I leave for another day... it is neither necessary nor desirable to determine whether they had a cognizable aboriginal interest sufficient to ground a fiduciary duty; all the more so since focused argument on whether or not this

²³ *Guerin v. The Queen*, 1984 CanLII 25 (S.C.C.), pp. 348-349.

critical component of a fiduciary obligation existed has not taken place.²⁴

The Manitoba Métis Federation was granted leave to appeal to the Supreme Court of Canada. Oral argument was heard by that court in December of 2011 and the reasons for judgment were handed down in March of 2013.

In *MMF*, the Supreme Court of Canada emphasized the requirement that land must have been held collectively in order to be found to be subject to aboriginal title. In *MMF*, the court held that Métis in Red River used and held land individually rather than communally and permitted alienation. Having said this, it should be noted that the plaintiffs did not present any evidence at trial about the nature of Métis land holdings. The only evidence on this issue came from the Crown's witnesses. Based on the Crown's evidence, the trial judge found that individual Métis held interests in land that arose from their personal history, not their shared Métis identity. Indeed the trial judge concluded Métis ownership practices were incompatible with any claim to an aboriginal interest in land. Based on these findings of 'fact' by the trial judge, the Supreme Court of Canada held that the Métis could not claim that their pre-existing land holdings were aboriginal title.

As we read the *MMF* decision in this regard, while it was fatal in that case to any determination of Métis title, that does not necessarily preclude a finding that Métis have aboriginal title in other situations or where the proof in the case is directed to that end. In *MMF*, despite many public claims that the case was a 'land claim,' the evidence in fact was not directed towards proving aboriginal title.

"It is far from clear what interest the Métis of Red River actually had prior to s. 31 being enacted, if any, but their ability to claim Aboriginal title was lost (or at least seriously impeded) through its enactment."

- Manitoba Court of Appeal in *MMF*

The only other Métis land claim litigation is in Northwest Saskatchewan. The case, *Morin*, is currently stayed. In this case, the Métis Nation-Saskatchewan, their locals in Northwest Saskatchewan, the Métis National Council and several individuals (the 'plaintiffs') filed a land claim in court on behalf of the Métis of that area. To date this is the only Métis land claim that actually seeks a declaration that the Métis have aboriginal title to land. Research has been going on since the claim was filed.

This case will bring the scrip process directly into issue. One of the major questions will be whether scrip extinguished the land title of the Métis. A great deal of

²⁴ *MMF* (CA) *supra*, paras. 504-509.

data with respect to scrip has been collected over the past few years by a research team headed by Dr. Frank Tough at the Native Studies Department at the University of Alberta, Edmonton. Arguments about production of documents have resulted in the judge staying the proceedings pending disclosure. Canada was unsuccessful in seeking to have the case discontinued.

3.4 Scrip

Scrip was the means by which the government of Canada distributed lands to groups of people it wished to reward or pacify. They gave scrip to both sides of the North West Rebellion of 1885: to the Métis and the soldiers who put down the Rebellion. For the Métis, scrip purported to accomplish one other important purpose – the extinguishment of Métis claims to aboriginal title.

Scrip is now virtually an obsolete concept. It refers to a certificate indicating the right of the holder to receive payment later in the form of cash, goods or land. From the 1870s until the early 1950s the term was in current use in all of Western Canada. There were basically two types of scrip – land scrip and money scrip. Both were meant to give the bearer a certain amount of land. Money scrip looked like paper money and was usually issued in the amount of \$80, \$160 or \$240. Land scrip was generally issued for 80, 160 or 240 acres. Although scrip was bought and sold, it was not actually money. Its value was that it could be redeemed for a certain amount of land from the government. In the early days of scrip distribution, \$160 scrip entitled the bearer to 160 acres of land at \$1 per acre. As land values increased, scrip values decreased.

Scrip was issued pursuant to the *Dominion Lands Act*.²⁵ Scrip was also issued to some Métis under the *Manitoba Act, 1870*. (See *MMF* case where 993 children received scrip instead of a land grant.)

The question of what effect scrip and land grants had on Métis land rights is the subject of the *MMF* case and *Morin*. The Manitoba Court of Appeal declined to determine the nature of the Métis land interest in *MMF*. However, the court found that the Métis did have an interest of ‘some kind’ that was affected by the *Manitoba Act* scheme.²⁶

The Saskatchewan Court of Queen’s Bench in *Morin & Daigneault* considered the

²⁵ *Dominion Lands Act, 1872, 35 Vic., c.23*

²⁶ *MMF, (CA) supra, paras. 504-509.*

question of the effect of scrip on Métis harvesting rights. In that case, the court held that scrip did not extinguish hunting and fishing rights. The court held that extinguishment of aboriginal rights could be accomplished by legislation (pre 1982) that had the clear and plain intention of extinguishing such right. However, the *Dominion Lands Acts* and the scrip issued pursuant to those Acts were utterly silent on the issue of hunting and fishing.²⁷

In *Blais (Mb)* the Supreme Court of Canada, in *obiter*,²⁸ commented that “rightly or wrongly” the federal government created separate arrangements for the distribution of land for Indians and Métis – treaty and scrip.²⁹ Indian treaties were collective agreements about collective rights. Scrip was about individual grants of land. The Court said

“The history of scrip speculation and devaluation is a sorry chapter in our nation’s history.”
- SCC in *Blais*

that scrip was based on fundamentally different assumptions about the nature and origins of the government’s relationship with Métis. The assumptions underlying treaties with Indians were not the same. The Supreme Court in *Blais (Mb)* made no statements as to whether or not these assumptions are correct in law.

There are twelve historic cases, from 1875-1916, in the Case Law Summaries in Part Two that give evidence of some of the legal issues respecting the process of scrip distribution for Métis lands.³⁰ Each case deals with scrip granted under the *Dominion Lands Acts* or land grants under the *Manitoba Act*.

3.5 Specific Claims

Since the 1600s, Britain and Canada have made treaties with aboriginal peoples. The primary purpose of the treaties was to ensure peaceful European settlement while upholding the rights of aboriginal people. In exchange for title, First Nations received benefits and/or land. Unfortunately, history has shown that treaties have not been honored, and often they have been completely disregarded. Thus, many First Nations have made land claims, which are essentially legal declarations of a claim to ownership and control over property. Land claims come in two forms: specific and comprehensive claims.

²⁷ *R. v. Morin & Daigneault* [1996] 3 C.N.L.R. 157 (SKPC); aff’d [1998] 1 C.N.L.R. 182 (SKQB) paras. 39-46.

²⁸ *Obiter dictum* means “said in passing”. It is a remark made by a judge that does not form a necessary part of the court’s decision. Remarks made “in obiter” are not binding.

²⁹ *R. v. Blais*, [2003] 2 S.C.R. 236, para. 33; 2001 MBCA 55 (CanLII); [1998] 4 CNLR 103 (QB); [1997] 3 CNLR 109 (PC).

³⁰ *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Man. Q.B.); *Kerr v. Desjarlais* (1892), 3 W.L.T. 137 (Man. Q.B.); *L’Hirondelle (Antoine) v. The King* (1916), 16 Ex. C.R. 193; *L’Hirondelle (Joseph) v. The King* (1916), 16 Ex. C.R. 196 (Exchequer Court of Canada); *Re Mathers* (1891), 7 Man. R. 434 (Man. Q.B.); *McKiligan v. Machar* (1886), 3 Man. R. 418 (Man. Q.B.); *Patterson v. Lane* (1904), 6 Terr. L.R. 92 (NWT Supreme Court – on appeal); *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Man. Q.B.); *Sutherland v. Schultz* (1883), 1 Man. R. 13 (Man. Q.B.); *Re Thibeau* [1877] Man R. Temp. Wood 149 (Man. Q.B.); *R. v. Thomas* (1891), 2 Ex. C.R. 246; *Wright v. Battley* (1905), 15 Man. R. 322 (Man. K.B.).

Specific claims are claims that arise from the failure of the federal government to live up to its legal obligations originating with historic treaties, the *Indian Act* or other formal agreements between First Nations and the Crown. In an attempt to repair this breach of duty, the goal of specific land claims is to reach settlement, which may come in the form of money that can be used to purchase lands in place of land taken. Such settlements are regarded as final settlements. In other words the First Nation cannot make future claims for the same land. Currently there are over 800 specific claims in progress. On average it takes approximately 13 years to process a specific claim.

To deal with the enormous processing times, the government of Canada introduced a plan called “Justice At Last,”³¹ which proposes to restructure the old land claims system with a new, more efficient process. The main features of the plan are:

- (1) An Independent Claims Tribunal - comprised of retired sitting judges that will take over when a claim is not accepted for negotiation by Canada; in cases where all parties agree that a claim that has already been accepted should be referred for a binding decision; or after three years of unsuccessful negotiations. This new claims tribunal has no jurisdiction to award lands.
- (2) Procedural improvements including dedicated funding and faster processing; and
- (3) Better Access to Mediation

Does the Specific Claims Process have any application to the Métis?

Currently the “Justice at Last” program does not include the Métis. As Clément Chartier, president of the Métis National Council, stated:

It is misleading to leave Canadians with the impression that the reforms announced ... will address the claims of all aboriginal peoples. Canada’s Constitution recognizes and affirms the rights of the Indian, Inuit and Métis peoples. The reforms announced ... exclude the Métis. Canadians need to know that the “Justice at Last” announcement is not justice for all. It is only justice for some.³²

³¹ See Aboriginal Affairs and Northern Development Specific Claims: Justice at Last (website: <http://www.aadnc-aandc.gc.ca/eng/1100100030516/1100100030517>)

³² Clément Chartier, “Métis National Council Calls on Federal Government to Deal with Métis Claims”, NationTalk, June 14, 2007 at <http://nationtalk.ca/story/métis-national-council-calls-on-federal-government-to-deal-with-métis-claims>.

3.6 Métis Lands and Resources Negotiated Agreements

In the late 1970s, Canada agreed to enter into land claim negotiations with the Dene and Métis people of the NWT. By 1980 the NWT Métis Association and the Dene Nation were engaged in joint negotiations. These negotiations continued until 1990. Although the Dene/Métis leadership initialed a Final Agreement in April of 1990, in July the assembly did not ratify the Final Agreement. A motion was passed to have aboriginal and treaty rights affirmed in the land claims agreement. The Sahtu delegates abstained from voting on the motion. The Gwich'in delegates walked out of the assembly saying that the motion would kill the agreement. The Agreement being negotiated was called the *Dene Métis Comprehensive Land Claims Agreement* and included all of the Métis who could trace their ancestry back to the NWT as of 1921. When the negotiations broke off in 1990 the government began to negotiate regional claims. The First Nations living south of Great Slave Lake chose to enter into Treaty Land Entitlement discussions rather than participate in the comprehensive land claim negotiations the Gwich'in and Sahtu and the Dogribs had chosen. Both processes involved only Indians within the meaning of the *Indian Act*. Neither are open to the Métis. The first two regional claims to be negotiated were the *Gwich'in* and *Sahtu Agreements*. Of these two agreements, only the *Sahtu Agreement* includes specific mention of the Métis.

Sahtu Dene and Métis Comprehensive Land Claim Agreement (1993)

The *Sahtu Agreement* was signed in 1993. The Chiefs of four Dene bands, the Presidents of three Métis locals, and the Sahtu Tribal Council signed the Agreement. The preamble to the Agreement states that the Dene and the Métis of the Sahtu region have negotiated the Agreement in order to give effect to certain rights of the Dene and Métis. The 'aboriginal community' in the agreement is defined as the Dene bands in particular towns and the Métis locals in Fort Good Hope, Norman Wells and Fort Norman. The Agreement contains definitions of Sahtu Dene, Sahtu Dene and Métis, and Sahtu Métis. While they are separately named, each is defined exactly the same and refer to persons of Slavey, Hare or Mountain ancestry who resided in, or used and occupied the settlement area prior to December 1921, or is a descendant of such a person.

South Slave Métis Framework Agreement (1996) / Northwest Territory Métis Nation Framework Agreement (2003)

The government promised that all aboriginal peoples in the NWT would be included in a land claims process. When the First Nations south of Great Slave Lake

chose Treaty Land Entitlement, a process that excluded the South Slave Métis, the government agreed to enter into a South Slave Métis Framework Agreement. A *South Slave Métis Framework Agreement* was signed in 1996. The parties to the Agreement were the Métis of Fort Smith, Hay River and Fort Resolution and the governments of the NWT and Canada. *The South Slave Métis Framework Agreement* sets out the parties' agreement to explore ways and means of addressing the concerns of Métis. *The South Slave Métis Framework Agreement* notes that the "Indigenous Métis of Fort Smith, Fort Resolution and Hay River in the Northwest Territories are one of the aboriginal peoples of Canada."³³ *The Framework Agreement* contemplates a two-stage negotiation process. The first stage is the negotiation of an Agreement in Principle that will lead to a Final Agreement. The second stage will be the negotiation of a self-government agreement. Subjects for negotiation include eligibility, land and water and economic benefits.

In July of 2002, the South Slave Métis Tribal Council changed its name to the Northwest Territory Métis Nation. In February of 2003, the *South Slave Métis Framework Agreement and the Interim Measures Agreement* were amended to replace the SSMTC name with the "Northwest Territory Métis Nation."

Deh Cho First Nations Framework Agreement & Interim Measures Agreement (2001)³⁴

In May of 2001, the Deh Cho First Nations entered into a Framework Agreement and an Interim Measures Agreement with Canada and the Government of the Northwest Territories. *The Framework Agreement* sets out the framework for land claims and self-government negotiations between the parties. The preamble states that for the purposes of the negotiations the Deh Cho First Nations represent the Deh Cho Dene and the Métis of the Deh Cho territory. *The Interim Measures Agreement* states that Deh Cho First Nation includes among other First Nation entities, Fort Simpson Métis Local 52, Fort Providence Métis Local 57 and Fort Liard Métis Local 67. *The Interim Measures Agreement* sets up processes for land withdrawal, participation by the Deh Cho First Nations in land and water regulation. In addition it provides processes for consultation with respect to sales and leases of lands, issuance of prospecting permits and oil and gas exploration licences. New forest management authorizations will be issued in accordance with the *Interim Measures Agreement*. The Deh Cho First Nations can nominate a member for appointment to the Mackenzie Valley Environmental Impact Review Board. There are also provisions for trans-boundary and overlap issues.

³³ *The South Slave Métis Framework Agreement* Available online:(<http://www.nwtmetisnation.ca/ssfa.pdf>)

³⁴ Deh Cho First Nations Framework Agreement available online:(http://www.daair.gov.nt.ca/_live/pages/wpPages/Dehcho.aspx)

Northwest Territory Métis Nation Interim Measures Agreement (2002)

In June of 2002, the SSMTC entered into an Interim Measures Agreement with Canada and the government of the NWT. The agreement sets up a process that allows the SSMTC to pre-screen applications for licences, permits and leases with respect to the use and disposition of lands and resources in a defined area.

Deh Cho First Nations Interim Resource Development Agreement (2003)³⁵

In April 2003, the Deh Cho First Nations, Canada and the Government of the Northwest Territories entered into this new agreement to foster resource development in Deh Cho territory and to accrue benefits to the Deh Cho First Nations in the interim of a Deh Cho Final Agreement.

³⁵ Deh Cho First Nations Interim Resource Development Agreement available online:(http://www.daair.gov.nt.ca/_live/pages/wpPages/Dehcho.aspx)



Chapter Four: Constitutional Interpretation

4.1 Jurisdiction

The question of jurisdiction for Métis is an issue that affects almost every aspect of Métis life. All governments have consistently denied jurisdiction for Métis who live south of the 60th parallel. North of the 60th parallel, the federal government does assume jurisdiction and responsibility for Métis. Also, in Alberta, the provincial government has been working with the Métis since the 1930s, although without claiming jurisdiction.

While there are very large departments and ministries at the federal and provincial levels for Indians (until quite recently the department of Indian Affairs and Northern Development), no such permanent institutions of government were accessible by the Métis. There is a ‘Federal Interlocutor’ who is a federal Minister with the Métis and non-status Indian portfolio. The fact that this Minister has the responsibility for both Métis and non-status Indians shows the federal tendency to lump Métis issues and non-status Indian issues together. It also seems to reflect the federal government’s previous position that Métis were not a distinct aboriginal people.

In 2004, the Minister of Indian Affairs took on the role of the Federal Interlocutor for Métis and non-status Indians. Whether this will result in Métis south of the 60th parallel being permitted to partake in any of the systems set up to deal with aboriginal issues, such as the Indian Claims Commission, the Comprehensive Claims Process, the Specific Claims Process or test case funding remains to be seen.

In 2011, the Federal Government changed the name of the department of Indian Affairs and Northern Development to Aboriginal Affairs and Northern Development Canada. In its news release the federal government announced that:

The new title of the Minister and the department’s new name better reflect the scope of the Minister’s responsibilities with respect to First Nations, Inuit and Métis. It is also in keeping with practices of the department as, in recent years, the responsibilities of the department have expanded to include and better serve First Nations, Métis and Inuit peoples. In 2004, the Office of the Federal Interlocutor for Métis and Non-Status Indians became part of the department.¹

¹ Press Release, June 2011, <http://www.aadnc-aandc.gc.ca/eng/1314808945787/1314809172051>

The decision of the Supreme Court of Canada in *Powley* did not put the jurisdiction issue to rest. The Court affirmed that Métis are a distinct aboriginal people and that the government must recognize them as such. However, in the absence of any decision with respect to jurisdiction for the Métis, there continues to be confusion and buck-passing by the various levels of government.

The Métis Nation has sought for many years to have this jurisdiction issue resolved. The most direct way of dealing with this issue would be to have a reference question directed to the court. Such a question might be phrased in the following way: are Métis ‘Indians’ for the purposes of s. 91(24) of the *Constitution Act, 1867*? A similar question was posed for the Inuit in *Re Eskimos*.² However, only the provincial or federal government can bring a reference question before the courts and no government in Canada to date has sponsored the reference. Whether Métis are within federal jurisdiction under s. 91(24) was the central theme of the *Daniels*³ case. The court determined that Métis are indeed ‘Indians’ within federal jurisdiction under s. 91(24).

4.2 Section 91(24)

In 1867, Canada was formed by an Act of the British legislature known as the *British North America Act*. We now call this the *Constitution Act, 1867*. This Act sets out two lists that describe which level of government – federal or provincial – is responsible for various matters. These two lists set out what we usually call the ‘division of powers’ between these levels of government. The list in section 91 describes matters in the ‘exclusive Legislative Authority’ or jurisdiction of the federal government, while the list in section 92 sets out those that are in the ‘exclusive Legislative Authority’ or jurisdiction of the provincial governments. The word ‘jurisdiction’ comes from two Latin words: *juris* meaning ‘law’ and *dicere* meaning ‘to speak.’ So, jurisdiction is the authority or responsibility granted to a legally constituted body to deal with specific matters. The specific matters listed in sections 91 and 92 are often referred to as ‘heads of power.’

Jurisdiction does not mean the federal government has control or power over the Métis people. It simply means that the federal government has the jurisdiction to legislate on Métis issues. For example, the federal government could enact a Canada-Métis Nation Relations Act, which recognized existing Métis governance structures, provide funding to Métis governments, set out a negotiations process,

² *Re Eskimos* [1939] S.C.R. 104.

³ *Daniels, Gardner & Congress of Aboriginal Peoples v. Canada*, 2002 FCT 295; 2005 FC 1109; 2011 FC 230 (CanLII)

etc.

In order to answer ‘jurisdictional’ questions, the Supreme Court of Canada has developed a series of approaches and principles that the trial judge in Daniels relied on. Generally, Canadian courts use a ‘living tree’ analysis in interpreting Canada’s Constitution. This means that our Constitution is not frozen in time. Instead, it is to be interpreted in a “purposive and progressive manner” that respects our constitutional roots as a country, while also recognizing that our Constitution needs to grow and adapt in order to keep up with the times and address new issues that were not thought of in 1867.

In trying to understand the division of powers between the federal and provincial governments, one cannot rely only on the written text of the *Constitution Act, 1867*. The written text is just the beginning of the inquiry because there are many matters that are simply not mentioned in the listed “heads of power.” The environment and health care are good examples of important issues that are not specifically listed in the heads of powers set out in the *Constitution Act, 1867*.

A review of the case law is necessary to determine the scope of each listed power. For example, case law has determined that labour relations are a provincial matter coming under the head of power that refers to “property and civil rights.” In another example, even though the *Constitution Act, 1867* does not mention communications (i.e., radio, television, the internet, etc.) the courts have held that it comes within federal jurisdiction under transportation, or interprovincial or international undertakings. The interpretation of sections 91 and 92 by the court is ongoing. The *Daniels* case is another in a long line of cases that have sought to interpret these heads of power.

By and large, the federal list of enumerated powers in section 91 is concerned with national matters while the provincial list in section 92 is concerned with local matters. Provincial heads of power include: direct taxation within the province, management and sale of public lands, incorporation of companies, property and civil rights, administration of justice, and all matters of a merely local or private nature in the province. Federal heads of power include: unemployment insurance, postal service, the census, the military, navigation and shipping, sea coast and inland fisheries, banking, weights and measures, patents, marriage and divorce, and in the 24th head of federal power reads,

s. 91 It is hereby declared that ... the exclusive Legislative Authority of the Parliament of

Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated...

(24) Indians, and Lands reserved for the Indians.

The federal government usually interprets this as Indians *on* lands reserved for the Indians and argues that responsibility for Indians off-reserve falls to the provinces. The provinces deny that they have any responsibility for Indians at all, whether on or off reserve. It is under the authority of s. 91(24) that the Federal Government has enacted the *Indian Act*. This stance by government was criticized by the Saskatchewan Court of Appeal in *Grumbo*.

I view it as unfortunate that there appears to be a considerable amount of tactical manoeuvring involved in the positions taken by the federal and provincial authorities with respect to issues of this nature ...

... This province [Saskatchewan] probably felt obliged to maintain the position it had consistently taken that the Métis are a federal responsibility ... This position the Province has adopted leads to the judicial temptation to conclude it cannot blow hot and cold ... I refrain from such temptation only because I have decided the position taken by the Province is, in all likelihood, one thrust upon it by the historical inability of governments to agree on the extent of the responsibility owed to the Métis and which level of government has that responsibility. It is a political rather than a legal foundation which they stand upon ...

It is of interest that the Federal government was made aware of this appeal and chose not to become involved. It too may have had the difficulty of denying responsibility for the Métis since it is their position the Métis were not included as an Indian in s. 91(24) and at the same time acknowledging the existence of certain rights of the Métis now recognized in s. 35 of the *Constitution Act, 1982*. These inconsistencies in the position of governments reinforce the view that the judicial process should give but scant attention to the positions the provincial and federal governments have adopted as they appear to be tainted by considerations beyond those which are properly relevant to a judicial determination.⁴

It is usually thought that Indians, whether or not they are registered under the *Indian Act*, are within the meaning of s. 91(24) of the *Constitution Act, 1867*.⁵ The court in *Re Eskimos* has also determined that Inuit (previously called Eskimos) are 'Indians' for the purposes of s. 91(24).

⁴ *R. v. Grumbo*, [1998] CanLII 12345 (SK CA) at paras. 83-87

⁵ See *R. v. Grumbo*, [1996] CanLII 7045 (SK QB); rev'g [1998] CanLII 12345 (SK CA) *R. v. Blais* [2003] SCC 44 (CanLII); 2001 MBCA 55 (CanLII); [1998] 4 CNLR 103 (QB); [1997] 3 CNLR 109 (PCT) "Blais (Mb)", which found that Métis are not "Indians" for the purposes of the NRTA. But see also *R. v. Ferguson* [1993] CanLII 7268 (AB QB); aff'd [1993] 2 C.N.L.R. 148, where the court found that Métis are "Indians". See also the *Report of the Royal Commission on Aboriginal Peoples*, at Vol. 4, page 209; Clem Chartier, "Indian: Analysis of the Term" (1978) 43 Sask. L.R. 37; and Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1997) at 27-3; Morse and Giokas, "Do Métis Fall Within Section 91(24) of the Constitution Act, 1867?" in *Aboriginal Self-Government: Legal and Constitutional Issues* (1995); McMahon and Martin, "The Métis and 91(24): Is Inclusion the Issue?" in *Aboriginal Self-Government: Legal and Constitutional Issues* (1995). All of which conclude that Métis are "Indians" for the purposes of s. 91(24). For contra see Flanagan, "The Case Against Métis Aboriginal Rights" (1983) 9 Canadian Public Policy, 314; Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada* (1986).

Whether the Métis are also included within the meaning of ‘Indians’ in s. 91(24) has now been determined by the Federal Court in *Daniels*. At its core, the *Daniels* case was about settling the ongoing dispute about who has legislative jurisdiction for Métis and non-status Indians – the federal government or the provinces. Métis and non-status Indians have long taken the position that they are included within s. 91(24). The Federal Government has always understood that ‘Indians’ registered under the *Indian Act* are within s. 91(24), but has denied responsibility for individuals who are members of Indian communities that are not ‘status Indians.’ In addition to denying its jurisdiction with respect to non-status Indians, the federal government has long denied jurisdiction for the Métis.

Why does the exclusion of Métis and Non-Status Indians from s. 91(24) matter?

The denial of jurisdiction by the federal government and the provinces has made Métis and non-status Indians the proverbial ‘political footballs’ in the Canadian federation.⁶ The practical result of this jurisdictional avoidance was to leave Métis and non-status Indians vulnerable and marginalized. They have not had access to federal programs and services available to ‘status’ Indians or Inuit. They have been denied access to federal processes to address their rights and claims, which are available to First Nations and Inuit. Notably, the federal government’s own internal documents concluded that “... in absence of Federal initiative in this field they are the most disadvantaged of all Canada citizens.”⁷ Ultimately, the Court concluded that this situation “has produced a large population of collaterally damaged people”⁸ because,

They are deprived of programs, services and intangible benefits recognized by all governments as needed. The MNSI proponents claim that their identity and sense of belonging to their communities is pressured; that they suffer undevelopment as peoples; that they cannot reach their full potential in Canadian society.⁹

How did the Court determine Métis and Non-Status Indians were in s. 91(24)?

In order to determine whether Métis and non-status Indians were in s. 91(24), the Trial Judge reviewed 200 years of British and Canadian historical evidence. He concluded that Métis and non-status Indians are within this head of power. In reviewing the historic record, the trial judge determined that in order to achieve the

⁶ The federal government has always accepted jurisdiction for Métis and non-status Indians north of the 60th parallel. That is because the territorial governments in Yukon, Northwest Territories and Nunavut do not have the same powers as the provinces under s. 92.

⁷ *Daniels v. Canada*, 2013 FC 6 (F.C.T.D.), para. 26.

⁸ *Daniels*, *supra*, note 1, para. 108.

⁹ *Daniels*, *supra*, note 1, para. 108.

objects of Confederation (i.e., creating a country from coast to coast, settling the Northwest, building a national railway to the Pacific coast, etc.), the federal government needed the ‘Indian head of power’ in s. 91(24) to be broad in order to deal with the different Aboriginal peoples it encountered along the way.

The evidence showed that the federal government used this power in many ways, including, allowing Halfbreeds and mixed ancestry individuals into Indian treaties at various times or establishing the Métis scrip system in the Northwest to deal with the ‘Indian title’ of the Métis. The trial judge concluded that these federal actions, among others, provided evidence that s. 91(24) is broad enough to include Métis and non-status Indians.

The Court also noted that, historically, wherever non-status Indians and Métis were discriminated against or subjected to different treatment, such as in schooling, liquor laws, land grants and payments, it was because non-status Indians and Métis were considered to be of ‘Indian heredity.’ The Court decided that the single most distinguishing feature of either non-status Indians or Métis is that of ‘Indianness’ not language, religion, or connection to European heritage, which brought them within s. 91(24).¹⁰

The Court held that the term ‘Indian’ in s. 91(24) is broader than the term ‘Indian’ in the *Indian Act*.¹¹ Canada argued that it could define who is within s. 91(24) by legislation. The Court rejected this. It is a settled constitutional principle that no level of government can expand (or contract) its jurisdiction by actions or legislation. While Canada may be able to limit the number of Indians under the *Indian Act* that has no affect on who is within s. 91(24). The result of the *Daniels* decision is that all aboriginal peoples in Canada, including Métis and non-status Indians, are included in federal jurisdiction under s. 91(24).

The Crown has appealed to the Federal Court of Appeal where the case will be heard October 29-31, 2013.

4.3 Natural Resources Transfer Agreements

Interpretation of the Constitution has arisen in many Métis cases. The question with respect to interpreting the Natural Resources Transfer Agreements (NRTAs) is this – are Métis ‘Indians’ for the purposes of the constitutional protection in this

¹⁰ *Daniels*, *supra*, note 1, para. 532.

¹¹ *Daniels*, *supra*, note 1, para. 547.

part of the Constitution? This is not a jurisdiction question, because the answer to the question would not determine which level of the Crown had authority for Métis. The answer would only determine how harvesting rights are to be protected. It is clear that even though the NRTA provides protection for Indian harvesting and permits provincial regulation of that harvesting, jurisdiction for 'Indians' remains with the federal government. Therefore, when considering the application of the NRTA, it is more useful to consider it separately from the jurisdiction question in s. 91(24).

In order to understand the NRTA, a short lesson in Canadian history is necessary. In 1867, when Canada was created, jurisdiction (power and authority) was distributed between the federal government and provincial governments. Jurisdiction for lands and resources was made a provincial power for the provinces that were in Confederation at that time. In 1870, when Louis Riel negotiated Manitoba into confederation, he attempted to have jurisdiction for lands and resources also granted to the province. He was not successful in this part of his negotiation and jurisdiction for lands and resources remained with the federal government largely because Prime Minister Macdonald wanted control over lands and resources in order to push forward with the railway.

This was a problem for Manitoba, and later for Saskatchewan and Alberta, when they joined Confederation. After years of debate finally, in the 1920s, the federal and provincial governments began to negotiate the transfer of jurisdiction for lands and resources to the provinces. The process ended in 1930 in the NRTAs, which are part of the *Constitution Act, 1930*, and are therefore constitutional provisions.

There is a NRTA for each of the Prairie Provinces and each forms part of the Constitution of Canada (*Constitution Act, 1930*). The NRTA (paragraph 13 in Manitoba and paragraph 12 in Saskatchewan and Alberta) appears to give the food harvesting rights of Indians on the Prairies more constitutional protection than those who live elsewhere in Canada. The NRTA states that:

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.

This paragraph says that hunting and fishing by Indians are subject to provincial regulation. In addition, it gives a blanket of protection, constitutional protection, to Indian hunting, fishing and trapping on unoccupied Crown lands and on lands to which Indians have a right of access. The agreement has two parts or what the Supreme Court in *Blais (Mb)* called a “stipulation” and an “exception.”¹² The stipulation is the respect for the provincial power over lands and resources in the province. The exception is the blanket of protection, which limits the exercise of provincial regulatory power by protecting the Indians’ continued right to hunt, trap and fish for subsistence.

The Supreme Court of Canada has said that the NRTA had four basic effects.

1. It gave constitutional protection to the Indians’ right to hunt, trap and fish for subsistence.¹³
2. It removes the Indians’ treaty right to hunt and fish commercially.¹⁴
3. The NRTA expanded the harvesting territory from the lands described in the treaties. As a result, the Indians’ right to hunt, trap and fish became a province-wide right on all unoccupied Crown lands or any other lands to which the Indians have a right of access. Because all three Prairie Provinces have the identical protection, it really means that the Indians’ right is a Prairie-wide right.¹⁵
4. Finally, the NRTA expands the definition of ‘Indians’ who can hunt in the Prairie Provinces. Any Indian from anywhere can harvest for subsistence anywhere in the Prairie Provinces.¹⁶

It is for the third and fourth reasons listed above that the Métis sought to be included within the NRTA. If Métis were included in the term ‘Indian’ for the NRTA, they too would have Prairie Province-wide rights to hunt, fish and trap, and any Métis from anywhere would have been able to harvest for subsistence in the Prairie Provinces.

Shortly after the NRTA was enacted, a Royal Commission was established in Alberta to determine financial compensation for the lands that Alberta had not had control over since becoming a province. The *Report of the Royal Commission on the Natural Resources of Alberta, 1935* considered ‘half-breed lands’ as a lost asset

¹² *Blais (SCC)*, *supra*, para. 8.

¹³ *Blais (SCC)*, *supra*, para. 32.

¹⁴ *Blais (SCC)*, *supra*, para. 32.

¹⁵ *R. v. Frank*, [1978] 1 S.C.R. 95.

¹⁶ *Ibid.*

for which they wanted compensation.

Half-breed lands -The care of Indians was assumed by the Government under the *British North America Act*. In order to extinguish Indian title in the Northwest Territories, certain lands were, under treaties, set apart as reserves for full-blooded Indians, on which those Indians were to reside. Other lands were made available for half-breeds belonging to the region, and were alienated by scrip, entitling each holder, if otherwise qualified, to 240 acres of land, to be selected from available settlement lands. Most of this half-breed scrip was sold by the half-breed recipients and so passed into the hands of speculators and others, thus depriving the alienation of some part of the intended settlement element.

The question is raised as to whether or not Alberta was bound to provide lands for all the half-breeds who later secured scrip. The question is one of difficulty, and we do not pass upon it in the sense of deciding legal rights. It seems, on the whole, that had the province been in control, a substantial part of these half-breed alienations would never have been made, and the land so saved from such alienation would have been saved to the Province as assets with revenue potentialities.¹⁷

The question of whether Métis are ‘Indians’ for the purposes of the NRTA has now been decided in *Blais (Mb)*.¹⁸ They are not included. It should be noted that the question was not whether Métis are ‘Indians’ in the cultural or social sense. Rather, it is strictly in the legal sense of the term. ‘Indians’ is a legal definition in the *Indian Act*, in s. 91(24) of the *Constitution, 1867*, in the NRTA, and in s. 35 of the *Constitution Act, 1982*.

4.4 1870 Order

The *1870 Order* is in fact the *Order of Her Majesty in Council admitting Rupert’s Land and the North-Western Territory into the Union*, dated the 23rd day of June 1870. At the request of the Parliament of Canada, this British order in council sanctioned the annexation of Rupert’s Land and the North-Western Territory to Canada. Afterwards, these territories were known as the Northwest Territories. The *1870 Order* forms part of Canada’s constitution.

If Métis are indeed ‘Indians’ within the meaning of s. 91(24) of the *Constitution Act, 1867* it is logical to conclude that they are also ‘Indians’ within the meaning of the *1870 Order*. Section 146 provides that:

It shall be lawful for the Queen, by and with the Advice of Her Majesty’s Most Honourable

¹⁷ Report of the Royal Commission on the Natural Resources of Alberta, 1935, p. 30

¹⁸ *Blais, (SCC) supra*, para. 41

Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Article 14 of the *1870 Order* reads as follows:

Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.

The *1870 Order* is informed by two Addresses to the Queen from the Senate and House of Commons of Canada. The first one, dated December 1867 is contained in Schedule A and provides that:

That we do therefore most humbly pray that your Majesty will be graciously pleased, by and with the advice of your Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government; and we most humbly beg to express to your Majesty that we are willing to assume the duties and obligations of government and legislation as regards those territories ... And furthermore, 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 the 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.

In May 1869, a second Address was made by the Senate and House of Commons to the Queen and is contained in Schedule B to the *1870 Order*. It states:

That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer, and we authorize and empower the Governor in Council to arrange any details that may be necessary to carry out the terms and conditions of the above agreement.

The 'above agreement' is in article 8 of Schedule B, which is an agreement between Canada and the Hudson's Bay Company. Article 8 is identical to what later became article 14 in the *1870 Order*. If Métis are 'Indians' or 'aborigines' within the

meaning of the *1870 Order*, their rights should have been dealt with by application of the equitable principles, which “uniformly governed the British Crown.”

The *1870 Order* has been the subject of recent litigation in *Ross River Dena*.¹⁹ The question before the court was whether the terms and conditions of the *1870 Order* give rise to enforceable legal obligations and whether those obligations were fiduciary in nature. The Yukon court held that the terms and conditions referred to in the *1870 Order* for compensation for lands required for the purposes of settlement were not, at the time, intended to have enforceable legal effect reviewable by the court. The *1870 Order* did not create a positive obligation on the Crown to settle claims of First Nations persons. Even if the relevant provision gave rise to legally enforceable obligations, those obligations were not fiduciary in nature. The issue of the *1870 Order* came before the court as a preliminary question of law. On appeal to the Yukon Court of Appeal, the court held that the question was improperly severed from the rest of the case and overturned all findings made by the trial judge.

¹⁹ *Ross River Dena Council v. Canada (Attorney General)* [2012] Y.J. No. 1



Chapter Five: Human Rights

Amnesty International defines human rights as the “basic rights and freedoms that all people are entitled to regardless of nationality, sex, national or ethnic origin, race, religion, language, or other status.”¹ Human rights vest in all individuals simply by virtue of the fact that they are human beings.

Much of our current understanding of human rights came out of the Second World War, especially the Holocaust, which led to the adoption of the *Universal Declaration of Human Rights* by the United Nations General Assembly in 1948. Article 1 of the United Nations *Universal Declaration of Human Rights* is as follows:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.²

Canada’s initial attempt to protect human rights came in 1960 with the passage of the Canadian *Bill of Rights*.³ It was not very effective for two reasons. First, because it was a federal statute it had no application to provincial laws. Second, the Supreme Court of Canada narrowly interpreted the *Bill of Rights*. The British Parliament formally enacted the *Charter of Rights and Freedoms* as a part of the *Canada Act, 1982*. The *Charter* was enacted at the same time as s. 35, which is the section of the *Constitution Act, 1982* that protects aboriginal and treaty rights.

5.1 Section 15 of the Charter of Rights and Freedoms – Equality

Section 15 of the *Charter* guarantees equal treatment before and under the law, and equal protection and benefit of the law without discrimination. This section of the *Charter* protects against discriminatory laws and government actions and has a goal of substantive equality, which it provides in two ways. Section 15(1) aims to prevent discrimination on grounds such as race, age and sex. Laws and government acts that perpetuate disadvantage or prejudice are invalid. Section 15(2) aims to permit government actions that have a goal of improving the situation of members of disadvantaged groups. It achieves this goal by affirming the validity of ameliorative programs targeted at disadvantaged groups.

¹ <http://www.amnestyusa.org/research/human-rights-basics>

² UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <http://www.unhcr.org/refworld/docid/471355a82.html> [accessed 8 October 2012]

³ *Canadian Bill of Rights*, S.C. 1960, c. 44

The courts have stated that the guarantee of equality under s. 15 of the *Charter* is a comparative concept. In other words, the courts must identify a comparator group – a group in comparison to which there is a complaint of discriminatory treatment.

Several cases have arisen that are asserting comparisons between Indians who live off reserve and bands. The Métis National Council of Women asserted that they should be able to participate as a separate program and service provider group because the Métis National Council was, they asserted discriminating against women. The court found no evidence to support this claim.⁴ *McIvor* asserts (successfully at the BC Court of Appeal; leave to appeal to the Supreme Court of Canada denied) that the *Indian Act* discriminates against women.⁵

In 2004 the Métis Settlements Appeals Tribunal (MSAT) found that s. 75(2)(a) of the *Métis Settlements Act* violated s. 15 of the *Charter*. The clause at issue denies membership to applicants who are registered as ‘Indians’ under the *Indian Act*. To highlight the discrimination MSAT noted the following hypothetical situations:

- If Ms. Willier had married an Indian before she was 18 she would be eligible for membership.
- If Ms. Willier had married a non-Indian she would have been eligible.
- If a Métis man married an Indian woman he would be eligible.
- If Ms. Willier’s Indian status could be canceled she would be eligible.
- If *Bill C-31* had restored her status as a non-Indian she would be eligible.
- If Ms. Willier had married an Indian after 1985 she would be eligible.

Since then, the Alberta Government passed a law that prohibits MSAT from making *Charter* determinations.⁶

The Supreme Court of Canada held in *Cunningham* that the Métis Settlements Act did not discriminate against members of the Métis Settlements who identify as Métis and are registered as Indians under the *Indian Act*. The court recognized that the *Métis Settlements Act* scheme is an ameliorative program that is protected by s. 15(2). The exclusion of registered Indians from Métis settlement membership was not discriminatory.

⁴ *Métis National Council of Women v. Canada (AG)*, 2006 FCA 77 (CanLii); aff’g 2005 FC 230 (CanLii); leave to appeal to SCC denied [2006] S.C.C.A. No. 170.

⁵ *McIvor v. Canada (Registrar, Indian and Northern Affairs)* [2007] B.C.J. No. 1259; aff’d in part [2009] 2 CNLR 236 (BCCA); leave to appeal to the SCC denied Nov. 5, 2009.

⁶ *Vicklund v. Peavine Métis Settlement*, MSAT Order 160, p. 30

... the exclusion from membership in any Métis Settlement ... of Métis who are also status Indians serves and advances the object of the ameliorative program. It corresponds to the historic and social distinction between the Métis and Indians, furthers realization of the object of enhancing Métis identity, culture and governance, and respects the role of the Métis in defining themselves as a people.⁷

5.2 International Human Rights

5.2.1 UN Human Rights Committee

The Human Rights Committee was established under article 28 of the *International Covenant on Civil and Political Rights*. The Human Rights Committee is the body of independent experts that monitors implementation of the *International Covenant on Civil and Political Rights* by its State parties. All States parties (including Canada) are obliged to submit regular reports to the Committee on how the rights are being implemented.

States must report initially one year after acceding to the *Covenant* and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of ‘concluding observations.’ In addition to the reporting procedure, article 41 of the *Covenant* provides for the Committee to consider inter-state complaints. Furthermore, the First Optional Protocol to the *Covenant* gives the Committee competence to examine individual complaints with regard to alleged violations of the *Covenant* by States parties to the Protocol.⁸

Resort to the UN Human Rights Committee has had a profound effect on reserve membership and registration under the *Indian Act*. In *Lovelace v. Canada*,⁹ Sandra Lovelace appealed to the United Nations to have the *Indian Act* amended. She married an American non-Indian, Bernie Lovelace, in 1970 and moved with him to California. The fact that she married a non-Indian caused her name to be removed from the *Indian Act* Register. After the marriage failed a few years later, Lovelace and her children returned to the Tobique Reserve in New Brunswick. It was then she learned she had lost the right to housing, education, and health care normally granted to an Indian. At the time, the *Indian Act* did not apply in the same way to males who, if they had married a non-Indian, would still retain their full status and

⁷ Cunningham, (SCC) *supra*, para. 83

⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 8 October 2012]

⁹ *Sandra Lovelace v. Canada*, UN Human Rights Committee, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

benefits as an Indian. The Supreme Court of Canada had previously upheld these provisions of the *Indian Act*. In 1979, Sandra Lovelace appealed to the UN Human Rights Committee to consider the unfairness of this ruling. In 1982 the UN ruled that Canada acted in disregard of the *International Covenant on Civil and Political Rights*. As a result of this case, in 1985 Canada amended the *Indian Act* with *Bill C-31*.

5.2.2 UN Declaration on the Rights of Indigenous Peoples

The United Nations *Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly on September 13th 2007. A General Assembly Declaration is not a legally binding instrument under international law. However, it is a major development of a new international legal norm and it reflects the commitment of the UN's member states to move in a certain direction. Weissner describes it as follows:

In United Nations practice, a declaration is a “formal and solemn instrument”, resorted to “only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.” Using that particular instrument creates “a strong expectation that Members of the international community will abide by it” and, “consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.”¹⁰

The *Declaration* sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. It prohibits discrimination against indigenous peoples, and it promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development.

The *Declaration* was negotiated over a period of 22 years. Progress was slow because certain states expressed concerns about some key provisions such as the right to self-determination and the control over natural resources existing on indigenous peoples' traditional lands.

On June 29, 2006 the *Declaration* was finally adopted by the Human Rights Council (30 countries in favor, 2 against, 12 abstentions, 3 absentees). The *Declaration* was then referred to the General Assembly, which voted on the adoption of the

¹⁰ Siegfried Wiessner, quoting from the Report of the Commission on Human Rights, E/3616/Rev. I, para. 105 at http://untreaty.un.org/cod/avl/ha/ga_61-295/ga_61-295.html

proposal on September 13, 2007 (143 countries in favor, 4 against, and 11 abstained). The four member states that voted against were Australia, Canada, New Zealand and the United States.

In contrast to the *Declaration's* rejection by Australia, Canada, New Zealand and the United States, United Nations officials and other world leaders were very vocal about its adoption. The Secretary-General of the UN described it as an,

... historic moment when UN Member States and indigenous peoples have reconciled with their painful histories and are resolved to move forward together on the path of human rights, justice and development for all.¹¹

Louise Arbour, a former justice of the Supreme Court of Canada then serving as the UN's High Commissioner for Human Rights, expressed satisfaction at the hard work and perseverance that had finally "borne fruit in the most comprehensive statement to date of indigenous peoples' rights."¹²

The four states that voted against the *Declaration* all have significant indigenous populations. They continued to express serious reservations about the final text of the *Declaration* as placed before the General Assembly. Canada said that while it supported the spirit of the *Declaration*, it contained elements that were fundamentally incompatible with Canada's constitutional framework and unworkable in a western democracy under a constitutional government. New Zealand described the *Declaration* as toothless, and said that some of the provisions were fundamentally incompatible with New Zealand's constitutional and legal arrangements. The United States complained that the declaration did not establish clear principles and was subject to multiple interpretations. The United States also cited the *Declaration's* failure to provide a clear definition of exactly whom the term indigenous peoples is intended to cover.

In *R. v. Hape* the Supreme Court of Canada held that Canada has an obligation to ensure that its legislation conforms with international law.¹³

In 2009 Australia signed onto the *UN Declaration on the Rights of Indigenous Peoples*. In April 2010, New Zealand signed on. On November 12, 2010 Canada signed and on November 16, 2010 the United States also signed.

¹¹ UN News Center, "United Nations adopts Declaration on Rights of Indigenous Peoples", September 13, 2007, at <http://www.un.org/apps/news/story.asp?NewsID=23794#.UHIT4xhcSfs>

¹² *Ibid.*

¹³ *R. v. Hape* 2007 SCC 26

5.2.3 *Convention No. 169*

Convention No. 169 was adopted in 1989. It is a legally binding international instrument open to ratification, which deals specifically with the rights of indigenous and tribal peoples. Today, it has been ratified by 20 countries, but not by Canada. Once ratified a country has one year to align its legislation, policies and programs to the *Convention*, before it becomes legally binding. Countries that have ratified the *Convention* are subject to supervision with regards to its implementation.

In recognition of the fact that indigenous peoples are subject to much discrimination, the first principle of *Convention No. 169* is non-discrimination. Article 3 states that indigenous peoples have the right to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. In Article 4, the *Convention* also guarantees enjoyment of the general rights of citizenship without discrimination. Another principle in the *Convention* concerns the application of all its provisions to male and female indigenous persons without discrimination (Article 3). Article 20 provides for prevention of discrimination against Indigenous workers.

Article 4 calls for special measures to be adopted to safeguard the persons, institutions, property, labour, cultures and environment of these peoples.

The *Convention* seeks to ensure that Indigenous peoples' cultures and identities, ways of life, customs and traditions, institutions, customary laws, forms of land use and forms of social organization are protected and taken into account when any measures are being undertaken that are likely to have an impact on these peoples. The *Convention* requires that indigenous are consulted on issues that affect them. It also requires that these peoples are able to engage in free, prior and informed participation in policy and development processes that affect them. The principles of consultation and participation in *Convention No. 169* relate to broad questions of governance, and the participation of indigenous peoples in public life.

Article 7 of *Convention No. 169* states that Indigenous peoples have the right to

decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control over their economic, social and cultural development.

The *Convention* stipulates that governments shall have the responsibility for developing coordinated and systematic action to protect the rights of indigenous peoples (Article 3) and ensure that appropriate mechanisms and means are available (Article 33). With its focus on consultation and participation, *Convention No. 169* is a tool to stimulate dialogue between governments and indigenous peoples and has been used as a tool for development processes, as well as conflict prevention and resolution.

Since its adoption, *Convention No. 169* has gained recognition well beyond the number of actual ratifications. Its provisions have influenced numerous policy documents, debates and legal decisions at the regional and international levels, as well as national legislation and policies. The Provisions of *Convention No. 169* are compatible with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples, and the adoption of the Declaration illustrates the broader acceptance of the principles of *Convention No. 169*.

5.2.4 Organization of American States – Inter-American Commission on Human Rights (IACHR)

Along with the Inter-American Court of Human Rights, the IACHR is one of the bodies that comprise the inter-American system for the promotion and protection of human rights. The IACHR is a permanent body that meets in regular and special sessions several times a year to examine allegations of human rights violations in the Americas.

Its jurisdiction with respect to human rights arises from the OAS Charter, the *American Declaration of the Rights and Duties of Man*, and the *American Convention on Human Rights*. The inter-American system for the protection of human rights emerged with the adoption of the *American Declaration of the Rights and Duties of Man* in April 1948 – the first international human rights instrument of a general nature.

The IACHR was created in 1959. It held its first meeting in 1960, and it conducted its first on-site visit to inspect the human rights situation in an OAS member state, the Dominican Republic, in 1961. In 1965, the Commission was expressly authorized to examine specific cases of human rights violations. Since that date the IACHR has received thousands of petitions and has processed in excess of 12,000 individual cases. In 1969, the guiding principles behind the American Declaration

were taken, reshaped, and restated in the American Convention on Human Rights. The Convention defines the human rights that the states parties are required to respect and guarantee, and it also ordered the establishment of the Inter-American Court of Human Rights. It is currently binding on 24 of the OAS's 35 member states.

IACHR recommendations are in theory non-binding. However, the Inter-American Court on Human Rights qualified this and found that states have an obligation to implement the recommendations of the IACHR. The Court has stated that if a State signs and ratifies an international treaty, especially one concerning human rights, it has the obligation to make every effort to comply with the recommendations.

Canada is subject to the jurisdiction of the Commission since depositing its instrument of ratification of the OAS Charter on January 8, 1990.

*Hul'qumi'num Treaty Group v. Canada*¹⁴ – The Hul'qumi'num Treaty Group (HTG) filed a human rights complaint against the government of Canada before the IACHR on May 10, 2007. The complaint, filed in the form of a petition, alleges that Canada violated the human rights of the Hul'qumi'num peoples by granting approximately 85% of the lands traditionally used and occupied by the Hul'qumi'num to private land owners without ever offering any form of restitution, either through return, replacement or payment of just compensation. HTG's petition explains that Canada's confiscation of virtually all of the Hul'qumi'num traditional lands has resulted in the plundering and destruction of the natural environment upon which the Hul'qumi'num peoples depend for their subsistence, livelihood, enjoyment of their culture and survival as indigenous peoples. The petition alleges, Canada refuses to recognize or discuss the claims of the Hul'qumi'num to restitution for their lost ancestral lands that are now owned and controlled by these large forestry development corporations.

On October 30, 2009, the Commission ruled that HTG's Petition was admissible with regard to alleged violations of Articles II (right to equality), III (right to religious freedom), XIII (right to culture), and XXIII (right to property) of the *American Declaration on the Rights and Duties of Man*, the OAS' main human rights instrument. As a member of the OAS and signatory to the OAS Charter, Canada

¹⁴ *Hul'qumi'num Treaty Group v. Canada*, *Inter-American Commission on Human Rights*, [2009] Report No. 105/09, paras. 39-41.

is internationally responsible for violating rights that are affirmed in the American Declaration and by other relevant rules and principles of international human rights law. The case now moves to a point where it will be considered on the substance of the claim. In ruling HTG's petition admissible, the Commission waived the normal requirements under international law and its own rules and procedures that petitioners must first exhaust domestic remedies before a case can be considered on the merits. The Commission's decision admitting HTG's petition agreed with HTG that Canada has failed to provide an effective remedy for its alleged violations of the Hul'qumi'num peoples' human rights in their traditional lands.

Canada had argued before the Commission that the British Columbia Treaty Commission (BCTC) process could provide HTG with a remedy for the taking of Hul'qumi'num ancestral lands in the form of a negotiated treaty that would settle its claims, but the Commission specifically found that,

... the BCTC process has not allowed negotiations on the subject of restitution or compensation for HTG ancestral lands in private hands, which make up 85% of their traditional territory. Since 15 years have passed... the IACHR notes that by failing to resolve the HTG claims with regard to their ancestral lands, the BCTC process has demonstrated that it is not an effective mechanism to protect the right alleged by the alleged victims.¹⁵

Canada had also argued that HTG could pursue its claims for restitution in Canada's courts. However, the Commission also rejected that argument as no Canadian court case, as HTG showed, had ever "resulted in a specific order by a Canadian court mandating the demarcation, recording of title deed, restitution or compensation of indigenous peoples with regard to ancestral lands in private hands." As the court decisions cited by Canada on aboriginal title had failed "to provide any reasonable expectation of success," the Commission ruled that:

because Canadian jurisprudence has not obligated the State to set boundaries, demarcate, and record title deeds to lands of indigenous peoples, ... therefore, in the case of HTG, those remedies would not be effective under recognized general principles of international law.¹⁶

¹⁵ *Hul'qumi'num Treaty Group, supra*, para. 37

¹⁶ *Hul'qumi'num Treaty Group, supra*, para. 41



Chapter Six: Administrative Tribunals and Class Actions

6.1 Administrative Tribunals

It is a fact of life in Canada that more issues are now determined before administrative tribunals than the courts. Over the past three decades Canada has systematically increased the number of tribunals and the issues they determine. Tribunals regularly now handle labor and employment complaints, workers compensation, human rights, commercial fishing, forestry and environmental issues, to name just a few. Indeed, many aboriginal rights issues are initially raised at administrative tribunals. For example, the diamond mining industry in the Northwest Territories has generated several environmental assessments and subsequent water board hearings. At each of these hearings, aboriginal groups have participated with a view to ensuring that their aboriginal or treaty rights and their reliance on the migratory caribou herds form an important part of the tribunal's recommendations to the decision-makers.

Many of these administrative tribunals are not decision-making bodies. Their function is often to hold public hearings and to report and make recommendations to the Ministers (federal and/or provincial). In some circumstances, the first level of hearing in these administrative processes is very informal and may take place in a District Manager's office.

The question as to whether or not aboriginal rights can be heard by these lower level administrative officers, or indeed, by more formal bodies has recently come before the Supreme Court of Canada in *Paul v. British Columbia (Forest Appeals Commission)*.¹ The conclusion seems to be that aboriginal rights should be raised at first instance and at all levels in an administrative scheme. If the body with original jurisdiction to hear a complaint will not or cannot hear the aboriginal rights or *Charter* issues, that body must, at the very least, be made aware that such issues are relevant and that any decision or recommendation made without consideration of aboriginal rights would likely be deficient. It might also be wise to ask the original hearing officer to specifically note in his or her report that the matter of aboriginal rights or the *Charter* was raised.

For Métis, the issue of consideration of their aboriginal and treaty rights has arisen in three hearings to date. In *Tucker & O'Connor*² the hearing was before a

¹ *Paul v. British Columbia (Forest Appeals Commission)* [2003] 2 S.C.R. 585

² *Tucker v. Snobelen*, S.C.J. Court File #2001-009; *Ronald & Thomas O'Connor v. Snobelen*, S.C.J. Court File #2001-010

fisheries officer appointed under the Ontario *Fish & Wildlife Act*.³ The issue was whether their commercial fishing licences could be unilaterally substantially diminished or, in Mr. O'Connor's case, eliminated entirely, without reference to their commercial right to fish as Métis descendants of the Half Breed Adhesion to Treaty 3. At the hearing, the fisheries officer determined to hear the treaty rights evidence over the strong objections of the Crown. In fact, the Crown brought three separate motions trying to convince the officer that he ought not to hear the treaty rights defence.

The Manitoba Métis Federation was involved in hearings before the Manitoba Clean Environment Commission. The hearings are with respect to the Wuskwatim Hydro Generation and Transmission projects. The Commission has a mandate, set out in its terms of reference, to consider “the potential environmental, socio-economic and cultural effects of the construction and operation of the [Wuskwatim Proposals].”⁴ In order to determine what these effects are, the Commission is to consider, among other things, the proponent's Environmental Impact Statement and public concerns. This Commission is also to provide recommendations with respect to proposed mitigation measures and future monitoring and research.

The MMF argued that the mandate of the Commission necessitated an inquiry into the effects of the Wuskwatim Projects on the Métis in the project region. The Commission held that it had no mandate to hear any issues with respect to s. 35 rights.

In applying the *Paul* test to this administrative tribunal, it would seem that the Commission does have the jurisdiction to hear the aboriginal rights issues raised by the Manitoba Métis Federation. The hearings are public, under oath, and with legal representation and the opportunity for full cross-examination. Further, there is no appeal mechanism from the Commission's findings. In other words, this is the first and only step in the process whereby the MMF can raise its concerns. Finally, there is no express provision in the *Manitoba Environment Act* that prohibits the Commission from hearing aboriginal rights issues.⁵

6.2 Métis Settlements Appeals Tribunal (MSAT)

The general rule is that provincial laws continue to apply to the Métis Settlements. One exception is in the area of hunting, fishing, trapping and gathering. The

³ *Fish and Wildlife Conservation Act*, S.O. 1997, C.41

⁴ Summary of Public Hearing- Wuskwatim generation and transmission projects(http://www.cccmanitoba.ca/resource/reports/Commissioned-Reports-2004-2005-Wuskwatim_Generation_Transmission_Projects.pdf) pg. 5

⁵ *Environment Act*, C.C.S.M. c. E125

General Council has the authority to enact policies in this area and, once enacted, these policies are given priority over other provincial law. These must be made in consultation with the Minister and approved by all the settlement councils and the Lieutenant Governor in Council. They can be abrogated only to protect endangered species and after consultation with the General Council.

Enforcement is accomplished through the Métis Settlements Appeal Tribunal (MSAT). MSAT has delivered well over a hundred decisions, most of which concern membership, interests in settlement land, family law, inheritance, surface rights, housing and debt settlements.

The Métis Settlements in Alberta comprise 1.25 million acres of land, most of which is affected by substantial oil and gas activity. An important issue for the General Council is to balance development and traditional lifestyles. Two panels of MSAT have jurisdiction with respect to leases, compensation and rights of entry on settlement lands: the Land Access Panel (LAP) and the Existing Leases Land Access Panel (ELLAP). Both can grant compensation and are charged with taking into account the “cultural value of the land for preserving a traditional Métis way of life.”⁶

The issue of how to place an economic value on the impacts of development on activities such as berry picking, hunting, trapping and fishing have been addressed in at least one case to date – *Husky Oil*.⁷

The issue of how to determine compensation amounts payable under s. 118(1)(c) (iii) of the Métis Settlements Act as a result of oil and gas activity on settlement lands was addressed by the LAP in *Auger*.⁸ Specifically the question was with respect to the cumulative effect of oil and gas activity on the loss of trapping. A judicial review of that decision came before the Alberta Court of Appeal in *Gift Lake*.⁹

MSAT also has full jurisdiction with respect to all membership issues for the Settlements.

6.3 Class Actions

A class action is a lawsuit in which many claimants can join together to sue government, a company or person in one lawsuit. In these types of cases one claim-

⁶ *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)* [2009] A.J. No. 395 (ACA), para. 22

⁷ *Husky Oil Limited and Barrington Petroleum Limited and Elizabeth Métis Settlement*, MSAT-LAP Order No. 1, May 8, 1996

⁸ *Métis Settlements Land Registry v. Brenda Auger*, Tribunal Order 231, March 14, 2012.

⁹ *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)*, [2009] A.J. No. 395 (ACA).

ant cannot usually start his or her own lawsuit because the amount of money that individual could win would be too small to justify the legal expense. While it is not usually practical for any one individual to sue a large entity such as government or a large corporation, the total of all the damages suffered by many people may be very large. Taken together, that may make the case financially feasible.

Until 1993, class actions were not permitted in Canada except in the province of Quebec. The *Ontario Class Proceedings Act*¹⁰ came into force on January 1, 1993, after more than a decade of discussion. The basic framework of the Act is as follows: a member of an identifiable class of two or more persons may ask the Court to certify the proceeding as a class proceeding where, among other things, the claims of the class members raise common issues and a class proceeding would be the preferable procedure for the resolution of the common issues. The Court is directed not to refuse to certify the class action merely because the relief claimed includes a claim for damages that will require individual assessment after determination of the common issues. The certification order will describe the class and the common issues and specify how and when a class member can exercise a right to opt out of the class. Notice of the certification of the class and of the right to opt out must be given to the class members and those who do opt out will not be bound by any judgment on the common issues. The judgment will, however, bind all members of the class who have not opted out. There is no express restriction on the composition of the class related to a member's connection with Ontario. The Ontario legislation permits certification of either a plaintiff or a defendant class.

British Columbia¹¹ joined Ontario and Quebec¹² by adopting class action legislation in 1995. The British Columbia legislation permits the Court to certify either a plaintiff or defendant class. As in the Ontario legislation, there is no review of the merits of the proceeding on the certification motion except to confirm that the pleadings disclose a cause of action. The *British Columbia Act* restricts the persons who can be members of the class to residents of British Columbia or non-residents who opt into the class.

Both the Ontario and Quebec governments established funds that can, in appropriate cases, be used to defray legal expenses of a representative plaintiff. The Ontario fund is only to be used to defray disbursements (out-of-pocket expenses other than legal fees) whereas the Quebec fund can also be used to defray counsel fees.

¹⁰ *Class Proceedings Act*, 1992, S.O. 1992, C. 6

¹¹ *Class Proceedings Act*, RSBC 1996] C. 50

¹² *Class Proceedings Act*, RSQ, c R-2.1

The advantage of a class action is that there is usually no cost to the plaintiffs up front. That is because the lawyers usually get paid a percentage if they win, and also pay for the costs, such as expert reports, investigations, etc. Another advantage is that an individual can recover losses from a wrongdoer without having to sue individually.

There have been many class actions. Some examples include suits for defective products such as silicone breast implants and blood transfusion products infected with HIV and hepatitis C, actions against stock brokerage firms and actions for plane crashes, etc.

There are at least five major class actions involving First Nations individuals who were at residential schools that are currently before the courts or in the process of settlement. There are two Métis class actions that are in process. One is with respect to Métis veterans. The second is with respect to residential schools and was filed in 2005.

6.3.1 Sixties Scoop Class Actions

Brown is a class action about the ‘sixties scoop.’ The class in that case is described as “Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person’s customs, traditions, and practices.”¹³ This would clearly include Métis children.

6.3.2 Residential School Class Actions

Although residential schools have been a part of official government policy for over 350 years, their formal origins begin in the early 19th century when they were established as church run, off-reserve, industrial boarding schools for aboriginal children. The Law Commission has identified stages in the development of residential schools. The first stage (1840-1910) was assimilation, where the goal was to integrate aboriginal children into the work force by teaching them Euro-Canadian labor skills. The second stage was segregation during which the education the children received away from their families was supposed to make them return to their communities as ‘good Indians.’ The integration stage (from 1951-1970) was where the children attended the same schools as non-aboriginal children. Finally from 1971 to the present is the self-determination stage, which marked the ‘movement towards aboriginal government.’

¹³ *Brown v. Canada (AG)* [2010] ONSC 3095 (CanLII) para 162

The Canadian government's residential schools project had and continues to have dramatic effects on aboriginal peoples in Canada. Aboriginal children, taken away from their families and forced to live in institutions, "were the only children in Canadian history who, over an extended period of time, were statutorily designated to live in institutions primarily because of their race."¹⁴ This detention lasted for decades and has affected many generations. Thus, the residential school phenomena can be understood in its broad context, in that it has harmed not only those who were students, but also has harmed the families and whole communities who have been profoundly harmed by the loss of their children. The total institutionalization of these children denied the ability of their families to pass on their aboriginal traditions and erased many chances for the younger generations to learn from their elders.

The goal of the system was to 'undermine culture,' to eliminate the savage and create the civilized Canadian citizen. The system targeted children because of their vulnerability. The rationale was that children are more easily "absorbed into the body politic."¹⁵ One of the most effective tools of this strategy was that "the students were forbidden to speak languages or practice their cultural traditions."¹⁶ This denial resulted in "psychological disorientation and spiritual crisis."¹⁷ In addition, the children, upon arrival, were immediately stripped of their clothes, cultural belongings and even their hair. During their time at the schools, many children were fed food with inadequate nutritional content, lived in substandard sanitary conditions, and were forced to work because of the lack of funding for schools.

Chronically underfunded, the schools were short on staff. The staff was often transient because of the poor working conditions, and loose staff (by today's standards) screening processes were an invitation to child abusers.

In light of the extreme difficulties that the residential school children faced, there have been an increasing number of legal actions taken in order to seek justice and restitution. Since the 1990s we have seen many claims against the government and churches who created and ran the schools. In 1991, several lawsuits were launched and survivor groups began to be formed. In 1996, the Royal Commission for Aboriginal Peoples recommended that a public inquiry be undertaken on residential schools to document the abuses and make recommendations on what actions

¹⁴ Restoring Dignity: Responding to Child Abuse in Canadian Institutions, Law Commission of Canada Report, 2000. page 56.

¹⁵ Ibid page 58

¹⁶ Ibid page 59

¹⁷ Ibid page 61

should be taken. The following year, the Assembly of First Nations initiated negotiations to reach an out of court settlement.

In 1998 the government admitted to its role in the abuses that took place in the residential schools and apologized for the first time. This Statement of Reconciliation was part of the establishment of the Aboriginal Healing Fund, a fund aimed at rectifying at least some of the legacy of residential schools. 1991 also marked the initiation of the first class actions against these schools. There were numerous class actions; the most recent and largest was the Residential Schools Settlement.

6.4 Indian Residential Schools Settlement Agreement – May 8, 2006

A Federal government compensation agreement worth \$2 billion for those who attended government-funded Indian residential schools has been announced. The agreement was negotiated between the government, church and school organizations and a law group acting on behalf of the students. It is expected that over 80,000 surviving Métis, Indian and Inuit students will be able to apply for compensation for residential school. Complainants over 65 years of age will be offered a smaller lump sum payment to fast-track the process. When the settlement was announced it was understood that Métis students who attended residential schools that were funded privately by religious organizations are not eligible under this agreement.

As a result, on December 9, 2005 a class action suit was filed against the government's partially funded Îl-à-la Crosse Residential School in Saskatchewan.

In total, there are 79,000 aboriginal children who attended residential schools. The settlement package involved in this case includes most notably the following terms:

- A common experience payment (CEP) which former students are paid \$10,000 per person, plus \$3,000 for every subsequent year in the schools. These CEP payments are available to students who did not receive actionable abuse at the schools.
- For those subject to physical, sexual and psychological abuse, an additional compensation through an Independent Assessment Process (IAP) where adjudicators “will hear from claimants and witnesses and award compensation.” The award can range from \$5,000 to \$275,000, is determined by a point system, and has an appeal process.
- Former students can receive both CEP and IAP payments if they meet both criteria. More money may be given if a loss of income can be shown, and the

absolute maximum IAP payment is \$430,000.

- There is a \$205 million dollar budget for a Truth and Reconciliation and Commemoration and Healing process to promote education, record creation, and healing.

In addition, the settlement package has an opt-out procedure. The 150-day opt-out period ends on August 20, 2007. Before this time, former students have several options:

- Request a Claim Form: If a former student wants a payment without having to sue the government independently, they can request a claim form by calling 1-866-879-4913 or visiting www.residentialschoolsettlement.ca. A form will be sent after August 20, 2007.
- Opt Out: If a former student feels that able to get a higher payment by suing independently, then he or she can opt out.
- Do Nothing: a former student forfeits his/her right to sue and receive payment if he or she accepts a settlement.

Another important aspect of the settlement was the Advance Payment for Elders. Eligible Elders age 65 years or older, as of May 30, 2005 qualified for an \$8,000 Advance Payment. The deadline for applications for the Advance Payment must have been received by Indian Residential School Resolution Canada by December 31, 2006.

For greater certainty, every Eligible CEP Recipient who resided at an Indian Residential School is eligible for the CEP and will have access to the IAP in accordance with the terms of this Agreement including all First Nations, Inuit, Inuvialuit and Métis students.

6.5 Truth and Reconciliation Commission

The Truth and Reconciliation Commission was established on June 1, 2008. The Truth and Reconciliation Commission is an independent body with a five-year mandate. It is not a part of government or the courts and it is not a criminal tribunal. It is part of the negotiated Indian Residential Schools Settlement Agreement reached in September 2007. It will provide former students and anyone affected by the Indian Residential Schools experience with an opportunity to come forward and share their personal experiences in a safe, respectful, and culturally appropriate manner.

The Commission will conduct research and examine the conditions that gave rise to the residential schools legacy. Its intention is to create an accurate and public historical record of the past. The Commission hopes to contribute to a process of truth, healing and reconciliation. It will be “forward looking in terms of rebuilding and renewing aboriginal relationships and the relationship between aboriginal and non-aboriginal Canadians.”¹⁸ The Commission hopes that to bring about a new understanding, and hopefully a better relationship between aboriginal peoples and all Canadians.

The Commission will meet with former students and their families, former staff and anyone who has been affected by Indian Residential Schools. The Commission will prepare a complete historical record on the policies and operations of the schools. It will prepare a report including recommendations. The Commission will establish a national research centre that will be a lasting resource for all Canadians to learn about the residential schools legacy. The Research Centre will receive statements after the Truth and Reconciliation Commission’s five-year mandate is completed.

The Truth and Reconciliation Commission’s activities are available to all former students and their families, even if they choose to opt-out of the Settlement Agreement. Despite the fact that the Truth and Reconciliation Commission claims to be dealing with ‘Indian’ residential schools, many Métis were also students at these schools. Métis are invited to participate in the Truth and Reconciliation Commission. For more information on the Truth and Reconciliation Commission see their website at www.trc-cvr.ca.

¹⁸ Mandate for the Truth and Reconciliation Commission of Canada online: <http://www.trc-cvr.ca/overview.html> or as schedule N of the Indian Residential Schools Settlements Agreement



Chapter Seven: Criminal Law

7.1 Aboriginal Sentencing

The *Gladue*¹ case was about about sentencing and the over-representation of aboriginal peoples in Canadian prisons. Section 718.2(e) of the *Criminal Code* states that:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Thus, the primary focus of the Case was sentencing within a restorative justice paradigm.

The *Gladue* case was appealed to the Supreme Court of Canada. Canada's highest court took the opportunity to articulate the appropriate analysis to be undertaken in a s. 718.2(e) inquiry. The Supreme Court found that attention should be given to the social context and that the main problem s. 718.2(e) was designed to address was the over-incarceration of aboriginals. The Court found this high prison rate to be a symptom of a general overrepresentation of aboriginals in the criminal justice system. According to the Court, this overrepresentation is the result of a number of causes. Section 718.2(e) was interpreted as a directive to the judiciary to enquire into these causes and attempt to redress through sentencing, to the extent possible, the alienation of aboriginals from the criminal justice system.

The court outlined a two-step process. First, a judge must consider the unique systemic and historical factors that may have contributed to bringing the particular individual before the courts. The court intended this step to assist sentencing judges in the determination of whether imprisonment will likely deter the crime in a manner that is meaningful to the community.

The second step is to determine the appropriate sentencing procedures and sanctions. The Court found that the justice system has failed aboriginal people in the past because it has failed to take into account the different procedural and substantive views on justice. The Court said that the criminal sanctions should be geared toward the needs of the victim, the community, and the offender and should be

¹ *R. v. Gladue*, 1999 CanLII 679 (S.C.C.)

based on healing these relationships. The Court called for further development of the principles of restorative justice and community-based sanctions in the criminal justice system.

The Court recognized that aboriginal communities in Canada have different histories and beliefs. As a result, the approach will be changed according to the facts of each individual offence and offender. The provision applies to all aboriginal peoples. Sentencing judges are directed to explore reasonable community-based sanctions with every aboriginal offender as an alternative to imprisonment.

In response to the *Gladue* decision the Gladue (Aboriginal Persons) Court was created in Toronto. The court will be available to all aboriginal persons. While the court is open to all aboriginal accused persons, no person will be required to have his or her charges heard by the court. Aboriginal individuals are free to have their matters dealt with in any court. What will distinguish the court is that those working in it will have a particular understanding and expertise of the range of programs and services available to aboriginal people in Toronto. This range of expertise will allow the court to craft decisions in keeping with the directive of *Gladue* because the information required to develop such responses will be put before the court.

7.2 Sentencing circles

The principles with respect to the use of sentencing circles was set out by the Saskatchewan Court of Appeal in *Morin*.² Ivan Joseph Morin was convicted of committing robbery with violence contrary to s. 343(b) and s. 344 of the *Criminal Code*. Mr. Morin applied for a sentencing circle to consider the sentence he ought to receive. The judge granted the application. A sentencing circle was convened. It deliberated, arrived at a consensus (excluding Crown counsel) and made a list of recommendations. Apart from three small variations the judge accepted the recommendations.

The Crown appealed the sentence to the Saskatchewan Court of Appeal on three grounds:

1. That the learned trial judge failed to properly consider the seriousness of the offence and the previous criminal record of the accused.
2. That the learned trial judge failed to properly consider the deterrent aspect of the sentencing and also the need for protecting the public.

² *R. v. Morin*, [1995] S.J. No. 457, (CA)

3. That the learned trial judge erred in law in holding a sentencing circle. The Crown launched the appeal,

... in an attempt to bring to this Court the issue of whether or not there are any guiding principles or limitations which should be placed on a court requested to hold a sentencing circle. The conflicting decisions in the Court of Queen's Bench cause difficulty both for the other members of that court and for lower courts in assessing how they should exercise their discretion when asked to hold a sentencing circle.³

The first sentencing circle was held in Sandy Bay, Saskatchewan in July of 1992. Since then many sentencing circles have been held in Northern Saskatchewan and out of this experience there have emerged seven guidelines that are applied in deciding if a case for sentencing should go to a circle. The criteria are as follows:

- (1) The accused must agree to be referred to the sentencing circle.
- (2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
- (3) That there are elders or respected non-political community leaders willing to participate.
- (4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
- (5) The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counseling made available to her and be accompanied by a support team in the circle.
- (6) Disputed facts have been resolved in advance.
- (7) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

There is no provision in the *Criminal Code* for the use of sentencing circles. The power and duty to impose a fit sentence remains vested exclusively in the trial judge. If a sentencing circle is used, and it recommends a sentence that is not a fit sentence, the judge is duty bound to ignore the recommendation to the extent that it varies from what is a fit sentence. One of the duties of the Court of Appeal is to prevent disparity in sentences. Disparity between the sentence imposed in any given case and other sentences for like offences in like circumstances in other cases is a ground of appeal.

The purpose of sentencing circles implicitly suggests sentences that will differ from

³ *Morin (CA)*, *supra*, para. 6

those which the courts have up to now imposed in order to take into account aboriginal culture and traditions, and in order to permit and to take into account direct community participation in both imposition and administration of the sentence. It also seems implicit in all discussions of sentencing circles that they will in many cases, if not most of them, recommend sentences imposing lesser terms of incarceration than would have been imposed by a judge alone and to substitute alternative sanctions, usually involving the community in the administration of those sanctions. Fafard P.C.J. elaborated on this criterion in *Joseyounen*:

It is often said in sentencing circles and elsewhere that one main purpose of the circle process is to keep aboriginal offenders out of jail. It is not so. It may well be that a welcome side-effect of sentencing circles is that fewer offenders are incarcerated. I know that this is the result in property related offences especially. I know this because at the opening of the sentencing circle I inform the participants that without their assistance in finding an alternative a certain period of incarceration will be imposed. This is to insure that the offender knows where he stands.

But keeping people out of jail is not the aim of this exercise. If that were the only goal, one need only open the jails and release all aboriginal inmates immediately.

The aim of sentencing circles is the same as it is when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by this offender and others.

However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.⁴

Other cases from the Supreme Court of Canada have recognized that departure from the normal range of sentences for a given offence may be permitted where there are circumstances out of the ordinary to justify the departure. This leaves substantial room for the use of sentencing circles.

Criminal Code sections 718.2(d) and (e) require that sanctions other than imprisonment, if appropriate or reasonable in the circumstances, should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. These provisions maintain the requirement that rehabilitation be considered in all cases, and that departure from the normal range of sentences is acceptable if circumstances warrant. The use of sentencing circles in appropriate cases fits with the requirement that there be particular attention to the circumstances of aboriginal offenders.

⁴ *R. v. Joseyounen*, [1995] S.J. No. 362, paras. 37-40



Chapter Eight: Métis in Legislation

8.1 Alberta – Constitution of Alberta Amendment Act, 1990

The *Constitution* of Alberta was amended in 1990 to provide constitutional recognition to the grant of lands to the Métis. The preamble is as follows:

WHEREAS the Métis were present when the Province of Alberta was established and they and the land set aside for their use form a unique part of the history and culture of the Province; and

WHEREAS it is desired that the Métis should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance under the laws of Alberta and, to that end, Her Majesty in right of Alberta is granting title to land to the Métis Settlements General Council; and

WHEREAS Her Majesty in right of Alberta has proposed the land so granted be protected by the Constitution of Canada, but until that happens it is proper that the land be protected by the constitution of the Province

8.2 Alberta – Métis Settlements Legislation

Alberta is unique in the Métis Nation Homeland in that it currently has the only legislated regime that recognizes and gives effect to Métis land and local governance. This has been accomplished through the *Métis Settlements Accord Implementation Act*,¹ *Métis Settlements Land Protection Act*,² *Métis Settlements Act (MSA)*³ and the *Constitution of Alberta Amendment Act*.⁴ These are collectively referred to as the Métis Settlements legislation.

A recital was added to the MSA in 2004:

This Act is enacted

(a) recognizing the desire expressed in the Constitution of Alberta Amendment Act, 1990 that the Métis should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance under the laws of Alberta,

¹ S.A. 1990, c.M-14.5

² S.A. 1990, c.M-14.8

³ S.A. 1990, c.M-14.3

⁴ S.A. 1990, c. C-22.2

(b) realizing that the Crown in right of Alberta granted land to the Métis Settlements General Council by letters patent and that the patented land is protected by an amendment to the *Constitution of Alberta* and by the *Métis Settlements Land Protection Act*,

(c) in recognition that this Act, the *Constitution of Alberta Amendment Act, 1990*, the *Métis Settlements Land Protection Act* and the *Métis Settlements Accord Implementation Act* were enacted in fulfilment of Resolution 18 of 1985 passed unanimously by the Legislative Assembly of Alberta, and

(d) acknowledging that the Government of Alberta and the Alberta Federation of Métis Settlement Associations made The Alberta Métis Settlements Accord on July 1, 1989.

The Métis Settlements legislation is delegated authority from the provincial government. It provides a framework within which Métis Settlement institutions can develop laws concerning membership, land, financial accounting, resource development and other issues pursuant to settlement council bylaws, General Council policies and ministerial regulations. In addition there are several regulations that have been enacted pursuant to the *Métis Settlements Act* including: the *Land Interests Conversion Regulation*, *Métis Settlements Election Regulation*, *Métis Settlements Land Registry Regulation*, *Métis Settlements Subdivision Regulation* and the *Transitional Membership Regulation*.⁵

The *Métis Settlements Amendment Act* (Bill 30)⁶ was introduced into the Alberta legislature on April 1, 2004. The amendments include the following:

- 1) Previously, there was a requirement that consensus was required at the General Council (MSGC) level. That has now been replaced with a majority decision-making rule. The Bill proposes that a 75% majority or six of eight settlements required for passage of a motion.
- 2) Terms of office are now to be three years instead of one year.
- 3) Membership provisions previously prohibited registered Indians from being settlement members. The Bill enables MSGC to make a policy that determines membership with respect to Indians.
- 4) The Minister can appoint a Métis Settlements Ombudsman and expand the scope of investigatory powers.
- 5) MSAT, the Métis Settlements Appeals Tribunal is reorganized. A new Executive Committee is created.
- 6) Amendments to bylaws previously had to be by means of a public meeting

⁵ Land Interests Conversion Regulation, Alta. Reg. 362/1991; Métis Settlements Election Regulation, Alta. Reg. 145/1993; Métis Settlements Land Registry Regulation, Alta. Reg. 361/1991; Métis Settlements Subdivision Regulation, Alta. Reg. 363/1991; Transitional Membership Regulation, Alta. Reg. 337/1990.

⁶ *Métis Settlements Amendment Act* (Unproclaimed Sections Only), S.A. 2004, (Bill 30)

vote.

Bill 30 enables the Minister to pass a regulation or the Métis Settlements General Council to pass a policy establishing alternate conditions for bylaw approval.

8.3 Saskatchewan – *The Métis Act*

In 2002, the government of Saskatchewan proclaimed “an Act to recognize contributions of the Métis and to deal with certain Métis Institutions.” The Bill passed first reading on May 29, 2001 and second reading on June 1, 2001. *The Métis Act* was proclaimed and became effective on January 28, 2002.

Known as *The Métis Act*, the new legislation formally recognizes the culture, history, customs and language of the Métis. It provides a mechanism for the Métis Nation-Saskatchewan (MNS) to engage in a bilateral process of negotiations about capacity building, land and resources, governance and harvesting. *The Métis Act* also provides for the incorporation of the Métis Nation-Saskatchewan Secretariat Inc., which removes the MNS from the limitations of the *Non-Profit Corporations Act*.

8.4 Ontario Green Energy Act

In 2010 the Ontario government enacted the *Green Energy Act*.⁷ For the purposes of the Act an ‘Aboriginal Community’ includes “the Métis Nation of Ontario or any of its active Chartered Community Councils.”

8.5 Historic Legislation

Métis are referred to in two specific historic pieces of legislation – the *Manitoba Act* and the *Dominion Lands Acts*.

8.5.1 Manitoba Act

The *Manitoba Act, 1870* refers to the Métis (then known as the half-breeds) in s. 31, which read as follows:

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 four hundred thousand acres thereof, for the benefit of the families of the half-breed residents it is hereby enacted, that, under regulations to be from time to time made by the

⁷ *Green Energy Act*, S.O. 2009, C. 12

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-breed 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.

Section 31 of the *Manitoba Act* was repealed in 1969. This section of the *Manitoba Act* was at issue in the *MMF* case. The Manitoba Court of Appeal held that “there appears to be little doubt that the constitutional issues raised in this case (*MMF*) are moot, given that the impugned legislation was repealed many years ago and does not continue to have any legal or practical effect on the parties.”⁸ However, the Supreme Court of Canada overturned this finding and held that the constitutional nature of the issue was not moot and determined that the failure of the Crown to provide the 1.4 million acres breached the honour of the Crown. For more information on the *MMF* case see Part Two: Case Law Summaries.

8.5.2 Dominion Lands Act

The *Dominion Lands Act* was amended in 1879 to permit land grants to the Métis (half-breeds) in what are now the parts of Manitoba outside the original postage stamp province, Alberta, Saskatchewan and the Northwest Territories. Section 125 of the *Dominion Lands Act* read as follows:

To satisfy any claims existing in connection with the extinguishment of the Indian title preferred by half-breeds resident in the North-West Territories outside the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting lands to such persons, to such extent and on such terms and conditions, as may be expedient.

It was pursuant to s. 125 of the *Dominion Lands Act* that scrip was distributed to the Métis.

8.5.3 – Regulations & Orders in Council

27 May, 1927 - *Special Fisheries Regulations for the Provinces of Saskatchewan and Alberta and The Territories North Thereof* were adopted by a federal order in council.⁹ The regulations provided that:

3. Any Indian or half-breed resident in either of these provinces shall be eligible for an annual fishing permit, which shall entitle him or a member of his family to fish with not more

⁸ *MMF*, (CA) *supra*, para. 369.

⁹ Special Fisheries Regulations for the Provinces of Saskatchewan and Alberta and The Territories North Thereof, 27 May 1927 - Order in Council P.C. 1927-1034, NAC RG2, Vol. 1404.

than sixty yards of gill-net for domestic use, but not for sale or barter.... Such permit shall be issued free.

28 November, 1928 – Order in Council permitting Treaty Indians and half-breeds to take a limited number of beaver.¹⁰

14 January, 1931 - Order in Council granted permission to Indians and Métis to trap beaver during a three-year closed season:

That representations have now been made that because of the scarcity of fur-bearing animals in the Mackenzie District the natives have not been able to secure adequate returns from their trapping operations to enable them to purchase sufficient food for themselves and their families.

Therefore...the Royal Canadian Mounted Police as game officers...be empowered to issue a permit to one member of each Indian family or each half-breed family leading the life of Indians...where the needs of such family warrant such an exception being made.¹¹

3 July, 1947 - Order in Council was issued to deal with an unnecessary slaughter of caribou “upon which many of the native residents are dependent for food and clothing.” Section 14 of the regulations was revoked and replaced by the following:

14 (1) Subject to the provisions of these regulations, or of any ordinance of the Northwest Territories, the holder of a hunting and trapping licence may:

- (a) hunt, kill, take or trap game during the open season;
- (b) have in his possession at all times the pelts and skins of such game as he has legally trapped or killed;
- (c) sell, trade, ship or remove such pelts and skins.

(2) The rights of a holder of a hunting and trapping licence, as specified in this section, may be exercised, without the issue of a licence, by the following: every native-born Indian or native-born half-breed leading the life of an Indian; every native-born Eskimo, or native-born half-breed leading the life of an Eskimo.¹²

8.5.4 – Policies

July 2007 - Updated June 2010 - Métis Harvesting in Alberta Policy

Alberta states that the following three elements are essential to government of Al-

¹⁰ Order in Council P.C. 2146, 28 November 1928

¹¹ Order in Council P.C. 1931-51, 14 January 1931

¹² Order in Council P.C. 1947-2567, 3 July 1947

berta's recognition of Métis harvesting rights:

- Determining who are Métis harvesters;
- What comprises Métis harvesting rights; and
- Where those rights can be exercised.

The policy states that Métis fishers must have a Métis Domestic Fishing Licence or a sportfishing licence. Further, Métis who wish to claim Métis harvesting rights must provide evidence as to how long they have self-identified as Métis, membership in the Métis Nation of Alberta or a Métis Settlement, an ancestral connection to a Métis community that Alberta agrees is a historic Métis community, a genealogical history to the late 1880s, the name and acceptance by a contemporary Métis community and involvement in that community.

Alberta considers the following 17 communities as both historic and contemporary Métis communities: Fort Chipewyan, Fort McKay, Fort Vermillion, Peace River, Cadotte Lake, Grouard, Wabasca, Trout Lake, Conklin, Lac La Biche, Smoky Lake, St. Paul, Bonnyville, Wolf Lake, Cold Lake, Lac Ste. Anne and Slave Lake.

For Settlement members, Alberta accepts demonstration of a pre-1900 ancestral connection to the general geographic area of the settlement, or a pre-1900 ancestral connection to a recognized Métis community within Alberta from which an individual or their family migrated when the settlement was established.

In *Beer*¹³ and *O'Sullivan Lake Outfitters*¹⁴ the Court had occasion to comment on crown policies. In *Beer*, the issue was with respect to Manitoba's Wood Harvesting Policy (January 2011). Métis found out about the policy only through disclosure in the court case, which revealed that at the time of the offence Manitoba had no Métis harvesting policy, but that a policy had been adopted shortly afterward. The evidence showed that Manitoba had never consulted with the Métis about the policy, it was not published anywhere and in fact the Métis had no idea of its existence. In *O'Sullivan Lake Outfitters*, the court in Ontario held that the Crown breached the principles of constitutionalism and the rule of law by acting in an arbitrary manner in seeking to enforce a draft policy concerning the building of cabins on public lands. The court cited the *Quebec Reference* case, where the Supreme Court of Canada emphasized the importance of the principles of constitutionalism and the rule of law and affirmed that there must be a system of "an actual order of

¹³ *R. v. Beer* [2011] M.J. No. 405; supplementary reasons [2012] M. J. No. 158

¹⁴ *R. v. O'Sullivan Lake Outfitters Inc.* [2011] 2 C.N.L.R. 307.

positive laws”¹⁵ and that all government action must comply with that principle. The court held that in applying a draft policy the Crown offended those principles by “arbitrarily seeking to enforce a draft policy concerning the issuance of work permits for incidental cabins that does not have legislative approval” and held that the process for implementing and enforcing the policy did not satisfy “section 35 of the *Constitution Act, 1982*, and the jurisprudence that has evolved in accordance with that provision.”

8.6 Riel Bills – Proposed Exoneration for Louis Riel

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

More than 25 Bills have been introduced into Parliament seeking exoneration of Riel. The following is a list of Bills to exonerate Riel that have been put to either Parliament or the Senate since 1983.

- 1) In September 23, 1983 Conservative member William Yurko tabled Bill C-691, *An Act to Grant a Pardon to Riel*;
- 2) Mr. Yurko tabled it again on March 14, 1984 (Bill C-228);
- 3) On June 28, 1984 Mr. Yurko tabled it again (Bill C-257);
- 4) On December 13, 1984 (Bill C-217), NDP member Les Benjamin introduced a Bill that called for the guilty sentence against Riel to be overturned.
- 5) On November 28, 1985, Liberal member Sheila Copps asked the House for a posthumous pardon for Riel.
- 6) On September 16, 1987, NDP member Nelson Riis introduced Bill C-265.
- 7) On November 16, 1994, Suzanne Tremblay of the Bloc Québécois introduced Bill C 288 requesting the revocation of the conviction of Riel.
- 8) Ms. Tremblay tried again on June 4, 1996 (Bill C 297).
- 9) Bill C 380 was introduced on March 5, 1997.
- 10) On June 3, 1998, Mr. Coderre (Liberal from Quebec) introduced Bill C-417, *An Act Respecting Louis Riel, which sought to reverse the conviction and recognize and commemorate Riel’s role in the advancement of Canadian Confederation and the rights and interests of the Métis People*.
- 11) In 1999-2000, Marlene Jennings introduced Bill C-257 – *An Act Respecting Louis Riel*.

¹⁵ Reference Re: Secession of Quebec, [1998] 2 S.C.R. 217 at para. 70

- 12) On November 7, 2001 five members representing all parties in the House introduced Bill C-411 - *Act respecting Louis Riel*. The Bill proposed to establish July 15th as Louis Riel Day and to revoke his conviction of August 1, 1885 for high treason.
- 13) Bill S-35 – Senate Bill introduced in 2001 - *Act to honour Louis Riel and the Métis People*. The Bill originally proposed to ‘vacate’ the conviction of high treason. In the original Bill, the historic role of Louis Riel was acknowledged and May 12th, the day on which the *Manitoba Act* was assented to, was proposed as Louis Riel Day. The sash was proposed as a symbol of the Métis people. In October of 2002, the Senate Bill was re-introduced but was amended. It no longer proposed to vacate Riel’s conviction and now took the form of a Bill to honor Louis Riel and the Métis people.
- 14) Bill S-9 – A Senate Bill introduced in 2004 - *An Act to honour Louis Riel and the Métis People*. The Bill proposed to honour Louis Riel as a Métis patriot and Canadian hero and to establish May 12th as Louis Riel Day. It also proposes to acknowledge the arrowhead sash as the recognized symbol of the Métis people. This Bill contained no proposal to exonerate Riel, vacate Riel’s conviction or to pardon him.
- 15) C-216 (2004-05) introduced by Pat Martin (NDP) – *An Act Respecting Louis Riel*
- 16) C-324 (2004) introduced by Reg Alcock (Liberal) – *An Act Respecting Louis Riel*
- 17) Bill C-258 introduced in 2006 - *An Act Respecting Louis Riel*; “to reverse the conviction of Louis Riel for high treason and to formally recognize and commemorate his role in the advancement of the Canadian Confederation and the rights and interests of the Métis people and the people of Western Canada”. Article 3 states that “Louis Riel is hereby deemed to be innocent of the charge of high treason. His conviction for high treason is hereby reversed.”¹⁶
- 18) C-248 (2008) introduced by Pat Martin (NDP) – *An Act Respecting Louis Riel*.
- 19) C-248 (2009) reinstated from previous year.
- 20) C-248 (March 2010-March 2011) reintroduced again.

In 2010, former Liberal Leader Michael Ignatieff toured Batoche, Saskatchewan, the site of the 1885 rebellion, where he called for Riel to be pardoned.

¹⁶ Bill c-258, An Act respecting Louis Riel available online: <http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=2493409>

8.7 Métis Resolutions

8.7.1 Honoring Louis Riel

In 1992, unanimous resolutions recognizing the contributions of Louis Riel were passed in the Manitoba Legislative Assembly, the House of Commons and the Senate. The House of Commons resolution read as follows:

That this House recognize the unique and historic role of Louis Riel as a founder of Manitoba and his contribution in the development of Confederation; and that this House support by its actions the true attainment, both in principle and practice, of the constitutional rights of the Métis people.¹⁷

8.7.2 The Year of the Métis – 2010

The House of Commons, Ontario and Saskatchewan all passed resolutions in 2010 declaring it to be the ‘Year of the Métis.’ The Ontario resolution read as follows:

The Ontario Legislature commemorates 2010 as the Year of the Métis. The Ontario Legislature recognizes and honours the distinct culture, identity and heritage of the Métis people in the Province as well as the historic and ongoing contributions of the Métis in Ontario.¹⁸

¹⁷ Resolution to Recognize the Historic Role of Louis Riel as a Founder of Manitoba, Manitoba Legislative Assembly, May 1992, passed unanimously.

¹⁸ Resolution to Recognize the Historic Role of Louis Riel, House of Commons and Senate of Canada, March 10, 1992, by Joe Clark, then Minister of Constitutional Affairs. The resolution was adopted with the unanimous consent of the House and the Senate. Note that a previous motion was put to the house on October 13, 1989 when Bob Skelly (NDP), tabled a motion calling for recognition of Riel as one of the Fathers of Confederation.



Chapter Nine: Obligations of the Crown

9.1 Fiduciary Law and the Honour of the Crown

The Supreme Court of Canada has stated many times that aboriginal peoples are in a fiduciary relationship with the Crown. In *Sparrow*, the court said:

The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.¹

The fiduciary relationship therefore has its roots in the history of the relationship between aboriginal peoples and the Crown. The concept of fiduciary obligation is old in law. If one party has a legal obligation to act for the benefit of another that party is a fiduciary. The courts will then supervise the relationship by holding him/her to the fiduciary's strict standard of conduct. In addition the courts have been very clear to state that it is the nature of the relationship that may give rise to a fiduciary duty. It is not the specific category of actor involved.

The government's duties with respect to aboriginal peoples are also grounded in the honour of the Crown. The Supreme Court of Canada has said that the honour of the Crown is always at stake in its dealings with aboriginal peoples.² It is not a mere incantation, but rather a core precept that finds its application in concrete practices. The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. The Supreme Court has said that nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."³

The honour of the Crown gives rise to different duties in different circumstances.

¹ *Sparrow* (SCC), *supra*, para. 59

² *Haida Nation* (SCC), *supra*, para. 16

³ *Haida Nation* (SCC), *supra*, para. 17

Where the Crown has assumed discretionary control over specific aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, fulfillment of the duty requires that the Crown act with reference to the aboriginal group's best interest in exercising discretionary control over the specific aboriginal interest at stake. In *Wewaykum*, the Court stated that the term 'fiduciary duty' does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and aboriginal peoples:

"Fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.⁴

Where aboriginal rights and title have been asserted but have not been defined or proven, the aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of 'sharp dealing.' In *Marshall*, the majority of the Court stated that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship."⁵

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of aboriginal claims. Treaties serve to reconcile pre-existing aboriginal sovereignty with assumed Crown sovereignty, and to define aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and it is always assumed that the Crown intends to fulfill its promises. This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

There are currently at least four cases that claim that the Crown breached its fidu-

⁴ *Wewaykum Indian Band v. Canada*, [2002] S.C.J. No. 79 para. 81

⁵ *R. v. Marshall*, [1999] S.C.J. No. 55, para. 4

ciary obligations to the Métis. These are *Morin* (NW Saskatchewan Land Claim), which was stayed by order of the court in December of 2005, the *MMF* case, *Adams* (Métis Veterans class action) and *Letendre* (Kelly Lake oil & gas consultation case).

In July of 2010, the Manitoba Court of Appeal handed down its decision and reasons for judgment in the *MMF* case. The Court made several findings with respect to the honour of the Crown, the fiduciary relationship and fiduciary duties.

The Manitoba Court of Appeal held that the general doctrine of the honour of the Crown applied to the Métis. This means that the honour of the Crown is always at stake in its dealings with the Métis because they are an aboriginal people. Treaties and statutory provisions are to be interpreted in a manner that maintains the integrity of the Crown and it is always assumed that the Crown intends to fulfill its promises and no appearance of ‘sharp dealing’ will be sanctioned. The Court of Appeal found that the Métis are aboriginal people and the honour of the Crown provides the foundation for determining whether or not fiduciary obligations are owed and whether they were breached. The honour of the Crown does not give rise to a freestanding fiduciary obligation.

The Court of Appeal recognized that the relationship between the Crown and the Métis, as one of the aboriginal peoples of Canada, is fiduciary in nature. However, that does not mean that every aspect of the relationship gives rise to a duty. The relationship is not the same thing as the obligations. The trial judge found that there was no fiduciary relationship between the Métis and Canada. The Court of Appeal held that this was an error. The court accepted that Métis are included in the Crown-aboriginal fiduciary relationship.

... both precedent and principle demonstrate that the Métis are part of the sui generis fiduciary relationship between the Crown and the aboriginal peoples of Canada.⁶

Whether a fiduciary has a duty in any given circumstance is a different question from whether there is a fiduciary relationship. The test for determining whether a fiduciary duty exists within a Crown/aboriginal relationship is twofold. First, is there a specific or cognizable aboriginal interest? Second, has the Crown assumed discretionary control, in the nature of a private law duty over that interest?

In *MMF*, the trial judge assumed that the specific aboriginal interest had to be the

⁶ *MMF* (CA), *supra*, para. 443.

existence of aboriginal title, which the Métis had not proven. The Court of Appeal disagreed and noted that even in Indian case law, the Supreme Court of Canada has recognized a fiduciary duty could arise with respect to interests in land that are not aboriginal title interests. The Court of Appeal also found, following *Guerin*, that language such as ‘for the benefit of’ in a statute does not create a fiduciary duty, but rather recognizes the existence of such a duty.

The Court of Appeal declined to decide on the first part of the test. In other words they made no finding that the Métis had a cognizable interest that would ground a fiduciary obligation. They did find that the Crown had assumed discretionary control over the administration of s. 31 of the *Manitoba Act* and that this satisfied the second part of the test.

In order to prove that there has been a breach of a fiduciary duty, the court examines the standard of conduct, which refers to the “general description of how a fiduciary is obligated to act.” The content of that duty varies. The general standard is to act as an ordinary person would act, that is with prudence and in the best interests of the beneficiary. The fulfillment of fiduciary duties generally requires that fiduciaries act honourably, with honesty, integrity, selflessness, and the utmost good faith in the best interests of their beneficiaries.

In the *MMF* case, the Manitoba Métis Federation claimed that Canada breached its duty by failing to grant land to some Métis children, by inadvertence or ineptitude, by sale before patent or majority, by delay, by proceeding by way of lottery, and by allowing Manitoba to enact unconstitutional legislation. The Court of Appeal held that, based on the evidence before them (note that the court is highly critical of the evidence provided) with respect to each of these claims there was no breach of the duty.

In March of 2013 the Supreme Court of Canada handed down its reasons for judgment in the *MMF* case. It held that:

The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature. However, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations.⁷

A fiduciary duty may arise is where the Crown administers lands or property in which aboriginal peoples have an interest. The Supreme Court held, in *MMF*, that a duty arises if there is a specific or cognizable Aboriginal interest, and a Crown

⁷ *MMF v Canada*, [2013] S.C.J. No. 14, para. 48

undertaking of discretionary control over that interest.

With respect to the 1.4 million acres at stake in *MMF*, the court held that there was no dispute that the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*. So the second requirement was clearly met. The court however, found that the *MMF*'s claim that there was a fiduciary duty with respect to the lands did not meet the first condition – proving that there was a “specific or cognizable Aboriginal interest”⁸ in those lands.

The Supreme Court held that “the fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land.” While there was an ‘interest,’ the court held that it had to be “distinctly Aboriginal: it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land.” The issue was whether the Métis as a collective had a specific or cognizable Aboriginal interest in the ss. 31 or 32 land.⁹

The Métis argued that because the land of s. 31 was “towards the extinguishment of the Indian Title to the lands in the Province,”¹⁰ that meant they had an aboriginal interest in the lands. The court held that the fact that the Métis used and held land individually, rather than communally, and permitted alienation, meant that their interest was not aboriginal. Rather, those individual Métis held interests in the land arose from their personal history, not their shared Métis identity. In the result, the court agreed with the trial judge when he concluded that Métis ownership practices were incompatible with an Aboriginal interest in land.

In summary, the words of s. 31 do not establish pre-existing communal Aboriginal title held by the Métis. Nor does the evidence: the trial judge’s findings of fact that the Métis had no communal Aboriginal interest in land are fatal to this contention. It follows that the argument that Canada was under a fiduciary duty in administering the children’s land because the Métis held an Aboriginal interest in the land must fail. The same reasoning applies to s. 32 of the *Manitoba Act*.¹¹

The court also declined to find that the Crown had made an undertaking to act in the best interests of the Métis, which is another means of establishing a fiduciary duty. The court held that:

While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for

⁸ *Ibid.*, para. 52

⁹ *Ibid.*, para. 53

¹⁰ *Ibid.*, para 51

¹¹ *Ibid.*, para 59.

broader settlement. Indeed, the discretion conferred by s. 31 to determine “such mode and on such conditions as to settlement and otherwise” belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests.¹²

The court concluded that Canada did not owe a fiduciary duty to the Métis with respect to the implementation of ss. 31 and 32 of the *Manitoba Act, 1870*. However, the Supreme Court of Canada did find that Canada breached its honour of the Crown duty in its implementation of its obligations under s. 31 of the *Manitoba Act, 1870*.

The *MMF* also argued that Canada breached its honour of the Crown duty, which is “a duty that arises from the Crown’s assertion of sovereignty over an aboriginal people and de facto control of land and resources that were formerly in the control of that people.”¹³ Furthermore,

The ... honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the “Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation” ... It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, “[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably”: para. 17 (emphasis added).¹⁴

The court then compared a constitutional obligation to a treaty promise and called both “an intention to create obligations,” noting that a certain measure of solemnity attached to both. The court further noted that both types of promises were made for the purpose of reconciliation. The obligation had to be explicitly owed to an aboriginal group. The court held that a constitutional obligation owed to a group partially composed of aboriginal people did not engage the honour of the Crown obligation. The honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it. An honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. To fulfill this duty, Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left ‘with an empty shell of a treaty promise.’

The court noted that with respect to the constitutional obligation in *MMF*:

¹² *Ibid.*, para. 62.

¹³ *Ibid.*, para 66.

¹⁴ *Ibid.*, para 70.

It is a narrow and circumscribed duty, which is engaged by the extraordinary facts before us...

Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts.¹⁵

The court held that the honour of the Crown is engaged by constitutional obligations to Aboriginal groups.

Section 31 of the *Manitoba Act, 1870* is just such a constitutional obligation. Section 31 conferred land rights on yet-to-be-identified individuals -- the Métis children. Yet the record leaves no doubt that it was a promise made to the Métis people collectively, in recognition of their distinct community. The honour of the Crown is thus engaged here.

... It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived. Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown's claim to sovereignty.

... Section 31 is a constitutional obligation to an Aboriginal group. In accordance with the principles outlined above, the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.¹⁶

The central issue in the case, the court held was whether the government's actual implementation of s. 31 was consistent with the duty of the Crown to diligently pursue implementation in a way that would achieve its objectives. In other words, did the Crown's conduct meet this standard? The court concluded that it did not. The court concluded that the Crown acted with persistent inattention and failed to act diligently to achieve the purposes of s. 31. The delay was inconsistent with the behaviour demanded by the honour of the Crown.

The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in "the most effectual and equitable manner". Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.¹⁷

¹⁵ *Ibid.*, para 81-82.

¹⁶ *Ibid.*, para 91-94.

¹⁷ *Ibid.*, para. 128.

9.2 Consultation and Accommodation

The issue of whether Métis are in a fiduciary relationship with the Crown arose also in the *Daniels* case. The plaintiffs asked the court for a declaration that the Crown had fiduciary obligations to the Métis arising out of the fact that Métis are under federal jurisdiction in s. 91(24). The court observed that it was likely that Métis were in a fiduciary relationship with the Crown as a result of the finding that they were ‘Indians’ within the meaning of s. 91(24). However, the court distinguished a fiduciary relationship from a fiduciary duty. There was, the court held, decidedly no fiduciary duty in the absence of any specifics and declined to make declarations on either issue.

On November 18, 2004, the Supreme Court of Canada handed down its decision in the *Taku River Tlingit First Nation v. British Columbia* case.¹⁸ The case was part of the Tlingit’s ongoing struggle to protect their aboriginal rights and way of life – in this case, from the effects of a proposal to reopen the Tulsequah Chief mine by building an industrial highway through the heart of their traditional territory.

The Court also handed down a companion decision in the *Haida Nation v. British Columbia*¹⁹ case. Together these cases have changed aboriginal rights law by declaring that the Crown has a duty to consult and accommodate in cases where aboriginal title and rights have not been proved in court.

What is the constitutional source of the duty to consult, and how should it be interpreted?

The government’s duty to consult with aboriginal peoples and accommodate their interests finds its source in the Crown’s duty to act honourably. The honour of the Crown is always at stake in its dealings with aboriginal peoples and must be interpreted generously in order to reflect the underlying realities from which it stems.

The scope of the duty to consult ... 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.

Taku, par. 29

What are the historical roots of the duty?

Canada’s aboriginal people were already here when Europeans came. This fact is the historical foundation of the honour of the Crown. Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of aboriginal claims. The potential rights embedded in these claims are

¹⁸ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550

¹⁹ *Haida Nation v. B.C. (Minister of Forests)* [2004] 3 S.C.R. 511

protected by s. 35. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown requires it to consult and, where indicated, accommodate aboriginal interests.

“The duty ... flows from the Crown’s assumption of sovereignty over lands and resources formerly held by the aboriginal group.”
Haida, par. 53

What is the purpose of the duty?

Reconciliation between aboriginal peoples and the Crown is the goal of s. 35. It is to be achieved through negotiations. It is a process flowing from the rights guaranteed by s. 35(1) of the *Constitution Act*, 1982. The process of reconciliation arises out of the Crown’s duty of honourable dealing toward aboriginal peoples. It arises from the Crown’s assertion of sovereignty over an aboriginal people and the Crown’s control of lands and resources. With the assertion of Crown sovereignty there arose an obligation on the Crown to treat aboriginal peoples fairly and honourably and to protect them from exploitation.

What interim measures are required to satisfy the duty?

Consultation and accommodation before final claims resolution is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the aboriginal interest pending claims resolution. It also fosters a relationship between the parties that makes negotiations possible. Negotiations are the preferred process for achieving ultimate reconciliation.

When is the duty triggered?

The provincial and federal governments argued that they have no duty to consult or accommodate prior to final determination of the scope and content of an aboriginal right. The Court called this an ‘impoverished view’ of the honour of the Crown. A proven right is not the only trigger for the legal duty to consult or accommodate. Reconciliation is not to be limited to proven rights or title. This kind of narrow thinking would mean that when proof is finally reached, by court determination or treaty, aboriginal peoples might find their lands and resources changed and denuded. This is not reconciliation, and it is not honourable.

The duty to consult arises whenever the Crown has knowledge of an aboriginal rights or title claim and is considering actions that might negatively affect those claimed rights or title.

What is the difference between the trigger and the content of the duty?

There is a distinction between what triggers the duty to consult and accommodate and the content of the duty. Knowledge of a credible claim is sufficient to trigger the duty. The content of the duty will depend on the seriousness of the potentially adverse effects. In all cases, the honour of the Crown requires governments to act with good faith to provide meaningful consultation appropriate to the circumstances. Sharp dealing is not permitted.

How to satisfy the duty in serious cases?

In cases where a strong aboriginal rights claim is established, the right is important to the aboriginal people, and there is a high risk of harm to that right, deep consultation, aimed at finding a satisfactory interim solution, is required. The consultation required at this stage may include the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that aboriginal concerns were considered and to reveal the impact they had on the decision. While there is no duty to agree, there must be a commitment to a meaningful process.

What processes satisfy the duty?

The government could adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases. The controlling question in all situations is; what is required to maintain the honour of the Crown and to achieve reconciliation between the honour of the Crown and the aboriginal people with respect to the interests at stake? Pending settlement, the Crown is bound by its honour to balance societal and aboriginal interests in making decisions that may

The Crown argued that while the government should consider the impact on the treaty right, there was no duty to accommodate because the treaty itself constituted the accommodation of the aboriginal interest.

The SCC held that this is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the aboriginal peoples an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred in 1899 was not the complete discharge of the duty arising from the honour of the Crown.

Mikisew, SCC at par. 54-55

“The honour of the Crown ... is not a mere incantation, but rather a core precept that finds its application in concrete practice.”

Haida, par. 16

affect aboriginal claims. The Crown may be required to make decisions in the face of disagreement on the adequacy of its response to aboriginal concerns. Balance and compromise will then be necessary.

Who can assert a breach of the duty to consult?

The Supreme Court of Canada in *Behn v. Moulton Contracting* has held that an individual can assert a breach of the duty to consult, but only with authorization of the aboriginal collective.

9.3 Métis Consultation

Three cases have recently dealt with Métis consultation – *Daniels*,²⁰ *Beer*²¹ and *Kane*.²² In *Daniels*, the plaintiffs ask for a declaration “that the Métis and non-status Indian peoples of Canada have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.”²³ However, there were no facts before the court about negotiations and the court declined to make this declaration in the abstract. The trial judge said that this was without prejudice to the Métis being able to raise it in another case where there were facts with respect to consultation.

In *Beer* the Manitoba court found that the provincial crown breached its honor of the Crown duty when it failed to consult with Métis in Manitoba about its policy with respect to domestic timber harvesting. One interesting factor of the case was that consultation was so absent that the Métis had no idea that there even was a policy that permitted them to harvest timber for domestic purposes. The policy had never been published and no one from Manitoba had consulted with the Métis about it. The only reason it came to light at all was via disclosure in the case.

In *Kane* a Métis elder made an application, in her personal capacity, concerning an alleged failure to consult with the Métis community. The court held that an individual cannot bring such an application without being a representative on behalf of the rights bearing community.

Implications when there is no meaningful and proper consultation with the Métis Nation

When is consultation improper? When is there no meaningful consultation? Gen-

²⁰ *Daniels v. Canada*, 2013 FC 6 (F.C.T.D.) For decisions on motions see: 2002 FCT 295; 2005 FC 1109; 2011 FC 230 (CanLII).

²¹ *R. v. Beer* [2011] M.J. No. 405; supplementary reasons [2012] M. J. No. 158

²² *Kane v Lac Pelletier (Rural Municipality No. 107)* [2009] 4 CNLR 108 (Saskatchewan QB)

²³ *Daniels v. Canada*, 2013 FC 6 (F.C.T.D.) para 3(c)

erally, there will be no meaningful consultation if the government and the proponent are not genuinely seeking to inform themselves about the aboriginal interests that will be affected, the significance of such effects and how those could be mitigated. Evidence that there is no genuine intention in this regard would be readily shown by:

- failing to recognize that there is an aboriginal people in the project area, especially when put on repeated written notice.
- suggesting that the aboriginal people themselves are at fault for not asking for the consultation.
- suggesting that the obligation lies with government, but not with the proponent, or with the proponent but not with the government; or with either the government or the proponent but not the body holding the public hearing – in fact, suggesting that the obligation lies anywhere but with anyone responsible for the process;
- the suggestion that public meetings or signs announcing public meetings fulfills the obligation
- the suggestion that everyone knows about the project so there is no need for consultation;
- the suggestion that meeting with an individual trapper or fisherman will fulfill the obligation; and finally
- the refusal to deal with the duly chosen representatives of the aboriginal people.

If the Crown chooses to exercise its legal authority in the absence of meaningful consultation and an agreement on accommodation, any authorization that it grants will suffer from a fundamental legal defect. If the Crown chooses to authorize the project without meaningful consultation, it proceeds at its peril.

The Complexities of Consultation with the Métis

With respect to the Métis, the Crown and project proponents have the same consultation obligations that they have to all other aboriginal peoples. (1) They must take steps to inform the Métis about pending actions; and (2) they must inform themselves about the Métis in order to understand how the project might affect the Métis collective. With respect to how consultation obligations are to be fulfilled, there are two main issues. First, with whom is there an obligation to consult; who represents the Métis as Métis? Second, is a Métis collective synonymous with a physical community?

As a general principle, the government's consultation obligation must be directed to

the aboriginal people as a collective because aboriginal rights are collective rights. Consultation with individual members of the collective can only inform about that individual's interests. It cannot fully inform about the collective interests or aspirations of an aboriginal people.

As with consultation implemented with Indians, consultation with Métis must begin with their elected representatives. Admittedly this is a more complicated task for Métis than for Indians because Métis do not live in discrete physical communities equivalent to reserves. Métis people, in any given region, are rarely synonymous with a physical town, village or city. This is because the Crown did not relocate Métis into geographically distinct areas as it did when it relocated Indians onto reserves. The Métis continue to live, as most aboriginal people lived prior to the creation of reserves, scattered throughout their traditional territory. Some live on reserves, some live adjacent to reserves, some live in the bush, some live in cities, towns or villages. Statistics show that the Métis have always been a highly mobile people and it is interesting to note that this characteristic has not changed. Indeed the latest census data shows that the Métis continue to move more than average Canadians. Under these circumstances, consultation with Métis collectives is complicated but not an insurmountable task.

Can the Crown fulfill its consultation obligation with respect to the Métis by consulting with local municipal representatives?

While it will obviously be important for the Crown to engage in consultations with municipal representatives, this would likely not fulfill the Crown's consultation obligation with respect to the Métis and their section 35 rights. Municipal representatives have no jurisdiction, authority or mandate to deal with the Métis qua Métis. They have limited jurisdiction pursuant to their governing statute and within the geographic territory of their municipality, but municipal representatives have no mandate or authority to represent Métis with respect to the exercise of Métis rights or title. Municipal representatives are particularly inappropriate when one considers that elected municipal representatives may not even be Métis and that the exercise of many Métis rights, such as hunting, fishing and trapping, take place well outside municipal boundaries. Finally, Mayor and Council in some northern communities (i.e. those in northern Manitoba) are not decision-making bodies; their every decision is subject to review by the Minister who has the ultimate authority. Therefore, a consultation with the Mayor and Council by Manitoba government officials would amount to little more than the provincial government consulting itself.

Can consultation with the Métis be accomplished by holding public meetings or open houses?

This is a particularly insensitive perspective for dealing with a minority group. As the statistics show, the Métis in Canada are a minority. To expect that they will be forthcoming with their needs and perspectives as individuals in a group where they are outnumbered or actively disparaged, denies their special status as a constitutionally protected people and the constitutional protection of minorities.

Would the Crown's consultation obligation be fulfilled by consultation with Métis organizations?

For Indians, the Crown instituted Chief and Council on reserves and gradually these bodies have replaced the traditional forms of governance and become recognized in law as the official representatives for all purposes, including consultation. The Crown has never established similar political or legal bodies for the Métis. As a result, the self-created, ballot-box elected Métis organizations are the only entities in existence that have the structure and mandate to represent Métis qua Métis.

Governments appear to be reluctant to recognize the authority of these Métis created organizations for consultation purposes. Governments question the Métis organizations' membership rules, question their authority and deny them recognition, resources and respect. In view of the fact that the Crown has neglected to maintain its own Métis records, has not adequately funded these organizations to enable them to develop verifiable records, and in the absence of any other viable entities, it is difficult to understand how the Crown can fulfill its constitutional and fiduciary consultation obligations without consulting Métis organizations.



Chapter Ten: Self-Government

10.1 Self Government

The federal government in its Inherent Right Policy has recognized that s. 35 of the *Constitution Act, 1982* includes the inherent right to self-government. The *Report of the Royal Commission on Aboriginal Peoples* stated that the right of self-government is a right of all aboriginal peoples, including the Métis Nation.¹

Recall that above we noted that aboriginal rights are not absolute and that they may be limited by justifiable government legislation and regulation. Aboriginal rights are collective rights. They belong to the collective but are exercised by individual members of that collective. They belong to the collective so that the collective or the aboriginal people may continue to survive as a people. Ultimately the survival of a people must be in the hands of its leaders. In order to effect that survival the leaders must be able to make policies, laws and regulations. This right to make policies, laws and regulations is not limited to provincial or federal governments but also includes aboriginal governments.

Aboriginal self-government was first considered by the Supreme Court of Canada in *Pamajewon*.² In that case, the Shawanaga First Nation asserted an aboriginal right to self-regulate gaming. The Supreme Court of Canada rejected the claim.

The self-government provisions of the Nisga'a Treaty were attacked in the *Campbell*³ case as unconstitutional. The B.C. Supreme Court found that the self-government provisions in the Nisga'a Treaty were constitutional. The plaintiffs in *Campbell* (Campbell, later the Premier of BC, plus two others who subsequently became members of cabinet in the B.C. provincial government) appealed to the B.C. Court of Appeal. Once the plaintiffs became the government they officially dropped the case.

More recently, the *Mississaugas of Scugog Island First Nation*⁴ claimed a right of aboriginal self-government - to enact its own code of labour law to govern collective bargaining in relation to a casino that operates on reserve lands. The Great Blue Heron Casino employs approximately one thousand employees, less than one

¹ *Report of the Royal Commission on Aboriginal Peoples, supra*, Vol. 2, Ch. 3, s. 2.3, para. 1

² *R. v. Pamajewon*, [1996] 2 S.C.R. 821

³ *Campbell v. British Columbia*, [2000] B.C.J. No. 1524

⁴ *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, Local 444, [2007] O.J. No. 4603

percent of which are members of the First Nation. A few months after the CAW was certified as the Casino employees' bargaining agent under the Ontario *Labour Relations Act*,⁵ the Band Council enacted its own *Labour Relations Code*, which is closely modeled on the *Canada Labour Code*.⁶ The First Nation asserted that it had the right to enact the Code and displace the *Labour Relations Act* under its aboriginal and treaty rights, as recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

The Ontario Labour Relation Board rejected the claims and found that there was no ancestral practice, custom or tradition capable of supporting the right, properly characterized as the right to regulate labour relations on the reserve. The Board also found that no treaty right was established that would lead to any right to regulate labour relations or, more broadly, a right to self-government. The Board concluded that the *Labour Relations Act* applied to the Casino and its employees. The Divisional Court and then the Ontario Court of Appeal dismissed the Mississaugas application for judicial review. The Supreme Court of Canada dismissed the leave to appeal with costs.⁷

The Métis National Council and its provincial governing members are the legitimately elected leadership of the Métis people in the Métis Nation and therefore have the right and the responsibility to enact policies, laws and regulations which will ensure that Métis people can continue to support their lives. This responsibility may be carried out by enacting policies, laws or regulations and/or by negotiating harvesting agreements with the government. However, it is clear from the case law that the courts will acknowledge only a scope of aboriginal self-government that is based on an ancestral practice, custom or tradition. A broad right of self-government does not, at this time, appear to be recognized by the courts as a right that supports modern administration of government.

10.2 Delegated Governance

10.2.1 Métis Settlements in Alberta

Métis Settlements governance is delegated from the provincial government. Despite that settlement governments have more extensive legislative and administrative powers than most band councils established under the *Indian Act*. However, the ultimate power over the Settlements lies with the delegating government – Alberta.

⁵ *Labour Relations Act*, 1995, S.O. 1995, c. 1

⁶ *Canada Labour Code*, R.S.C., 1985, c. L-2

⁷ *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [2008] S.C.C.A. No. 35

Settlement Council by-laws must be consistent with policies passed by the General Council and the General Council's policies are subject to Ministerial veto. The Minister can also enact transitional regulations at his or her own motion and at the request of the General Council. To date, it does not appear that the Minister has vetoed a policy or refused to enact a regulation at the request of General Council. With the exception of harvesting laws, federal and provincial laws apply on the Métis Settlements unless they are expressly excluded by the *Métis Settlements Act*. Settlement by-laws have the force of provincial law.

10.2.2 Manitoba Northern Affairs Act Community Councils

Cross Lake, a central Manitoba Métis community has incorporated as a community council under the *Northern Affairs Act*.⁸ At the same time it reached a \$9.2-million compensation settlement with the province for flooding damages caused by diversion projects on the Churchill River. The longstanding dispute dates back to April 1992, when the Cross Lake community council filed legal action against the province and Manitoba Hydro.

The three parties agreed in April 2003 to sign an agreement-in-principle that would guide negotiations for a resolution. The financial compensation, to be paid out over a 13-year period, includes provisions for the transfer of approximately 5,000 acres of land intended to help with the expansion of the growing community. A new resource management committee will also help the council in having a voice in natural resource activities in the Cross Lake trapline district, according to the news release.

10.3 Negotiated Agreements in Support of Métis Self-Government

Northwest Territory Métis Nation Political Accord (2001)

In November of 2001, the South Slave Metis Tribal Council (later renamed the Northwest Territory Metis Nation) entered into a political accord with the government of the NWT to address certain matters, including the exploration of revenue sources needed to support investments in economic, cultural and social development, and capacity building.

Métis National Council Framework Agreement (2005)

In May of 2005, the Métis National Council and Canada entered into a Framework Agreement. The objectives of which were to engage a new partnership; build capacity; develop and establish processes to address the aboriginal and treaty rights of the

⁸ *Northern Affairs Act*, SM 2006, c. 34

Métis including the inherent right of self-government; to resolve long outstanding issues; and to identify and implement initiatives that will help to improve the quality of life of Métis people within Canada. The *MNC Framework Agreement* contained a list of the subject matters including addressing the implementation of the *Powley* decision; finding the place of Métis within federal policies; enhancing electoral and governance capacity; exploring options to resolve long outstanding Métis legal issues, as well as exploring options to fund Métis litigation; examine opportunities of programs and services which may be suitable for devolution; identification and registration of Métis people based on their national definition of Métis for membership within the Métis Nation; exploring economic development initiatives; and exploring options for honouring Louis Riel and the contributions of the Métis people to the development of Canada. The *MNC Framework Agreement* was to be in effect for a five-year period.

The Métis Nation of British Columbia Relationship Accord (2006)

This *Relationship Accord* was entered into between the Métis Nation British Columbia and the Province of BC on May 12, 2006. The *Accord* commits the parties to a relationship and achievable results on areas that include: housing, health care, education, employment opportunities, Métis identification and data collection. The accord is intended to complement and renew a previous 2003 agreement that addressed socio-economic challenges faced by Métis. The Province noted in its joint press release that it is building relationships with aboriginal people on principles of mutual respect and reconciliation with a goal of ensuring that aboriginal people share in the economic and social development of BC.

The Métis Nation Protocol (2008)

In September of 2008, the Métis National Council entered into a *Protocol Agreement* with the Federal Government. The MNC and Canada agreed to establish a bilateral process to examine jurisdictional issues, Métis students of residential schools; access to benefits and settlements by Métis veterans; governance and institution building; economic development including community capacity; Métis aboriginal rights including land and harvesting rights. The *Protocol* envisions the need to include the provinces on some topics and is in effect for five years or until superseded by a subsequent agreement.

Ontario-Métis Nation of Ontario Framework Agreement (2008)

November 2008 – The *Framework Agreement* sets out a process for the Métis Na-

tion of Ontario and the Ontario Government to work together to improve the well-being of Métis children, families, and communities, while also working to protect and promote the distinct culture, identity, and heritage of Métis people in Ontario. The *Framework Agreement* also encourages other Ontario Government Ministries to enter into Memorandums of Understanding with the MNO in order to support similar processes in other sectors. Key initiatives and commitments in the Framework Agreement include the development of an ongoing political process between MNO leadership and the Ontario Government; support for the MNO's structures, operational capacity and financial management; joint planning, collaboration and action on initiatives to improve the cultural, economic and social wellbeing of Métis people in Ontario; and the pursuit of reconciliation with Métis through the recognition of Métis rights and Ontario's ongoing commitment to participate in a MNO-Canada-Ontario tripartite process.

Métis Nation-Saskatchewan Harvesting Memorandum of Agreement

November 10, 2010 – The purpose was to arrive at an interim and ultimately a long-term agreement that recognizes and accommodates Métis food harvesting rights in Saskatchewan.



Case Law Summaries

*Acker*¹

New Brunswick [2004] – Mr. Acker claimed that he was Mi'kmaq and as such had a right to hunt in New Brunswick. The Court applied the *Powley* test to determine whether he was a member of the Mi'kmaq community – ancestral connection, self-identification and community acceptance. The trial decision was upheld on appeal at the Court of Queen's Bench. The court said it found Mr. Acker's self-identification as a Mi'kmaq to be “hollow and unconvincing... a bold assertion without factual support.”² There was no evidence of an aboriginal lifestyle or way of life. There was no evidence that the defendant has associated with or been recognized by any native community in the province or elsewhere. He presented no evidence of an “ongoing participation in a shared culture” or in any of the “customs and traditions” that make up any particular community's identity, as distinguished from other groups, which is how *Powley* defines membership criterion.³ Even on the basis of his membership in the New Brunswick Aboriginal Peoples' Council, which in and of itself would not be sufficient, the defendant has woefully little evidence to present of his participation in any activity involving a shared culture, customs or traditions with others in his community. There is in fact no evidence of that whatsoever, excepting the few meetings he attended in Miramichi on the topic of fishing.

*Adams*⁴

Federal Court [2002] - The plaintiffs in this action are individual Métis veterans filing on their own behalf and on behalf of all persons to whom benefits and allowances to Métis veterans and their families are owed under the *Veterans Charter*. In the Statement of Claim the plaintiffs adopt the following definition of Métis: Métis means a person who self-identifies as Métis, is of historic Métis Nation ancestry and is accepted by the Métis Nation. The plaintiffs state that in 1947 the government had created an innovative program of legislation designed to compensate veterans for their service and to ease their way back to civilian life. The Statement of Claim asserts that Métis veterans were disadvantaged and were consequently unable to obtain information as to the availability of veterans benefits and to satisfy onerous application requirements and that the government breached its fiduciary

¹ *R. v. Acker* [2004] NBJ No 525; aff'd [2006] NBJ No. 608

² *Ibid*, para 65

³ *Ibid*, para 72

⁴ *Adams v. Canada (AG)*, Federal Court Trial Division, August 8, 2002 (Court File No. T-1277-02).

obligation by failing to provide benefits and meaningful information and assistance regarding benefits to the plaintiffs and their families. As a result of this breach, the plaintiffs were denied pensions, compensation, allowances, bonuses, grants and other monies.

*Alberta (Human Rights and Citizenship Commission) v. Elizabeth Métis Settlement*⁵

Alberta [2005] – Elizabeth Métis Settlement Council passed a resolution requiring employees to undergo drug and alcohol testing. Cassandra Collins and Sonia Jacknife were employed in the administration office, refused to undergo testing and were terminated as a result. They filed complaints under Alberta’s *Human Rights, Citizenship and Multiculturalism Act*, which were dismissed by a human rights panel. The reviewing judge dismissed on first appeal. The Alberta Court of Appeal determined that the threshold question was whether the policy, even if valid, was properly applied. The evidence did not establish that the work done by Jacknife and Collins fell within the policy which was clearly directed toward work assignments with an elevated safety risk. The reviewing judge chose the proper standard of review, correctness erred in that she missed the threshold issue and therefore did not apply the standard of review correctly. The Court of Appeal allowed the appeal and sent it back to a human rights panel for a determination in accordance with its decision.

*Aubichon*⁶

Saskatchewan [2007] – The plaintiffs are former students of a school at Île-à-la Crosse, Saskatchewan. The plaintiffs claim to represent “all Métis persons, status Indians, and persons who are not status Indians ... who attended Île-à-la Crosse.” The claim lists 47 plaintiffs by name plus another 25 ‘John Does’ and ‘Jane Does.’ All 72 of those individuals are alleged to have been residents or students at Île-à-la Crosse from 1937 to 1979. The claim asserts three classes of plaintiffs – a Student Class, a Sibling Class that includes all of the parents and siblings of the student class members, and a Family Class that includes the spouses and children of the student class members. The claim asserts that the Sibling Class and Family Class members suffered a loss of culture, language and traditional ways of living. The claim alleges that Canada and Saskatchewan funded and were responsible for Île-à-la Crosse school in a supervisory and oversight capacity and they are liable to the plaintiffs for physical and sexual abuse; cultural abuse; failing to provide an

⁵ *Alberta (Human Rights and Citizenship Commission) v. Elizabeth Métis Settlement*, 2005 ABCA 173

⁶ *Aubichon v. Canada* [2007] S.J. No. 590

adequate education; and holding the students against their will and the will of their parents. The statement of claim pleads the following causes of action: systemic negligence in failing to adequately protect the Plaintiffs from physical and sexual abuse and loss of culture; breach of fiduciary duty resulting in injury to the student class; breach of fiduciary duty resulting in injury to the sibling and family classes; breach of non-delegable duty to protect the plaintiffs; unlawful confinement; breach of *Charter* rights of freedom of expression and religion; vicarious liability; and breach of aboriginal rights. They commenced a proposed class action in 2005. In 2007, the plaintiffs filed an amended statement of claim, which added the Government of Saskatchewan as a second defendant.

B.H. v. Métis Settlements (Appeal Tribunal)⁷

Alberta [2008] – BH sought leave to appeal a decision of the Métis Settlements Appeal Tribunal (“MSAT”) regarding his membership in the Kikino Métis Settlement. His membership application was refused due to insufficient evidence of his Canadian aboriginal status, and his appeal to the Tribunal was dismissed on the same basis. BH relied on a handwritten genealogical record, prepared by his mother on the basis of a family bible, which purports to show that his great, great-grandparents were aboriginals from Upper Canada and unsworn statutory declarations signed by two Métis elders attesting to his aboriginal ancestry, with no supporting facts. Appeals to the court are on points of law. Essentially BH was appealing MSAT’s findings of fact and not raising any points of law. The court denied leave to appeal.

Baker⁸

Ontario [2005] – The defendant, is a member of the Couchiching First Nation, which is a signatory to Treaty 3. He began construction of a cabin at Otukamamoen Lake in March 2001. He was charged with unlawfully constructing a cabin on public land without a work permit. Mr. Baker asserted an aboriginal and treaty right to hunt and fish on the land in question, including the right to construct a cabin for use in connection with hunting and fishing. The court found that construction of a cabin is reasonably incidental to the defendant’s hunting and fishing rights as a member of Couchiching First Nation. However, the evidence before the court showed that the “Indians of the district are divided into several bands, each of which has its own hunting grounds more or less accurately defined.” The court found that Otukamamoen Lake is in the traditional hunting and fishing territory of

⁷ *B.H. v. Métis Settlements (Appeal Tribunal)*, 2008 ABCA 344

⁸ *R. v. Baker* [2005] 2 C.N.L.R. 295

the Nicickousemenecaning First Nation, not the Couchiching First Nation. Therefore, construction of the cabin at Otukamamoen Lake was not reasonably incidental to the defendant's hunting and fishing rights promised in Treaty 3. The court also found that the requirement to obtain a permit did not unjustifiably infringe Mr. Baker's treaty rights.

Beer⁹

Manitoba [2012] – Beer was charged with harvesting timber without a permit, contrary to s. 37 of the *Forest Act*. Beer is a member of the Western Manitoba Métis community. The wood was used to construct a house and a garage. At the time Beer harvested the trees, Manitoba had a permit system in place for individuals who wanted to harvest timber on Crown land. The scheme placed restrictions on the amount and location of harvesting. In 2010, after Beer had been charged, the province unilaterally put in place a policy to issue free permits to Métis and First Nations in priority to other harvesters, although the other conditions of the permit scheme still applied. The fact that Beer did not have a permit when he began harvesting was not in dispute. After Beer was charged, he did apply for a permit, but that application was denied based on the type and amount of timber he sought to harvest. Beer argued that s. 37 of the *Forest Act* was of no force and effect, as it violated his constitutionally protected right to harvest timber for domestic use as a Métis. The Court found that the permit scheme in place in 2009 when Beer was charged, with its restrictions on amount and location of harvesting coupled with the lack of priority for Métis harvesters, created a *prima facie* infringement of Beer's Métis rights. Further, the Manitoba government had failed to consult with the Métis of Western Manitoba before putting the new 2010 policy into place.

The trial judge noted that there were four conflicting factors that, to his mind, were outstanding. These included (1) the failure of the Manitoba Government and Manitoba Conservation to consult with the Métis of Western Manitoba when they were obliged to do so; (2) the fact that at the time of the wood harvesting in December 2009 the formal policy of Manitoba Conservation did not give priority rights to the Métis; (3) the policy adopted by Manitoba Conservation in January

The trial judge's conflicting factors are wrong on two points:

(1) Aboriginal rights defences are not an impermissible "collateral attack" on legislation. see Hirsekorn by the Alberta Court of Queen's Bench.

(2) The January 2010 policy is not relevant to the case. Policies are not retroactive

- MLIC Editor's Note

⁹ *R. v. Beer* [2011] M.J. No. 405; supplementary reasons [2012] M. J. No. 158

2010; and (4) the fact that the defence was a collateral attack on the legislation. The matter was adjourned to permit argument from the parties as to the appropriate remedy in light of the Court's four conflicting factors.

Outside legal counsel, sought leave from the court for an appointment as amicus. An amicus is a friendly intervention to assist the court with respect to appropriate remedies. After hearing of the amicus application, the Crown determined that it would ask the court to acquit the defendant. The question then was whether it was appropriate for the court to hear an amicus application in light of the Crown's request for an acquittal. In subsequent reasons for decision, the court determined that in light of the Crown's request for an acquittal there was no longer a live controversy and therefore not need to consider appointing an amicus. Mr. Beer was acquitted.

*Beaudry*¹⁰

Ontario [2006] - There were eight defendants in this case, all charged with offences contrary to the *Fish and Wildlife Conservation Act* or the Ontario Fishery Regulations. While these cases were heard together, they mostly stem from separate incidents. The court found that some of these defendants were hunting unlawfully even though there was no finding that they unlawfully hunted moose. The court found that the DNA evidence and the existence of moose meat in the freezer were proof of unlawful possession of unlawfully hunted moose. The communities at issue were Longlac, Red Rock, Orient Bay and Hurkett. The court held that each of the defendants must prove the existence of an historic Métis community in his or her area to which he or she belonged at the time of the alleged offences. There was no evidence from any of the defendants that they belonged to a Métis community or of the existence of a historic Métis community in any of these areas. Mere membership in the Ontario Métis Aboriginal Association was held to be insufficient.

*Belhumeur*¹¹

Saskatchewan [2007] – The main issue in this case was whether Métis who live in a major city (Regina) can exercise a Métis right to fish in the Qu'Appelle Valley. The other main issue was determining the definition of the community. The court adopted the regional community approach from *Laviolette* and found that the Métis community was the Qu'Appelle Valley and environs, an area that extended

¹⁰ *R. v. Beaudry* [2006] O.J. No. 790

¹¹ *R. v. Belhumeur* 2007 SKPC 114

to include Regina. The court also found that the date of effective control was 1882 to the early 1900s. The court noted that the Métis continued to hunt and fish with little interference until that time. The Crown filed a Notice of Appeal to the Court of Queen's Bench on November 13, 2007.

Bellrose¹²

Alberta [2012] – This was an appeal by Bellrose from the dismissal of his income tax reassessment appeals. The Métis Nation of Alberta (MNA) was incorporated under the *Societies Act*, with the objectives of promoting the development, self-determination, constitutional and property rights of Métis in Alberta. Bellrose served as an elected official of MNA from 1996-2011. In four of those years he claimed an income tax exemption in the amount of 1/3 of his remuneration from the MNA on the basis that his role was equivalent to that of an elected officer of an incorporated municipality. The Minister of National Revenue disagreed and reassessed Bellrose for each of those four years. The Tax Court judge dismissed Bellrose's appeal despite finding that the MNA performed commendable services for Métis. The Tax Court judge found that the services the MNA provided were not akin to those provided by a municipality and that the MNA's Regional Councils did not have self-government powers. Bellrose argued that the MNA was a form of government for Métis persons in Alberta on par with other municipalities in the Province. The appeal was dismissed. It was not relevant that the MNA was unable to provide services akin to those provided by municipalities because of a lack of resources. Regardless of the reason a body not providing municipal-like services was not a municipality. There was no obligation on the judge's part to interpret the *Income Tax Act* in a manner favorable to Bellrose as an aboriginal person. The *Income Tax Act* is not a treaty or a statute directly related to aboriginal peoples.

Blackwater v. Plint¹³

British Columbia [2005] – This case involved four actions by 27 former students of Alberni Indian Residential school who claimed damages based on sexual abuse and other harms. The court held that there can be no class based exemptions, that is no exemptions for organizations based on charitable immunity. The Court of Appeal's argument was that the Canadian Government was better able to bear the loss than the Church, which is a non-profit organization. The court rejected this argument, stating that "the result is to convert a policy observation in *Bazely* into a free-standing legal test that dictates that non-profit organizations should be free from

¹² *Bellrose v. Canada* [2012] FCJ No 301 FCA

¹³ *Blackwater v. Plint* [2005] S.C.J. No. 59

liability for wrongs committed by their employees, provided they are less at fault than a party better able to bear the loss.”¹⁴ In accordance, the court also held that duty is delegable from the Crown to other institutions, like Churches, by virtue of the *Indian Act*. Furthermore, the court stated that a non-delegable duty must be found in the language of the statute.

In terms of vicarious liability, it was held that parties may be more or less vicariously liable for a wrong depending on their level of supervision and direct contact. The court ordered 75% of the damages from the Canadian government, and 25% to the Church. Finally, the court held that constructive knowledge of a foreseeable risk of sexual assault to children must have been held by those whom had the duty of care at the time of the assaults for there to be an actionable wrong based on negligence.

*Blais (Mb)*¹⁵

Manitoba [2003] - At trial, Ernie Blais and some friends were convicted of hunting deer out of season on unoccupied Crown land. He appealed to the Manitoba Court of Queen’s Bench and then to the Manitoba Court of Appeal. Both appeals were unsuccessful. Mr. Blais argued that he had a right to hunt that was protected by paragraph 13 of Manitoba’s Natural Resources Transfer Agreement (NRTA), which protects the right of ‘Indians’ to hunt, trap and fish for food. Mr. Blais defended himself on two fronts at trial. First, he claimed that because he was Métis, the harvesting protections in paragraph 13 of the Manitoba NRTA meant that the provincial *Wildlife Act* did not apply to him. Second, he said that because he was Métis, he had harvesting rights that were protected under s. 35 of the *Constitution Act, 1982*. At trial he lost on both defences. On appeal Mr. Blais relied solely on the NRTA defence.

Blais was argued before the Supreme Court of Canada on March 18th 2003. The only issue the Court considered was whether Métis are ‘Indians’ under paragraph 13 of the Manitoba NRTA. As a result, the Supreme Court of Canada made no decision in this case about whether Manitoba Métis can claim the protection of s. 35 for their harvesting rights.

Placing para. 13 of the NRTA in its proper historical context does not involve negating the rights of the Métis. Paragraph 13 is not the only source of the Crown’s or the Province’s

¹⁴ *Ibid*, para 40

¹⁵ *R. v. Blais*, 2003 SCC 44 (CanLII); 2001 MBCA 55 (CanLII); [1998] 4 CNLR 103 (QB); [1997] 3 CNLR 109 (Pct)

obligations towards aboriginal peoples. Other constitutional and statutory provisions are better suited, and were actually intended, to fulfill this more wide-ranging purpose.¹⁶

On September 19th 2003, the Court handed down its decision that Métis are not included in the term ‘Indians’ in the NRTA. The NRTA is a constitutional document. The usual way to read such a constitutional document is to read it generously and within its historical setting. When the Court is interpreting a constitutional right (such as the aboriginal right to hunt protected in the *Constitution*) it must interpret the constitutional provision in a way that will fulfill the broad purpose of the right and ensure the full benefit intended by the constitutional protection. This is what is called a purposive interpretation.

The Court cautioned that it would not ‘overshoot’ the actual purpose of the right and said that the constitutional provision was not to be interpreted as if it was enacted in a vacuum. As a result, the Supreme Court approached the interpretation of paragraph 13 of the Manitoba NRTA in its historical setting by looking at the purpose behind the provision and giving ordinary meaning to the language used. Are Métis ‘Indians’ for the NRTA? In answering this question, the Court looked first at the common understanding of the term ‘Indians’ at the time in 1930. The Court looked at which groups were intended to be included in the term ‘Indians’ in the NRTA. The Court found that the Métis were not considered the same as ‘Indians’ for determining rights and protections.

The terms “Indian” and “half-breed” had been used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through the period in which the NRTA was negotiated and enacted.¹⁷

Also, the Court said that the Manitoba Métis were not considered wards of the Crown - either by the Métis themselves or by the Crown. The historical record showed that the difference between Indians and Métis was widely recognized and understood by the mid 19th Century. Both government and the Métis saw the Métis as a separate group with different historical entitlements.

The record suggests that the Métis were treated as a different group from “Indians” for purposes of delineating rights and protections.¹⁸

The Court noted that individual Métis could identify as either Indians or as ‘white.’

¹⁶ *Blais, supra*, at para. 26.

¹⁷ *Blais, supra*, at page 237.

¹⁸ *Blais, supra*, at para. [19]

The fact that Métis could choose either identity supported the view that a Métis person was not considered an Indian unless he or she chose to be seen as one. The Court also took note of the submissions of the Métis National Council. While Métis were seeking the constitutional protection of the term ‘Indians’ under paragraph 13 of the NRTA that did not mean that they saw themselves culturally as ‘Indians.’ The Court then looked to the common usage of the terms in the *Constitution* in order to understand their meaning. The Court said that the term ‘Indians’ did not refer to both Indians and Métis. The terms ‘Indians’ and ‘half-breed’ referred to separate groups. ‘Half-breed’ was the term that was commonly used in the 19th and 20th centuries when speaking about the people we now know as ‘Métis’ (for example the *Manitoba Act, 1870* and the *Dominion Lands Acts* both use the term “half-breeds”). The Court set out examples where the Métis saw themselves as different from Indians. For example, in 1870, Riel’s provisional government created a *List of Rights*, which excluded ‘Indians’ from voting. Also the Court noted that the local legislature in Manitoba in 1870 was a Métis-dominated body.

The Court also noted that paragraph 13 in the Manitoba NRTA is under the heading “Indian Reserves,” a heading which includes two other paragraphs relating solely to reserves, which would not apply to Métis in 1930.

The Court said that “rightly or wrongly” in 1930 the Crown believed that Indians required special protection and assistance and Métis did not. Shared ancestry between the Métis and the ‘colonizing population,’ and the Métis’ own claims to a different political status than the Indians contributed to this perception.

This distinction resulted in separate arrangements for the distribution of land – treaty and scrip. Indian treaties were collective agreements about collective rights. Scrip was about individual grants of land. The Court said that scrip was based on fundamentally different assumptions about the nature and origins of the government’s relationship with Métis. The assumptions underlying treaties with Indians were not the same. The Court made no statements as to whether or not these assumptions are correct in law.

There was a great deal of argument before the Supreme Court of Canada as to whether or not the definition of ‘Indians’ in the *Indian Act* was to be used to interpret the term ‘Indians’ in the NRTA. The Court made no statements on this issue in its reasons for judgment in *Blais*.

As a result of the Supreme Court of Canada decision in *Blais*, all of the earlier and lower court decisions on the NRTA (*Laprise*,¹⁹ *Grumbo*,²⁰ *Laliberte*²¹ and *Ferguson*²²) are no longer good law with respect to those who identify as Métis. Under such circumstances, these cases have been overruled and replaced by *Blais*.

*Blais (Ont)*²³

Ontario [2013] – The defendants, Michel Blais and his children, Matthew and Tracey were charged with unlawfully harvesting forest resources in a Crown forest without authority of a license contrary to the *Crown Forest Sustainability Act*. The defendants, who reside near Sault Ste Marie within the area covered by *Powley*, claimed a Métis right to commercially harvest timber.

Blais also claimed that the Crown breached a non-delegable duty to consult and negotiate with the representatives of the Métis community in and around Sault Ste Marie in order to develop opportunities for community members in the local forest resources industry. They claimed this was a breach of the honour of the Crown and that the prosecution was an abuse of process. They further asserted that their right to make full answer and defense under the *Charter* was infringed because the trial judge would not join their trial to a similar one involving members of the Batchewana First Nation or to adjourn pending the result of that trial or to allow Batchewana to intervene. The defendants maintained that the *Crown Forest Sustainability Act* was inapplicable to their timber harvesting by virtue of the doctrine of interjurisdictional immunity.

The Justice of the Peace found against them on all points. The court noted that Mr. Blais appeared to be motivated to claim Métis status in order to access forestry opportunities and for personal gain. There was no evidence of Métis community involvement in his forestry corporation and no evidence that Mr. Blais had any authority to act on behalf of the Métis community. Additionally, Mr. Blais failed to establish his membership in the contemporary Sault Ste Marie community, and there was also no evidence of an ancestral connection to the community.

*Brideau*²⁴

New Brunswick [2008] – Mr. Brideau, assisted by Mr. Breau, was charged with

¹⁹ *R. v. Laprise* [1977] 3 W.W.R. 379; aff'd [1978] 6 W.W.R. 85; overturned in *R. v. Grumbo* [1998] CanLII 12345 (SK CA)

²⁰ *R. v. Grumbo* [1996] CanLII 7045 (SK QB); rev'g [1998] CanLII 12345 (SK CA)

²¹ Laliberte was an unreported case

²² *R. v. Ferguson* [1993] CanLII 7268 (AB QB); aff'd [1993] 2 C.N.L.R. 148

²³ *R. v. Blais* (unreported, Ontario Court of Justice, May 2, 2013)

²⁴ *R. v. Brideau*, 2008 NBBR 70 (CanLII)

cutting down a tree on Crown lands pursuant to the *Crown Lands and Forest Act*. Brideau claimed that he was Métis and that the wood was to be used for a drum in order to continue an aboriginal tradition. The evidence established an aboriginal ancestor some nine generations removed for Mr. Brideau and at eight generations removed for Mr. Breau. The trial judge held that Brideau and Breau failed to establish that there was a historic community near Pont-Lafrance on the old military site of Tracadie. The judge also held that there was insufficient evidence and rejected the defendant's claim of Métis rights. Brideau appealed the decision to the Québec Court of Queen's Bench, which upheld the decision of the trial judge.

Buckner²⁵

Ontario [1997] - Brad Buckner identifies as Métis. He was charged with a hunting offence. His mother is a Micmac with ancestry that comes from the Maritimes. Mr. Buckner and his family now live in the Treaty 3 area of Ontario. He claimed in his defense at court that he had a Treaty or aboriginal right to hunt. The justice of the peace found that there was an existing Métis community in Treaty 3 with recognized hunting rights. She further found that Mr. Buckner had been accepted as a member of the Métis Nation of Ontario. Therefore he had a right to hunt because the Métis community in that area had a right to hunt. The community could decide to accept him as a member and if it did, then he could share their right to hunt. The Crown brought a motion to appeal this decision before a judge of the Ontario Provincial Court but it was struck out as being out of time.

Budd²⁶

Saskatchewan [1979] – Two non-treaty Indians (Métis) were charged with unlawfully hunting big game in violation of the *Game Act*. They were acquitted by the trial judge. The Crown appealed. The issue was whether the word 'Indian' in the *Game Act* meant 'treaty-Indian' or could include non-treaty Indians. The matter was remitted back to the trial judge for further adjudication.

Burns²⁷

Ontario [2005] - The three accused claimed to be members of the "Delta Woodland Métis," numbering some 400 members. The court found that the evidence did not establish an ancestral connection to and current membership in a Métis community. The court found that the evidence fell short of a "solid bond of past and present

²⁵ *R. v. Buckner* [1997] O.J. No. 1165

²⁶ *Saskatchewan (Attorney General) v. Budd* [1979] S.J. No. 281

²⁷ *R. v. Burns* [2005] O.J. No. 2215

mutual identification and recognition of common belonging between the accused and other members of the rights bearing community.”

*Caissie*²⁸

New Brunswick [2012] – Mr. Caissie claimed that he was a member of the historic Métis community in the Parish of Dundas, in the County of Kent, New Brunswick, and that he had a right, protected by s. 35 of the *Constitution Act, 1982*, to possess the fish for his personal consumption. The court found that if a Métis community did exist in the Parish of Dundas and Mr. Caissie’s heirs formed part of that community, there was no evidence that this Métis community exists today. There was an admission by Mr. Caissie that evidence of a historic Métis community is lacking in New Brunswick. The evidence did not support the existence of a contemporary Métis community and there was no evidence of Mr. Caissie’s membership in a relevant contemporary community. There appeared to be efforts to identify Métis ancestry by means of his membership in the Canadian Métis Council and to legitimize Métis status by granting a card to identify and confirm Métis ancestry. However, that is insufficient evidence. The trial judge accepted that Mr. Caissie may have presented evidence as to an ancestral connection but the evidence was lacking in regards to his self-identity as a member of a Métis community and he failed to demonstrate that he was accepted by any Métis community. Notwithstanding Mr. Caissie’s mixed blood heritage, he did not present any evidence that he participated in any Métis community in New Brunswick or that a Métis community historically existed at the time of the alleged offence. The trial judge also rejected Mr. Caissie’s claim to the defence of necessity and that he fished to secure his subsistence. This claim for the necessity for food was, in the trial judge’s opinion, difficult to make out in Canada considering the various social programs we have such as local food banks and other charitable organizations. The defence of necessity only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril. There was no evidence of such a risk in this case.

*Callihoo*²⁹

Alberta [2003-2007] - This case was filed in the Federal Court Trial Division. Ms. Callihoo applied for registration and was registered as an ‘Indian’ under the *Indian Act*. The Minister gave Callihoo notice that her name would be deleted from the register because of information that brought into question the Indian status of her paternal great grandfather; specifically that he had taken scrip. Callihoo’s name

²⁸ *R. v. Caissie* 2012 NBPC 1

²⁹ *Callihoo v. Canada (Minister of Indian Affairs and Northern Development)*, [2004] FC 1312; aff’d [2008] FCA 368

was deleted from the register. Under the *Indian Act*, there is a specific process for protesting the decisions of the registrar. Ms. Callihoo did not follow that process and instead filed an action in the Federal Court. The trial judge held that the Federal Court had no jurisdiction to hear the case because the process under the *Indian Act* ousted federal court jurisdiction. The pleadings argued that scrip does not have the legal effect of removing Indian status under the *Indian Act*. However, the trial judge and the Federal Court of Appeal dismissed the claim largely on procedural grounds because Madame Callihoo did not follow the appropriate process.

*Castonguay (Jean-Denis)*³⁰

New Brunswick [2002] – Jean-Denis Castonguay was charged with possession of wood from Crown lands pursuant to the *Crown Lands and Forest Act* for incidents that took place in 2000. Mr. Castonguay defended himself on the basis of his relationship to his father. He described himself as being a member of a ‘First Nation’ but identified as a Métis. He described himself as a member of the Rising Sun Alliance which represented persons of Mi’Kmag, Maliseet and Métis origin. He described himself as being a ‘full-blooded Indian.’ François Faucher testified for the defense and described himself as being Chief of the “Rising Sun Restigouche West.” He gave evidence as to the origin and activities of this group. He described himself as being its elected Chief. Mr. Faucher’s claimed that this community operates as a First Nation and has 31 members in the St. Quentin/Kedgwick area of New Brunswick. When Faucher was questioned as to his definition of a Métis person, he responded that “it is a First Nation who married a White.” The trial judge held that it “is elementary to observe that unless any person claiming an aboriginal right can bring himself/herself within one of the three defined classes that comprise aboriginal peoples in Canada then any discussion of the existence of an aboriginal right becomes moot.” Genealogical evidence showed an ancestral connection between the Jean-Denis Castonguay and native persons who were living in the Port Royal area in the 1600s, a link that goes back at least 12 generations.

50 ... I have concluded that the historical evidence that was presented at Trial falls far short of the type of evidence that would be necessary to sustain the position of Jean-Denis Castonguay that he is a Métis and as such has proven the existence of an aboriginal right to cut or harvest wood on Crown Lands in the area where the illegal cutting took place.

56 While Mr. Morrisson’s genealogical evidence is well done, I query whether the ancestral link is sufficient to satisfy the first branch of the *Powley* test. Admittedly, the family tree of Jean-Denis Castonguay contains persons of native ancestry namely; Edmee Lejeune

30 *R. v. Jean-Denis Castonguay* 2002 CanLII 49690 (NB PC); 2002 NBPC 26

who was born in 1625 and who died in 1687; Radegone Lambert who was born in 1621 and died in 1686. With all due respect, I don't think this is the type of ancestral family connection contemplated in the *Powley* decision. It would seem reasonable to conclude that evidence of more recent ancestral aboriginal connection would be required.

59 The only tangible expression of self identification apart from his assertion is his membership in Soleil Levant Community. Again, with respect, it would be difficult to characterize Soleil Levant as a "Métis Community of significance". It would seem that Soleil Levant came into being in the year 1999. They did gain some type of official status by filing a Certificate of Business Name and Style with the Department of Justice of the Province of new [sic] Brunswick on September 8th, 2000. Curiously, in Box 2 of this application where it requires the Applicant to identify the Business Activity or service to be carried on, in or identified by the Registered Name, the following appears: "Exploitation forestière et pêche-rie". There is a complete absence of any mention of any Métis connection, which I find to be significant.

60 Given the totality of the evidence surrounding Jean-Denis Castonguay's claim to Métis status, I find it to be more opportunistic than factual.

*Castonguay et al and Faucher*³¹

New Brunswick [2003] - Five individuals were charged with harvesting wood of-fences under the New Brunswick *Crown Lands and Forests Act*. All of the de-fendants claimed they were entitled to harvest wood because they are aboriginal, specifically Métis, and are therefore protected by section 35 of the *Constitution Act, 1982*. Donald, Élie, Roger and Raymond Castonguay are brothers. They are members of the Rising Sun Aboriginal Community of Restigouche West. Since May 2003, the association has comprised 37 members, most of whom are from the Range 16 South area in St. Quentin. Apparently, almost all of them are related to the Castonguay family or François Faucher. To become a member, a person must submit a membership application along with genealogical research establishing genuine aboriginal connection to the Mi'kmaq or Maliseet, and must obtain the board's approval.

The fact that a person holds a membership card in a Métis association does not establish that the person has an aboriginal right ... A membership card does not prove the existence of an aboriginal right; it merely proves that the holder of the card is a member of the as-sociation in question.

The Court held that there was no evidence that a Métis community came into being in the St. Quentin area at any time in its history, except very recently [after 1999]. The court could not establish a date from which the rights claimed arose

³¹ *R. v Castonguay et al and Faucher* [2003] NBJ No. 496

from a distinctive Métis culture. The reason was the lack of any evidence regarding the continuous existence of an historical Métis community in the St. Quentin area.

The following are quotes from the trial judge:

Since the claimant is unable to establish the continuity, or even the existence, of an historical Métis community in the St. Quentin area, it follows that he cannot establish a point in time from which a Métis activity was an integral part of a custom, practice or tradition of that community.

But two important aspects regarding the genealogy of the defendants should be pointed out. First of all, their shortest line to an aboriginal person goes back at least 10 generations to Edmée Lejeune, born in 1623, probably in Port Royal. Edmée was the daughter of Pierre Lejeune-Briard and an unknown Mi'kmaq. Secondly, the aboriginal blood of the defendants ends with Edmée Lejeune. In other words, there is no evidence that Indian or Métis blood mixed with the blood of Edmée Lejeune's ancestors. Thus, the defendants must go back some 350 years to establish a true aboriginal connection.

The defendants established a so-called "Métis" association for the purpose of claiming their rights as Métis. In my opinion, such a claim cannot be made out merely by creating an association and relying on an ancestral connection that is ten or more generations old. The aboriginal right in issue is protected and recognized by the Constitution of Canada. Such rights are not acquired so easily.

There is no evidence, historical or otherwise, of a Métis community in our province.

Castonguay (Roger) and Faucher³²

New Brunswick [2002-2012] - Roger Castonguay and Faucher were charged with possession of wood from Crown lands pursuant to the *Crown Lands and Forest Act*. Castonguay asserted that he was a member of a Métis community in the St. Quentin area of New Brunswick and a member of the Rising Sun organization, a group made up of individuals with Mi'kmaq, Maliseet and Métis origins and which claimed to operate as a First Nation. The judge used the Ontario Court of Appeal's decision in *Powley* as an analytical framework to determine whether Castonguay was Métis and the existence of Métis rights. The judge found that Castonguay had not proven that he was Métis because the ancestral link was too far removed. Castonguay's aboriginal ancestry was from the 1600s. The evidence as to his self-identification was also weak and his acceptance by the Rising Sun did not demonstrate that he was a member of a Métis community. The judge further concluded that there was insufficient historical evidence to support a finding that

³² *Castonguay and Faucher v. R.*, [2002 NBJ No. 447; aff'd 2003 NBQB 325 (CanLII); aff'd 2006 NBCA 43 (CanLII)]

there was an existing aboriginal right to harvest wood.

... the Court heard no evidence based on which it could hold that there ever was a Métis community in New Brunswick. At one point, there clearly were Métis, that is to say children of one aboriginal parent and one parent of European descent. The family trees prepared by Donald Morrison provide ample evidence of this with respect to each of the defendants. Having said this, an aboriginal genetic connection that was formed ten generations ago and has no continuity with the present cannot give rise to a constitutional right.

The defendants established a so-called “Métis” association [the Rising Sun aboriginal Community of Restigouche West] for the purpose of claiming their rights as Métis. In my opinion, such a claim cannot be made out merely by creating an association and relying on an ancestral connection that is ten or more generations old. The aboriginal right in issue is protected and recognized by the Constitution of Canada. Such rights are not acquired so easily.

Consequently, I am of the opinion that there is insufficient evidence of a Métis community in the St. Quentin area before the fall of 1999. Obviously, there is no evidence of the continuous existence of a Métis community in the St. Quentin area. There is no evidence that a Métis community in St. Quentin has a specific practice, custom or a tradition that is an integral part of its distinctive culture. There is no evidence that the current practice, custom or tradition is being exercised in continuity with the practices, customs and traditions of an earlier era.

There is no evidence, historical or otherwise, of a Métis community in our province. aboriginal rights are collective and community-based, not individual ... This concept of collective continuity is essential to the recognition of aboriginal rights, but it is the major gap in the defence’s argument.

The defendants brought a preliminary motion that *Powley* did not apply in New Brunswick. The matter was appealed to the New Brunswick Court of Appeal, which upheld the trial judge and confirmed that *Powley* applies to New Brunswick.

*Castonguay (Stanley)*³³

New Brunswick [2012] – Mr. Castonguay was accused of possession of a moose carcass contrary to s. 58 of the *Fish and Wildlife Act*. The accused claimed he had a right to possession as Métis. The evidence was that Mr. Castonguay had some Indian ancestry between 10 and 13 generations ago. He had a card issued by the Confederation of Aboriginal People, which the trial judge held was a political organization. Mr. Castonguay argued he was part of a Métis community, had practiced native customs all his life and that he had an aboriginal right to possess moose meat. Mr. Castonguay’s own expert, Mr. Alemann, testified that in his opinion no

³³ *R. v. Castonguay (Stanley)*, [2012] N.B.J. No. 442

Métis community could be identified in New Brunswick. Mr. Alemann testified that the group founded in the Grand Falls, New Brunswick as the Nation Autochtone du Nord-Ouest du Nouveau-Brunswick, to which Mr. Castonguay belongs and that is sanctioned by the Confederation of Aboriginal People is new and trying to find its way. However, the group is not derived from ancestral roots or communal roots. The court held that was guilty as charged. The evidence indicated the accused did have aboriginal ancestry, but he failed to establish he had any form of aboriginal status or the existence of a historic or contemporary Métis community. While the accused's grandfather, father and himself were avid hunters, hunted for sustenance and even followed customary activities of consuming and distributing meat, they did not do so as part of a Métis community. This was a strict liability offence and the accused ought to have known it took more than a Confederation card to establish Métis status.

*Chiasson*³⁴

New Brunswick [2004] – Mr. Chiasson was charged with unlawful possession of moose contrary to s. 58 of the New Brunswick *Fish and Wildlife Act*. Mr. Chiasson made two claims. First, that he was an Indian with rights under seven treaties. Second, Mr. Chiasson claimed that he was Métis and had Métis rights. The evidence established that he had one Indian ancestor in 1720 and did not connect him to any specific tribe. The court held that this was not a “sufficient and substantial connection with a tribe” to ensure him rights to any protection under any treaty. With respect to his Métis claims, the evidence did not establish either Mr. Chiasson or his ancestor as a member of a Métis community. The trial judge found that he had not established that he was Métis or that there was a Métis community in existence. The case was appealed to the New Brunswick Court of Queen's Bench, which confirmed the Provincial court decision. The Court of Appeal denied leave to appeal.

*Corneau*³⁵

Québec [2008-2011] – Mr. Corneau contested a petition for illegal occupation of Crown lands in the judicial district of Chicoutimi. Corneau contested the petition claiming that he had Montagnais ancestry and that his aboriginal rights allowed him to maintain a dwelling without ministerial approval. In 2006, Mr. Corneau amended his defense and put forward an objection on a point of law. Mr. Corneau claimed his mixed ancestry and stated that he belonged to a Métis community

³⁴ *R. v. Chiasson* [2004] N.B.J. No. 62 (N.B.Q.B.) (QL); leave to appeal denied 2005 NBCA 82 (CanLII).

³⁵ *Québec (Procureur général) c. Corneau*, 2008 QCCS 1205; 2008 QCCS 1133 (CanLII); aff'd 2011 QCCS 781; [2012] QJ No. 1334

whose traditional territory was larger than the Saguenay-Lac Saint-Jean Côte Nord and encompassed the land he occupied. Furthermore, citing *Powley* and *Sundown*, he argued that his ancestral rights to hunt and fish in this territory should be recognized. The superior court judge determined that this was in fact a request for a declaratory judgment and rejected Mr. Corneau's objection because the issue of Corneau's ancestral rights was being addressed in related litigation.

In 2009, the Québec general prosecutor asked the Québec Superior Court to merge 17 cases. All 17 cases are petitions for dispossession of lands occupied without rights in which the respondents were claiming aboriginal rights. Fifteen of the defendants claimed Métis rights and 2 claimed rights as non-treaty Indians. The judge determined that the cases could be heard collectively and judged by the same evidence because all of the defendants are subject to the tests set out in *Powley* and *Van der Peet*. In 2010, the court granted Mr. Corneau and the other petitioners an advanced costs order. The Crown appealed but the costs order was upheld by the Quebec Superior Court in 2011. In 2012, there was a dispute about the costs order, with the Attorney General seeking a reduction in costs because one of the defendant's experts had died and the replacement was said to be of lesser experience and also because the Crown had determined to withdraw certain reports. The court adjusted the costs order.

*Cunningham*³⁶

Alberta [2001-2011] – In 1999 the Council for the Peavine Métis Settlement passed a policy that required every member to give Council written authorization to request a search of his or her name on the Indian Register under the *Indian Act*. If the member did not comply, the member would not receive any services or benefits or be employed by the Settlement. If names are registered as Indians, they lose their Settlement membership.

Later, Peavine Métis Settlement sought an order directing Alberta to prepare an updated Settlement Members List for the purpose of administering the next municipal election and for administering Settlement programs.

Peavine asked the federal Minister of aboriginal Affairs to investigate whether certain persons were registered under the *Indian Act*. The Minister declined. The Settlement then sent a letter to the Registrar requesting that certain names be re-

³⁶ *Alberta (Minister of International and Intergovernmental Relations) v. Peavine Métis Settlement* [2001] ABQB 165 (CanLII); [2007] 4ABQB 517 (CanLII); 2009 ABCA 239.

moved from the list. Registrar replied that it was not possible to verify because the Department of Indian Affairs would not release the information. Peavine argued that the refusal of the Registrar to enforce ss. 90 and 97 could result in benefits being provided to persons not entitled to receive them and could result in elections being subject to challenge because of ineligible candidates and voters. They argued that the obligation in the legislation was clear and that the prerequisites for mandamus were satisfied. Also argued that if information was not to be obtained from the Department of Indian Affairs the Registrar had to determine an alternative method of obtaining the information. The court granted the order. The Registrar had to supply an updated list to the Peavine Métis Settlement.

[2007] - Following on the previous case, the Minister did remove these people (mostly one family) from the Registry. A new council was elected and it brought an action seeking to have these individuals re-instated. The Minister said no because there was no mechanism for re-instatement in the *Indian Act*.

The family then filed an originating notice in the Court of Queen's Bench of Alberta seeking a declaration that ss. 75 and 90(1)(a) of the *Métis Settlement Act* (MSA) breached their *Charter* ss. 2(d) freedom of association, 7 life, liberty and security of the person and/or 15(1) equality rights. Elizabeth Métis Settlement intervened and raised a s. 25 *Charter* argument.

The facts before the court showed that the list for exclusion did not include all Peavine members who had registered as Indians after November 1, 1990. In fact it only listed the members of the Cunningham family. Affidavit evidence showed that all the family members registered as Indians for one purpose only – to access health benefits that are not available to Métis either on or off Settlement lands. The evidence showed that all the family identified as Métis and did not intend their Indian registration to affect their Métis identity.

The chambers judge concluded that these provisions of the MSA did not breach the family's rights. With respect to the freedom of association claim, the judge held that this was not about the state's interference with an individual's right to belong to an association but whether the MSA was under-inclusive and whether the government was obligated to extend settlement membership to the family despite their status as registered Indians. The judge concluded that the claim was based on access to a statutory regime and therefore there was no substantial interference

with a fundamental freedom of association and that the state was not responsible for any interference. Therefore there was no s. 2(d) breach of the *Charter*.

The chambers judge likewise dismissed s. 7 violations holding that the MSA was not arbitrary because it followed a legitimate state interest in securing a land base for the Métis and providing them with a measure of self-autonomy. The legislation was not disproportionate to state interest because it was adopted after consultation with the Métis and the General Council could adopt a policy negating the exclusion.

Section 15(1) was also dismissed because the chambers judge held that the impugned provisions did not affect the family's human dignity with the result that discrimination was not established.

The case was appealed to the Alberta Court of Appeal.

[2009] The Court of Appeal overturned the chambers judge's decision in its entirety. First, the Court of Appeal held that the standard of review for the chambers judge's decision was 'correctness' because this involved questions of law. The Court of Appeal did not agree that ss. 2(d), 7 or 25 were breached. They held that the matter was properly resolved on the analysis of s. 15(1) of the *Charter* – the equality provisions.

The court looked at s. 15(2) first because if the state can meet the requirements of s. 15(2) then a s. 15(1) claim will fail. Section 15(2) allows the government to establish programs and services that favour a disadvantaged group. The court found many problems with the chambers judge's analysis. While the MSA did have the appropriate ameliorative purpose, the sections at issue were not rationally connected to the enhancement and preservation of Métis culture and self-governance and to securing a Métis land base. There was no evidence that there would be a stampe of Indians to seek membership on the Settlements. The Council that sought to remove the family from membership did not seem to have furtherance of Métis culture in mind.

Since being Métis requires aboriginal roots, if the aboriginal roots that make an individual eligible to acquire Indian status are the same aboriginal roots that qualify him or her as Métis, removal of members because of their Indian status may be at odds with the goal of enhancing Métis culture. The evidence established that in some settlements, one third of

the members also hold Indian status.³⁷

The Appeal court held that ss. 75 and 90 of the MSA are “relatively arbitrary” and although they might advance the legislative objective, “they are not rational.” They do not advance self-governance, they “merely enable councils to pick and choose among various status Indians who have taken that status after November 1, 1990.” In the result, s. 15(2) was not held to be a bar to consideration of s. 15(1).³⁸

Because s. 15(1) deals with equality, one must always ask a basic question – equal to what? So there is a necessity to choose what is called a ‘comparator group.’ In this case the comparator group was “Métis who have not registered as Indians under the *Indian Act* and who meet the other criteria for settlement membership.” The court then asks if the treatment was discriminatory. Discrimination is found when the distinction drawn “has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.” Discrimination is found in decisions or laws that perpetuate the prejudice or disadvantage of a claimant and in decisions or laws that are based on inaccurate stereotypes. The court held that these sections of the MSA have only “served to permit a seemingly vindictive council to arbitrarily prevent the appellants from continuing as members of Peavine.” The fact that the family lost benefits such as voting rights also supported a finding of discrimination and unique disadvantage. The court also noted that there was some evidence to show that the family’s status was resulting in stereotyping because they were now seen as ‘less Métis.’ The appeal court did not agree with the chambers judge who said that because it was their choice to register as Indians, there was no discrimination. The appeal court held that choice “is irrelevant to the analysis.”

In asking whether the differential treatment corresponded to the actual needs, capacity or circumstances of the family, the court looked at the special circumstances. Again the appeal court disagreed with the chambers judge and said it was an error to look at the context of the comparator group in this analysis. Legislation may be associated with a valid purpose for some people and at the same time be discriminatory against others. The question said the appeal court, is with respect to the family’s human dignity. The law must be viewed from the perspective of the claimant.

³⁷ *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239 (CanLII) para 27

³⁸ *Ibid.*, para 28-29

The Court of Appeal concluded that the s. 15(1) rights of the family were breached and were not saved (justified) under s. 1 of the *Charter*. The court noted that the family could have taken a judicial review or an action in abuse of public office, but that left them vulnerable to repeated litigation and the potential that another council would do to them as the former Peavine Council did.

The Respondents (Province, Registrar and Métis Settlements Land Registry) asked for a suspension of the declaration. This was denied. The Court of Appeal declared that ss. 75 and 90 of the MSA were unconstitutional and were severed from the Act. They also ordered the Registrar to restore the family's names to the Peavine membership list retroactive to the date their names were removed.

[2011] The Supreme Court of Canada dismissed the Cunninghams' appeal. They held that the MSA is an ameliorative program protected by s. 15(2) of the *Charter*. Unlike many ameliorative programs, its object is not the direct conferral of benefits on individuals within a particular group, but the enhancement and preservation of the identity, culture and self governance of the Métis through the establishment of a Métis land base. The court held that the correlation between the program and the disadvantage suffered by the target group, the Métis who are one of the three aboriginal peoples of Canada recognized in s. 35 of the *Constitution* was obvious.

Excluding Métis who are registered as status Indians from membership in Métis settlements advances the object of the ameliorative program.

The Métis have a right to their own culture and drawing distinctions on this basis reflects the Constitution and serves the legitimate expectations of the Métis people. The exclusion corresponds to the historic and social distinction between the Métis and Indians and respects the role of the Métis in defining themselves as a people. Moreover, achieving the object of the program would be more difficult without the distinction. The fact that some people may identify as both Métis and Indian does not negate the general correspondence underlying the distinction between the two groups.

Requiring Aboriginal adults who might otherwise meet the definition of both Indian and Métis to choose whether they wish to fall under the *Indian Act* or the MSA is not grossly disproportionate to the interest of Alberta in securing a land base for the Métis.

Since the Supreme Court of Canada handed down its reasons for judgment in *Cunningham* the Métis settlements have not taken the necessary steps to remove membership of the Cunninghams. *Gauchier*³⁹ is a case that seeks an order of the court (known as a mandamus order) to enforce *Cunningham* decision.

*Daigle*⁴⁰

New Brunswick [2003] - Mr. Daigle was charged with possession of fish larger than the legal size contrary to the New Brunswick *Fish and Wildlife Act*. The court found that there was no historic Métis community despite evidence of mixed marriages in the past. The court also found that there was no present day Métis community in any form whatsoever. While the defendant proved one aboriginal ancestor born in 1665 and that was sufficient to qualify for a membership card in the East Coast First Peoples Alliance, this was insufficient to qualify under the protection of s. 35 of the *Constitution Act, 1982*. The judge further held that even if wrong on the above points, he would have found that the size limitation was a justifiable infringement for conservation purposes.

On appeal to the Court of Queen's Bench, Mr. Daigle abandoned his previous assertion that he was Métis and had Métis rights. On appeal he asserted that he was "aboriginal" and therefore entitled to the protection of s. 35. The appeal court found that Mr. Daigle did not provide sufficient evidence of a "sufficient and substantial connection of aboriginal ancestry" to be able to claim the protection of s. 35 as an Indian, Inuit or Métis.

*Daniels & Gardner*⁴¹

Federal Court [2002-2013] - There are three parts to this case. The plaintiffs seek declarations: (1) to establish that Métis are 'Indian' for the purposes of s. 91(24) of the *Constitution Act, 1867*; (2) that the Crown owes a fiduciary duty to Métis and non-status Indians as aboriginal peoples; and (3) that they have a right to be negotiated with, on a collective basis, in good faith by the Crown.

The federal government filed a motion to strike the claim as showing no cause of action, that the plaintiffs have no standing and that the claim is vexatious, prejudicial and abusive. The motion was defeated. The standard to strike a statement of

³⁹ *Gauchier v. Registrar Métis Settlements Land Registry, Peavine Métis Settlement and Peavine Métis Settlement Council* (Alberta Court of Queen's Bench, court file # 1103 15013, filed September 22, 2011)

⁴⁰ *R. v. Daigle*, 2003 NBPC 4 (CanLII)

⁴¹ *Daniels, Gardner & Congress of Aboriginal Peoples v. Canada*, 2002 FCT 295; 2005 FC 1109; 2011 FC 230 (CanLII); 2013 FC 6 (F.C.T.D.)

claim is very high, particularly in constitutional cases. The Crown did not succeed in defeating the claim. In noting the problems associated with Métis claims, the judge said:

I do not accept that the individual Plaintiffs must have membership in a distinct aboriginal community, holding an unextinguished aboriginal right, to have standing to sue for declaratory relief.

... Clearly, neither the federal Crown nor the provincial Crown are the least bit interested in negotiating with the Métis and with non-status Indians who, as a result, are trapped in a jurisdictional vacuum between Canada and the Provinces.

... Given the track record of the Crown in refusing to negotiate, it could well be generations before this issue could come before the Court in some other suitable fact situation. That is in no one's interest. To urge, at this point, that the litigation is premature, when there is no prospect of negotiation, is to throw unreasonable difficulty in the way of this proceeding, for there is a real point of difficulty which requires a timely judicial decision.

In 2004, Harry Daniels, a well-respected Métis leader, died. He was one of the plaintiffs in this action. A motion was brought, successfully, before the court to add new plaintiffs, one of which is Harry Daniel's son, Gabriel. Another new plaintiff was added – Terry Joudrey, a non-status Mi'kmaq from Nova Scotia. The Crown appealed the addition of the new plaintiffs, but the court in August of 2005, denied their appeal noting that, “unless Gabriel Daniels is added as a Plaintiff, the Respondents fear that there will be no party with standing to raise the issue of Métis status, an issue of great importance to an estimated 200,000 people.” Section 91(24) is also included in the arguments in Maurice and in the *MMF* case.

In November of 2005, the Court also issued an Order granting leave to the Plaintiffs to amend their Statement of Claim and that the Crown be compelled to answer questions which they had refused to answer to date. The Crown had argued that it needed a further 27 months to review and complete its production of documents. The court stated that this was not “reasonable or acceptable.”

In June of 2008, the Crown brought another motion to strike the statement of claim or to dismiss the action. The Crown argued as it did in the previous motion that the case raises a pure question of law and is analogous to a private reference. The judge held that the fact that the government has the power in a reference to raise the same issues not mean that those issues cannot come before the Court in some other way. In the judge's view, the present action was precisely such another

way and was legitimate. The judge also noted that the case is well developed and in his view this motion should not have been brought. The Crown was ordered to pay costs to the plaintiffs in the amount of \$20,000.

In 2005 there was an agreement between the plaintiffs and Canada to pay for the costs from 1999 to 2005 and then ongoing to date. Canada's Test Case Funding Program was created to fund important Indian-related test cases that had the potential to create judicial precedent. Funding is capped at \$1.5 million dollars. This case reached the \$1.5 million cap approximately one month before trial. The Congress of Aboriginal Peoples could not fund the case because it is completely dependant on federal government funding that is granted on the condition that the funds not be used for litigation especially against the federal government. The plaintiffs filed motion for an advanced costs order, which the court granted in the amount of \$345,000.

[2013]⁴² The Federal Court held that Métis and non-status Indians are 'Indians' within the meaning of s. 91(24) of the *Constitution Act, 1867*. The result is that all aboriginal individuals in Canada are now within federal jurisdiction.

At the beginning of its analysis, the Court sets out definitions of 'Métis' and 'non-status Indians' and held that these definitions were not the same as in s. 35 of the *Constitution Act, 1982*. The trial judge held that non-status Indians have two essential qualities – they have no status under the *Indian Act* and they are Indians. He went on to note that the federal government in 1980 defined them as “a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status.”⁴³ Their 'Indianess' was based on self-identification, group recognition and a substantial connection, both subjectively and objectively, to Indian ancestry. The Court set out a general method of determining who was a non-status Indian and provided the following definition:

The group of people characterized as “non-status Indians” are those to whom status could be granted by federal legislation. They would be people who had ancestral connection not necessarily genetic to those considered as “Indians” either in law or fact or any person who self-identifies as an Indian and is accepted as such by the Indian community, or a locally organized community, branch or council of an Indian association or organization which (sic) that person wishes to be associated.⁴⁴

⁴² *Daniels v. Canada*, 2013 FC 6 (F.C.T.D.)

⁴³ *Daniels*, *supra*, para. 117.

⁴⁴ *Daniels*, *supra*, para. 122.

This definition roughly mirrors the three part test for the identification of members in a Métis community as set out by the Supreme Court of Canada in *Powley*: (1) self-identification, (2) ancestral connection, (3) community acceptance. The third part of this test – community acceptance – can, according to the *Daniels* case, be to any “locally organized community, branch or council of an Indian association or organization,” which may be separate and apart from the relevant Indian community or collective.

Despite his acknowledgment that there was no “one size fits all” when it comes to a definition of the Métis, the trial judge developed a “country-wide” definition.⁴⁵ He defined Métis as “a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status.” In so doing, the trial judge separated the s. 91(24) definition of ‘Métis’ from any culture or aboriginal people. He found that *Powley* was not relevant to his s. 91(24) definition of ‘Métis’ because Métis harvesting rights cases were about the application of s. 35 and therefore were not determinative of the jurisdiction issue.⁴⁶

The MLIC editor is of the opinion that the trial judge’s definition of Métis for the purposes of s. 91(24) is wrong. First, it is confusing and unhelpful to have every other part of the Constitution relate to aboriginal collectives, except s. 91(24). Second, any “country-wide” definition of Métis must at the very least include and acknowledge the Métis Nation, which is the only group that actually does have legal recognition as one of the “aboriginal peoples of Canada.” If the trial judge wanted to set out a national definition, it should, in our opinion, start with the core group and then include others who have only lately adopted the term ‘Métis.’

The definition of Métis from the Métis National Council expressly requires a link to Métis collectives not Indian heritage or communities. However, because the Métis National Council did not participate in this case, the judge’s failure to include their perspective is understandable. Court decisions are made by reference to the evidence that is before it. The reasoning in this case illustrates the danger when interested parties do not participate.

In addition to deciding that Métis need not show any connection to a Métis community, the trial judge also eliminated any requirement of Métis community acceptance. He held that there may be circumstances where there is “no such asso-

⁴⁵ *Daniels*, *supra*, paras. 126, 129.

⁴⁶ *Daniels*, *supra*, paras, 126.

ciation, council or organization” but that there may be objective evidence that the person identifies subjectively as a Métis.

This approach reduces Métis to two things - self identification and a genealogical fact. This cannot be correct.

Canada has been appealed to the Federal Court of Appeal where it will be argued October 29-31, 2013

*Deschambeault v. Cumberland House Cree Nation*⁴⁷

Saskatchewan [2008] - Deschambeault, a Métis woman claimed that she was denied employment with a First Nation on the basis of ethnic origin. She brought a complaint under s. 7 of the *Canadian Human Rights Act*. Deschambeault applied for a job as a Residential School Healing Facilitator twice. Both times she received the highest scores in the job competition but was passed over in favour of someone who was less well qualified but was a First Nation member of the band.

The Village of Cumberland House is on an island in northern Saskatchewan. The Village shares the island with the Cumberland House Cree Nation reserve. The reserve and the village are a couple of kilometers apart. The village’s population is almost entirely Band members and Métis. Some Métis live on the reserve as well and the lives of the Band members and the Métis are ‘very much intertwined.’

The Band argued that Deschambeault’s status as a non-Band member was not equivalent to ‘race’ because it is possible to gain or lose band membership in one’s lifetime. For example, the person might marry into the Band or acquire status under *Bill C-31*. The Tribunal disagreed saying this was the equivalent of saying that a victim of religious discrimination was not discriminated against because he or she could convert to that religion. The Band also argued that because both Indians and Métis were aboriginal peoples within the meaning of s. 35 of the *Constitution Act, 1982*, there was no discrimination. Again, the Tribunal disagreed noting that a complainant and respondent do not have to be of different ethnic origins for a complaint to be substantiated. The Tribunal noted that the Band provided no evidence to show why it hired (twice) individuals who were less qualified for the position.

The Band also argued that the Canadian Human Rights Tribunal had no juris-

⁴⁷ *Deschambeault and Canadian Human Rights Commission v. Cumberland House Cree Nation* [2009] 2 CNLR 80 (CHRT)

diction because of s. 67 of the *Canadian Human Rights Act*, which states that, “nothing in this Act affects any provision of the *Indian Act* or any provision made or pursuant to that Act.” However, the Band had not passed any bylaw nor was its decision about staffing the facilitator position made pursuant to an authority expressly granted by the *Indian Act*. The Tribunal granted Ms. Deschambeault lost wages, expenses, compensation for pain and suffering, special compensation and interest.

*Desjarlais (Hardy v.); Desjarlais (Kerr v.)*⁴⁸

Manitoba [1892] - These cases both concern issues under the *Real Property Act* and the evidence and issues were the same. They were tried together. The case concerns lands allotted to the defendant Napoleon Desjarlais as his share of the half-breed land grants under the *Manitoba Act*. The land was sold in 1880 to a Rev. C. St. Pierre for \$200, under the direction of a court order by Napoleon’s father. It was subsequently sold to one M.T. Hunter in 1881 for \$540 and nine weeks later Hunter sold the land, along with the adjoining parcel, to one Treleven for \$2400. Kerr purchased the lots from Treleven and conveyed a portion to Hardy. When Napoleon Desjarlais came of age he claimed the land under the patent that was issued to him in 1882. The plaintiffs filed caveats and took the matter to court. The trial judge found for the plaintiffs. The matter was appealed to the Manitoba Court of Queen’s Bench.

The original sale under court order was conditional. The conditions were not met and Napoleon’s father had no authority to make the conveyance. The court held that the Court never sanctioned a sale that had already been made and conveyed. It also never sanctioned that the purchase money not be paid until ten months after the purchaser had succeeded in reselling the land at a large advance. The court agreed unanimously that the transaction could not be upheld.

*Douglas*⁴⁹

British Columbia [2004] – Counsel for the Crown submitted that one of the defendants, Mr. Hourie, accused of fishing violations on the Fraser River was Métis. However, there was no evidence to support his claim. The court referred to the need to substantiate such a claim pursuant to *Powley* and concluded that in the absence of such evidence the court will not conclude that the individual has a right to fish. “Mr. Hourie cannot support a right to participate in a native fishery on the

⁴⁸ *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Man. Q.B.); *Kerr v. Desjarlais* (1892), 3 W.L.T. 137 (Man. Q.B.)

⁴⁹ *R. v. Douglas et al* 2004 BCPC 0606

assertion that he is Métis.”

*Enge & North Slave Métis Association v Mandeville*⁵⁰

Northwest Territories [2012] - This is a judicial review that challenges the administrative scheme of the Government of the Northwest Territories (GNWT) that allows two aboriginal groups to have a limited harvest of the Bathurst Caribou herd in a ‘no hunting zone’ while expressly prohibiting the North Slave Métis Association (NSMA) from hunting in that zone. In 2009, the GNWT imposed a ‘no hunting zone’ on an area north of Great Slave Lake. Then, over a period of two years, the GNWT allowed a limited aboriginal harvest of 300 +/- 30 Bathurst caribou to be harvested in the zone. There are harvesting authorization cards for the limited hunt. The limited hunt was for the Tłı̄cho and the Yellowknives. Each group was allocated 150 caribou. The Wek’eezhii Renewable Resources Board approved the limited hunt for the Tłı̄cho and the Yellowknives but advised the GNWT that it was required to consult with the NSMA. In 2011, the NSMA asked for a caribou allocation that was less than the number of caribou the two other groups had left unharvested from the previous year. The request was denied. NSMA does not challenge the GNWT’s authority to impose hunting restrictions for conservation reasons. However, it does challenge the decision to exclude the NSMA. They base their challenge on a failure to consult. GNWT told NSMA that it would not consult with them because they held only asserted and not proven aboriginal rights. GNWT said that until Canada recognized NSMA as an aboriginal group for the purposes of negotiation of land claims, the GNWT could not consult with them about their aboriginal rights. GNWT did consult with the NSMA about the Bluenose East caribou herd, which lies to the northwest of the Bathurst herd range.

*Ferguson*⁵¹

Saskatchewan [1993] - Ferguson was a descendant of Métis scrip recipients and based his defense on the *Natural Resources Transfer Agreement*. The case revolved around whether or not a Métis or a ‘non-treaty Indian’ was an ‘Indian’ for the purposes of the NRTA. Scrip was not included in the analysis. The Alberta Court of Queen’s Bench upheld the trial judge’s finding that non-treaty Indians are included within the meaning of ‘Indian’ in the NRTA. Note should be taken that at trial, when questioned as to how he identified, Mr. Ferguson identified as Cree, not Métis. This case is likely still relevant to those who identify as ‘non-treaty Indians.’ However, since *Blais (Mb)*, it seems likely that those who self-identify as Métis can-

⁵⁰ *Enge & NSMA v Mandeville*, SCNWT Court File No. S-1-CV-2012-000002

⁵¹ *R. v. Ferguson* [1993] 2 C.N.L.R. 148; aff’d [1994] 1 C.N.L.R. 117 (Alta. Q.B.)

not also self identify as ‘Indians,’ whether treaty or non-treaty, for the purposes of the application of the *Ferguson* test.

Fortin⁵²

Ontario [2006] - Fortin was charged with unlawfully hunting white tail deer without a licence, contrary to the *Fish and Wildlife Conservation Act*, s. 6(1)(a). The defendant claimed to be a member of the Woodland Métis community in Sturgeon Falls. The evidence showed that his aboriginal ancestry was MicMac Indian from Acadia. No evidence was presented to show ancestry to an historic Métis community in Ontario and no evidence to support traditional practices on Manitoulin Island or a modern Métis community there. The Defendant was found guilty.

Freedom of Information and Protection of Privacy Act (Appeals) P-9400670 and P-9400786⁵³

Ontario [1993] - The Ministry received two requests from one of the groups whose views were sought by Ontario as part of the consultation process. The first request was for all records of public consultation regarding aboriginal communal fishing licences (ACFL). The second was for copies of all correspondence between the Ministry and the DFO relating to the licences. The records at issue in these appeals consisted of the Ministry’s communications strategy in conducting the consultations, as well as correspondence between the Ministry and the federal government departments with respect to the licences. Some of the correspondence dealt directly with the proposed consultations and the regulations, while other correspondence addressed more general issues of the impact of the *Howard* decision and Ontario’s enforcement of the general hunting and fishing regulations.

The Privacy Commissioner found that all the records were exempt pursuant to section 15(a) of the Act. In order for section 23 to apply to a record, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the relations with other government exemptions.

The appellant (the group requesting the information) submitted that there was overwhelming public opposition to the government’s plan to issue the ACFLs. In addition, it claimed that the province misled the federal government, municipalities and the public in its public consultation exercise. The appellant then cited numer-

⁵² *Ontario (Ministry of Natural Resources) v. Fortin* [2006] O.J. No. 1166

⁵³ *Ontario Access & Privacy Inquiry Order P-961, Appeal P-9400670 and P-9400786*

ous examples of this and other concerns about the manner in which the consultations were conducted.

The Ministry argued that it was in the public interest to resolve and implement aboriginal fishing rights through negotiations. The Ministry stated that if the records were disclosed, and the negotiations broke down, there was a risk that these matters would proceed to litigation, in which case the parties would be forced to take adversarial positions in relation to one another. The Ministry claimed that a negotiated, as opposed to a litigated, resolution was in the public interest for two reasons. First, the Ministry stated that a negotiated settlement was likely to be more balanced and satisfying for the parties. Second, it would be less costly for the province and the taxpayers of Ontario.

The Privacy Commissioner held that the appellant asserted a private, as opposed to a public interest. The appellant's group objected to the aboriginal communal licences. However, the documentation provided by both the appellant and the Ministry indicated that there were other members of the public who supported aboriginal communal licences. The Commissioner found that while the appellant had shown that there was a public interest in the disclosure of the records, the need to protect the relationship with aboriginal peoples and the conduct of intergovernmental relations by the Government of Ontario overrode that public interest.

*Gagnon*⁵⁴

Ontario [2006] - This case involved two separate incidents of fishing without a licence. The accused were all members of the Ontario Métis Aboriginal Association and claimed this membership as a defence. The issue was “whether or not the defendants demonstrated that they have a Métis right under Section 35 of the *Constitution Act*, 1982 to fish in the vicinity of Lake Nippising.” Relying on the *Powley* test, the court concluded that the accused failed to provide sufficient evidence of a Métis community in the vicinity of Lake Nippising prior to effective European control, and the charges were upheld. The judge also held that 1850 was the time of effective control, and based on the evidence, found that the defendants' ancestors arrived in the area after 1850.

⁵⁴ *R. v. Gagnon* [2006] O.J. No. 4738 (O.C.J.)

*Gauchier*⁵⁵

Alberta [2011] – Since the Supreme Court of Canada handed down its reasons for judgment in *Cunningham* the Métis settlements have not taken the necessary steps to remove membership of the Cunninghams. Gauchier seeks an order of the court (known as a mandamus order) to enforce *Cunningham* decision.

*Gauthier*⁵⁶

Ontario [2006] – The four applicants self-identify as Métis, the Ontario Métis aboriginal Association is a non-profit organization that represented aboriginal peoples in Ontario (no longer in existence). They claimed that their income was exempt from taxation pursuant to the *Indian Act* and s. 15 of the *Charter of Rights and Freedoms* (equality provision). They also claimed that they had an “inherent immunity from taxation as an aboriginal right deriving from the aboriginal right to self-government which is constitutionally entrenched and protected under section 35 of the *Constitution Act, 1982*.” The Crown filed motions to strike out the claim. The judge found that the claim was so deficient in material facts that it did not raise a ground of appeal. He said that the claims were assertions of “overly broad unsupported conclusions” with no specific practices, customs or traditions pleaded with sufficient specificity so as to clearly identify the right at issue. The court noted that they were relying on the *Powley* decision that an historic Métis community existed and continues to exist in Sault Ste Marie. *Powley* however, was a harvesting rights case and the judge held that it could not be relied on to confirm the existence of a Métis right of self-government. In the result the judge struck the paragraphs claiming a right to immunity from taxation pursuant to the *Indian Act* and self-government pursuant to s. 35.

*Gift Lake*⁵⁷

Alberta [2009] – This is an appeal of a judicial review of a decision of the Métis Settlements Land Access Panel (“LAP”) about compensation payable to Gift Lake Métis Settlement as a result of oil and gas activity on its lands by Devon Canada Corporation. The question in the case was whether the panel erred in deciding that past and continuing effects are not cumulative and by requiring evidence be tendered to prove cumulative effects. The LAP did not want to look at evidence of the impacts of oil and gas activity generally. They only wanted to look at the proponent’s activities. Concerns were expressed by LAP about the objectivity of the

⁵⁵ *Gauchier v. Registrar Métis Settlements Land Registry, Peavine Métis Settlement and Peavine Métis Settlement Council* (Alberta Court of Queen's Bench file # 1103 15013, filed September 22, 2011)

⁵⁶ *Gauthier, Wetelainen, McGuire, McKay v. the Queen* 2006 TCC 290 (CanLII)

⁵⁷ *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)* [2009] A.J. No. 395 (ACA).

evidence provided. LAP took the approach that while one must necessarily look back in time to ascertain whether there is a cumulative effect, compensation for such effects are awardable only if the affected party demonstrates that those effects occurred or will occur during the relevant review period. LAP declined to award retroactive compensation, that is, compensation for effects experienced during an earlier review period. LAP said that “it may be possible that the loss of trapping does have some ongoing impact on the cultural environment in some cases.” However, in its view, the evidence before it was insufficient to show whether loss of trapping was caused by Devon, other oil operators or broader societal changes, or even what declines in trapping occurred over particular time frames. Gift Lake Métis Settlement argued that LAP imposed an impossible evidentiary burden on it by requiring evidence of “specific cumulative effects,” pointing out that the rules of evidence must be applied flexibly to aboriginal claims and that the same principles should apply to claims for cultural loss.

The Court of Appeal did not agree that LAP’s approach with respect to evidence proving cumulative effect was unreasonable. LAP acknowledged that the issues were complex and difficult and that this was the first time LAP had been called upon to make awards for loss of cultural value and for cumulative effect. LAP’s overall approach to the evidence was not rigid. Its criticisms about the generality of the evidence was not wrong. The Court of Appeal upheld LAP’s decision.

*Gladue*⁵⁸

British Columbia [1999] – Section 718.2(e) of the *Criminal Code* states that:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The *Gladue* case was about sentencing and the over-representation of aboriginal peoples in Canadian prisons that seeks to view sentencing within a restorative justice paradigm. At the Supreme Court of Canada, the court took the opportunity to articulate the appropriate analysis to be undertaken in a s. 718.2(e) inquiry. The Supreme Court found that attention should be given to the social context because s. 718.2(e) was designed to address the over-incarceration of aboriginals, which was in turn a symptom of a general overrepresentation of aboriginals in the criminal justice system. Section 718.2(e) is a directive to the judiciary to enquire into these causes and attempt to redress through sentencing, to the extent possible, the

⁵⁸ *R. v. Gladue*, 1999 CanLII 679 (S.C.C.)

alienation of aboriginals from the criminal justice system.

Gladue sets out a two-step process. First, a judge must consider the unique systemic and historical factors that may have contributed to bringing the particular individual before the courts. The second step is to determine the appropriate sentencing procedures and sanctions. Criminal sanctions should be geared toward the needs of the victim, the community, and the offender and should be based on healing these relationships.

The Court recognized that aboriginal communities in Canada have different histories and beliefs. As a result, the approach will be changed according to the facts of each individual offence and offender. The provision applies to all aboriginal peoples. Sentencing judges are directed to explore reasonable community-based sanctions with every aboriginal offender as an alternative to imprisonment.

Gladue & Kelly Lake Métis Settlement Society v. BC⁵⁹

British Columbia [2002] - Lloyd Gladue & the Kelly Lake Métis Settlement Society filed a statement of claim in the Supreme Court of British Columbia claiming that the citizens of Kelly Lake are not provided with basic minimum services equal to those provided to citizens of BC. The plaintiffs claim that BC has breached its fiduciary duty to the people of Kelly Lake and has discriminated against them under s. 15 of the *Charter*. Among the complaints, the plaintiffs claim that the Crown has discriminated against them by delaying and failing to include them in land claim negotiations; that the Ministry of Children and Family Development failed to ensure adequate and equal schooling for the children of Kelly Lake; that the Ministry of Community, aboriginal and Women's Services failed to provide adequate and equal government services, including public library services, safe roads and housing. The claim includes failure to provide access to employment and employment training and by giving or encouraging preference for nominal First Nations organizations for available employment opportunities contrary to s. 35 of the *Constitution Act*. The fact that the Province closed the Kelly Lake School is a source of complaint in the claim. The claim states that the Crown has conspired to allot work primarily or exclusively to "nominal alleged First Nations organizations" without regard to their residence or affiliation with the Kelly Lake community rather than the Métis people residing in the area. The claim further states that the Crown failed in its duty to the Métis people of Kelly Lake by, among other things,

⁵⁹ *Gladue & Kelly Lake Métis Settlement Society v. BC* – BCSC Vancouver Registry File No. S024022.

failing to ensure their sacred burial grounds are not moved or infringed upon by industry or unscrupulous individuals and by failing or refusing to verify the accuracy of various First Nation's claims before allowing the transfer of land and community assets to the wrong parties. The plaintiffs seek general damages in the amount of \$10 million dollars plus various declarations and injunctions.

In 2003, the parties signed an Abeyance Agreement. The Abeyance Agreement notes that the parties have entered into negotiations with respect to the claim and that they will not take any further steps in the Action or begin any civil disobedience activities related to the matters in the Action.

*Goodon*⁶⁰

Manitoba [2009] - Will Goodon, a Métis was charged with possession of wildlife killed in contravention of the *Wildlife Act*. Mr. Goodon shot a ringneck duck in Turtle Mountain in southwest Manitoba. He claimed the right to hunt under s. 35 of the *Constitution Act, 1982*.

The trial judge distinguished the identification of the geographic area where the right can be exercised from the geographic area of the historic rights-bearing community. He noted that these may be two different geographic areas. The trial judge characterized the right as being a right to hunt for food at Turtle Mountains and its environs.

The Métis community of Western Canada has its own distinctive identity. Within Manitoba, this community includes all of the area within the present boundaries of southern Manitoba from Winnipeg extending south to the USA and northwest to Saskatchewan including the area of present day Russell, Manitoba. Despite the fact that there was no permanent settlement in Turtle Mountain, it was very much part of that large Métis regional community. A contemporary community in southwestern Manitoba exists and is well organized and vibrant.

The date of effective European control in the part of the Province originally established as the 'postage stamp province' was in 1870. For the remainder of southern Manitoba effective control was 1880. This was despite the existence of a settlement at Red River perhaps as early as 1810. This was because the Métis continued throughout the mid-nineteenth century to resist the imposition of European control and because the creation of the Province in 1870 did not include the Turtle Moun-

⁶⁰ *R. v. Goodon* [2009] 2 CNLR 278

tain area or all of southern Manitoba.

The trial judge noted that the Métis were distinguished by two defining characteristics – “they are hunters and they are mobile.”

The Crown argued that Métis hunting rights were extinguished by the *Manitoba Act*, 1870. However, the judge found that because the hunting occurred outside the boundaries of the ‘postage stamp province’ the Manitoba did not and does not have any effect on any activities that occurred at Turtle Mountain. Extinguishment was therefore not proven.

The Crown made no attempt to justify the infringement of the Métis right to hunt for food. Therefore the court found that Mr. Goodon has a right to hunt for food within the meaning of s. 35 of the *Constitution Act, 1982*. The Crown did not appeal.

*Grumbo*⁶¹

Saskatchewan [1996] - Mr. Grumbo was charged with possession of wildlife taken by an Indian for food, contrary to s. 32 of the *Wildlife Act* in Saskatchewan. The main issue in *Grumbo* was the same as in *Blais (Mb)*: whether a Métis is an ‘Indian’ within the meaning of the NRTA. The Crown admitted that Métis are Indians for the purposes of s. 91(24) of the *Constitution Act, 1867*. The finding of the trial judge was that Mr. Grumbo was not an Indian for the purposes of the NRTA. At the Court of Queen’s Bench, the judge held that the Crown failed to establish that Mr. Grumbo was not an Indian. He went on to find that if there was any doubt it should be resolved in favour of the accused and therefore he found that the Crown failed to establish Grumbo’s guilt. He overturned (quashed) the trial court conviction. The Crown appealed to the Saskatchewan Court of Appeal and on June 19, 1997, *Grumbo* was argued at that court. On May 14, 1998 the Court of Appeal delivered its judgment in *Grumbo*. The majority held that there was a preliminary issue to be determined before the Court could decide whether or not Métis are Indians for the purposes of the NRTA. They held that the NRTA does not confer new rights. Rather, the NRTA accommodates, preserves and, where necessary, amends pre-existing aboriginal rights. Therefore, the preliminary issue is whether the Métis had existing aboriginal title or harvesting rights prior to the enactment of the NRTA. The majority found that no evidence or argument had been presented

⁶¹ *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.)

to address this fundamental preliminary issue and they ordered a new trial. The Crown stayed the charge rather than proceed back to trial with Mr. Grumbo.

*Guay*⁶²

Ontario [2006] - Mr. Guay was charged with unlawfully hunting moose without a licence. At trial he established that he had a great great grandfather who was of MicMac descent and that his great great great grandmother was an “Indian lady.” The family moved to the Espanola area of Ontario in the late 1800s. The court found that Mr. Guay established that he was of Métis descent, but did not establish a constitutional right to hunt because there was: (1) no evidence of an historic rights bearing community in the area of Espanola; (2) no evidence of a contemporary Métis community and rejected the defendant’s assertion that the Sault Ste Marie community could also include Espanola; and (3) no evidence of an ancestral connection to a historic Métis community. The trial judge noted that in *Willison* and *Lavolette* the courts had found extended communities, but held there was no evidence in this case to support such a contention.

*Haida & Taku*⁶³

British Columbia [2004] - These are the highlights of the duty declared in the two decisions:

- Canada’s aboriginal people were already here when Europeans came. Therefore, the honour of the Crown requires governments to negotiate treaties in order to have a just settlement of claims and to reconcile pre-existing aboriginal sovereignty with assumed Crown sovereignty.
- The Crown’s duty to act honourably is enshrined in s. 35 (1) of the Constitution Act, 1982, and applies to all government dealings with aboriginal peoples.
- An essential part of the Crown’s s. 35 duty requires governments to consult aboriginal peoples and accommodate their interests before claims are resolved.
- The purpose of this duty to consult and accommodate is to preserve aboriginal interests until treaties are concluded and to foster relationships that will make effective negotiations possible.
- Aboriginal people do not have to go to court to prove their rights or title before this Crown duty arises.

⁶² *Ontario (Ministry of Natural Resources) v. Guay* [2006] O.J. No. 1165

⁶³ *Haida Nation v. B.C. (Minister of Forests)* [2002] BCCA 147 (CanLII) at 134, para. 37 (B.C.C.A.); aff’d [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* [2000] B.C.J. No. 1301 (B.C.S.C.); aff’d [2002] B.C.J. No. 155 (B.C.C.A.); rev’d [2004] 3 S.C.R. 550

- The duty arises whenever the Crown knows of the potential existence of an aboriginal right or title, and is considering conduct that might adversely affect it.
- In such cases, governments must do what is necessary to maintain the honour of the Crown and achieve reconciliation with respect to the interests at stake. Governments must balance societal and aboriginal interests when making decisions affecting aboriginal claims.
- This duty will require government to change its plans or policies in order to accommodate aboriginal concerns if consultation shows accommodation to be necessary.

*Hape*⁶⁴

International [2007] – The Supreme Court of Canada held that Canada has an obligation to ensure that its legislation conforms with international law.

*Hirse Korn*⁶⁵

Alberta [2010] Alberta Provincial Court found that Métis have no right to hunt in southern Alberta. The trial judge held that raising a Métis rights defence to a hunting charge was a collateral attack on the legislation and therefore was an “impermissible constitutional challenge.” He dismissed the case on that basis. He also found that because the Métis chose to challenge Alberta’s hunting laws by means of a community hunt that was well publicized, the hunt was for ‘political purposes’ and the defendant could not claim a right to hunt for food. Finally, the judge found that the test for determining a hunting right was ‘occupation’ and a pattern of ‘frequent and consistent use.’ As a result he found that because there was no Métis settlement in southern Alberta prior to the arrival of the NWMP in 1874, there was no historic Métis community to be the rights-bearing community.

Mr. Hirsekorn appealed and the case was heard by the Court of Queen’s Bench in June of 2011. The appeal judge overturned the trial judge on many grounds. Chief Justice Wittman held that the case could not be dismissed just because the hunting had political overtones. He said it was not an impermissible collateral attack on the legislation and that the defendants had not changed their case at the end of the trial. In applying the *Powley* test, the appeal judge upheld the trial judge’s finding of fact that (1) the Métis had insufficient evidence of hunting in Blackfoot territory and (2) that their hunting there was the result of European influences. He

⁶⁴ R. v. *Hape* 2007 SCC 26

⁶⁵ R v. *Hirse Korn*, [2010] A.J. No. 1389; aff’d in part [2011] A.J. No. 1217;aff’d 2013 ABCA 242

hinted strongly that he would prefer to acknowledge the Métis right to hunt but that he was constrained by the *Powley* test, which a higher court would be able to re-examine.

In July of 2013, the Court of Appeal handed down its reasons for judgment in *Hirsehorn*. It generally upheld the trial judge's decision that Métis have no right to hunt in the Cypress Hills. The Court of Appeal applied a new threshold test to determining whether the plains Métis had a right to hunt. The new threshold requires that the Métis must establish that the site where the impugned hunting took place had to be within their traditional territory and that they had frequented the area for the purpose of hunting. This new threshold was added to the determination of whether the practice was integral to the Métis traditional way of life. Mr. *Hirsehorn* has applied for leave to appeal to the Supreme Court of Canada.

*Hopper*⁶⁶

New Brunswick [2008] - A judge in Moncton found Richard Hopper guilty of possessing a deer carcass without a licence in November of 1999. Hopper, who was sentenced to seven days in jail and a \$1000 fine, claimed it was his treaty right as a Métis. Judge Vautour said he relied on the SCC *Powley* decision, but found there was no evidence that a Métis community exists in New Brunswick. He rejected evidence of Hopper's direct lineage to a signatory of a Massachusetts treaty dating back to 1693. He said if that were enough to gain status, most Acadians would qualify as Métis. Hopper is part of the Maritime Wabanaki Confederacy, a Métis group formed several years ago. The Confederacy appealed the decision to the Court of Queen's Bench, which upheld the trial judge's finding. Hopper appealed to the NB Court of Appeal, which again upheld the lower court decisions. The court said the appropriate approach to determining Métis rights is to use the *Powley* test. Hopper failed to prove the existence of either an historic or a contemporary rights-bearing community. The court also noted that Hopper's self-identification was of 'recent vintage' and not with a specific aboriginal community. While Hopper proved a genealogical connection to an historic Indian community, that was outside the reach of the treaty under which he was claiming rights. Hopper did not demonstrate a connection to any contemporary rights-bearing community.

Membership in a self-styled Métis and aboriginal organizations does not make one aboriginal for purposes of constitutional exemptions. Furthermore, it is inappropriate for an organization to announce to the world at large that its members are clothed with constitutional

⁶⁶ *R. v. Hopper* [2004] N.B.J. No. 107; [2005] NBJ No. 477 (QB); [2008] 3 CNLR 337 (NBCA)

rights. To do so constitutes an attempt to usurp the role of the courts on a fundamental issue affecting all Canadians. There is no evidence the organizations in which the appellant is a member are rights-bearing communities, nor do they provide any proof that an aboriginal community has accepted him. He has not shown any shared culture, customs or traditions with any aboriginal community and thus has not established the connection required by *Powley*.

*Houle*⁶⁷

Alberta [2005] - Five members of the Whitefish Lake First Nation, which is part of the Saddle Lake Indian Band, were fishing for food in an area on the fringes of the reserve by means of rods, reels and lures – angling. They were also participating in an event called the “Annual Family Fish Derby Whitefish Lake,” an event restricted to members of the First Nation. The organizer of the event contacted the Fish and Wildlife office to obtain Indian sport fishing licences but was told by someone there that licences were not necessary because the event was on reserve. The Crown argued that although they were intending to eat the fish, they were really sport fishing, which was not a Treaty right. The Crown also argued that even if fishing for food, they were still limited in the size and type of fish caught because the *Alberta Fishery Regulations* were made in support of valid conservation measures. The trial judge found that they were sport fishing and therefore required to comply with the catch restrictions of the regulations. The accused were all convicted.

On appeal to the Court of Queen’s Bench, the appeal judge found that Treaty Six preserves a right to fish for food and that the right is modified by the Natural Resources Transfer Agreement. The appeal judge held that the trial judge erred in using a “predominant purpose” test. After finding as a matter of fact that the Appellants intended to eat the fish, there was no need to look to a collateral or other purpose. The appeal judge noted that the parties themselves had agreed that, “the fact that they were not starving, the fact that they did not need the fish for subsistence and the fact they were employed, do not determine the scope of the right to fish for food” (par. 28). The appeal judge also noted that the trial judge failed to consider the aboriginal perspective, which was that the people in the community came together in a drug-free, alcohol free environment to enjoy a family fun day event. As the appeal judge noted, there is nothing in Treaty 6, the NRTA or case law to suggest that food-fishing rights cannot be exercised in an enjoyable manner. The QB judge then examined whether the regulations infringed the rights claimed. He found that the requirement in the regulations that restricts food fishing to gill nets infringed their fishing rights. He also found that the regulations prioritized

⁶⁷ *Houle v. Canada*, 2005 A.B.Q.B. 127

the needs of sport anglers and included aboriginal food fishers simply because their preferred means of fishing was angling. Finally, the appeal judge found that the Crown failed to properly consult with the First Nation with respect to the regulations. The convictions were quashed.

*Howse*⁶⁸

British Columbia [2002] - Six Métis in Cranbrook, B.C. faced several charges, including hunting without a licence contrary to the *Wildlife Act*. The defendants were taking part in an organized Métis hunt for moose and deer to provide food for their families. The trial judge found that the defendants were Métis based on the Superior Court definition in *Powley*. The judge further found that the Métis traditionally hunted in the Rocky Mountain Trench and that hunting was an integral part of Métis culture prior to the assertion of effective control. He further found that there was no evidence that the hunting rights of the Métis had been extinguished. The B.C. regulatory scheme did not recognize or affirm the aboriginal hunting rights of its Métis citizens and interfered with their harvesting. The trial judge found that all of the defendants met the onus of showing that they have an aboriginal right to hunt pursuant to s. 35 of the *Constitution Act, 1982*.

The Crown appealed to the B.C. Supreme Court. The appeal judge did not agree with the lower court. The appeal judge found that there was not enough evidence to support the claim that Métis in BC have an aboriginal right to hunt. Most of the evidence at trial was given orally by the Métis defendants. No expert put forward historical evidence about Métis harvesting practices or the existence of a Métis community in the area. The appeal judge said that they had not presented enough evidence to establish that: (a) hunting was integral to their distinct Métis society; or (b) that they, as Métis, had a historic tie to the Kootenay area; or (c) that their Métis right to hunt had been infringed; or (d) that they were Métis. On March 12, 2003, leave to appeal to the British Columbia Court of Appeal was granted.

*Hudson*⁶⁹

Northwest Territories [1999] - In 1999 Ken Hudson of Fort Smith, NWT, was charged with hunting moose in Wood Buffalo National Park contrary to the *National Parks Act*. The Act allows treaty Indians to hunt and fish in the Park but

⁶⁸ *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 B.C.C.A. granted on March 12, 2003 [2003] B.C.J. No. 508 (B.C.C.A.)

⁶⁹ *R. v. Hudson* (1999) Territorial Court of NWT, Court File No. 200-412

denies Métis the same rights. The Crown stayed the proceedings just before trial stating that “A judgment in this case would potentially have significant ramifications throughout the country...we do not think the public would be well-served if we proceed with the trial at this time.” Despite statements from the Parks representatives that Métis who hunt in the Park will be charged, Métis in the Fort Smith area are now hunting in the Park and no charges have been laid.

*Hul’qumi’num Treaty Group*⁷⁰

British Columbia [2009] – The Hul’qumi’num Treaty Group (HTG) filed a human rights complaint against the government of Canada before the Inter-American Court on Human Rights (IACHR). The complaint alleges that Canada violated the human rights of the Hul’qumi’num peoples by granting approximately 85% of the lands traditionally used and occupied by the Hul’qumi’num to private land owners without offering any form of restitution, either through return, replacement or payment of just compensation. The petition alleges that Canada refuses to recognize or discuss the claims of the Hul’qumi’num to restitution for their lost ancestral lands that are now owned and controlled by these large forestry development corporations.

On October 30, 2009, the Commission ruled that HTG’s Petition was admissible with regard to alleged violations of Articles II (right to equality), III (right to religious freedom), XIII (right to culture), and XXIII (right to property) of the *American Declaration on the Rights and Duties of Man*. As a member of the OAS and signatory to the *Organisation of American States (OAS) Charter*, Canada is responsible for violating rights that are affirmed in the *American Declaration* and by other relevant rules and principles of international human rights law. In ruling HTG’s petition admissible, the Commission waived the normal requirements under international law and its own rules and procedures that petitioners must first exhaust domestic remedies before a case can be considered on the merits. The Commission held that Canada failed to provide an effective remedy for its alleged violations of the Hul’qumi’num peoples’ human rights. Canada had argued that the British Columbia Treaty Commission process could provide HTG with a remedy for the taking of Hul’qumi’num ancestral lands in the form of a negotiated treaty, but the Commission found that:

the BCTC process has demonstrated that it is not an effective mechanism to protect the right alleged by the alleged victims.

⁷⁰ *Hul’qumi’num Treaty Group v. Canada*, IACHR [2009] Case No. 12.374

Canada had also argued that HTG could pursue its claims for restitution in Canada's courts. However, the Commission rejected that argument because no Canadian court case had ever actually resulted in a finding of aboriginal title. The case now moves to consideration on the substance of the claim.

*Husky Oil*⁷¹

Alberta [1996] - The Land Access Panel considered whether compensation should be awarded for the cultural value of the land as it relates to preserving a traditional Métis way of life. The Panel has the authority to base its assessment on the impact of the lease or project on the physical environment and on the social and cultural environment.

The Panel found as a fact that oil and gas activity, however minimal, had an impact on the surrounding environment. Hunting and trapping are an inherent and vital part of Métis traditional culture and are wholly dependent on the maintenance of that physical environment. Therefore, oil and gas activity had a corresponding impact on Métis culture for which the existing mineral lease-holder was required to pay compensation.

The Panel imposed compensation in the amount of \$800 per year on the leasing company. The low amount represents the fact that there was insufficient evidence with respect to actual losses in this regard. The Panel stated that:

In fact, no other written or oral evidence was produced by General Council or the Settlement to support a finding that the current operation has a greater than minimal effect on the diminishment of game and corresponding negative effect on Métis culture.

In the absence of such proof, the Panel found it had no option but to set the compensation at a minimal amount.

*Janzen*⁷²

Alberta [2008] – The case was an appeal from Notices of Reassessment for back taxes. One of Mr. Janzen's alternative arguments was that he was Métis and that his income was not taxable in accordance with *Powley*. The court did not accept this argument and held that *Powley* does not stand for the proposition that income earned by Métis is not subject to taxation.

⁷¹ *Husky Oil Limited and Barrington Petroleum Limited and Elizabeth Métis Settlement*, MSAT-LAP Order No. 1, May 8, 1996

⁷² *Janzen v. The Queen* 2008 TCC 292 (CanLII)

*Kane*⁷³

Saskatchewan [2009] – The application concerning the Director’s alleged failure to observe procedural fairness was brought by CB on her own behalf as a local Métis elder residing in the area. Although she submitted that the Director failed to consult with the Métis community, her application was not brought in a representative capacity, but in a personal one. CB holds no office with the Ponteix Métis Local or the Métis Nation-Saskatchewan. However, Métis Aboriginal rights, like all Aboriginal rights, are communal rights, possessed by the community and not by individual members who make up the community. The proper applicant for a judicial review application would be the rights-bearing community itself or an individual member of the community in a representative capacity on behalf of all other members of the community. The first part of the test articulated in *Haida* requires the Director to have actual or constructive knowledge of the Métis rights being asserted at Lac Pelletier. The Director had no actual knowledge and there was no basis upon which one could conclude the Director had constructive knowledge. There was no evidence of anyone in the area having asserted Métis aboriginal rights of any sort. An asserted aboriginal right must be based upon the questions outlined in *Powley*. Métis rights requires significant evidence addressing these factors. The evidence provided was not near enough to address the complexity of the factors identified in *Powley*. The application failed on this ground.

*Kelley*⁷⁴

Alberta [2006] - Mr. Kelley was charged with trapping squirrels without a licence in contravention of s. 24(1) of the Alberta *Wildlife Act*. He defended himself on two fronts: first, by his constitutional right to trap as a Métis, and second, pursuant to the *Interim Métis Harvesting Agreement (IMHA)*. At trial, the court held that Mr. Kelley established that he was Métis, but did not establish a constitutional right to trap. The court further held that the *IMHA* could not operate as a defence to the charge.

The Crown submitted that Mr. Kelley could not rely on the *IMHA* as a defence because there was a reserved right to prosecute. The trial judge did not accept this position because the agreements provide that a Métis can hunt, trap or fish in accordance with the agreements. He stated at par. 26, that “having agreed to this position, the Crown cannot validly take the position that if a Métis does hunt,

⁷³ *Kane v Lac Pelletier (Rural Municipality No. 107)* [2009] 4 CNLR 108 (Saskatchewan QB)

⁷⁴ *R. v. Kelley*, 2006 ABPC 17; 2007 ABQB 41

trap or fish in that fashion, he or she can still be prosecuted.” The trial judge then proceeded to determine whether Mr. Kelley had met the test in *Powley* to prove a s. 35 right to trap. He found that the *Powley* test had not been met. The judge then went on to find that the *IMHA* purported to extend to all Métis in the province, for all areas of the province, the rights defined by the Supreme Court of Canada in *Powley*, but that it could not do so.

The judge stated that the problem with the *IMHA* was that it did not have a legislative origin and purported to assign special rights, which were not constitutional rights. The judge looked to the case of *R. v. Catagas*,⁷⁵ a decision of the Manitoba Court of Appeal, which concluded that the government could not exempt a specific group or race from the application of the law. The judge held that the Supreme Court had ruled that Métis rights were more restricted than Indian rights. He also held that the Alberta government could not implement a policy which ignored the ruling of the Supreme Court of Canada and which effectively granted Métis unrestricted hunting, trapping and fishing rights. The judge thought that the defendant had been misled by the actions of the Province and imposed a nominal fine of \$25.

[2007] In February of 2007, the Queen’s Bench appeal judge handed down his reasons for judgment. It is not the role of an appeal court to retry a case. The role of the appeal court is to determine if the trial judge made any errors. The Queen’s Bench appeal judge found that the trial judge did not commit an error in determining that Mr. Kelley is Métis and found that his trapping came within the *IMHA*. He also found that the right to harvest for subsistence includes the incidental right to teach the younger generation to harvest.

The appeal judge stated that s. 35 and the honour of the Crown combine to create a constitutional imperative on governments to consult on and negotiate with a view to accommodating or resolving credible aboriginal rights claims. This imperative applies to provincial governments with respect to Métis rights generally and Métis harvesting rights specifically.

The appeal judge noted that the *IMHA* was entered into by Alberta in an attempt to fulfill its constitutional imperative in light of the decision in *Powley*. The accommodation arrived at between Alberta and the MNA – the *IMHA* - is a part of the reconciliation process mandated by s. 35 and the honour of the Crown.

⁷⁵ *R. v. Catagas* (1977), 38 C.C.C. (2d) 296 (Man. C.A.)

The *IMHA* and accommodations like the *IMHA* do not depend on first proving a constitutionally protected aboriginal right. Métis did not have to establish Métis harvesting rights across all of Alberta prior to Alberta entering into an accommodation with them. Accommodations are workable arrangements that achieve the constitutional imperative, outside the adversarial process and without the cost of litigation. Accommodations have benefits for all involved.

The *IMHA*, a province-wide accommodation, is not inconsistent with or contrary to the existing case law on Métis harvesting rights. Negotiated agreements such as the *IMHA* do not have to exactly mirror the result if Métis rights were litigated with respect to each hectare of Alberta.

Alberta argued that there was no duty on government to negotiate or consult in a quasi-criminal context, such as proceeding with the prosecution of a Métis harvester. The appeal judge said that, whether or not that is true, the fact is that Alberta did consult and negotiate in advance of and in contemplation of this case, and formalized an agreement – the *IMHA* – which sets out what Alberta agrees to do. The honour of the Crown is implicated in these negotiations and the implementation of these agreements.

The honour of the Crown demands that the Crown follow through on the commitments it makes in these non-prosecutorial agreements, whether with aboriginal or non-aboriginal peoples. Further, in a situation like this where the non-prosecutorial agreement is negotiated between the Crown and an aboriginal people in fulfillment of a constitutional imperative, the honour of the Crown demands that the aboriginal peoples who negotiated and entered into the accommodation, be able to rely upon it.

Accommodation agreements like the *IMHA* must be reconcilable with the rule of law. The appeal judge found that the *IMHA* was meant to provide an exemption from Alberta's fish and wildlife regulatory regime to eligible Métis harvesters. However, in its current form, the *IMHA*'s exemption is not authorized under Alberta's own statutes and regulations. The appeal judge pointed out that this is a legal defect that could be easily corrected. In this regard, the appeal judge noted that Alberta's Governor in Council has the authority to authorize the *IMHA*'s exemption pursuant to s. 104(1)(c) of the *Wildlife Act*, but it had not done this.

Alberta argued (contrary to the express words of the *IMHA*) that the *IMHA* only protects those Métis who can establish s. 35 rights and that because the *IMHA* was not incorporated into Alberta's statutes and regulations, Métis could not rely on it as a defence to charges. Justice Verville noted that the Crown appeared to want to "have their cake, and eat it, too" with this argument.

Even though he found the *IMHA* to be legally unenforceable in its current form, Justice Verville recognized that Mr. Kelley and others like him have relied on the *IMHA*. The Court held that Mr. Kelley would be severely prejudiced if the Crown was able to proceed with charges against him even though the Alberta Government signed a formal agreement, which clearly authorized the harvesting activity he undertook.

The Court also pointed out that if Alberta was able to proceed with charges, the Alberta Métis community would, in effect, be in a worse position than if there had been no negotiations or accommodation with the province. Clearly, this was not what courts have contemplated by encouraging governments and aboriginal peoples to negotiate accommodations.

The Court concluded that since Alberta negotiated and signed an agreement expressly with a view to accommodating Métis harvesting practices, it would be extremely egregious and shock the conscience of the community for a conviction to ensue when the activity was contemplated and authorized by such agreement. Moreover, it would be extremely unjust for the Métis harvester, who relied on the Crown's commitments within the *IMHA*, to bear the consequences. Because this would be an abuse of process, Justice Verville set aside the lower court's conviction of Mr. Kelley and granted a stay.

In addition, the Court recognized that this was a 'test case' and that the remedy granted (i.e. a stay based on reliance on the *IMHA*) may not be open to all Métis harvesters in the future, if, for example, Alberta publicly clarifies its interpretation of the *IMHA*, cancels the *IMHA* or the *IMHA* is replaced by a long term harvesting agreement.

However, the Court was clear that even if the *IMHA* was cancelled, the Alberta Government would still be under a constitutional imperative to accommodate Métis harvesting practices, "given its knowledge that the Act breaches certain as yet

unascertained rights of non-Settlement Métis in Alberta.”

*Labrador Métis Association v. Minister of Fisheries and Oceans*⁷⁶

Labrador [1996] - The question before the court was whether the Minister breached principles of natural justice or procedural fairness in declining to grant a communal fishing licence to the Labrador Métis Association (“LMA”). The Minister made the decision without affording the LMA an opportunity to make submissions on whether it represented a group of aboriginal people who have continuously used fisheries resources in an area from pre-European contact to the coming into effect of the *Constitution Act, 1982*. The Minister argued that it denied the licence because the LMA was attempting to lever an initial attempt at obtaining a communal fishing licence into recognition by the federal government of the LMA’s aboriginal rights. The Ministry wrote to the LMA that it would not authorize the members of the LMA to fish salmon as a reflection of an aboriginal right. The Ministry also stated that the LMA would have to provide evidence that it had used the fisheries resources in the area since before European contact. The trial judge held that the Department of Fisheries and Oceans policy was open to change as a result of emerging information and advances in law. Therefore, it is still open to the LMA to provide evidence in support of its claim. As a result, there was no breach of the principles of natural justice or procedural fairness. The judicial review was dismissed.

*Labrador Métis Nation and Carter Russell v. Canada (AG)*⁷⁷

Quebec [2005] - Mr. Carter Russell, as a member of the Labrador Métis Nation, swore private informations against the Province of Newfoundland and Labrador as well as a contractor, Johnson’s Construction Ltd. The informations claimed that the construction of a bridge over Paradise River resulted in harmful disruption or destruction of fish habitat contrary to s. 35 of the *Fisheries Act* and resulted in the restriction of over two-thirds of the water flow contrary to s. 26 of the Act. Because this was a private prosecution, it required the consent or permission of the Attorney General. The Attorney General decided not to intervene in the prosecutions or to permit the applicant to proceed. Mr. Russell then sought a judicial review of the Attorney General’s decision.

One of the questions before the Federal Court was whether the Attorney General had a duty of consultation and accommodation arising from the applicant’s aborig-

⁷⁶ *Labrador Métis Association v. Minister of Fisheries and Oceans*, 1997 CanLII 4864 (F.C.)

⁷⁷ *Labrador Métis Nation and Carter Russell v. Canada (Attorney General)* 2005 FC 939 (CanLII); aff’d 2007 NLCA 75 (CanLII)

inal rights and s. 35 of the *Constitution Act, 1982*. The court found that any duty to consult did not apply to the Attorney General's prosecutorial discretion to lay charges or to stay a criminal charge. The court held that while the duty to consult was not to be interpreted narrowly or technically, it was not 'all-encompassing.' The court was not convinced that the decision not to prosecute was conduct that might adversely affect the aboriginal rights or title of the Labrador Métis Nation.

In the case of prosecutorial discretion, I do not believe that anyone or anything should be able to exert pressure in order to sway the decision of the Attorney General one way or another. To allow such a possibility would be to undermine the independence of the Attorney General.⁷⁸

On appeal, the question before the court was whether the Labrador Métis Nation (LMN) was a proper plaintiff to enforce a duty to consult? The court rejected the idea that a corporation could not represent an aboriginal people.

I reject the Crown's submission that a corporate plaintiff may not be the vehicle for enforcement of an aboriginal right to consultation. The Crown provided no authority for its submission that s. 35 rights could not be asserted and protected by an agent. Also, the Crown provided no authority for its proposition that, in order for an agent to so assert and protect, the rights would have to be transferred, which is impossible with s. 35 rights. I know of no proposition in the law of principle and agent which requires that rights be transferred to an agent before the agent can act to protect them. In the present case, the LMN has established through its memorandum and articles of association, including the preamble to its articles, that it has the authority of its 6,000 members in 24 communities to take measures to protect aboriginal rights.⁷⁹

The court held that the LMN was entitled to consultation from government when it took action that might impair or interfere with their rights.

*Laliberte*⁸⁰

Saskatchewan [1996] - Mr. Laliberte was charged with hunting out of season and without a license, contrary to the Saskatchewan *Wildlife Act*. Mr. Laliberte lives in Green Lake, Saskatchewan and was hunting on a bush trail near Beaver River that is a few miles northwest of Green Lake. The hunting area was within the Green Lake townships and was deemed by the Crown to be unoccupied Crown lands. The trial judge found that Green Lake is a Métis community. Between 1902 and the early 1960s, the federal and provincial governments allocated a total of 12

⁷⁸ *Labrador Métis Nation and Carter Russell v. Canada (Attorney General)* 2005 FC 939 (CanLII), para 22

⁷⁹ *Newfoundland and Labrador v. Labrador Métis Nation*, 2007 NLCA 75 (CanLII) para 46

⁸⁰ *Laliberte v. Saskatchewan* [1996] unpublished.

townships in the vicinity of Green Lake to enable Métis to live and sustain themselves in their traditional manner. The trial judge found that the defendant was Métis and that hunting, as well as trapping, fishing and gathering, were defining features of the historic Métis culture. Judge White further found that the Métis still rely quite heavily on wildlife for food and that the “traditional avocations of hunting, trapping, fishing and gathering are still central to the way of life of the people of Green Lake.” The question before the court was whether or not the defendant, as a Métis, is an ‘Indian’ for the purposes of the NRTA. The trial judge found that Métis are not Indians for the purposes of the NRTA. However, he was clear that his judgment reflected the fact that he felt bound by *Laprise*.⁸¹ At trial, White J. acknowledged that in the absence of the *Laprise* decision he would have found that Métis are ‘Indians’ for the purposes of the NRTA. The judge invited the defendant to appeal the decision since he felt that a higher court could address what he considered to be the wrongly decided *Laprise* case. The decision of Judge White in *Laliberte* was delivered on June 19, 1996. Mr. Laliberte subsequently filed a notice of appeal to the Saskatchewan Queen’s Bench. On November 28, 1996, in *Laliberte* the QB judge found that the major issue in both *Grumbo* and *Laliberte* was the status of the *Laprise* decision as well as the inclusion or exclusion of Métis from the NRTA. The *Laliberte* QB judge decided that it was best all round to await the Court of Appeal decision in *Grumbo*. He adjourned *Laliberte* pending the *Grumbo* decision. In July of 1998, after the *Grumbo* decision was handed down, the court ordered a new trial. The Crown subsequently stayed the charges.

*Langan*⁸²

Saskatchewan [2012] – Mr. Langan was charged with angling without a licence contrary to the *Fisheries Regulations of Saskatchewan*. Mr. Langan claimed his aboriginal right to fish for food as a Métis pursuant to s. 35 of the *Constitution Act, 1982*. He also claimed that the requirement for a licence violated his s. 15 equality rights under the *Canadian Charter of Rights and Freedoms*. Mr. Langan lives in San Clara Manitoba and was fishing just over the border into Saskatchewan on Lake of the Prairies. He had no valid Saskatchewan angling licence. The trial judge applied the *Powley* test and characterized the rights as the right to fish for food in the environs of San Clara, Manitoba because the site where Mr. Langan was fishing, despite being in another province, was only a few kilometers from San Clara. The judge declined to determine whether the historic rights-bearing Métis

⁸¹ *R. v. Laprise* [1977] 3 W.W.R. 379; aff’d [1978] 6 W.W.R. 85; overturned in *R. v. Grumbo* [1998] CanLII 12345 (SK CA)

⁸² *R. v. Langan* 2011 SLPC 125

community was Manitoba or Manitoba and Saskatchewan as suggested by Mr. Langan. Instead the judge determined that the question was whether an historic rights-bearing Métis community existed in San Clara or environs at the time of effective control.

The trial judge found that San Clara was not the continuation or re-emergence of any historic Métis community. The two possibilities were that San Clara was the continuation of or re-emergence of the Métis who lived in Swan River District from 1830-1850 or the Métis from nearby Fort Pelly between 1870 and the early 1990s. The judge found that the Swan River District Métis entered into Treaty in the 1870s and that in fact the Métis community that exists today in San Clara and environs was formed in 1906 when Métis people moved from North Dakota. The trial judge found that by 1885 there was effective control of the area of San Clara. Mr. Langan was found to have ancestral connections to North Dakota, to the Red River settlement and to the present day Métis community of San Clara. However, he had no ancestral connection prior to 1922 to a historic Métis community in San Clara environs. Mr. Langan was found to be an accepted member of the present day Métis community in San Clara. Because the trial judge was not satisfied that an historic rights-bearing community existed in San Clara prior to effective control he declined to answer whether the practice of fishing for food was integral to the historic rights-bearing community. Finally the trial judge found that the requirement for a licence was a law of general application and that it did not create any personal or group distinction that could form the basis of a s. 15 claim of discrimination. In the result the court found Mr. Langan guilty and that s. 11(1) of the *Fisheries Regulations* did not infringe his s. 35 or s. 15 rights.

*Laprise*⁸³

Saskatchewan [1977] - This is an early case where the courts considered who was included within the term 'Indian' in the NRTA. In this case the court ruled that non-treaty Indians did not have harvesting rights because they were not covered by the NRTA. The court ruled that persons not entitled to registration under the *Indian Act* were also not entitled to the harvesting protections of the NRTA. Laprise in his testimony stated that his mother was a treaty Indian and his father was a non-treaty Indian. His paternal grandfather and grandmother received scrip although this did not emerge during the trial. This case was explicitly overturned in *Grumbo*. It is also of note that George Laprise has received his status as an 'Indian' within the meaning of the *Indian Act*, via *Bill C-31*, and as a result could

⁸³ R. v. Laprise [1977] 3 W.W.R. 379; aff'd [1978] 6 W.W.R. 85; overturned in R. v. Grumbo [1998] 3 C.N.L.R. 172 (Sask. C.A.)

likely now harvest as an ‘Indian’ under the NRTA.

*Laviolette*⁸⁴

Saskatchewan [2005] - Ron Laviolette was charged with fishing on Green Lake without a licence in a closed season. He identifies as Métis and has deep ancestral connections to Green Lake in northwestern Saskatchewan. He lives with his wife on Flying Dust Reserve, which is located on the outskirts of Meadow Lake, approximately 55 kilometers southwest of Green Lake. He was ice fishing with two Treaty Indians from Flying Dust. Also fishing nearby was another Treaty Indian from Prince Albert and a Métis from Green Lake. Only Mr. Laviolette was charged.

At the time, Saskatchewan had a policy that Métis must meet the following four criteria in order to exercise their harvesting rights. (1) they must identify as Métis; (2) they must live within the Northern Administration District; (3) they must have a long-standing connection to the community; and (4) they must live a traditional lifestyle. According to Saskatchewan, Mr. Laviolette did not meet these criteria. He lived in Meadow Lake but Meadow Lake was not a Métis ‘community’ and was not within the Northern Administration District. Green Lake was a Métis community and was in the Northern Administration District.

The Crown argued that the word ‘community’ should be defined according to the common understanding of the word. In other words, ‘community’ meant specific villages, towns or cities and their surrounding areas. The trial judge did not accept the Crown’s argument. He found that a Métis community did not necessarily equate to a single fixed settlement, but could encompass a larger regional concept. He accepted the guidance from *Powley* that a Métis community is to be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The trial judge further agreed with *Powley* in that he found it unnecessary to determine whether the Métis community at issue formed part of a larger Métis people that extends over a wider area. He noted that other courts (*Powley* and *Willison*⁸⁵) have held that ‘community’ may include more than one village or town.

The trial judge looked at the evidence presented at trial, in particular Dr. Tough’s

⁸⁴ *R. v. Laviolette* 2005 SK.P.C. 70.

⁸⁵ *R. v. Willison* [2005] B.C.J. No. 924 (BC Prov Ct.); rev’d [2006] B.C.J. No. 1505 (BCSC).

evidence, to the effect that problems would arise if one attempted to define a Métis community as a particular fixed settlement. Dr. Tough testified that the Métis had a sense of community that transcended geographical distance. Both experts (Dr. Tough and Mr. Thornton) testified that the Métis had a regional consciousness and were highly mobile. The regional unity was an established network based on trade and family connections. The experts both testified about fixed settlements that were connected by transportation systems – river routes, cart trails and portages. Constant movement between the fixed settlements allowed the Métis to develop and maintain significant trade and kinship connections in the region and within the larger network of Métis people (the Métis of the Northwest).

How to identify the Métis community? The evidence in this case specifically pointed to a regional network in a triangle in and around the fixed settlements of Lac La Biche, Île-à-la-Crosse and Green Lake. There were strong kinship and trade ties between these settlements over time. There were also many other settlements within and around the triangle and along the transportation routes that connected them. The region was important generally because it was the access route between Rupertsland and the Mackenzie district.

The evidence showed that while these fixed settlements were important historic Métis settlements, the Métis were highly mobile. They moved often and traveled far and wide for food, trapping and work. They moved frequently between the fixed settlements and between the settlements within a given region.

The trial judge found that there was sufficient demographic information, proof of shared customs, traditions and collective identity, to support the existence of a regional historic rights bearing Métis community, which he identified as Northwest Saskatchewan. It is generally defined as the triangle of fixed communities of Green Lake, Île-à-la-Crosse and Lac la Biche and includes all of the settlements within and around the triangle, including Meadow Lake.

What is effective control in this area? The date of effective control was found to be 1912. This was based on the evidence that ‘effective control’ reflects a time when Crown activity has the effect of changing the traditional lifestyle and economy of the Métis in the area. In this area, it was not until 1912 that the government established townships and a new land system.

How does one prove connection to the Métis community? The trial judge re-

jected the Crown's argument that the defendant had to show something more than involvement in the traditional and ongoing Métis cultural activities of fishing and hunting for food, such as involvement in Métis dances, singing or other cultural activities. The judge was satisfied that hunting and fishing for food showed the defendant's involvement in Métis cultural activities sufficient to meet the test in *Powley*. The Crown did not argue extinguishment, infringement or justification. The trial judge concluded that Mr. Laviolette, as a member of the Métis community of Northwest Saskatchewan, has a right to fish for food within that Métis community's traditional territory. *Laviolette* was not appealed.

*Legrande*⁸⁶

Alberta [2012] – A status Indian (Legrande) and a Métis (Gauchier) from the Peavine Métis Settlement in Alberta shot a decoy moose on a resource road in a wildlife sanctuary. Legrande and Gauchier defended themselves on their s. 35 right to hunt. Specifically they said they had a right of access to the sanctuary to hunt for food. The Whitefish Lake First Nation was holding a camp for children. More children and elders attended than the organizers had planned for. Mr. Legrande was asked to get more moose and he asked Mr. Gauchier to help him pack out any moose he shot. The defendants argued that the sanctuary was unoccupied Crown land that that it was land to which they had a right of access to hunt. Alberta argued that despite the Métis and Indian right to hunt for food, they could not exercise it in the sanctuary. If that limitation infringed their rights, it was justified. The trial judge determined that the sanctuary was a visibly incompatible use of land. He also followed the Alberta Court of Appeal decision in *Lefthand*, to the effect that once government action is complete, consultation or the failure to consult forms part of the justification analysis. This is a different situation from *Haida*, *Taku* and *Mikisew*⁸⁷ where there was an opportunity for government to fulfill its consultation obligation before the action was undertaken. The judge found that there was no right of access to the sanctuary for hunting; that the defendants did not establish a prima facie infringement of their right to hunt and on that basis he did not need to consider whether any infringement was justified.

*Letendre & Métis Community of Kelly Lake v. Minister of Energy and Mines, the Oil and Gas Commission and Encana Corporation*⁸⁸

British Columbia [2004] - This is a judicial review application filed in April of

⁸⁶ *R. v. Legrande* [2011] A.J. No. 1560

⁸⁷ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388

⁸⁸ *Letendre & Métis Settlement of Kelly Lake v. Minister of Energy and Mines, Oil and Gas Commission and Encana* – BCSC Victoria Registry File No. 04 1790.

2004. In 2003, Encana announced that it had acquired 500,000 acres of prospective natural gas development lands in Cutbank Ridge. Encana has carried on extensive exploration and development of Cutbank Ridge. The Métis Community of Kelly Lake asserts that it has aboriginal rights and title in the area and states that it was not consulted by the Minister or the Commission. The provincial crown refuses to acknowledge the existence of the Métis as an aboriginal people with aboriginal rights and therefore maintains that it has no fiduciary duty of protection or consultation. The Métis claim that the seismic testing and other activities have seriously diminished wildlife and trapping resources in the territory. They seek, among other things, an order setting aside the decision of the Minister to give Encana subsurface oil and gas rights; an order prohibiting further disposition of subsurface rights without consultation with the Métis and workable accommodations; a declaration that the respondents have fiduciary and constitutional duties to consult and accommodate the Métis and that this duty has not been satisfied; an order compelling the respondents to consult with the Métis; and an injunction intended to restrain further actions that might adversely impact the Métis aboriginal rights or title or their continued existence as a distinctive Métis community.

*L'Hirondelle*⁸⁹

Alberta [2011-2013] – Mr. L'Hirondelle is a member of the East Prairie Métis Settlement. He was denied a domestic fishing licence and sought a judicial review of that decision and of the policy under which his licence was refused. He also sought a declaration that a Métis Settlement identification card was sufficient proof for the purposes of Alberta Métis to exercise their s. 35 harvesting rights. Alberta argued that membership in a Métis Settlement was not sufficient proof because it did not meet the full test in *Powley*. Mr. L'Hirondelle wanted the court to consider *Lizotte*,⁹⁰ which held that a Settlement membership was sufficient proof. The court declined and decided that a judicial review was not the appropriate context for the decision both parties sought. First, the court held that legislative action was not subject to judicial review. While the regulations establish the existence of Métis domestic fishing licences, the court found that the Minister had not exercised his authority to actually make a regulation respecting eligibility for such a licence. The Crown argued that the policy was the Minister's attempt to provide guidance with respect to the regulatory regime and Métis fishing. In citing the *Adams* decision, the court noted that the Supreme Court's criticism in *Adams* seemed to refer to the very thing that was not done in this case – the enactment of a regulation. The

⁸⁹ *L'Hirondelle v. Alberta (Minister of Sustainable Resource Development)* [2011] A.J. No. 1108; [2013] A.J. No. 11

⁹⁰ *R. v. Lizotte*, 2009 ABPC 287

court held that the Minister cannot assume a legislative function not expressly delegated to him. However, Mr. L'Hirondelle did not seek a declaration that the regulations infringed his constitutional fishing rights. Further, the policy, even if it were a valid exercise of legislative authority is not subject to judicial review. The refusal by the wildlife officer to issue the licence is also not subject to judicial review. The application was dismissed with the judge noting that what the parties really seek is the determination of a constitutional question, which is not available in judicial review. The matter was appealed to the Alberta Court of Appeal

[2013] - The Alberta Court of Appeal held that the trial judge was wrong when he held that this issue could not be determined by means of a judicial review. With respect to the merits of the case, the Court of Appeal held that a Métis Settlements identification card was insufficient proof that the individual was indeed a member of a s. 35 rights bearing Métis community. The court noted that not all Settlements members were Métis and that Settlement members who wished to hunt off-settlement lands had to prove that they had that Métis had s. 35 harvesting rights under the Powley test. The court also held that *Lizotte* was wrongly decided.

*L'Hirondelle (Antoine) v. The King*⁹¹

Alberta [1916] - Antoine L'Hirondelle received scrip in 1900. He turned it over to his father so that his father could pay a debt. His father received a credit of \$150 for the scrip, which he sold with a guarantee that he would undertake to locate it when necessary. In July of 1902, the lands were located. Antoine stated in court that he never signed the documents. He asked for the return of his scrip or the value, which he set at \$6,000. The court held that the allegation of forgery was irrelevant to the case. The case was against the Crown, not against the original purchasers of the scrip and there was no privity of contract between the Crown, who now owned the lands, and L'Hirondelle. The court, in dismissing the action with costs, stated that it was barred by laches and called the case a "tardy afterthought."

*L'Hirondelle (Joseph) v. The King*⁹²

Alberta [1916] - This case is almost identical to his brother Antoine's case (see above). The only material difference is that Joseph was only 18 years of age when his father took his scrip. Joseph came of age in 1903 and in 1905 was asked to sign the transfer to McNamara. A patent was subsequently issued. Joseph, like Antoine, states that he did not sign the application to locate in 1905. The court

⁹¹ *L'Hirondelle (Antoine) v. The King* (1916), 16 Ex. C.R. 193 (Exchequer Court of Canada – now Federal Court)

⁹² *L'Hirondelle (Joseph) v. The King* (1916), 16 Ex. C.R. 196 (Exchequer Court of Canada)

held that the father had the full power to dispose of his scrip, which the court held was merely a chattel (as opposed to an interest in land). The court also noted that this case also was estopped by laches. Joseph could have repudiated the sale within a reasonable time, but ten years was too long.

*Lizotte*⁹³

Alberta [2009] - Mr. Lizotte is a member of the Paddle Prairie Métis Settlement, which is one of eight Métis Settlements in Alberta. The Métis Settlements legislation in Alberta provides that Settlement Members can hunt and fish on Settlement lands. The question in this case was whether Mr. Lizotte, because he was hunting off Settlement lands, met the test for Métis identification within the meaning of *Powley*. In July of 2007, the Alberta Government established a policy with respect to Métis harvesting. It created a Métis subsistence harvesting zone of 160km surrounding each Settlement. Mr. Lizotte was hunting off Settlement lands but within that zone. The Crown took the position that Mr. Lizotte could not prove his Métis identity and connection to the community simply by providing his Métis Settlements identification card. The Crown wanted Mr. Lizotte to prove his genealogical antecedents in that area to the late 1800s. Such a task would be virtually impossible for most, if not all Métis Settlement members because the Métis Settlements were not established until the late 1930s and “by its creation the Métis were given a new haven and doubtlessly migrated from many other locations where they likely did enjoy historic roots to the late 1800s.” The evidence before the court established that when the Métis Settlements legislation was amended in the 1980s it was the intention to leave it to the Métis people on the settlements to define and propose criteria for membership. The judge noted that the Crown’s position in this case is inconsistent with the Alberta government’s historical approach to the Métis people. He was particularly critical of the Crown’s attempt to “create a parallel world of unnamed bureaucrats to analyze Métis genealogical records and second-guess the work of the Settlements.” This said the judge, “is inconsistent with the Act, and with common sense.” The judge went on to note that the Settlements were “designed to ameliorate their plight not steal any prior aboriginal connection with the land.” In the result, the court found that in meeting the identification requirement for the purposes of *Powley*, it is sufficient for Settlement Métis to produce a membership card or proof of status by production of Settlement membership records. The Alberta Court of Appeal in *L’Hirondelle* held that this case is wrongly decided. It is therefore no longer good law.

⁹³ *R. v. Lizotte*, 2009 ABPC 287.

*Lovelace (UN)*⁹⁴

United Nations Human Rights Committee [1981] – Sandra Lovelace appealed to the United Nations to have a Canadian law changed. She married an American non-Indian, Bernie Lovelace, in 1970 and moved with him to California. The fact that she married a non-Indian caused her name to be removed from the Indian Register in Canada. After the marriage failed a few years later, Lovelace and her children returned to the Tobique Reserve in New Brunswick. It was then she learned, being a female, she had lost the right to housing, education, and health care normally granted to an Indian. The *Indian Act* did not apply in the same way to males who, if they had married a non-Indian, would still retain their full status and benefits as an Indian. This clause of the *Indian Act* had been upheld by the Canadian Supreme Court so, in 1979, Sandra Lovelace appealed to the UN Human Rights Committee to consider the unfairness of this ruling. In 1981 the UN ruled that Canada acted in disregard of the *International Covenant on Civil and Political Rights*.

The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the Covenant must also be taken into account.

In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve ... must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole...

The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the *Indian Act* in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

Accordingly, the Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the present case, which establish that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve, disclose a breach by Canada of article 27 of the Covenant.

⁹⁴ *Sandra Lovelace v. Canada*, UN Human Rights Committee, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981). (“Lovelace (UN)”)

Canada subsequently recognized the right of Lovelace to live on an Indian reserve, and in 1985 amended the *Indian Act* by means of *Bill C-31*.

*Lovelace (Ont)*⁹⁵

Ontario [2000] - In the early 1990s several First Nation bands approached the Ontario government for the right to control reserve-based gaming activities. The profits were to be used to strengthen band economic, cultural and social development. Negotiations began towards the development of the province's first reserve-based casino. All proceeds were to be distributed by the First Nation Fund only to Ontario First Nation communities registered as bands under the *Indian Act*. The appellants in this action, while they have some members who are registered or entitled to be registered under the *Indian Act*, are not 'Bands' and do not have reserve lands. The appellants wanted to be included in the distributions of the casino profits.

The Ontario Métis Aboriginal Association (OMAA), Be-Wab-bon Métis and Non-Status Indian Association and the Bonnechere Métis Association were some of the appellants. Be-Wab-Bon and Bonnechere identified as Métis communities. OMAA identified itself as a non-profit organization representing the interests of off-reserve aboriginal peoples. The court noted that the Métis organizations did not advance a common definition of 'Métis.'

At the first court level, a motions court judge granted a declaration that Ontario's refusal to allow the appellants to participate in the negotiations was unconstitutional and that they should be allowed to participate in the distribution negotiations. The trial judge held that their exclusion violated s. 15 (2) of the *Charter of Rights and Freedoms*, and that Ontario's actions were ultra vires (outside of the jurisdiction) of s. 91(24) of the *Constitution Act, 1867*.

The Ontario Court of Appeal set aside the judgment on errors of fact and law. The court held that the main object of the casino was to ameliorate the social and economic conditions of Indian bands and that there was no violation of s. 15 of the *Charter*. The Court of Appeal also held that the province simply exercised its spending powers and did not violate s. 91(24).

At the Supreme Court of Canada the matter was decided on the basis of s. 15(1)

⁹⁵ *Lovelace v. Ontario* [2000] S.C.J. No. 36 ("*Lovelace Ont*")

of the *Charter*. The court compared band and non-band aboriginal communities. They noted that the appellants have been subjected to differential treatment and successfully established that they suffered under a pre-existing disadvantage, stereotyping and vulnerability. However, the appellants failed to establish that the First Nation Fund functioned by device of stereotype. Second, while the appellant's needs corresponded to the needs addressed by the casino program that was not sufficient to claim a violation of s. 15 of the *Charter*. The exclusion of the appellants did not demean the appellants' human dignity. This conclusion was reached despite recognition that the appellant and respondent aboriginal communities have overlapping and largely shared histories of discrimination, poverty, and systemic disadvantage that cried out for improvement.

Finally, the province did not act ultra vires in partnering the casino initiative. The exclusion of non-registered aboriginal communities did not act to define or impair the 'Indianess' of the appellants since the province simply exercised its constitutional spending power. Nothing in the casino program affects the core of s. 91(24) federal jurisdiction. The casino program does not have the effect of violating the rights affirmed by s. 35 (1) of the *Constitution Act, 1982* and does not approach the core of aboriginality.

*Manitoba Métis Federation v. Canada and Manitoba*⁹⁶

Manitoba [1981-2013] - In order to understand this case, we have to go back in time to the 1860s. The Métis had created a vibrant community at Red River in the early 1800s. By 1869, there were 1200 inhabitants; 10,000 were Métis. Canada became a new country in 1867 and wanted to expand westward. Plans were made to negotiate Rupert's Land into Canada and as a first step, ownership of the Hudson's Bay Company's interest in Rupert's Land was transferred to Canada in 1868. As a result, Canada considered itself to be the owner of the Red River Settlement. However, the Métis in Red River did not agree and were deeply concerned that Canadian control would threaten their traditional way of life. They were particularly worried about a wave of English-speaking Protestant settlers arriving. Canada sent out survey parties in 1869 and the Métis, led by Louis Riel, turned them back. They also turned back Canada's proposed Lieutenant Governor. Then in November of 1869, the Métis seized Upper Fort Garry and established a provi-

⁹⁶ On the merits see: *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2007 MBQB 293 (CanLII); 2008 MBCA 131 (CanLII); 2010 MBCA 71 (CanLII). Preliminary motions: *Dumont v. AG Canada* [1990] 2 C.N.L.R. 19 (S.C.C.); rev'g (sub nom *Manitoba Métis 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.). See also *Dumont v. AG Canada* [1992] 2 C.N.L.R. 34 (Man. C.A.); rev'g [1991] 3 C.N.L.R. 22 (Man. Q.B.). See also [2002] M.J. No. 57. Intervention applications at Court of Appeal are at: *Manitoba Métis Federation v. Canada*, 2009 MBCA 17; *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2008 MBCA 131 (CanLII).

sional government. The Métis government drafted a list of demands that Canada had to satisfy before the Red River Métis would accept Canadian control. Riel sent three negotiators to Ottawa in March of 1870. Negotiations began between the Red River representatives and Prime Minister Sir John A. Macdonald and George-Etienne Cartier who was the Minister of Militia and Defence.

When Canada determined that it would retain ownership of the public lands in Manitoba, the Red River negotiators countered by demanding land. This took two forms: a provision to protect existing land holdings of the 3000 Métis adult land holders (s. 32); and a provision to give the 7000 Métis children a head start with a grant 1.4 million acres of land to Métis children (s. 31). On the basis of these promises, the Métis agreed to lay down their arms and enter into Confederation. This is one of the fundamental deals that led to the founding of the Canadian nation and has been called one of the “compacts of Confederation.” Manitoba became part of Canada on July 15, 1870. The *Manitoba Act* was made part of the *Constitution* of Canada in 1871.

The Canadian government began the process of implementing s. 31 in early 1871. The first step was to set aside the 1.4 million acres; the second step was to divide the land among the children. There were numerous problems, errors and delays. Changes of government, inaccurate census information, botched allotment processes and land speculation all contributed to an end result that entirely defeated the purpose of s. 31. In the result virtually no children actually received land.

The position of the Métis in Red River deteriorated. The new settlers from Ontario were hostile, there was a reign of terror against the Métis, the lands were being taken up by the Ontario settlers, and no lands were forthcoming for the Métis. As a result, many Métis sold their promised interests in the land and moved further west.

This is the basic history that led to the law suit.

The Manitoba Métis Federation and the Native Council of Canada (now known as the Congress of Aboriginal Peoples or CAP) filed this case in 1981. As of 2003, CAP was no longer a plaintiff in the case. Despite the fact that the case is often referred to as a ‘land claim,’ the case does not actually seek to claim title to land. Instead, it asks for a series of declarations that Métis were unjustly deprived of

land that they had rights to under the *Manitoba Act 1870*. The MMF and several individual Métis seek a declaration that various federal and provincial statutes and orders-in-council enacted during the 1870s and 1880s were unconstitutional because they had the effect of depriving the Métis of land to which they were entitled under the *Manitoba Act, 1870*.

In March of 1990, the government's motion to strike was appealed by the MMF to the Supreme Court of Canada. The Supreme Court unanimously overturned the Manitoba Court of Appeal decision. They refused to allow the *MMF* case to be struck out. It returned to provincial court in Manitoba. Since that time the Crown and the MMF were in court several times on preliminary motions including a demand for particulars, a motion to amend the statement of claim and several motions to adjourn the matter. The Crown's demand for particulars asked that the MMF specify "with respect to each enactment, each and every Métis (sic) person to whom it is alleged an interest in land was not conveyed as promised" and "each and every Métis (sic) person whose interest in land already conveyed to him or her is alleged to have been stripped from him or her as the case may be."

In December of 2007 the QB judge handed down his decision. He denied all aspects of the MMF claim.

The plaintiffs claimed that the Métis were to have received a land base under the *Manitoba Act, 1870*. They asserted that they suffered an historic injustice in not receiving such land base and sue Canada and Manitoba for certain declaratory relief. The plaintiffs did not claim any specific land, nor did they bring any claim for individual or personal relief. The plaintiffs asked for the following declarations:

- (1) that certain enactments, both statutes and Orders in Council, were ultra vires the Parliament of Canada and the Legislature of Manitoba, respectively, or were otherwise unconstitutional;
- (2) that Canada failed to fulfill its obligations, properly or at all, to the Métis under sections 31 and 32 of the Act, and pursuant to the undertakings given by the Crown;
- (3) that Manitoba, by enacting certain legislation and by imposing taxes on lands referred to in section 31 of the Act prior to the grant of those lands, unconstitutionally interfered with the fulfillment of the obligations under section 31 of the Act; and
- (4) that there was a treaty made in 1870 between the Crown in Right of Canada and the Provisional Government and people of Red River.

The QB Judge found that the MMF itself did not have standing to bring the action but recognized that the 17 individual plaintiffs, who are members of the Manitoba Métis community today and descendants of persons who were entitled to land and other rights under sections 31 and 32 of the *Act* did have standing in this action.

The judge found that the claim was statute-barred. In other words the plaintiffs were too late in bringing their suit to court. The events that founded the claim occurred from 1869-1890. The Métis leaders were knowledgeable and active and fully conversant with the rights given under the *Act*, including those provisions (sections 30 to 33), which pertained to the lands of the Province. Because the Métis were, according to the judge, aware of their rights and of the ability to commence action in respect of any denial of their rights, the *Limitation of Actions Act* applied to. The judge held that there was a “grossly unreasonable and unexplained delay on the part of the plaintiffs in the commencement of this action.” Because declaratory relief is equitable relief it must be applied for promptly. Bringing the case at this date was, according to the judge, unreasonable.

The plaintiffs argued that the result of the negotiations between the Red River delegates and Prime Minister Macdonald and his colleague Cartier was a treaty or agreement. The QB judge disagreed and held that there was no treaty or agreement. It was an Act of Parliament, which is a constitutional document and would be interpreted as such.

The judge held that as of July 15, 1870, the Métis did not hold or enjoy aboriginal title to the land and were not Indians within the meaning of s. 91(24) of the *Constitution Act, 1867*. The judge said that the Métis were not looked upon by those in the community as Indians and did not want to be considered as Indians. Rather, they wanted to be full citizens of the Province, as they previously had been of the Red River Settlement, a status that Indians at the time did not enjoy.

The judge held that – because Métis were not ‘Indians’ and had no aboriginal title, there could be no fiduciary relationship existing between Canada and the Métis. Therefore, the doctrine of honour of the Crown was not implicated. Rather, Canada owed a public law duty to those entitled under sections 31 and 32 of the *Act*.

The plaintiffs attacked the legislation enacted by Manitoba and the legislation and Orders in Council enacted by Canada on the basis that they were unconstitutional. The *Manitoba Act* is part of the constitution and the argument was that statutes

cannot amend the constitution. The judge did not agree.

The *MMF* case was appealed to the Manitoba Court of Appeal. The Congress of Aboriginal Peoples and the Treaty 1 First Nations sought to intervene at the Court of Appeal. Their intervention applications were denied on the basis that they would expand the scope of the issues before the court and with respect to the Congress' application, because it was too late.

The Manitoba Court of Appeal heard the appeal in February of 2009. The court sat five judges instead of the usual three, which is an indication of the legal importance of the case. The Court of Appeal agreed with the trial judge's disposition of the action and dismissed the appeal. They found the following:

- The entire action is barred by the combined operation of the limitation period/laches/mootness;
- The trial judge's determination not to grant the declarations sought should not be interfered with;
- The Court of Appeal did not determine whether a fiduciary duty was owed by Canada with respect to s. 31 of the *Manitoba Act*; but even if the duty existed, the MMF failed to prove that there was a breach of that duty;
- No fiduciary duty was owed pursuant to s. 32 of the *Manitoba Act*.

Mootness - The Court of Appeal found that the case was moot and declined to exercise its discretion to decide the moot constitutional issues because the plaintiffs were "essentially seeking a private reference regarding the constitutionality of certain spent, repealed provisions." Mootness arose because Manitoba argued that the legislation at issue had long been repealed [in 1969] making the case academic.

Manitoba submits that in the case at bar, there are no legal reasons to rule on the constitutionality of legislation that has been repealed for decades. The role of the courts is to adjudicate real disputes. The courts should not be co-opted to fulfil a political agenda.

The Court held that there had been no live legal controversy or concrete dispute with respect to the validity of Manitoba's statutes for decades. The court especially appeared to be concerned with the precedent that would be set that might allow other spent or repealed constitutional statutes to be reviewed thus creating legal uncertainty on a grand scale.

Honour of the Crown - The general rule is that the honour of the Crown is always

at stake in its dealings with aboriginal people. Treaties and statutory provisions are to be interpreted in a manner that maintains the integrity of the Crown and it is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' will be sanctioned.⁹⁷ The Court of Appeal found that the Métis are aboriginal people and that the honour of the Crown provides the foundation for determining whether or not fiduciary obligations are owed and whether they were breached. The honour of the Crown does not give rise to a freestanding fiduciary obligation.

Evidentiary Issues - In making its findings, the Manitoba Court of Appeal had cause to comment on the evidence in the case. They began, (para. 16-18) by quoting one of the trial experts who noted that "all of the surviving sources need to be read in the light of the biases of their authors." The Court also drew attention to the fact that "essential context" for various historical documents was lacking. It noted that some of the sources were incomplete and that there were gaps - "some extensive" - in the documentary trail "leaving unanswered questions in many instances." This is the beginning of a running commentary throughout the reasons for judgment with respect to the quality of the evidence at this trial.

Standing - As noted above, Manitoba and Canada had previously argued in a pre-trial motion that the MMF should be denied the ability to be a plaintiff in this case. There was no objection to the seventeen named plaintiffs. As noted above, in an early motion to the Supreme Court of Canada the question was whether or not the issue could be litigated at all. It was coupled with the Crowns' objection as to MMF's standing. The Supreme Court of Canada did not address the MMF standing issue, which left the Crowns free to raise it again before the trial judge. The trial judge did not grant MMF standing because it did not meet the public interest test for standing. In the test for public interest standing the plaintiff must show that it is directly affected by the legislation or has a genuine interest in it. There seemed to be no problem with this part of the test. Clearly the MMF had a genuine interest in the case. The problem was with the part of the test that asks whether there is another reasonable and effective way to bring the issue before the court. Here, since there were seventeen named individual plaintiffs, it was clear that the case could proceed through them. The trial judge had the discretion not to grant standing to the MMF and in the absence of clear error in that regard, the Court of Appeal is to give deference to that decision. In the event, the Court of Appeal declined to interfere with the trial judge's finding. Therefore, the MMF was

⁹⁷ *R. v. Badger*, 1996 CanLII 236 (S.C.C.), para. 41.

denied standing.

Fiduciary Relationship - The Court of Appeal recognized that the relationship between the Crown and the aboriginal peoples of Canada is fiduciary in nature. However, that does not mean that every aspect of the relationship gives rise to a duty. The relationship is not the same thing as the obligations. The trial judge found that there was no fiduciary relationship between the Métis and Canada. The Court of Appeal held that this was an error. The court accepted (paras. 443) that Métis are included in the Crown-aboriginal fiduciary relationship.

... both precedent and principle demonstrate that the Métis are part of the sui generis fiduciary relationship between the Crown and the aboriginal peoples of Canada.

The court said that the source of the fiduciary relationship does not lie in a “paternalistic concern to protect” primitive people. Instead the source was the necessity of persuading aboriginal people that it was in their interest to rely on the Crown rather than exercising military action or ‘self-help.’ The history of the Métis in Manitoba in 1869, as the court notes, fits this concept. The Métis were a powerful political and military force and led by Louis Riel they were exercising their version of ‘self-help.’

The Court of Appeal also commented that the *Powley* case applied the fiduciary relationship to the Métis in the context of the justification test, where the government must demonstrate that its actions are consistent with its fiduciary duty towards aboriginal peoples.

Fiduciary Duty - Whether a fiduciary has a duty in any given circumstance is a different question from whether there is a fiduciary relationship. The test for determining whether a fiduciary duty exists within a Crown/aboriginal relationship is twofold. First, is there a specific or cognizable aboriginal interest. Second, has the Crown assumed discretionary control, in the nature of a private law duty over that interest.

In *MMF*, the trial judge assumed that the specific aboriginal interest had to be the existence of aboriginal title, which the Métis had not proven. The Court of Appeal disagreed and noted that even in Indian case law, the Supreme Court of Canada has recognized a fiduciary duty could arise with respect to interests in land that are

not aboriginal title interests. The Court of Appeal also found, following *Guerin*,⁹⁸ that language such as ‘for the benefit of’ in a statute does not create a fiduciary duty, but rather recognizes the existence of such a duty.

The Court of Appeal declined to decide what might be a specific Métis interest that might ground a fiduciary duty, noting that this was the first time such an issue had come before the courts, that there was little guidance to be found, and that there had been no ‘focused argument’ on this component of the fiduciary duty test. Previous cases looking at the specific interest required to found a fiduciary duty had all dealt with Indian Bands, usually reserve lands. Because the Court of Appeal held (paras. 504-509) that it was not necessary for the Métis interest in land to be aboriginal title, they declined to decide whether Métis had aboriginal title.

The Métis are aboriginal people, some of whom were being allocated land in a process that was at the discretion of the Crown. ... what the Métis have ... is the statement in s. 31 of the Act that it was enacted “towards the extinguishment of the Indian Title to the lands in the Province...” Some significance might be accorded to the fact that that section purports to give the Métis children land grants in return for the extinguishment of Indian title. It is far from clear what interest the Métis of Red River actually had prior to s. 31 being enacted, if any, but their ability to claim aboriginal title was lost (or at least seriously impeded) through its enactment. The Métis of Red River had an interest of some kind sufficient to be recognized, at least for political purposes, as having been extinguished through the Act. Nor should it be forgotten that the Act was enacted in the process of nation-building, and evolved from negotiations between Canada and the delegates... this means that it is possible that the Métis could have an interest in land sufficient to ... establishing a fiduciary duty... The question of exactly what does constitute a cognizable Métis interest, and whether one exists in this truly unique case I leave for another day... it is neither necessary nor desirable to determine whether they had a cognizable aboriginal interest sufficient to ground a fiduciary duty; all the more so since focused argument on whether or not this critical component of a fiduciary obligation existed has not taken place.

The Court of Appeal did find that the Crown had assumed discretionary control over the administration of s. 31 of the *Manitoba Act* and that this satisfied the second part of the test.

Standard of Conduct and Content of Fiduciary Duty - In order to prove that there has been a breach of a fiduciary duty, the court examines the standard of conduct, which refers to the “general description of how a fiduciary is obligated to act.” The content of that duty varies. The general standard is to act as an ordinary person

⁹⁸ *Guerin v. The Queen*, 1984 CanLII 25 (S.C.C.), pp. 348-349.

would act – with prudence and in the best interests of the beneficiary.

The fulfillment of fiduciary duties generally requires that fiduciaries act honourably, with honesty, integrity, selflessness, and the utmost good faith ... towards the best interests of their beneficiaries.⁹⁹

The plaintiffs said Canada breached its duty in five ways:

- by failing to grant land to 993 children – all Métis children were supposed to receive land grants
- with its undue delay in granting the lands
- by distributing the lands by means of a lottery
- by permitting sales of interests before grant
- by permitting sales before the children reached the age of majority.

The Court of Appeal found that there were evidentiary gaps that forced the conclusion that the plaintiffs had not proven the factual foundation of their claim. For example, the court was troubled by the fact that with respect to the claim that 993 children did not get land grants, but instead received scrip, only three examples were before the court. The court was also troubled by the lack of expert evidence from the plaintiffs who took the perspective throughout that the document evidence was sufficient despite the fact that they acknowledged that it did not provide context or proof that what the documents said happened, actually did happen. Given that the Crowns did provide expert evidence for context, this appears to have put the plaintiffs at a severe disadvantage in providing the required proof for their claims. The Court particularly refers to the lack of evidence with respect to the issue of undue delay in granting the lands. In the end, the trial judge concluded that the plaintiffs had not proven the factual foundation of their claim and the Court of Appeal noted that “the trial judge did the best he could with the documents available” and found that in light of that, his conclusions were reasonable and supported by the evidence.

The final breach of fiduciary duty asserted by the plaintiffs is that Canada stood by and did nothing while Manitoba passed legislation that was beyond its jurisdiction and which facilitated sales before grant and before the children reached the age of majority. The Court of Appeal found that this issue was moot because the legislation had long been repealed. However, it commented in obiter that it was “far

⁹⁹ Leonard Rotman, “Aboriginal Rights: Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years After Guerin” (2003), 22 Windsor Y.B. Access Just. 363 at p. 17 (QL)

from persuaded that Manitoba's impugned legislation was constitutionally invalid." No discussion was provided for this opinion. The Court of Appeal also asked, in obiter, what action Canada might have taken if Manitoba's legislation was ultra vires. The court dismissed the idea that Canada might disallow Manitoba's legislation as a "quintessentially political act," while noting that Canada had previously taken just such action.

On March 8, 2013, the Supreme Court of Canada handed down its reasons for judgment.

Standing - The plaintiffs in the case are the MMF and several named individuals. The individuals were or are MMF board members. The Crown took no issue with the individual plaintiffs. However, the Crown fought vigorously to keep the MMF out of the claim. They argued that the MMF had no interest in the litigation because the lands were not set aside for the MMF or any representative body. Rather, the Crown argued, the matter was strictly about individual entitlements. The Crown also said that the membership of the MMF was not solely composed of the descendants of s. 31 beneficiaries, which meant that the MMF was an inappropriate plaintiff. Therefore, they said, the MMF should not have standing to participate in the claim.

The Supreme Court of Canada rejected this argument. They said that the presence of other claimants does not preclude standing. The question was whether this litigation is a reasonable and effective means to bring a challenge to court. They said that the requirements for public interest standing should be flexible and generous and considered in light of the underlying purposes of setting limits on who has standing in court.

The Supreme Court held that this case was not a series of claims for individual relief. It was a collective claim for declarations for the purposes of reconciliation of the Red River Métis with Canada. While the *Manitoba Act* provided for individual entitlements, that did not negate the fact that the appellants advanced a collective claim of the Métis people. This claim was based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. The collective claim merits allowing the body representing the collective Métis interest to come before the court. The Supreme Court of Canada, therefore, granted the MMF standing.

Fiduciary Duty - The MMF claimed that Canada owed them a fiduciary duty to implement s. 31 and s. 32 of the *Manitoba Act* as their trustee. They say this duty arose out of their aboriginal interests in lands in Manitoba or directly from the promises made in ss. 31 and 32. The Supreme Court of Canada did not agree.

A fiduciary is required to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest and to strictly account for all property held or administered on behalf of that person. The Court held that the relationship between the Métis and the Crown is fiduciary in nature. However, that does not mean all dealings between them are governed by fiduciary obligations. Fiduciary duties may arise because the fiduciary has control over specific aboriginal interests or from an undertaking.

There is no dispute that the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32. The question is whether there was a specific aboriginal interest. The trial judge said no and the Court of Appeal declined to decide the point. The Supreme Court of Canada said that the interest must be distinctly aboriginal. The fact that the Métis are aboriginal and had an interest in land did not mean that their interest in those lands was an “Aboriginal interest in land.” To be an aboriginal interest in land the land must be a “communal aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land.” The key, said the Supreme Court, was whether the Métis “as a collective” had a specific interest in the ss. 31 and 32 lands.

The court dismissed the idea that the language of s. 31 meant that the Métis had a collective interest in the lands. Section 31 stated that the land grants were “towards the extinguishment of the Indian Title to the lands in the Province” and that the land grant was for “the benefit of the families of the half-breed residents.” The court held that the trial judge’s findings of fact were fatal to any finding that the Métis had a collective interest in these lands. The central objection was that the Métis held individual interests in land that arose from their personal history, not from their shared Métis identity. Métis ownership practices were incompatible with the claimed aboriginal interest in land. There was no evidence that the Métis held either aboriginal title or some other aboriginal interest in specific lands as a group. The aboriginal interest in land giving rise to a fiduciary duty was not established on the facts and could not be established by legislation or treaty. It is based on historic use and occupation. Neither the evidence or the words of s. 31

established that historic use and occupation. While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests.

In the result, the Supreme Court held that Canada was under no fiduciary duty in its administration of the children's lands or the s. 32 lands.

Honour of the Crown - The honor of the Crown is a principle that the servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign. The honour of the Crown arises from the Crown's assertion of sovereignty over aboriginal people and its control of land and resources that were formerly in the control of that people. The honour of the Crown is a very old idea and stretches back to the *Royal Proclamation* of 1763. It is not a paternalistic concept. Instead it arises in the idea of persuading aboriginal peoples at a time when they still had considerable military capacity that their rights would be better protected by reliance on the Crown than by self-help. The purpose of the doctrine is the reconciliation of pre-existing aboriginal societies with the assertion of Crown sovereignty.

The honour of the Crown imposes a heavy obligation on the Crown and it is not always at play. However, it is engaged by an explicit obligation to an aboriginal group that is enshrined in the *Constitution*. The *Constitution* is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior aboriginal occupation. It is at the root of the honour of the Crown.

The court drew analogies between treaty and a constitutional obligation saying that an intention to create obligations and a certain measure of solemnity should attach to both. Both types of promises are made for the overarching purpose of reconciling Aboriginal interests with Crown sovereignty. The obligation, however, must be explicitly owed to an aboriginal group. A strong interest is not enough. The obligation also does not arise when aboriginal people are part of the group. But a constitutional obligation explicitly directed at an aboriginal group invokes its special relationship with the Crown.

The Supreme Court said that the honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to aboriginal peoples. When the issue is the implementation of a constitutional obligation to an aboriginal people, the honour of the Crown requires that the

Crown take a broad purposive approach to the interpretation of the promise and act diligently to fulfill it. An honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. The law assumes that the Crown always intends to fulfill its solemn promises including constitutional obligations.

The honour of the Crown is pledged to the fulfillment of its obligations to aboriginal peoples but it goes further. It requires the Crown to endeavor to ensure its obligations are fulfilled. The duty applies whether the obligation arises in a treaty or in the Constitution, which is the situation with the MMF. Because the *Manitoba Act, 1870* became part of Canada's *Constitution* in 1871, the duties in ss. 31 and 32 are constitutional duties.

To fulfill its duty Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The aboriginal group must not be left with an 'empty shell' of a promise. The Court called the duty set out in ss. 31 and 32 a "narrow and circumscribed duty" based on "extraordinary facts." The court noted that breach of the Crown's duty would not be found based on a single mistake or negligent act in implementation. However, "a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise." The honour of the Crown does not guarantee that the purposes of the promise will be achieved because events may prevent fulfillment despite the Crown's diligent efforts. But the question before the Court will be this: "Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?"

The majority of the justices held that the honour of the Crown was at the heart of this litigation from the beginning. The MMF argued at all levels of court that the conduct of the government in implementing s. 31 breached the duty that arose from the honour of the Crown. The intervener Métis Nation of Alberta argued that s. 31 is an unfulfilled promise which the honour of the Crown demanded be fulfilled by reconciliation through negotiation. The intervener the Métis Nation of Ontario argued that s. 31 could not be honoured by a process that ultimately defeated the purpose of the provision. In general these submissions raised the broader issue of whether the government's conduct generally comported with the honour of the Crown. The court held that in this case the government's conduct did not comport with the honour of the Crown.

The Promise of Section 31 of the *Manitoba Act, 1870* - Section 31 gave land rights to the Métis children. There is no doubt that this was a promise to the Métis people collectively in recognition of their distinct community. This promise engaged the honour of the Crown. The court looked at what it called s. 31's "treaty-like" history and character. Section 31 sets out solemn promises, which are no less fundamental than treaty promises. Like a treaty, s. 31, was adopted with the intention to create obligations 'of the highest order.' Section 31 was conceived during the negotiations to create the new province of Manitoba and with a view to reconciling the Métis aboriginal interest with the Crown's claim to sovereignty.

The broad purpose of s. 31 was to reconcile the Métis community with the sovereignty of the Crown and to permit the creation of the province of Manitoba. This reconciliation was to be accomplished by a concrete measure – the prompt and equitable transfer of the allotted public lands to the Métis children. It was designed to give the Métis children a head start in the race for land and a place in the new province. This required that the land grants be made while a head start was still possible. Everyone knew that a wave of settlement was coming and Minister Cartier assured the Métis that the grants would "be of a nature to meet the wishes of the half-breed residents" and that the division of land would be done "in the most effectual and equitable manner." Nothing even remotely like an effectual and equitable process happened.

The MMF claimed that Canada failed to fulfill its duties to the Métis people in relation to the children's grants in four ways: (1) by the inexcusable delay in distributing the lands; (2) by using random selection rather than ensuring family members got adjoining parcels; (3) failing to protect the Métis from land speculators; and (4) giving some Métis children scrip instead of a direct land grant.

Delay - It took over 10 years to make the allotments of land to the Métis children and the scrip distributions did not occur until 1885. The court held that this delay substantially defeated the purpose of s. 31. Because the purpose was to give the children a head start in the new province in anticipation of the influx of immigrants, time was plainly of the essence. Minister Cartier promised the Métis that the land would be distributed "as soon as practicable" and in "the most effectual and equitable manner."

But the delays were huge and noted by everyone involved at the time. Meanwhile

the Manitoba legislature passed a series of acts intended to frustrate the purpose of s. 31 and the settlers poured into the province and were allowed to take up the lands intended for the Métis children. Petitions were sent to Ottawa complaining about the delay and its damaging effects and the Deputy Minister of the Interior called it “disgraceful delay.”

The Supreme Court of Canada asked whether the delay was inconsistent with the duty imposed by the honour of the Crown to act diligently to fulfill the purpose of s. 31. They held that it did because a “persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.” The facts in this case showed such a persistent pattern. Of particular note, the Supreme Court of Canada held that the fact that a new government comes into power cannot be used as an excuse. “The Crown’s obligations cannot be suspended simply because there is a change in government.”

The trial judge found that there was no bad faith or misconduct on the part of the Crown employees. But the Supreme Court said diligence requires more than simply the absence of bad faith. The record showed that there was consistent inattention and a consequent lack of diligence. The Supreme Court held that the Crown failed to act as its honour required. The delay in completing the s. 31 distribution was inconsistent with the behavior demanded by the honour of the Crown.

With respect to the issues of random selection, speculation and scrip, the Supreme Court held that these were really exacerbated by the central issue; it was the persistent pattern of inaction and mistakes over a decade that breached the honour of the Crown.

The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in “the most effectual and equitable manner”. Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.¹⁰⁰

The court declined to address the issue of whether the Manitoba statutes were unconstitutional noting that they had long been out of force so the issue was moot. The court held that the claim for a declaration was not barred by limita-

¹⁰⁰ *MMF (SCC)*, supra at para. 128.

tions because a constitutional issue is always justiciable and that “limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown’s conduct.”¹⁰¹ Furthermore,

What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the Charter and underlying s. 31 of the Manitoba Act, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and ... cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less...¹⁰²

*Marchand*¹⁰³

Québec [2007]- Mr. Marchand was charged in 2004 with unlawful hunting and possession of a deer. Mr. Oakes was charged with assisting and inciting Mr. Marchand to hunt during a prohibited period. Both defendants claimed to be part of a Métis community with a subsistence right to hunt. Mr. Marchand and Mr. Oakes requested that the court order pre-trial costs for the lawyers and the associated fees accumulated whilst making their constitutional argument, basing their request on the Supreme Court decision in *British Columbia vs. Okanagan*. The judge denied the request holding that Mr. Marchand and Oakes had to prove that they were destitute and that representation by a lawyer was required for due process. Mr. Marchand and Oakes qualified financially, however, the judge determined that the charges themselves (not the constitutional arguments) were simple and not severe enough to require a lawyer for a fair trial.

*Marshall (#3); Bernard*¹⁰⁴

The central issue in these cases was whether Mi’kmaq people in Nova Scotia and New Brunswick had treaty rights or aboriginal title entitling them to engage in commercial logging.

In *Marshall (#3)*, Mi’kmaq Indians were charged with cutting timber on Crown lands in Nova Scotia without authorization. In *Bernard* a Mi’kmaq Indian was charged with unlawful possession of spruce logs he was hauling from the cutting site to the local sawmill. The logs had been cut on Crown lands in New Bruns-

¹⁰¹ *MMF (SCC)*, supra at para. 135.

¹⁰² *MMF (SCC)*, supra at para. 140.

¹⁰³ *Québec (Procureur général) c. Marchand*, 2007 QCCQ 11711 (CanLII)

¹⁰⁴ *R. v. Marshall (#3); R. v. Bernard* [2005] S.C.J. No. 44

wick. In both cases the accused argued that, as Mi'kmaq Indians, they were not required to obtain provincial authorization to log because they have a right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title. They were convicted at trial.

In 1760 and 1761, the British Crown concluded '*Peace and Friendship*' treaties with the Mi'kmaq peoples of the former colony of Nova Scotia, now the Provinces of Nova Scotia and New Brunswick. The treaties contained a trading clause whereby the British agreed to set up trading posts or 'truckhouses,' and the Mi'kmaq agreed to trade only at those posts, instead of with others, like their former allies, the French.

In *Marshall* (#1)¹⁰⁵ a majority of the Supreme Court of Canada concluded that the 'truckhouse clause' amounted to a promise on the part of the British that the Mi'kmaq would be allowed to engage in traditional trade activities so as to obtain a moderate livelihood from the land and sea. The right to trade in traditional products carried with it an implicit right to harvest those resources. The right conferred by the treaties was not the right to harvest. It was the right to trade.

The ruling in *Marshall* (#1) was that the treaty conferred a right to continue to obtain necessities through the traditional Mi'kmaq activity of trading fish. The court noted that treaty rights are not frozen in time and that the question was whether the modern trading activity represented a logical evolution from the traditional trading activity at the time the treaty was made: "Logical evolution means the same sort of activity, carried on in the modern economy by modern means." This understanding, the court held, prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology. But the activity must be essentially the same. See also *Marshall* (#2).¹⁰⁶

what the treaty protects is not the right to harvest and dispose of particular commodities, but the right to practice a traditional 1760 trading activity in the modern way and modern context.¹⁰⁷

The question in *Marshall* (#3) and *Bernard* was whether commercial logging was the logical evolution of a traditional Mi'kmaq trade activity, in the way modern eel fishing was found to be the logical evolution of a traditional trade activity of the

¹⁰⁵ *R. v. Marshall* (#1) [1999] 3 S.C.R. 456

¹⁰⁶ *R. v. Marshall* (#2) [1999] 3 S.C.R. 533

¹⁰⁷ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 para 26

Mi'kmaq in *Marshall* (#1).

The trial judges in both cases asked whether the respondents' logging activity could be considered the logical evolution of a traditional Mi'kmaq trade activity. In *Marshall* (#3), the trial judge found no direct evidence of any trade in forest products at the time the treaties were made and concluded that:

Trade in logging is not the modern equivalent or a logical evolution of Mi'kmaq use of forest resources in daily life in 1760 even if those resources sometimes were traded. Commercial logging does not bear the same relation to the traditional limited use of forest products as fishing for eels today bears to fishing for eels or any other species in 1760. ... Whatever rights the defendants have to trade in forest products are far narrower than the activities which gave rise to these charges.¹⁰⁸

The Supreme Court agreed with the trial judges and found that the defendants had no treaty right to log for commercial purposes. In addition, the defendants argued that they had a right to log pursuant to their aboriginal title.

In *Marshall* (#3) and *Bernard*, issues arose as to the standard of occupation required to prove title, exclusivity of occupation with respect to nomadic peoples and continuity. The trial judges in *Bernard* and *Marshall* (#3) required proof of regular and exclusive use of the cutting sites to establish aboriginal title. The Courts of Appeal held that this test was too strict and applied a less onerous standard of incidental or proximate occupancy based on actual entry. In addition they looked at whether there were some acts from which an intention to occupy the land could be inferred such as cutting trees or grass and fishing in tracts of water.

In *Bernard*, the Court of Appeal also concluded that it was not necessary to prove specific acts of occupation and regular use of the logged area in order to ground aboriginal title. It was enough to show that the Mi'kmaq had used and occupied an area near the cutting site. This proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq.

The question before the Supreme Court of Canada was to choose which of these standards of occupation was appropriate to determine aboriginal title: the strict standard applied by the trial judges, the looser standard applied by the Courts of Appeal or some other standard. Included within this question is what standard of

¹⁰⁸ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 para. 32

evidence is required to prove occupation. Daigle J.A. criticized the trial judge for failing to give enough weight to evidence of the pattern of land use and for discounting the evidence of oral traditions.

The Supreme Court of Canada held that its task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice as faithfully and objectively as it can into a modern legal right. This exercise involves both aboriginal and European perspectives. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.

To determine aboriginal entitlement one must look to aboriginal practices rather than imposing a European standard. In considering whether occupation sufficient to ground title is established, one must take into account the group's size, manner of life, material resources, technological abilities and the character of the lands claimed.

...when dealing with a claim of “aboriginal title”, the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc.¹⁰⁹

The Court has rejected the view of a dominant right to title to the land from which other rights, like the right to hunt or fish, flow. It is more accurate to speak of a variety of independent aboriginal rights. One of these rights is aboriginal title to land. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, and in particular, the nature of the land and the manner in which the land is commonly enjoyed. For example, the court noted that where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession, that a person may choose to use land intermittently or sporadically and that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land.

To establish title, claimants must prove ‘exclusive’ pre-sovereignty ‘occupation’ of

¹⁰⁹ La Forest J. para 194 as cited in: *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 para. 49

the land by their forebears. ‘Occupation’ means ‘physical occupation.’ This “may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.” It is consistent with the concept of title to land at common law. Exclusive occupation means “the intention and capacity to retain exclusive control” and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent. Shared exclusivity may result in joint title. Non-exclusive occupation may establish aboriginal rights ‘short of title.’

It follows from the requirement of exclusive occupation, that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right.

In this case the only claim is to title in the land. The issue, therefore, is whether the pre-sovereignty practices established on the evidence correspond to the right of title to land. These practices must be assessed from the aboriginal perspective. But, as discussed above, the right claimed also invokes the common law perspective. The question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed.

What is exclusive occupation? In the sense of intention and capacity to control, is required to establish aboriginal title. Evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. Typically, exclusive occupation is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law.

*Mathers*¹¹⁰

Manitoba [1891] - The issue in this case was taxes. The lands in question were al-

¹¹⁰ *Re Mathers* (1891), 7 Man. R. 434 (Man. Q.B.)

lotted to Urbain Ross, one of the children of half-breed head of a family in Manitoba. The land was allotted to Ross in 1883 and was sold in 1887. The municipality sought arrears of taxes for 1883, 1884, 1885 and 1886. Despite the fact that the land was allotted to Ross in 1883, the legal title remained with the Crown until 1886. The court held that when the land was allotted in 1883 it amounted to a passing of the beneficial interest becoming invested in Ross. The property or interest was therefore liable to taxation.

Maurice

Saskatchewan [2005] - The Métis in the community of Sapwagamik in Northwest Saskatchewan filed a claim in Federal Court. This case was about the Primrose Lake Air Weapons Range in Saskatchewan. When the Range was established, Métis and Indians who lived and/or trapped in the range were compensated for the loss of their harvesting area. Indians were compensated at a higher rate than Métis, and indeed some Métis never got compensated at all. The Indians have recently received a full review of the issue under the Indian Claims Commission. This review led to a large multi-million dollar settlement for Indian communities such as Canoe Lake and Cold Lake.

The Métis applied to the Indian Claims Commission and asked to have their claims considered at the same time but were refused. The federal government maintained that Métis were compensated and that the matter is finished. The Indian Claims Commission maintained that its mandate included Indians only and that they could not deal with Métis claims. Indians have several government mechanisms where they can raise their land claims and harvesting issues. The federal government has created a large land claim structure including Comprehensive Claims and Specific Claims as well as the Indian Claims Commission.

Meanwhile, the Métis have nowhere to go to raise their land claims issues, except court. This raises the issue of whether the government can treat Indians differently than Métis in similar fact situations. *Maurice* was intended to address these issues. The Métis National Council was an intervener in the case. The matter settled out of court in 2005.

*Maurice & Gardiner*¹¹¹

Saskatchewan [2002] - Mervin Maurice and Walter Gardiner were hunting in 1999

¹¹¹ *R. v. Maurice & Gardiner* [2002] 2 C.N.L.R. 244, (Sask. Prov Ct.); aff'd [2002] 2 C.N.L.R. 273 (SKQB)

from their vehicle. They shot a white-tail deer on unoccupied Crown land at night using their headlights. They are both Métis and descendants of Métis who took scrip in 1906 at Île-à-la-Crosse. They were born and raised in Sapwagamik and had moved to Meadow Lake. The judge found that they live a ‘traditional Métis way of life’ during the summer months or when their children are not at school.

The Court found that the searchlight provisions of the Saskatchewan Wildlife Regulations were safety provisions and that aboriginal hunting rights must be exercised subject to any legislation that expresses legitimate safety concerns. The Court further said that the question is not whether the aboriginal/treaty right is to hunt safely. Rather, the question is whether the limiting legislation is a prima facie infringement on the appellants’ right to hunt for food and, if so, is it justifiable?

The decision was appealed by Maurice & Gardiner to the Saskatchewan Court of Queen’s Bench, where the appeal judge found that the prohibition against night hunting with lights was not unreasonable safety legislation. There was no evidence of undue hardship on Métis in general or the appellants in particular. There was no proof that the people of the Métis community of Sapwagamik preferred, as a community, to hunt at night with artificial lights. In fact, a contrary preference emerged from the evidence. In the end the appeal judge found that there was no infringement of the appellant’s aboriginal rights.

The appellants also argued that because Métis are ‘Indians’ within the meaning of s. 91(24) of the *Constitution Act, 1867*, the Saskatchewan regulations do not apply to them. The Queen’s Bench judge found that the doctrine applies only to extinguishment and not to the regulation of an aboriginal right. The court further found that these are laws of general application that do not touch the appellants’ core of ‘Indianness’ and therefore the regulations apply to the appellants as hunters not as Métis. The Saskatchewan Court of Queen’s Bench upheld the trial decision and no further appeal was taken.

*McCallum*¹¹²

Saskatchewan [2010] - a claim by the Métis of the Canoe Lake Region in Saskatchewan, whose parents exercised traditional activities of hunting, trapping and fishing on land that later became the Cold Lake Air Weapons Range. The claim seeks a declaration and damages for breach of contractual and fiduciary duties to secure

¹¹² *McCallum v. Canada and Saskatchewan*, 2010 SKQB 42

compensation for the plaintiffs for loss of hunting, trapping and fishing. The application before the Court is to determine whether the claim is barred because it is filed too late. The claim accuses the Government of Saskatchewan of not ensuring that compensation was at least equal to compensation paid to First Nations. The statement of claim was issued on March 7, 2005 but the claim arose from actions taken in the early 1950s. The court said that the latest date for the plaintiffs to claim they knew about the matter was 1975. That meant the limitation period expired in 1981. The court dismissed the claim holding that the limitations periods applied and that the claim, which was filed 24 years later, was filed too late. The court also held that ongoing negotiations with the government to resolve the issue did not stop the limitations clock from running.

*McIvor*¹¹³

British Columbia [2007, 2009] - This case involved a challenge by Sharon McIvor and her son to the constitutional validity of sections 6(1) and 6(2) of the *Indian Act*. These sections of the *Indian Act* deal with status, or entitlement to registration as an Indian. The court explains the controversy of the provisions:

Under previous versions of the *Indian Act* the concept of status was linked to band membership and the entitlement to live on reserves. In addition, under previous versions of the *Indian Act*, when an Indian woman married a non-Indian man, she lost her status as an Indian and her children were not entitled to be registered as Indians. By contrast, when an Indian man married a non-Indian woman, both his wife and his children were entitled to registration and all that registration entailed.

McIvor argued that *Bill C-31*, a bill passed in 1985 in order to remedy the sexual discrimination inherent in section 6, was incomplete and that the registration provisions continued to discriminate. She argued that this discrimination was in violation of section 15 (Equality Rights) and 28 (Equality Rights for Men and Women) rights of the *Canadian Charter of Rights and Freedoms*.

The trial judge ruled that the sections 6(1) and 6(2) of the *Indian Act* were unconstitutional because they infringed upon sections 15 and 28 of the *Charter*, and could not be justified under section one of the *Charter*. In other words, the sections discriminated against aboriginal people born before April 17, 1985 who have aboriginal ancestry through their female ancestors. The reasoning was that *Bill C31* gave preference to descendents who traced their Indian ancestry along pater-

¹¹³ *McIvor v. Canada (Registrar, Indian and Northern Affairs)* [2007] B.C.J. No. 1259; aff'd in part [2009] 2 CNLR 236 (BCCA); leave to appeal to the SCC denied Nov. 5, 2009.

nal lines over those who traced their Indian ancestry along maternal lines. Thus, the sections discriminated “on the basis of sex and martial status contrary to s. 15 and s. 28 of the *Charter*.”

On appeal to the BC Court of Appeal, a narrow ruling was substituted for the trial judge’s more expansive order. The Court held that s. 28 was not applicable. The court held that while the *Charter* is not to be applied retroactively government action can be a continuing violation even if it began prior to the *Charter* coming into effect. In this case the source of the violation was the 1985 Bill C-31, which does not pre-date the *Charter*. The ongoing source of discrimination is the fact that McIvor is a woman. The right to transmit Indian status to a child is a benefit to which s. 15 of the *Charter* applies. The court noted that s. 15 is to be interpreted in a broad purposive manner and also noted the cultural importance of being recognized as an Indian.

In s. 15 equality cases, the court looks for a comparator group because if one claims that one is not being treated equally, the first question is “equal to who”? Here the comparator group was Indian men who were married to non-Indian women and born prior to April 17, 1985. In comparing the two groups - women who married non-Indian men with men who married non-Indian women – the question is whether one group was treated more favorably than the other. The court held that the evidence showed that men who married non-Indian women were treated better because they could pass on their status to their children whereas women who married non-Indian men could not. The court held that this was clearly discrimination based on sex.

The court then examined whether the discrimination was justifiable. It held that it was not. *Bill C31* was found to have a pressing and substantial government objective – the preservation of rights acquired under the former legislation. *Bill C31* was also found to be reasonably connected to its objectives. The court found that *Bill C31* had no permanent discriminatory effects that were out of proportion to the government objective. It is on the third part of the justification test that *Bill C31* failed. The court found that it did not minimally impair McIvor’s *Charter* rights. It enhanced the status of the comparator group (men who married non-Indian women and their descendants) while it perpetuated the discrimination with respect to women who married non-Indian men by limiting their ability to transmit status to their children. Therefore, *Bill C31* failed on the minimal impairment part of the justification test.

The Court of Appeal held that the trial judge erred by expanding the extent of the *Charter* violation. The court limited its order to state that *Bill C31* violates the Charter only with respect to the fact that it accorded Indian status to children who have only one parent who is an Indian if their Indian grandparent is a man, but not if their Indian grandparent is a woman. The trial judge also erred in fashioning a remedy that re-worked the legislation and took effect immediately. The Court of Appeal held that this is the work of Parliament and the appropriate remedy is a declaration of invalidity that is temporarily suspended. Subsections 6(1)(a) and 6(1)(c) of the *Indian Act* are declared to be of no force and effect, but the declaration is suspended for one year – to April 6, 2010.

Leave to appeal to the Supreme Court of Canada was dismissed with costs.

*McKilligan v. Machar*¹¹⁴

Manitoba [1886] - The case concerns the proof required for title. Napoleon St. Germain, a child of a half-breed head of a family and entitled to a share of the 1,400,000 acres set aside under the *Manitoba Act*, assigned the lands to be allotted him by deed twice to two separate people. The court did not accept the evidence of the proof of title put forward by the plaintiff. The judge does state that lands can be registered that are not specifically described.

*McPherson & Christie*¹¹⁵

Manitoba [1994] - In 1990 McPherson and Christie were charged with hunting out of season. The trial took place in 1992 and both were convicted but, the judge also declared that the provisions of the Manitoba *Wildlife Act* under which they were charged were of no force and effect. He delayed the declaration of invalidity until August 1, 1994 and directed the Crown to enact new regulations that would register Métis who relied for subsistence on hunting as a way of life and would permit them to hunt moose for food in priority over non-aboriginal hunters. The judge made several important findings of fact. He found that the defendants were Métis and had aboriginal hunting rights that were recognized and protected within the meaning of s. 35 of the *Constitution Act, 1982*, and that those rights had not been extinguished. He further found that s. 26 of the *Wildlife Act* unjustifiably infringed those rights.

¹¹⁴ *McKilligan v. Machar* (1886), 3 Man. R. 418 (Man. Q.B.)

¹¹⁵ *R. v. McPherson* [1992] 4 C.N.L.R. 145; [1994] 2 C.N.L.R. 137 (Man. QB)

On appeal at the Manitoba Court of Queen's Bench, the Q.B. judge upheld the finding of fact that McPherson and Christie were Métis and had existing aboriginal hunting rights. He acquitted them and held that s. 26 of the *Wildlife Act* did not apply to them.

*Meshake*¹¹⁶

Ontario [2007] – Meshake a Treaty 9 beneficiary, married a woman who was a beneficiary of Treaty 3. They lived in Treaty 3 territory. Meshake was charged for hunting in Treaty 3 area and outside his traditional territory. He defended himself against the charges by claiming that his Treaty 9 right to hunt extended to Treaty 3. On appeal to the Ontario Court of Appeal, Laforme J.A. did not find that Treaty 9 extended to cover its beneficiaries who were hunting in Treaty 3. However, he did find that Meshake was accepted into the Treaty 3 community of Lac Seul by marriage and welcomed to hunt with his wife's family in accordance with the Ojibway custom. In the result the court found that treaty rights can extend to those who marry in and are accepted by the community.

*Métis National Council of Women v. Canada*¹¹⁷

[Federal Court – 2005] The Métis National Council of Women (MNCW) challenged the decision of the federal government not to permit the MNCW to become a party to the Human Resourced Development Canada program. The program was given effect through three national framework agreements with the Métis National Council, the Assembly of First Nations and the Inuit Tapirisat of Canada. The agreements provided for negotiation of labour market development funding with local or regional organizations. The MNCW wanted to be a signatory to the national framework agreement. They claimed that this breached their s. 15 (equality) and s. 28 (rights guaranteed equally to males and females) *Charter* rights. The MNCW further claimed that the MNC represented predominantly the interests of Métis men.

The action was brought by the MNCW and one individual Métis woman. They asked the Federal Court for: (1) a declaration that the failure to include MNCW as a signatory violated s. 15 and s. 28 of the *Charter*; (2) a declaration that the failure of the federal government to provide equal funding for job creation and employment for Métis women under those agreements violates s. 15 and s. 28; (3)

¹¹⁶ *R. v. Meshake* [2007] O.J. No. 1714 (OCA)

¹¹⁷ *Métis National Council of Women v. Canada (AG)*, 2006 FCA 77 (CanLii); aff'g 2005 FC 230 (CanLii); leave to appeal to SCC denied [2006] S.C.C.A. No. 170.

an order that the regional agreements be read so that funding and jobs and training provided under those agreements would be provided equally to men and women living in and outside of Métis communities; and(4) an order that the agreements be read so that MNCW is added as a signatory and is entitled to appoint a regional Métis women representative on the administrative boards that deal with them.

The Federal Court of Appeal supported the trial judge who had denied the claim. *Charter* rights can only be asserted by or on behalf of an individual. The MNCW claimed that through the various Métis women's organizations that comprise its membership, it represents all or at least a substantial number of Métis women in Canada. The MNCW also asserted that it has the capacity to ensure that Métis women would obtain the advantages that are intended to flow from the agreements. The MNCW claimed that those advantages are being denied to Métis women because the present arrangements exclude the MNCW.

The Court held that the onus was on the MNCW then to put forward evidence to show that Métis women were being denied the benefit of the program and that the MNCW was sufficiently representative of Métis women that the alleged deficiency would be remedied. The trial judge had found that there was insufficient evidence that Métis women were not being properly represented by the MNC or that Métis women had encountered difficulties in accessing programming or funding under the current arrangements. There was no evidence that the MNC advocated a male-dominated viewpoint or gives preference to male Métis with respect to negotiation, administration and disbursement of funds under the employment programs. The trial judge was also not satisfied that the evidence showed that the MNCW enjoys substantial support among Métis women.

The Court of Appeal upheld the trial judge's findings of fact and denied the appeal with costs against MNCW. Leave to appeal to the Supreme Court of Canada was dismissed with costs against MNCW.

*Mikisew*¹¹⁸

Alberta [2005] - In 1899, the Indians who lived in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories, surrendered to the Crown 840,000 square kilometers of land. In exchange for this surrender, they were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap

¹¹⁸ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388

and fish throughout the land surrendered to the Crown except “such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”

The Mikisew Reserve is located within Treaty 8 in Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew reserve, without consulting them. After the Mikisew protested, the road alignment was modified (again without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometers.

The Mikisew’s objection to the road included the affect it would have on their traditional lifestyle. The Supreme Court of Canada found that the government’s approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. The Court stated that when the Crown exercises its Treaty 8 right to ‘take up’ land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap, so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed ‘taking up,’ it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown.

The Crown, while it has a treaty right to ‘take up’ surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown’s duty. Here, the duty to consult was triggered. The impacts of the proposed road were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

However, given that the Crown is proposing to build a fairly minor winter road

on surrendered lands where the Mikisew treaty rights are expressly subject to the ‘taking up’ limitation, the content of the Crown’s duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew’s interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew’s concerns and attempt to minimize adverse impacts on its treaty rights.

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation.

*Misquadis*¹¹⁹

Federal Court [2004] - The case was brought by First Nation members of urban and off-reserve aboriginal communities and some aboriginal organizations. The Court of Appeal held that s. 15 guarantees equality only to individuals and does not guarantee equality to groups. Therefore the groups, the Aboriginal Council of Winnipeg and the Ardoch Algonquin First Nation, did not have standing to bring a s. 15 claim. However, the court proceeded on behalf of the individual applicants.

The first step in any s. 15 claim is to determine whether a law imposes differential treatment between the claimants and the comparator group. In this case, the comparator group was First Nation members living on-reserve. No one in the case purported to represent Métis. In fact, the Congress of Aboriginal Peoples (CAP), an intervener in the case, was specifically stated by the court as representing “non-status Indians, Indians who have regained their status and status Indians not living on reserve.”

The complaint was that a federal training program, the aboriginal Human Resources Development Strategy, had failed to fund the named Indian off-reserve communities who thereby were deprived of local community control of human resources programming. They were deprived on the basis of the personal characteristic of being Indians who do not live on reserves. The court held that the first

¹¹⁹ *Misquadis v. Canada (AG)*[2003] FCA 370 (CanLII); aff’g *Ardoch Algonquin First Nation v. Canada (Attorney General)* [2002] FCT 1058 (CanLII)

step was met – there was differential treatment between the claimants and the comparator group.

The second step in a s. 15 claim is to determine whether the discrimination is on the basis of a prohibited ground. Here the discrimination was because the claimants did not live on reserves. The Supreme Court of Canada had previously held in *Corbiere*¹²⁰ that ‘aboriginal-residence’ was an analogous ground because the decision to live on or off-reserve is a “personal characteristic essential to a band member’s personal identity.” Thus, the second step was met: the discrimination was based on a prohibited ground, which in this case was aboriginal residence.

The third step in a s. 15 claim is to determine whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The trial judge found that Human Resource Development Canada’s (HRDC) refusal to enter into an agreement with the applicants perpetuated the historical disadvantage and stereotyping of off-reserve aboriginal communities. Thus the third step was met because the decision had the effect of perpetuating discrimination.

The last step in a s. 15 claim is to analyze whether the law (or policy or decision) can be justified. Under this test the government must prove that the purpose is pressing and substantial, that there is a rational connection between the decision and the purpose and that if there is impairment, it is minimal. In this case the trial judge found that there was no rational connection for the refusal of HRDC to enter into an agreement with these urban, off-reserve Indian communities. Further, the court held that the decision did not meet the standard of minimal impairment.

Therefore, on the facts, the trial judge found that the s. 15 rights of the individual complainants had been unjustifiably violated. He ordered HRDC to provide agreements with the complainants’ communities and left it up to HRDC to consult as to how best to include these groups. The decision was upheld on appeal, and while the Court of Appeal recognized that the decision would not apply to the AHRDS that expired in March of 2004, it directed that it could apply to any future implementation of the strategy.

¹²⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 at 220.

*Morin v. Canada*¹²¹

Saskatchewan [1994] - The Métis Nation-Saskatchewan, their locals in Northwest Saskatchewan, the Métis National Council and several individuals (the ‘plaintiffs’) filed a land claim in court on behalf of the Métis of that area. To date this is the only Métis land claim that actually seeks a declaration that the Métis have aboriginal title to land. Research has been going on since the claim was filed.

This case will bring the scrip process directly into issue. One of the major questions will be whether scrip extinguished the land title of the Métis. A great deal of data with respect to scrip has been collected over the past few years by a research team headed by Dr. Frank Tough at the Native Studies Department at the University of Alberta, Edmonton.

In June of 2004, the court ordered production of documents and electronic materials. The Crown (Canada) had brought a motion claiming that research findings had not been disclosed as agreed. The plaintiffs did not comply with the judge’s order.

On December 23, 2005, Canada brought another motion demanding production with a short and firm deadline. In default, Canada sought to have the researcher barred from testifying, presenting evidence or preparing others to testify. Canada also sought to have the plaintiffs precluded from introducing into evidence any of the undisclosed materials. In anticipation that the court might dismiss the claim as a remedy for repeated failure to disclose, Canada also sought an order that no new claims relating to the same subject matter be commenced or substituted for the present claim.

The Court agreed with Canada that there had to be a remedy, but did not agree with any of the remedies suggested by Canada. In particular, the judge did not want to usurp the function of the trial judge to admit or reject evidence at trial. Also, he did not agree with any order that might preclude new representatives from bringing forward the same claim. In the result, the judge stayed the proceedings until otherwise ordered by the Court. The plaintiffs can only lift the stay when they promise to disclose immediately all the materials. The defendants, Canada and Saskatchewan, have leave to apply to dismiss the action or for summary judgment. Costs were awarded to the Defendant Canada. Canada then filed (unsuccessfully) for discontinuance of the action.

¹²¹ *Morin v. Canada & Saskatchewan* (Q.B. File No. 619-1994) (“*Morin v. Canada*”)

*Ivan Joseph Morin*¹²²

Saskatchewan [1995] – Ivan Joseph Morin was charged with committing robbery with violence contrary to s. 343(b) and s. 344 of the *Criminal Code*. He pleaded guilty and was convicted. Mr. Morin applied for a sentencing circle to consider the sentence he ought to receive. The judge granted the application. A sentencing circle was convened. It deliberated, arrived at a consensus (excluding Crown counsel) and made a list of recommendations. Apart from three small variations the judge accepted the recommendations. The Crown appealed the sentence to the Saskatchewan Court of Appeal. The Métis Society of Saskatchewan and the Federation of Saskatchewan Indians were granted intervener status. The main ground of appeal was that the sentence was not a fit one because the judge failed to properly consider the seriousness of the offence, the previous criminal record of the accused, the deterrent aspect of the sentencing, and the need to protect the public. The secondary ground of appeal was that the judge erred in law in holding a sentencing circle. The Court of Appeal found that it was not inappropriate to hold a sentencing circle. However it found that there was a disparity between the sentence recommended by the circle and other sentences for similar crimes. Three years imprisonment was the starting point for sentences for the robbery of convenience stores, gas bars, and like commercial enterprises. Since the sentence imposed on Mr. Morin fell outside the established range, it was set aside on account of disparity, unless it could be shown that there were, in this particular case, reasons for putting rehabilitation ahead of the other factors considered in sentencing, or unless there are other extraordinary circumstances to justify departure from the normal range of sentences. Mr. Morin had a string of previous convictions and showed no sign of rehabilitation.

*Morin (Alta)*¹²³

Alberta [2004] – Morin claimed to be Métis and held a card from the Ontario Métis aboriginal Association. He claimed the right to hunt in Alberta. He did not give notice of constitutional question to the Crown prior to trial. The trial judge found that he had a Métis right to hunt in Alberta. On appeal, the court held that without notice of constitutional question the trial judge was without jurisdiction to hear the issue of Métis rights. The trial judge's decision was quashed and the matter is to go back to trial.

¹²² *R. v. Ivan Joseph Morin*, 1995 CanLII 3999 (SK CA)

¹²³ *R. v. Morin* [2004] Alberta, unreported (*Morin (Alta)*)

*Morin & Daigneault*¹²⁴

Saskatchewan [1998] - Two Métis, Bruce Morin and Dennis Daigneault, were charged with several violations under the *Saskatchewan Fishery Regulations*. The court found that they had an aboriginal right to fish for food. The court held that neither the *Dominion Lands Act* or scrip issued pursuant to that Act extinguished Métis harvesting rights because both were silent on the issue of hunting, fishing and trapping. The judge held also that Métis have not and are not receiving the same benefits under the law as Indian people and that this is a violation of s. 15 of the *Canadian Charter of Rights and Freedoms*. (Note that s. 15 was not argued before the judge).

The Crown appealed to the Court of Queen's Bench where the trial judgment was upheld.

*Moulton Contracting Ltd. v. Behn and British Columbia*¹²⁵

British Columbia [2011] – This was an appeal by the defendants from an order striking portions of their statement of defence. Moulton was a logging company that obtained two Timber Sale Licences and a Road Permit for the Fort Nelson Timber Supply Area. The defendants are members of the Fort Nelson First Nation, which is a signatory to Treaty 8. They blockaded the only access road to the permitted logging area. The Behn defendants were licensed to trap in the logging territory and argued that the plaintiff's licences and road permit were invalid because they were issued in breach of the Crown's duty to consult and infringed their Treaty right to hunt and trap. The Crown argued the Behn defendants had no standing to raise the impugned defences in the absence of the express approval of the First Nation. Moulton argued that the defence should be struck out as unavailable in a civil action for intentional interference with contractual or business relations and conspiracy. The chambers judge found that the Behn defendants did not have standing to advance the collective rights of the Aboriginal community and that their defence was an impermissible collateral attack, which should have been pursued through administrative law means. Portions of the statement of defence were struck accordingly.

On appeal to the BC Court of Appeal, the case was dismissed. The Court of Appeal held that the judge was correct that the Behn defendants lacked standing and

¹²⁴ *R. v. Morin & Daigneault* [1996] 3 C.N.L.R. 157 (SKPC); aff'd [1997] CanLII 11328 (SK QB)

¹²⁵ *Moulton Contracting Ltd. v. Behn and British Columbia* [2011] B.C.J. No. 1271 (BCCA)

could not seek to avoid liability by attacking the licences and permit. Such an attack required authorization by the collective in whom the treaty and constitutional rights inhered. The defences were an impermissible collateral attack and an abuse of process.

In 2013, the Supreme Court of Canada upheld the lower courts on all points. The court held that the duty to consult exists to protect the collective rights of aboriginal peoples and is owed to the aboriginal group that holds them. An aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its aboriginal or treaty rights, but in this case that did not happen. In the absence of authorization the members cannot assert a breach of the duty to consult on their own. The court also held that certain aboriginal and treaty rights may have both collective and individual aspects, and in appropriate circumstances, individual members may be able to assert them. In some cases it may be possible to argue that a connection between the rights at issue and a specific geographic location gives some community members standing to raise the violation of their particular rights as a defence to the tort claim. However, the court would not make a decision in this case. The bulk of the decision was with respect to whether raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process. Neither the First Nation nor the community members had made any attempt to legally challenge the licences when the Crown granted them. Had they done so, the logging company would not have been led to believe that it was free to plan and start its operations. By blocking access to the logging sites, the community members put the logging company in the position of having either to go to court or to forego harvesting timber after having incurred substantial costs. To allow the members to raise their treaty rights and a breach of the duty to consult at this point was “tantamount to condoning self-help remedies and would bring the administration of justice into disrepute.”

*Newfoundland v. Drew*¹²⁶

Newfoundland [2006] - In this case the appellants argued that effective European control occurred in some places (for example, in Newfoundland) long after the date of first contact, with the result that the Inuit and Indian communities in Newfoundland are subject to a more onerous test than the Métis. The appellants argued that the ‘new promise’ reflected by s. 35 cannot, in light of the honour and duty of the Crown, be applied only to the Métis. Their peculiar circumstances, they argued, should be recognized in the same way as those of the Métis are. The

¹²⁶ *Newfoundland (Minister of Government Services and Lands) v. Drew* [2006] N.J. No. 270

Newfoundland Court of Appeal did not agree. They noted that the Supreme Court was careful to modify the pre-contact *Van der Peet* test, in its words, “to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims” (para. 14), and no more. The distinction between the claims of the two groups is noted throughout the *Powley* judgment. The Supreme Court thereby confirmed the validity of the *Van der Peet* test in its application to First Nations and held that *Powley* was not a break with the *Van der Peet* test, and did not signal the situational flexibility that the appellants sought. They also held that the *Powley* test was not discriminatory as between Métis, Indians and Inuit.

*Newfoundland and Labrador v. Labrador Métis Nation (LMN)*¹²⁷

Newfoundland [2007] – In an appeal to the Newfoundland Court of Appeal, the question before the court was whether the claimants (24 LMN communities) had to ethnically identify themselves as either Métis or Inuit before the Crown could be compelled to consult and accommodate them. The court said no they did not have to do that. The court agreed that it was sufficient to assert a credible claim that the claimants belong to an aboriginal people within s. 35(1) of the *Constitution Act, 1982*. This was established by evidence showing they were of mixed Inuit and European ancestry with Inuit ancestors that resided in south and central Labrador prior to European contact. Whether the present day LMN communities were the result of an ethnogenesis of a new culture of aboriginal peoples that arose between the period of contact with Europeans and the date of the effective imposition of European control, had not yet been established. The court noted that it was possible that such an ethnogenesis had occurred, in which case the members of the LMN communities could be, in law, constitutional Métis. However, the court noted that it is also possible that the LMN communities are simply the present-day manifestation of the historic Inuit communities of south and central Labrador that were present in the area prior to contact with the Europeans. The LMN communities did not refuse to self-identify with a specific constitutional definition but they said they were unable, at the present time, to do so definitively. This position may change as further historical, archeological, anthropological and other information is obtained and as the law provides further guidance on these complex issues.

In any event, definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown’s obligation to consult arises. All the respondents had to do was establish, as they did, certain essential

¹²⁷ *Newfoundland and Labrador v. Labrador Métis Nation*, 2007 NLCA 75

facts sufficient to show a credible claim to aboriginal rights based on either Inuit or Métis ancestry. The situation might be different if the right adversely affected only flowed from one of the Inuit or Métis cultures. But that is not the case. Here fishing rights are in issue. Those rights are not dependent upon whether the claim is Inuit or Métis-based. Fishing rights flow from both types of claims. The applications judge did not need to determine the issue of ethnicity.

Leave to appeal to the Supreme Court of Canada was denied.

*Norton*¹²⁸

Saskatchewan [2005] - In two separate incidents, Stanley Norton and Yvonne Samuelson were charged with angling without a licence. The trial judge concluded that the defendants had not provided sufficient evidence to meet the Powley test. Specifically, they failed to provide evidence of their genealogical connection to any historic Métis community. The judge noted that the defendant Norton, in oral argument, provided some materials with respect to his family. However, it was not provided during the trial and was not subjected to cross-examination. Therefore, the materials could not be considered as evidence. In the result, the judge found that the defendants did not meet the evidentiary burden required to prove an existing Métis right to fish. They were found guilty of fishing without a licence. In addition, Norton was also found guilty of obstruction because he defied, challenged and interfered with the officers who were trying to collect information.

*Nunn*¹²⁹

British Columbia [2003] - Ronald Nunn was charged with hunting deer contrary to the British Columbia *Wildlife Act*. In 2002 the provincial court found that there was insufficient evidence to prove either a contemporary or an historic Métis community in the Okanagan Valley of British Columbia. Further, the court noted that there was no evidence to suggest that any significant number of the Métis families who reside in the area pursue the 'Métis way of life.' Mr. Nunn appealed to the Supreme Court of B.C. and was granted leave but subsequently abandoned his appeal.

*O'Sullivan Lake Outfitters*¹³⁰

Ontario [2011] – The Crown claimed that the Meshakes built the cabin for a

¹²⁸ *R. v. Norton*, [2005] SK.P.C. 46 (CanLII)

¹²⁹ *R. v. Nunn* (April 17th 2003) unreported, Provincial Court of British Columbia, Court File No. 30689H (Penticton), appeal abandoned in 2004.

¹³⁰ *R. v. O'Sullivan Lake Outfitters Inc.* [2011] 2 C.N.L.R. 307.

commercial purpose and not for their personal use. The Crown also claimed that its laws and policies did not unjustifiably infringe on the treaty right. This was an appeal of a decision of a Justice of the Peace to enter a stay of charges against members of the Aroland First Nation who had begun construction of a cabin on a lake near Thunder Bay in 2003. The defendants were charged under a draft policy for unlawfully constructing a building on public land without a work permit and unlawfully continuing activity while a stop work order was issued, all contrary to the *Ontario Public Lands Act*. The court held that the cabin was part of the rights promised under Treaty 9 and that the permit requirement infringed those rights. At the time of the construction activity the Ministry of Natural Resources had not consulted with the Aroland First Nation with respect to the intent and application of the draft policy and procedure entitled Work Permits for Incidental Buildings on Public Lands, which was treated as ‘in force’ by ministry staff. The court held that the work permit process had an adverse impact on people like Elsie Meshake who are illiterate, whose second language is English and who would have to travel some 70 kilometers to the Ministry office. The court found that the cabin built by the Meshakes had a communal aspect in terms of the contributions in materials and labour by others, that it was built for the personal use of the Meshakes and their extended family (which he calculated to be at least 30 people), that the cabin was needed to exercise their rights to hunt, fish and trap in the area, and he referred to the support of the community which was demonstrated by a resolution of the Nishnawbe-Aski supporting the construction of the cabin. The court upheld the finding of the Justice of the Peace that the cabin was for personal use and part of the treaty rights promised by Treaty 9.

*Papaschase*¹³¹

Alberta [2004] - This case asserted aboriginal rights on behalf of the descendants of the Papaschase Indian Band. The main claim arises out of the allegedly wrongful surrender of the Papaschase Reserve in 1888. The individual plaintiffs are descendants of the original members of the Papaschase Indian Band and are also status Indians. They are members of at least four different Indian Bands. The Papaschase Indian Band existed in the 1880’s, but it has not existed in any organized sense since about 1887.

The Papaschase Band adhered to Treaty 6 in 1877. In July of 1886, Chief Papaschase, his brothers, and their families, applied to withdraw from Treaty and accept Métis scrip. At that time the process of withdrawing from Treaty was authorized

¹³¹ *Papaschase Indian Band (Descendants of) v. Canada (Attorney General)*, 2004 ABQB 655

by the *Indian Act*, 1880.

No half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and no half-breed head of a family, except the widow of an Indian, or a half-breed who has already been admitted into a treaty, shall, unless under very special circumstances, which shall be determined by the Superintendent General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty, and any half-breed who has been admitted into a treaty shall be allowed to withdraw therefrom on signifying in writing his desire so to do, - which signification in writing shall be signed by him in the presence of two witnesses, who shall certify the same on oath before some person authorized by law to administer the same.¹³²

In 1888, after Chief Papaschase and his family had withdrawn from Treaty, the statute was amended to require the consent of the Indian Commissioner to withdraw from Treaty.¹³³ While the statute gave an unconditional right to withdraw from Treaty, most persons withdrew in return for scrip. A head of family was entitled to land scrip for 160 acres, or money scrip for \$160.00, if he met certain conditions. The conditions were essentially that he had to be a half-breed and resident in the Northwest Territories on the date the Hudson's Bay Company surrendered its lands to Canada. Initially, land scrip and money scrip were of equal value, but because of the increase in the value of land, by 1885 land scrip was apparently worth double that of money scrip.

In 1886, partly because of the promotion of the idea by scrip buyers, Scrip Commissioners were faced with a flood of requests to withdraw from Treaty. Scrip buyers were merchants and bankers and other people who followed the many Half-Breed Commissions on their rounds and offered cash for scrip. The Indian Commissioner was so concerned about the large number of applications for scrip in 1886 that a temporary halt was put on the granting of scrip. The concern was with persons who were (or claimed to be) of mixed blood, but who followed a more or less traditional Indian lifestyle. Apart from the effect that wholesale withdrawals would have on the Bands, the Indian agents were concerned that these persons would not be able to support themselves if they withdrew from Treaty.

The application of Chief Papaschase to take scrip was initially refused, but was eventually approved. A discharge for Chief Papaschase was signed on July 31, 1886. In other documents he acknowledged he "hereby forfeits all Indian rights,"

¹³² *Indian Act, 1880*, S.C. 1880, c. 28, sec. 14 as amended by the *Indian Act Amendment Act*, S.C. 1884, c. 27, sec. 4 (carried forward as s. 13 of the *Indian Act*, R.S.C. 1886, c. 43

¹³³ *An Act to Further Amend the Indian Act*, S.C. 1888, c. 22, s. 1.

and he was discharged from Treaty. Despite having surrendered his Treaty rights, it appears that Chief Papaschase did not leave the Reserve. He at first denied having signed the surrender, but when confronted with the document he instead claimed compensation for the buildings he had constructed on the Reserve. The government resolved to enforce the terms under which scrip was given and Chief Papaschase eventually did leave. There is no evidence about what happened to him afterwards, but the Plaintiffs suggest the scrip money was spent quickly, leaving him and his family destitute and landless.

In the statement of claim, the plaintiffs state that, among other things, the Crown should not have permitted Chief Papaschase and the other members of the Band to accept Métis scrip, or should have better advised the Papaschase Band members of the consequences of taking scrip,

The trial judge found that the plaintiffs' allegations about Métis scrip were woven around two themes. The first theme was that Métis scrip was a bad idea generally, and that the government should never have implemented such a scheme. The second theme was that the taking of Métis scrip by members of the Papaschase Band was a bad idea for them personally and that the Defendant owed a fiduciary duty to dissuade them from that course of action.

The trial judge held that one cannot issue a general challenge to Métis scrip as bad public policy because of the doctrine of the supremacy of Parliament. He held that, regardless of the merits of the policy, it was authorized by Parliament and therefore the courts have no ability to examine legislation in the pre-Charter era to see if it is good policy or bad. Such issues, the trial judge stated, are simply not justiciable. The trial judge found that even if the scrip policy was, as the Plaintiffs argued, contrary to Treaty, Parliament had the power to override treaty rights. He found that because the merits of this policy were not justiciable, it raised no genuine issue for trial.

The trial judge also found that the allegation that Chief Papaschase and the other members of the Band should have been dissuaded from taking scrip could be met by related arguments. Chief Papaschase had an absolute right under the *Indian Act* to withdraw from Treaty and he had an absolute right to take scrip. The evidence showed that the Indian Agents in the Northwest Territories were concerned about the implication of this policy and were attempting to persuade Métis not to take

scrip, but the Métis did not accept this advice. Chief Papaschase actively lobbied to have scrip issued to him; he correctly sensed that he had a right to scrip and that it could not be denied to him. In all of these circumstances, Chief Papaschase was entitled to scrip, he demanded it, and there was no genuine issue for trial on the subject. The trial judge found that there was no evidence that Chief Papaschase was incapable of making informed decisions on these issues. The trial judge also noted that after 1888, when the statute was amended to give the Department the discretion over the withdrawal from Treaty, there may have been some responsibility on the Defendant, but that was not the case in 1886.

The Plaintiffs argued that Chief Papaschase was not really living a Métis lifestyle, was more properly considered an Indian and so should not have been allowed to take scrip. The record shows that Department officials tried to dissuade those who lived a traditional Indian life from taking scrip, and in some cases they even refused such persons scrip. At this time ‘living an Indian mode of life’ partly defined who was entitled to be recognized as a ‘non-treaty Indian,’ so it would have been a term of art to the Indian department officials. But the ‘lifestyle’ of the applicant was not one of the legal preconditions of the right to take scrip or to withdraw from Treaty. The trial judge found that whether Chief Papaschase and his family led such life is not legally relevant. They were clearly of mixed blood and entitled to withdraw from Treaty. Aboriginal people were allowed to self-identify as Indians or Métis when it came to entering Treaty, and the statutes in force at the relevant time gave them the same right to self-identify if they wished to withdraw from Treaty.

The Plaintiffs also complained that the Papaschase members were not given independent legal advice before they accepted scrip. They argued that the Papaschase members should have been advised of all of the consequences before they were allowed to withdraw from treaty. However, the trial judge held that to talk about anyone getting “independent legal advice” in the Edmonton area of the Northwest Territories in the 1880’s was a completely artificial concept. He saw this as an attempt to apply 21st Century standards to 19th Century transactions, and it is one of the reasons we have limitation statutes to prevent the prosecution of stale claims. In any event, the record is clear that the Band members were advised not to take scrip, but they persisted. The trial judge pointed to the fact that the standard set of scrip documents contained the following waiver:

I hereby forfeit all Indian rights. I agree to leave the reserve, to give up my house and all other improvements which I may have on the reserve without compensation, also any cattle

or implements received by me as an individual or as a member of the Band.¹³⁴

The documents all state that they were explained to the Band member signing the document and there is no evidence on the record to suggest that they were not. The trial judge noted that there was no evidence to suggest that if the Band members had received ‘independent legal advice’ they would have acted differently. The Papaschase members did receive advice about taking scrip but chose not to follow it.

The plaintiffs also point out that the exact motivation behind the taking of scrip is unknown. The correspondence of the time suggests that the Papaschase Band members were motivated by the prospect of receiving a sum of money immediately, and they did not fully consider the long-term implications of their actions. The plaintiffs suggest that there might have been other motivations. They argue that the defendant failed to provide the farming implements and other benefits called for by the Treaty, thereby causing the Papaschase Band to fail to establish itself as a farming community. The plaintiffs argued that the defendant did not properly help the Papaschase Band to make the transition from a hunting to a farming economy. It is suggested that the disappearance of the buffalo and the resulting hardships and starvation left the Papaschase Band with little choice. Another contributing factor is said to be the failure to survey the Reserve. The plaintiffs argued that the defendant should have given or explained other options available to the Papaschase Band before allowing them to accept scrip. The plaintiffs argued that these factors combined together represent a breach of the fiduciary obligation of the Defendant towards the Papaschase Band. The plaintiffs argued that the fact that the Papaschase members who took scrip appear to have been broke by 1887 is convincing evidence of this breach of fiduciary duty. The trial judge did not accept any of these arguments. He held that there was an absolute right to withdraw from Treaty, regardless of the motivation. There is no evidence on this record of misrepresentation, duress or other misconduct that would vitiate the decisions to take scrip. Speculation about possible motivations is not sufficient. In the end he found that no triable issue had been shown.

The Crown also argued that the claim was barred because of time limitations. The trial judge agreed. He held that, with respect to the complaints about the taking of Métis scrip, all of the facts surrounding this claim were known immediately upon

¹³⁴ *Pappaschase, supra*, at para. [-].

the applications for scrip having been accepted. Further, all of the general facts surrounding the taking of scrip were actually known by the time of the publication of a study by the Métis Association of Alberta. The specific circumstances surrounding the taking of scrip by the Pappaschase Band were known, at the very latest, by the time of a thesis that was published in 1979.

In summary, the trial judge found that all of the claims of the Plaintiffs with respect to scrip are barred by the passage of time, bound to fail and should be summarily dismissed. He noted that the Plaintiffs have come forward, in good faith, raising questions about transactions that happened over 100 years ago.

With hindsight it is easy to second-guess these decisions, to suggest that they were not prudent, and to speculate about what might have happened if those decisions had not been taken. However, over a century later, everyone has moved on ... It is for these reasons that the law requires that claims be pursued in a timely manner; it is simply not possible or appropriate to try and unravel transactions so long after they occurred. For the reasons I have given, the application for summary dismissal of the claim must be allowed. On many of the points the Plaintiffs have failed to show a genuine issue for trial. However, even if a genuine issue for trial could be shown, almost all the claims have long since been barred by the statutes of limitation.¹³⁵

*Paquette*¹³⁶

Ontario [2012] – Mr. Paquette was charged with hunting moose without a licence. He was a member of the Métis Nation of Ontario but had not been issued a Harvester Card. Ontario has an agreement with the MNO that it will not charge Harvester Card holders. In the absence of a Harvest Card, individuals who claim to be Métis must prove their aboriginal right to hunt under the test in *Powley*. Mr. Paquette presented no evidence to prove that there was a historic Métis community north of Lake Nipissing and east of Sudbury. His genealogical evidence showed that his aboriginal roots were in fact from Quebec and that his family did not arrive in the Sturgeon Falls area until between 1856-1902. The Justice of the Peace found that Mr. Paquette failed to prove that he was a descendant of a historic Métis community in Ontario and therefore found that he had not proven that he had a Métis right to hunt. Mr. Paquette also claimed that his s. 15 *Charter* rights had been violated.

¹³⁵ *Pappaschase, supra*, at para. [-].

¹³⁶ *R. v. Paquette*, North Bay Court File No. 2561-110170, 2012.08.15 (OCJ)

*Patterson v. Lane*¹³⁷

Alberta [1904] - This is an appeal against the trial judgment. In 1900, one P.J. Nolan obtained a scrip certificate from a half-breed named Justine Rouselle. Nolan subsequently took \$200 from the defendant Lane, to be applied on purchase of a half interest in two parcels of *Dominion Land Act* scrip. A few months later Nolan received \$150 from the plaintiff, Patterson, for land scrip. Nolan later got \$700 more from the defendant. Early in 1903, Justine Rouselle attended at the Dominion Lands office with Nolan and delivered up her scrip certificate and received a certain parcel of land, which she transferred that same day to the defendant, Lane. The plaintiff alleges that he is the proper owner of the scrip. The court held that the scrip certificate itself held no rights to any lands unless Rouselle presented herself to the Lands office and complied with the regulations to specify the land. Until that happened, Nolan had no rights to dispose of. Any claim in the plaintiff should be against Nolan not against Lane.

*Paul (BC)*¹³⁸

British Columbia [2003] - Mr. Paul, a status Indian, cut four logs from Crown lands to renovate his house. He claimed that he had an aboriginal right to harvest timber and that s. 96 of the *Forest Practices Code* did not apply to him. His defence took him first to the District Manager and then to an Administrative Review Panel. Both agreed that he had contravened s. 96. He then appealed to the Forest Appeals Commission, which determined that it had the jurisdiction to hear and determine the aboriginal rights issues in the appeal. Mr. Paul disagreed and took the matter to the courts. The trial judge agreed that the Commission had the jurisdiction to hear aboriginal rights issues. The Court of Appeal disagreed. The Supreme Court of Canada held that the province has the legislative competence to endow an administrative tribunal with the capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate. The Supreme Court held that the Code applied as a law of general application to Indians to the extent that it did not touch the ‘core of Indianness’: “there is no basis for requiring an express empowerment that an administrative tribunal be able to apply s. 35 of the *Constitution Act, 1982*” (par. 36). The Commission, therefore, can adjudicate a question of aboriginal rights if it is empowered by its enabling legislation, implicitly or explicitly, with the jurisdiction to interpret or decide any question of law.

The essential question is whether the empowering legislation implicitly or explicitly grants

¹³⁷ *Patterson v. Lane* (1904), 6 Terr. L.R. 92 (NWT Supreme Court – on appeal)

¹³⁸ *Paul v. British Columbia (Forest Appeals Commission)* [2003] 2 S.C.R. 585 (“*Paul (BC)*”)

to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

... where there is no express legislative intention to grant jurisdiction, jurisdiction may nonetheless be implied from the structure of the tribunal's enabling legislation, the powers conferred on the tribunal, the function it performs, and its overall context.¹³⁹

The Supreme Court specifically declined to decide whether the first avenues of complaint, the District Manager and the Administrative Review Panel, had the jurisdiction to hear aboriginal rights issues. However, the Supreme Court noted that where there is the possibility of an administrative appeal to a body that does have the power to consider aboriginal arguments, there is less need for lower bodies to hear the issues.

*Paul (Clem) & North Slave Métis Alliance v. Canada, Northwest Territories and Dogrib Treaty Eleven Tribal Council*¹⁴⁰

Northwest Territories [2002] - The North Slave Métis Alliance (NSMA) asserts a claim to aboriginal title in the NWT. The NSMA claims to represent Métis who live in the North Slave Region of the NWT. Previous Métis organizations had represented Métis for the purposes of the Dene Métis Land Claims Agreement negotiations in the 1980s and early 1990s. However, when those negotiations fell apart, the Métis in two regions of the NWT, Gwich'in and Sahtu, participated in their respective regional land claims negotiations.

In 1992, the Dogribs (now known as the Tłı̄cho) began to negotiate a land claim and self-government agreement. In the early days it was thought that this would be a regional claim encompassing the North Slave Region. However, the other aboriginal peoples in the region (the Yellowknives and the Métis) declined to participate in the negotiations. The Métis association at that time was actively pursuing recognition as an Indian band and the Yellowknives opted to participate in a Treaty Land Entitlement (TLE) process. As a result the negotiations became a Tłı̄cho only claim.

In 1998 the Métis changed their mind. They formed the NSMA and decided that they did want to participate in the Tłı̄cho negotiations. In 2001 they filed an injunction to stop the Tłı̄cho negotiations until the NSMA was either included at the

¹³⁹ *Paul, supra*, at para [-].

¹⁴⁰ *Paul (Clem) v. Canada*, 2002 FCT 615 (CanLII)

Tłı̄cho table or given their own land claim negotiations table.

The Court denied the NSMA injunction application and noted that the Métis had originally declined to participate and that the primary objective of the Tłı̄cho Agreement is for the Tłı̄cho, not for other aboriginal peoples who may live in the North Slave Region. The court noted that the NSMA has only 36 listed members in one of the four Tłı̄cho communities – Rae-Edzo. The Court went on to note that of those 36 members, 24 are also registered as ‘Indians’ within the meaning of the *Indian Act* and were on the Dogrib Rae Indian Band list. He also noted that approximately two-thirds of the 292 NSMA members are residents of the City of Yellowknife, which is not a Tłı̄cho community and is not within the lands that are the subject of the Tłı̄cho treaty negotiations.

The Court reviewed the latest draft of the Tłı̄cho *Agreement* and concluded that the non-derogation clauses of the agreement properly provide that the rights of other aboriginal peoples are not affected by the Tłı̄cho *Agreement*. The draft agreement further states that if a court determines that another aboriginal peoples rights are affected by any part of the agreement, then the agreement will be amended. The court held that there was no injunction available against the Crown, even where constitutional issues are raised. In addition the judge noted that there was no irreparable harm that would come to the NSMA, either after the Tłı̄cho *Agreement* is signed (because of the non-derogation clauses) or in the interim before it comes into effect.

The judge also noted (at par. 150) that when an individual Métis signed onto the *Tłı̄cho Agreement*, it did not mean that person was “forced to abandon being a Métis.” The judge noted that the effect of taking Treaty in 1921 was similar. The judge went on to say that the NSMA is “at liberty to pursue their action for recognition of their aboriginal rights and, if they succeed, their rights will be recognized and the [Tłı̄cho] Final Agreement will be adjusted.” The court noted (at par. 164) that the public interest was in favor of the Tłı̄cho and the governments who are trying to complete a land claims process “which itself is in the public interest because it is a process – a mechanism for the reconciliation of aboriginal peoples into Canadian society.”

Finally, the court cited delay as an important reason for denying the NSMA injunction application stating that they had known about the negotiations for several

years and had waited too long to launch their claim. The NSMA did not seek leave to appeal the injunction order to the Federal Court of Appeal.

This possibility of dual claims to Indian and Métis rights also arose in this case. Many of the plaintiffs were members of the North Slave Métis Alliance and claimed identity as Métis. However, most were also registered as Indians under the *Indian Act* and were members of Indian bands. In fact many were registered as members of Dogrib bands. The evidence further showed that most members of the North Slave Métis Alliance who registered as Indians chose to register following *Bill C-31*. Many also chose to be registered as Dogribs. By initiating this court action the plaintiffs elected to be identified qua Métis. In an awkward legal reality therefore, the plaintiffs as Métis, were also defendants, as Indians and Dogribs.

*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*¹⁴¹

Ontario [2007] – This was a motion by Kitchenuhmaykoosib Inninuwug First Nation for an interlocutory injunction to prevent Platinex Inc. from test drilling on traditional lands claimed by the First Nation. The court dismissed the motion on the grounds that there was not sufficient evidence of harm to the land, harvesting rights, and community culture, stating that much of the evidence indicating the harms of drilling presented were assumptions, and were not the result of the drilling. The court went on to explain that injunctions are often not suitable remedies when aboriginal rights are at stake. Injunctions were described as all or nothing solutions, which offer only partial or imperfect relief. While the court did not grant the injunction, the court made a declaratory judgment, which is a judicial statement confirming or denying a legal right. The court declared that the First Nation will have the right to ongoing consultation in relation to the drilling project. The parties will implement a consultation protocol, timetable, and Memorandum of Understanding, and the protocol will address a number of concerns, including environmental impact assessment and funding. The declaratory judgment of the Ontario Superior Court of Justice set a date by which the consultation protocol, timetable, and Memorandum of Understanding were to be implemented. The order was not met by the date, and the judge consequently created the order himself. Subject to the order, Platinex was given permission to begin the drilling program in June 2007.

*Powley*¹⁴²

¹⁴¹ *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* [2007] O.J. No. 1841

¹⁴² *R. v. Powley* [1998] O.J. No. 5310 (P.Ct.); aff'd [2000] O.J. No. 99 (Ont. S.C.J.); aff'd [2001] O.J. No. 607 (Ont. C.A.); aff'd (2003) SCC 43.

Ontario [2003] - On October 22, 1993, Steve and Roddy Powley killed a bull moose just outside Sault Ste Marie, Ontario. They tagged their catch with a Métis card and a note that read “harvesting my meat for winter.” The Powleys were charged with hunting moose without a license and unlawful possession of moose.

In 1998, the trial judge ruled that the Powleys have a Métis right to hunt that is protected by s. 35 of the *Constitution Act, 1982*. The charges were dismissed, but the Crown appealed the decision. In January 2000, the Ontario Superior Court of Justice confirmed the trial decision and dismissed the Crown’s appeal. The Crown appealed the decision to the Ontario Court of Appeal. On February 23, 2001 the Court of Appeal unanimously upheld the earlier decisions and confirmed that the Powleys have an aboriginal right to hunt as Métis. The Crown then appealed to the Supreme Court of Canada.

On September 19, 2003 the Supreme Court of Canada, in a unanimous judgment, said that the Powleys, as members of the Sault Ste Marie Métis community could exercise a Métis right to hunt that is protected by s. 35 of the *Constitution*.

What was the purpose for including Métis in s. 35? The Court in *Powley* made several statements about why the Métis were included in s. 35 and about the purpose of the constitutional protection. Specifically, the Court said that the Métis were included in s. 35 because Canada made a commitment to recognize and value the Métis and to enhance their survival as distinctive communities. The Court said that the purpose and the promise of s. 35 is to protect as ‘rights’ practices that were historically important to the Métis and which have continued to be important in modern Métis communities. The Court describes these practices as ‘integral’ to the Métis. Finally, the Court said that the framers of the *Constitution Act, 1982* recognized that Métis communities must be protected along with other aboriginal communities.

Who are the Métis in s. 35? This question was discussed at length before the Court. Many of the Crown lawyers argued that there were no Métis ‘peoples’ and that there were only individuals with mixed Indian and European heritage. The Court made a distinction between Métis identity generally (for citizenship, cultural purposes, etc.) and Métis rights-holders. The Supreme Court of Canada’s decision only relates to Métis rights-holders. The Court did not set out a comprehensive definition of Métis for all purposes. Instead, the Court set out who the Métis are for the purposes of s. 35. The Court said that the term ‘Métis’ in s. 35 refers to

distinctive Métis peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and group identity – separate from their Indian, Inuit or European forebears. The Court said that the term ‘Métis’ in s. 35 does not include all individuals with mixed Indian and European heritage.

It is not necessary for us to decide ... 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.¹⁴³

*Przybyszewski*¹⁴⁴

Ontario [2003] - The complainant alleged wrongful dismissal against the Métis Nation of Ontario under the *Canada Labour Code*. The MNO took the position that the Métis are ‘Indians’ within the meaning of s. 91(24) of the *Constitution Act, 1867*. However, the Métis Nation of Ontario argued that this did not necessarily mean that their employment relationship was under federal jurisdiction. Parliament’s jurisdiction with respect to labour relations only comes into play when the undertaking is a “federal work, undertaking or business.” In this case the adjudicator held that the labor relations, under the aboriginal Healing and Wellness strategy, were an integral part of the primary federal jurisdiction over ‘Indians.’ The adjudicator held that the *Canada Labour Code* applies to the employment relationship between the complainant and the Métis Nation of Ontario. On appeal, the Federal Court of Canada (Trial Division) upheld the adjudicator in finding that the labour relations of the Métis Nation of Ontario were federal jurisdiction and that the *Canada Labour Code* was applicable. However, the Métis Nation of Ontario has, for other reasons, not appealed the matter.

*Robinson v. Sutherland*¹⁴⁵

Manitoba [1893] - Marie Cardinal was born in 1861. At the age of 16, in 1877, she married Roger Boucher. She was allotted half-breed lands in 1880 as an ‘illegitimate’ child of a half-breed head of a family. In 1879, under pressure she assigned her right to her share of the lands to the defendant Sutherland. In 1880, both the assignment and the deed were registered. In 1881 Marie turned twenty-one and subsequently received the patent for the land. A deed was executed to the plaintiff, Robinson, in 1892.

The *Half-Breed Lands Act* stated that there was no sale or authority to sell by an

¹⁴³ *Powley* (SCC), *supra*, at para [-].

¹⁴⁴ *Métis Nation of Ontario v. Przybyszewski* [2003] 2 C.N.L.R. 232; aff’d 2004 FC 977.

¹⁴⁵ *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Man. Q.B.)

infant who was married with a husband living without his knowledge and consent in writing. At the time the 1879 assignment was made, no mention was made of the fact that she was married. Although that section of the Act was passed after the fact, it contained a clause that stated that the instrument “shall be deemed to have always been and shall be of full force.” In the result, the court held that the assignment made in 1879 was not binding on Cardinall and was voidable at her option upon obtaining the age of majority, and that she had voided them by assigning them to the plaintiff, Mr. Robinson. The court upheld Robinson’s purchase.

*Rocher*¹⁴⁶

NWT [1982-1985] – The question here was whether the fisheries regulations violated the *Canadian Bill of Rights* on the basis of race since they exempted “Indians, Inuit and persons of mixed blood” from licensing that applied to the accused, who was not an Aboriginal person. The trial judge dismissed the preliminary objection on the basis that Parliament, by virtue of section 91(24) of the *Constitution Act, 1867*, had jurisdiction to pass the challenged regulatory scheme. On appeal, the Northwest Territories Supreme Court overturned the conviction and noted that “persons of mixed blood” are “commonly called ‘Métis’ in the Mackenzie Valley area.” He noted in regard to the regulations that the “federal objective presumably in mind when section 22 of the regulations was enacted was the preservation of aboriginal rights and freedoms in relation to domestic fishing by ‘Indians’ in the widest sense of that term.”

The Crown appealed, and the Court of Appeal reinstated the conviction on the basis that section 22 was a method by which “natives, or persons of native descent or native blood” are accorded priority for food purposes, for a restricted resource and for the objective of conservation. According to the Court of Appeal the Governor in Council concluded that a limited priority was to be given to natives. The rationale for according native persons priority for food is clear. Their needs are a primary responsibility of Canada under the Constitution, a responsibility confirmed, in many cases, by treaty.

*Ross River Dena*¹⁴⁷

Yukon [2012-2013] – This were actions filed by Ross River Dena Council, an Indian band, to determine whether the terms and conditions of the *Rupert’s Land and North-western Territory Order* (the “1870 Order”) gives rise to enforceable

¹⁴⁶ *R. v. Rocher*, [1982] 3 C.N.L.R. 122 (N.W.T. Terr. Ct.); [1983] 3 C.N.L.R. 136 (N.W.T.S.C.); [1985] 2 C.N.L.R. 151 (N.W.T.C.A.) 38; [1985] 2 C.N.L.R. 155

¹⁴⁷ *Ross River Dena Council v. Canada (Attorney General)* [2012] Y.J. No. 1

legal obligations and whether those obligations were fiduciary in nature. The band and its members were part of the Kaska tribe of Indians, and were one of the Indian tribes referred to in an 1867 address by the Queen, in which she indicated that Indian land claims would be settled in accordance with equitable principles. The Kaska's traditional land included a tract of land in the southeastern part of the Yukon territory. In 1870, pursuant to an order and the *British North America Act*, the land was acquired by Canada. In 1973, the band filed a land claim. To date the Kaska Dena have not entered into a land claim agreement with the Crown. The actions were dismissed by the court. The terms and conditions referred to in the *1870 Order* for compensation for lands required for the purposes of settlement were not, at the time, intended to have enforceable legal effect reviewable by the court. The *1870 Order* did not create a positive obligation on the Crown to settle claims for of first nations persons. Even if the relevant provision gave rise to legally enforceable obligations, those obligations were not fiduciary in nature. The band had not shown that there was a specific, cognizable Indian interest in the claimed territory that was known to the government and was in the nature of a private law interest or that the government undertook to foresake the interests of others and to act in the band's best interests when exercising discretionary control over the territory.

On appeal, the issue was whether it was appropriate for the court to sever the threshold question raised. The Yukon Court of Appeal held that it was not. It was only appropriate to sever issues where it appeared efficiencies would result from having one issue determined in advance of others. To be suitable for severance, an issue had to be capable of being decided independently. The issue of the original Parliamentary intentions underlying the *1870 Order* provisions, which was put before the Supreme Court, was not an independent issue. The question put forward was not decisive of any other issue and could not meaningfully advance the litigation. The *1870 Order* could only be interpreted in light of the Crown and First Nations' pre-existing relationship and the philosophical and jurisprudential precepts underlying Aboriginal title and rights. In trying to determine the issue on a preliminary basis, the judge considered evidence that went beyond the scope of interpreting the *1870 Order*. The judge determined some issues based on incomplete evidence. The Supreme Court order was quashed.

*Rumley*¹⁴⁸

British Columbia [2002] - This case involved an appeal from the Court of Appeal for British Columbia by British Columbia. The respondents were a class of stu-

¹⁴⁸ *Rumley v. British Columbia* [2001] 3 S.C.R. 184

dents who enrolled in a residential school for deaf and blind children where they suffered sexual, physical and emotional abuse. The province argued that because there was a variation in the standard of care precluded the class action from proceeding. However the Supreme Court ruled that a shifting standard of care over time should not be an obstacle in preventing a class action from proceeding. Furthermore, the court argued that if the standard of care has changed, then “the court may find it necessary to provide a nuanced answer to the common question.” In other words, it may be helpful to divide the time period into sections and recognize subclasses in order to provide ample flexibility to deal with the differentiation among members. The appeal was dismissed on the grounds that the respondents satisfied the class action certification requirements.

*Sappier/Gray*¹⁴⁹

Nova Scotia [2007] - Recently, the Supreme Court of Canada clarified the issue of the significance of the practice that was originally set out in the *Van der Peet* test. The principal issue on appeal was whether a practice undertaken for survival purposes could meet the integral to a distinctive culture test. The trial judge concluded that it could not, because all people living in the area at that time would have harvested wood for domestic purposes. The trial judge relied on a statement in *Van der Peet*:

To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).¹⁵⁰

The Supreme Court of Canada went on to note that this statement by Lamer C.J. had resulted in considerable confusion as to whether a practice undertaken strictly for survival purposes could found an aboriginal right claim. Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a ‘core identity’ resulted in a heightened threshold for establishing an aboriginal right.

For this reason, I think it necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society’s identity, i.e. its single most im-

¹⁴⁹ *R. v. Sappier; R. v. Gray* [2006] S.C.J. No. 54

¹⁵⁰ *Sappier/Gray, supra*, at para. [-].

portant defining character. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture.¹⁵¹

The notion that the pre-contact practice must be a 'defining feature' of the aboriginal society, such that the culture would be 'fundamentally altered' without it, has also served to create artificial barriers to the recognition and affirmation of aboriginal rights. The Supreme Court held that lower courts should be cautious in considering whether the particular aboriginal culture would have been fundamentally altered had the gathering activity in question not been pursued.

Sayer

Manitoba [1849] - As early as 1824, the Hudson's Bay Company was aware of the Métis penchant for free trade with the American merchants. The Governor of the Hudson's Bay Company George Simpson, also knew that the struggle for free trade could escalate into military conflict because the Métis had no legal alternative for economic survival in the face of the HBCo's monopoly of Rupert's Land trade. The Métis were not alone in their dissatisfaction with the restrictive trade practices of the Company. The Selkirk settlers, although loyal to the British Crown, were also dissatisfied with lack of commercial markets for the produce from their farms.

By 1835 the Red River settlement contained almost 5,000 people, mostly Métis. The Council of Assiniboia was set up as the governing body for the people of the region. However, it had little effect on Métis free trade practices, which continued to cut into the Company's profits.

In 1849, four young Métis were arrested for illegal trading. Guillaume Sayer, a French-speaking Métis, resisted arrest and was roughed up by Company officers. The situation of his arrest, both the reason for the charges and the manner of the arrest, galvanized the community against the Company.

The trial of Guillaume Sayer was also, in some ways, the end of the influence of Cuthbert Grant. The trial was a test of whether the Warden of the Plains and Chief of the half-breeds still had influence over the half-breeds of Red River. At that time, James Sinclair, a leading free trader, was spoken of as the chief of the English-speaking half-breeds. Meanwhile, the Métis of St. Boniface and Pembina, the men of the buffalo hunt, were following the lead of the Riels, father and son.

¹⁵¹ *Sappier/Gray, supra*, at para. [-].

The Métis (English and French) planned to hold a demonstration on the day of the Sayer trial. After getting wind of the plans, and in the hopes of deflecting the demonstration, Recorder Adam Thom and Acting Governor Caldwell changed the day of the trial to May 17, which was a holiday celebrated by the Catholic Métis. Riel Sr. convinced the Bishop to hold mass at 8:00 a.m. so that the Métis could attend the trial at 11:00 a.m. On the bench were the Magistrates of Assiniboia, Recorder Adam Thom of the Quarterly Court of Assiniboia and Cuthbert Grant, sitting in judgment on his own Métis kin.

Following the mass, several hundred armed Métis (estimates range from 300-500) attended the trial. A group led by Sinclair and escorted by Sheriff Ross forced its way into the court and demanded to be heard. The upshot of the confrontation was that Sinclair represented Sayer and was permitted to challenge the jury selection. He challenged nine jurors and successfully replaced them with Métis (French) and half-breeds (English), some from those gathered outside the courthouse. In the end a jury of seven English speakers and five French speakers heard the case.

During the trial, the defendant Sayer testified that he had not been trading but was exchanging gifts in the Indian manner with relatives. Sayer also testified that Chief Trader Harriott told him he could trade for furs.

Following Thom's summation, the jury found Sayer guilty but recommended mercy in view of Sayer's belief that he had permission to trade. The magistrate complied, finding Sayer guilty and recommended that no sentence be imposed. The charges against the other young Métis were withdrawn. The intention was to assert the law (and the HBC monopoly) while at the same time appeasing the crowd. However, the fact of the conviction was lost on the crowd. When the news of Sayer's dismissal without penalty was shouted from the door, the crowd took it for acquittal and drew the conclusion that in future no one would be prosecuted. In fact, the crowd's assumption proved to be true.

The *Sayer* trial marked the end of any attempt to enforce the monopoly of the Hudson's Bay Company by resort to the courts. The Hudson's Bay Company trade monopoly was effectively broken and the cry of 'le commerce est libre!' became the Métis song of the day.

The Métis followed up their victory on May 17th by demanding that Thom, whom they regarded as an enemy of the Métis, retire from the Court, and that twelve representatives of the Métis be admitted to the Council of Assiniboia. It was a Métis assertion of their rights and in that assertion there was no longer a place Cuthbert Grant was seen now as a too loyal Hudson's Bay Company servant. After the *Sayer* trial, he was no longer regarded as the chief of all the Métis of Red River. It was a new era with new Métis leaders: James Sinclair for the English half-breeds and Louis Riel for the French Métis.

*Shipman*¹⁵²

Ontario [2007] - Shipman and four others, from Walpole Island First Nation, were charged with hunting moose without a licence in Robinson-Superior treaty area. Although Shipman had been granted consent to share in *Michipicoten First Nation's Treaty* rights in the past, he was not granted consent on the day the charges were laid. Furthermore, only one of the others charged had hunted in the Robinson-Superior area on a previous occasion. The issue was whether the accused were entitled to shelter under the hunting rights provided for by the *Robinson-Superior Treaty*. Two lower courts held that the evidence did not support the sheltering right. However, LaForme J.A. of the Ontario Court of Appeal held that "promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time."

In setting out the principles that establish a consent to shelter, Justice LaForme referred to the principles of treaty interpretation, that:

- (1) rigid and static interpretations of treaty rights are to be avoided;
- (2) treaty rights are not frozen in time; and
- (3) the courts must acknowledge the evolution of treaty rights.

In relation to this final point, the court sated that "treaty harvesting rights are communal," and there is evidence that the Michipicoten Ojibway shared their resources. Thus, a contemporary interpretation of the treaty right would include situations where individuals might seek shelter under other treaties. In addition, he made it clear that consent to share resources depends on the evidence of the case at hand. The court cautioned against interpreting these observations as an exhaustive list to consider in determining the treaty right, or treating them as the "mini-

¹⁵² *R. v. Shipman* [2007] O.J. No. 1716 (OCA)

mum evidentiary requirement necessary” to defend any hunting or fishing charges. Finally, in relation to consent, he ruled that normally consent to share resources is required in advance of harvesting and that all who wish to share resources and benefit from the prior consent must be identified.

*Sinclair*¹⁵³

Alberta [2001] - This case was filed in the Federal Court Trial Division. Sam Sinclair is a Métis from Slave Lake, Alberta. In 1990 Sinclair was granted registration as an Indian under the *Indian Act*. It was thought at the time that he had two great-grandparents who were Indians and who did not take scrip. However, in 1998 the Registrar determined that Sinclair’s registration was an error. New facts had come to light showing that Sinclair’s great-grandparents had in fact taken scrip, and therefore he was not entitled to registration as an Indian. The registrar determined that there is no provision in the *Indian Act* for the registration of a person who only has one parent entitled to registration under s. 6(2) of the Act and whose other parent is not entitled to registration because of scrip.

Sinclair filed a statement of claim seeking declarations that sections of the *Indian Act* are unconstitutional on various Charter grounds. He also filed an interlocutory injunction to prevent deletion of his name from the registry pending the outcome of the court cases. As part of the injunction application, Sinclair stated that he would suffer irreparable harm because he would lose access to necessary health benefits. The injunction was granted. The Registrar then brought two questions by way of reference to the Federal Court. The first question was whether the Registrar would err in law if she decided that Mr. Sinclair was not entitled to be registered. In deciding in the negative, the trial judge noted the following:

What the *Indian Act* defines is who is an Indian for its statutory purposes; in this context, how a person feels related culturally or ethnically to Indians is irrelevant.¹⁵⁴

The trial judge answered the second question in the positive. That question was a procedural question – whether the Registrar would err in deleting the name prior to his exhausting all avenues of protest and thus lose access to benefits available to him as an Indian. The Court of Appeal, however, dismissed the entire matter, holding that there was no jurisdiction in the federal court to hear a matter by way of a reference where the facts were in dispute. The matter would have to go to provin-

¹⁵³ *Canada (Registrar, Indian Registrar, Indian and Northern Affairs) v. Sinclair* [2001] FCT 319 (CanLII); [2001] FCT 1418 (CanLII); both rev’d by [2003] FCA 265 (CanLII); leave to appeal to SCC dismissed with costs on April 22, 2004.

¹⁵⁴ *Ibid* at par 74.

cial superior court as set out in the *Indian Act*. The Court of Appeal quashed the decisions, the reference questions, the appeal and the cross appeal.

Smith, Gary M¹⁵⁵

Saskatchewan [2005] – The accused was angling and was charged with exceeding the limit for angled fish. He caught two lake trout on a catch and release lake near Pinehouse. The Crown conceded that Mr. Smith was Métis and had an ancestral connection to the Métis community at Pinehouse Lake and that he had a right to fish for subsistence purposes. However, the Crown argued that because Mr. Smith was angling he was ‘sport fishing’ and therefore did not fall within the subsistence fishing exception. Mr. Smith did not testify and the Crown then argued that there was no evidence that he was fishing for subsistence purposes. The trial judge pointed out that one of the resource officers, on cross-examination, admitted that Mr. Smith had stated, after his fish were seized, that now there would not be enough for a meal. The judge held this was evidence that the accused was fishing for food. He noted that subsistence is not limited to the actual support of the family. The Trial judge also noted that “the fact that a person chooses to fish for food by way of angling, an aboriginal person, does not make it any the less a fishing for food.”

Smith’s Landing First Nation¹⁵⁶

NWT [2012] – The Fort Smith Métis Council built a cabin for the use of its elders in Wood Buffalo National Park. The cabin was built with the full knowledge and support of Parks Canada. Smith’s Landing First Nation filed a judicial review of Parks Canada’s decision to authorize the cabin saying that it was built without appropriate consultation with Smith’s Landing First Nation. The parties settled by consent order, which stated that the Métis elders cabin would remain, that the First Nation and the Métis will work together to establish a protocol for cabin building in that area of the park, that all parties will work together to develop a harvesting cabin policy, that the First Nation elders would be able to use the cabin, that until the harvesting cabin policy is in place the Fort Smith Métis Council won’t authorize or build any other cabins and finally that Parks Canada should have done a better consultation job with Smith’s Landing First Nation.

Sundown¹⁵⁷

¹⁵⁵ *Ibid* at par 74.

¹⁵⁶ *Smith’s Landing First Nation v. Parks Canada Agency and the Fort Smith Métis Council*, Federal Court docket # T-10-11.

¹⁵⁷ *R. v. Sundown* [1999] 1 S.C.R. 393, 1999 CanLII 673 (S.C.C.)

Saskatchewan [1999] - John Sundown, a member of a Cree First Nation in Treaty 6, cut down some trees in a provincial park and used them to build a log cabin. The provincial parks regulations prohibited the construction of a temporary or permanent dwelling on parkland without permission. Pursuant to Treaty 6, Mr. Sundown could hunt for food in the provincial park. He testified that he needed the cabin while hunting, both for shelter and as a place to smoke fish and meat and to skin pelts. Evidence was presented at trial of a long-standing band practice to conduct hunts in the area now included within the park. In order to carry out these hunts shelters were built at the hunting sites. The shelters were originally moss-covered lean-tos, and later tents and log cabins. Mr. Sundown was convicted of building a permanent dwelling on park lands without permission. The summary conviction appeal court quashed the conviction, and the Court of Appeal affirmed that decision. The Supreme Court of Canada held that a hunting cabin was reasonably incidental to the First Nation's right to hunt in their traditional style. The method of hunting was not only traditional but appropriate, and shelter was an important component of it. A reasonable person apprised of the traditional method of hunting would conclude that the treaty right to hunt encompasses the right to build shelters as a reasonable incident to that right. The small log cabin is an appropriate shelter for such hunting in today's society. By building a permanent structure such as a log cabin, the respondent was not asserting a proprietary interest in Park land. Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional method of hunting; it belongs to the band as a whole, not to the respondent or any individual band member.

*Sutherland v. Schultz*¹⁵⁸

Manitoba [1883] - The traffic in scrip led to transfers or assignments of the half-breed interest prior to the identification of land. The main question in this case was whether an agreement for sale by a half-breed entitled to share in the lands set apart for the half-breed children of the heads of families in Manitoba (Charles Ross) conveys title to the purchaser prior to land description. Here, the court finds that this would generally be an equitable interest. Equitable interests can be conveyed but do not, once conveyed, usually become legal interests. Here, the judge finds that the transfer of an equitable interest becomes a legal interest. This is a questionable finding. Logically this should be an agreement to agree and should not constitute legal title transfer until the land is properly described and conveyed to the purchaser.

¹⁵⁸ *Sutherland v. Schultz* (1883), 1 Man. R. 13 (Man. Q.B.)

*Thibeau*¹⁵⁹

Manitoba [1875] A lawyer named Thibeau, purchased on behalf of Sutherland, land scrip from a half-breed named Comptois. The deed of assignment prepared by Thibeau states that he paid Comptois \$35 for the scrip. Sutherland, on whose behalf Thibeau purported to purchase the scrip, never gets it and brings a claim against the lawyer Thibeau. The court finds Thibeau liable to repay the \$35 plus interest and costs. The case is interesting because it shows the value of the scrip lands; in 1877, 160 acres are market valued at \$70 to \$75. Furthermore, the case shows that half-breeds were being paid to procure the scrip once they had assigned it to someone else. In this case Comptois got \$12.

*Thomas*¹⁶⁰

Manitoba [1891] Thomas was a half-breed in possession of a lot of land in Manitoba prior to 1870. The Crown issued him a patent for the land in 1887, even though it formed part of the reserve lands under Treaty 1. Thomas signed onto and took Treaty One annuities from 1871-1874. Prior to taking the treaty annuities he asked the treaty commissioner if taking treaty would jeopardize his land holding. He was informed that it would not. In 1874, Thomas learned that by taking annuities he was considered an Indian and that he would have to forfeit his land. He returned the annuities paid to him that year. In 1876 he was issued half-breed scrip. The Crown sought to have his patent cancelled. The Court noted that Thomas was entitled to rely on the commissioner's assurances even if they were wrong. The Court further noted that even if Thomas was legally an Indian from 1871-1874, he could still have owned land. The Court confirmed Thomas' title.

*Tremblay*¹⁶¹

Québec [2008] – Jean-René Tremblay and La Communauté Métisse du Domaine du Roy et la Seigneurie de Mingan (“DRSM”) filed an interlocutory injunction in the District of Chicoutimi against several First Nations to stop them from signing onto an Agreement in Principle. The Métis community of DRSM claimed the signing of this agreement would infringe their constitutional rights because the agreement would grant the First Nations exclusive aboriginal title. Tremblay argued that an injunction was necessary because the trial process to prove Métis rights was long and would not be concluded prior to the signing of the treaty. The judge disagreed and noted that Delgamuukw recognized joint title. With respect to the

¹⁵⁹ *Re Thibeau* [1877] Man R. Temp. Wood 149 (Man. Q.B.)

¹⁶⁰ *R. v. Thomas* (1891), 2 Ex. C.R. 246 (Exchequer Court of Canada – now the Federal Court)

¹⁶¹ *Tremblay c. Première nation de Pessamit*, 2007 QCCS 5917 (CanLII); 2008 QCCS 1536 (CanLII); 2008 QCCS 1537 (CanLII)

ancestral rights and aboriginal title claimed by the Métis the judge noted that even if the Métis evidence appeared to support their claim of Métis rights, they had not shown that their rights would be damaged by the agreement. The court held that the Agreement could not affect the potential constitutional rights of the Métis and rejected the interlocutory injunction. The tribunal suggested that the Métis community of DRSM invest its resources in the fundamental issue at the heart of the proceedings, proving that they have constitutionally protected aboriginal rights.

Tsilhqo'tin (see William v. British Columbia)

*Tucker and O'Connor*¹⁶²

Ontario [2001] - The only Métis case to date that included consideration of commercial activity is Tucker and O'Connor. Ray Tucker and Ron and Tom O'Connor are commercial fishermen in the Treaty Three area of Ontario (near the Manitoba border). They are both descendants of signatories to the Half Breed Adhesion to Treaty Three. In March of 2001 they both filed judicial review applications in the Ontario Divisional Court. Mr. O'Connor is a commercial fisherman on Lake of the Woods. The government has closed down his fishery in order to support the Indian fishery. Mr. O'Connor argued that this amounts to expropriation of his treaty right and creates a hierarchy of rights as between Indians and Métis, both of which are unconstitutional. Mr. Tucker is a commercial fisherman on Rainy Lake. The government has restricted his fishery to the point where it is, according to Mr. Tucker, not commercially viable. The government is giving preference to the sport fishery, especially American tourists, over his aboriginal fishery. Mr. Tucker says this is unconstitutional. In 1999 the cases were heard by a Fisheries Hearing Officer who determined that the government had no obligation to consider Métis claims to commercial fishing rights. The Minister subsequently moved to close out Mr. O'Connor's fishery and further restrict Mr. Tucker's fishery. The judicial reviews have not been pursued.

*Vanfleet*¹⁶³

Ontario [2005] - A class action proceeding was filed in the Ontario Superior Court of Justice. The claim is on behalf of eight named individuals who assert that they are Métis or non-status Indians. The list of plaintiffs states that they are representatives and claimants on behalf of all Métis individuals and persons who are not

¹⁶² *Tucker v. Snobelen*, S.C.J. Court File #2001-009; *Ronald & Thomas O'Connor v. Snobelen*, S.C.J. Court File #2001-010

¹⁶³ *Vanfleet et al v. Canada* (Métis and non-status Indian Residential Schools class action case) filed in the Ontario Superior Court of Justice on September 30, 2005 (Court file No. 05-CU-032248).

status Indians who attended Residential Schools in Canada, including unnamed individuals in each Canadian province and territory, with their estates, next-of-kin and entities to be added. The action is against the government of Canada. No Churches are named as defendants in this class action.

The Statement of Claim states that approximately 4,500 individuals, who are not status Indians, attended residential schools. Canada was responsible for those schools. The claim is that the plaintiffs were mistreated in the same manner as status Indians and that Canada breached its duty to provide an appropriate education and protect the plaintiffs. Therefore, the plaintiffs claim Canada is liable for, among other things, any sexual, physical or cultural abuse. The Statement of Claim asserts that cutting the plaintiffs off from their families and holding them in school against their will constitutes assault, battery and false imprisonment.

The Statement of Claim appears to focus primarily on those who are non-status Indians because the bulk of the claim is for loss of “First Nations culture, First Nations language and First Nations habits and beliefs.” There is no claim for loss of Métis culture, language, habits or beliefs.

*Vautour*¹⁶⁴

New Brunswick [2001] - Mr. Vautour, a self-represented litigant, was charged with unlawfully fishing in a closed area contrary to the *National Parks Act*. During trial Vautour presented documentation regarding his status as a “Mic Mac Métis” and requested that the court decide his rights with reference to this status. He did not call any evidence and on final submissions decided he wanted to call witnesses regarding his status as Métis. The trial judge refused to reopen the case, stating that witnesses had to have been present at trial. On appeal to the New Brunswick Court of Queen’s Bench, the appeal court held that the trial judge erred in not permitting Vautour to present evidence relating to his status as Métis. The appeal court held that the Crown would not have been prejudiced and the trial would not have been greatly prolonged or complicated. The conviction was set aside and a new trial ordered.

*Vautour*¹⁶⁵

New Brunswick [2010] – The Vautours were charged with fishing for clams in a National Park. The trial judge held that, the “facts of this case provide an example

¹⁶⁴ *R. v. Vautour* [2001] N.B.J. No. 494

¹⁶⁵ *R. v. Vautour*, 2010 NBPC 39

where an over-reliance on genealogy coupled with a period of recent self-identification as ‘Métis’ have largely served to obscure the true legal issue this court must determine.” The court found that there was no historic Métis community prior to the date of effective control, which the court determined was 1670.

*Vicklund*¹⁶⁶

Alberta [2004] – the question before the Métis Settlements Appeals Tribunal (MSAT) was whether s. 75(2)(a) of the *Métis Settlements Act* violated Judy Willier’s s. 15(1) *Charter* equality rights. Section 75(2) of the *Métis Settlements Act* provides that an Indian registered under the *Indian Act* may be approved as a settlement member if the person was registered as an Indian when less than 18 years old and has lived most of their life on settlement, has parents who are members and has been approved for membership by the settlement members and the council. MSAT found as a fact that Ms. Willier was registered as an Indian after she was 18 years of age and as a consequence of her marriage to a registered Indian prior to 1985. She had lived most of her life on settlement and had settlement parents. However, it also found as a fact that Peavine Settlement had approved her membership because they were acting on inaccurate information. MSAT therefore declared Peavine’s approval of her membership to be null and void. MSAT went on to apply a s. 15 *Charter* analysis.

Thus MSAT was satisfied that the differential treatment of Ms. Willier amounted to discrimination within the meaning of section 15 of the *Charter*. To highlight the discrimination it noted the following hypothetical situations:

- If Ms. Willier had married an Indian before she was 18 she would be eligible for membership.
- If Ms. Willier had married a non-Indian she would have been eligible.
- If a Métis man married an Indian woman he would be eligible.
- If Ms. Willier’s Indian status could be canceled she would be eligible.
- If Bill C-31 had restored her status as a non-Indian she would be eligible.
- If Ms. Willier had married an Indian after 1985 she would be eligible.

Section 90 of the *Métis Settlements Act* provides that membership is terminated if a member voluntarily registers as an Indian under the *Indian Act*. As MSAT noted however, section 90 deals with “voluntary registration.” The consequence of

¹⁶⁶ *Vicklund v. Peavine Métis Settlement, Willier and Alberta*, MSAT 2004, Order 160; leave to appeal see *Elizabeth Métis Settlement v. Métis Settlements Appeal Tribunal*, 2004 ABCA 418

voluntary registration is automatic termination of membership and removal from the Métis Settlement membership list. MSAT noted that “the principle is - if you choose to be an Indian you can’t be a member of a Métis Settlement - one or the other but not both.”

MSAT determined that Section 75(2)(a) applies specifically to a person who becomes registered as an Indian when under the age of majority. This would include a person who became registered as an Indian by virtue of marriage. MSAT held that Ms. Willier was clearly of the age of majority and fully responsible for the legal consequences of her decisions. She made a legal decision to enter into a legal contract of marriage and she must accept the consequences of that contract, one of which was automatic registration under the *Indian Act*. MSAT distinguished between the concept of voluntary registration under section 90 and ‘consequential’ registration under section 75(2)(a).

MSAT found that Ms. Willier was treated differently on the basis of age, ethnicity, sex and marital status. It was not satisfied that the violation was rationally connected to the aim of the legislation. The aim of the legislation is to provide a land base for Métis people as opposed to non-Métis people. However, the application of s. 75 to one who acquires registered Indian status by reason of marriage after age 18, has the effect of denying settlement membership and its benefits to one of the very people that the Métis Settlements legislation was designed to protect.

MSAT was satisfied that the discriminatory effect of section 75(2)(a) was not reasonable or justifiable pursuant to section 1 of the *Charter*. The effect of the section, was overbroad and significantly impaired the right to equality on the basis of age, sex, ethnicity and marital status. MSAT found no proportionality between the effect of section 75(2)(a) and its goal. Indeed, MSAT found that:

... its effect would be to prohibit Ms. Willier, a Métis by birth, from obtaining membership in the Métis settlement where she grew up and has spent all but ten years of her life. Her family (parents, children and siblings) live on the settlement; she is in fact a member of the Métis community. She does not identify herself as an Indian, she does not live with Indians. Nevertheless, by section 75(2)(a), she would be excluded from settlement membership solely by virtue of her registered Indian status acquired because of her marriage to an Indian, whom she has been divorced from for over ten years.

MSAT concluded that the prohibitions contained in the *Métis Settlements Act* RSA violated the equality guarantees under the *Charter* and found them to be of

no force and effect. Ms. Willier was confirmed as a member of the Peavine Métis Settlement.

Elizabeth Métis Settlement and the Alberta government sought leave to appeal the MSAT ruling. Elizabeth Settlement was denied leave. It was not found to be directly affected by the MSAT decision because MSAT decisions are not binding on future cases. Alberta was granted leave to appeal on the following issues: (1) whether MSAT erred in law in finding that s. 75(2)(a) infringed s. 15(1) of the *Charter*; (2) whether MSAT properly applied s. 15(2) of the *Charter*; and (3) whether MSAT erred in its application of s. 1 of the *Charter*.

*Watier*¹⁶⁷

Saskatchewan [1999] - Watier was charged with possession of an untagged deer carcass. Watier claimed that s. 46(1) of the *Saskatchewan Wildlife Regulations* offended s. 15(1) of the *Canadian Charter of Rights and Freedoms* as it denied some Métis hunters the same benefits as Indian hunters. Métis could hunt on unoccupied Crown lands in the Northern Administration District (“NAD”) if they also resided within the NAD. Indians could hunt on unoccupied Crown lands throughout Saskatchewan regardless of where they resided. Watier was not hunting and did not reside within the NAD. The defendant presented uncontradicted evidence that he was Métis. The hunting took place approximately 22-100 km south of the NAD. The court found that s. 46(1) of the *Wildlife Regulations* did not reflect any “stereotypical application of presumed group or personal characteristics” and did not otherwise violate s. 15(1) of the *Charter*. The court stated that differential treatment in this case arose not from the singling out of any person or group but from the constitutionally guaranteed rights enjoyed by Indians and by some differently-situated aboriginal hunters in the NAD. The defendant was found guilty.

*(William) Tsilhqot’in Nation*¹⁶⁸

This case began as an attempt by the Tsilhqot’in to stop logging in their traditional territory. The first claim was filed in 1989. That litigation was discontinued and replaced by the current claim. An injunction was granted that halted the possibility of logging until the claim was decided. The case did not begin as an aboriginal title case. In fact the aboriginal title claim was added in 1998 in an amendment. The judge also granted an advance costs order. The trial began in 2002 and went for 339 days over nearly five years.

¹⁶⁷ *R. v. Watier* [1999] SJ No. 880

¹⁶⁸ *William v. British Columbia* 2012 BCCA 285 (*Tsilhqot’in Nation*)

The final amended claim sought a declaration that the Tsilhqot'in Nation has aboriginal title to the Claim area; a declaration that the Xenigwet'in has aboriginal rights to hunt and trap in the Claim area; a declaration that BC does not have jurisdiction to authorize forestry activities in the Claim area; declarations that BC's authorized forestry activities unjustifiably infringed the aboriginal title of the Tsilhqot'in Nation and the aboriginal rights of the Xenigwet'in; injunctive relief restraining BC from authorizing forestry activities in the Claim area in the future; damages for unjustifiable infringement of aboriginal title and rights; and damages for breach of fiduciary duty.

The trial judge dismissed the aboriginal title claims without prejudice to the Tsilhqot'in's ability to make new claims; dismissed the claims for damages; declared that the Tsilhqot'in Nation has aboriginal rights to trap and hunt birds and animals for specified purposes and to trade in skins and pelts to secure a 'moderate livelihood' as well as to capture and use horses; and declared that forestry activities in the Claim area unjustifiably infringed Tsilhqot'in aboriginal rights. The trial judge also held that because of changes to the case during and after trial that prejudiced the Crown, he would not make a decision as to whether or not the Tsilhqot'in had aboriginal title. Instead he gave his 'opinion' that they would indeed have made out their claim to approximately 40% of the Claim area.

All parties appealed the trial judge's decision. The Tsilhqot'in say the trial judge erred in failing to find that they exclusively occupied the entire Claim area at the date of the assertion of sovereignty; that the trial judge should have declared the entire Claim area subject to Tsilhqot'in aboriginal title. Alternatively that the trial judge erred in treating the case as an 'all or nothing claim.' Canada argued that the judge was correct in saying it was an 'all or nothing claim' and further argued that the dismissal should have been final. In other words, that the plaintiffs had to plead every inch of the claim correctly and if they got anything wrong or only proved part of it, they lose and could never bring another claim. BC appealed with respect to the aboriginal rights issues. They said the trial judge was wrong to identify the Tsilhqot'in Nation as the proper rights bearing entity. BC argued that the judge mischaracterized the extent of the hunting and trapping rights and applied an inappropriate burden of proof with respect to infringement. BC further said its consultations were sufficient and that the judge erred in finding that the Tsilhqot'in had a right to trade for a 'moderate livelihood.' Finally, BC argued that capture of horses was not an aboriginal right because it arose from European influences.

This is another case where the plaintiffs sought to have a court make a finding that they have aboriginal title and where the courts declined to answer the question. The *William* case came down in 2012, almost 40 years after *Calder*. Yet there is still not one grain of sand in Canada that a court has declared to be subject to actual aboriginal title. The BC Court of Appeal held that the Tsilhqot'in nation could not claim aboriginal title as a 'territorial claim.' The following is from paragraphs 219-230:

... a territorial claim for Aboriginal title does not meet the tests in *Delgamuukw* and in *Marshall*; *Bernard* ... I do not see a broad territorial claim as fitting within the purposes behind s. 35 of the Constitution Act, 1982 or the rationale for the common law's recognition of Aboriginal title ... I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal ... Aboriginal title cannot generally be proven on a territorial basis, even if there is some evidence showing that the claimant was the only group in a region or that it attempted to exclude outsiders from what it considered to be its traditional territory ... I agree with British Columbia's assertion that what was contemplated were specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis. Examples might include salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps ... Aboriginal title must be proven on a site-specific basis ... In all cases, however, Aboriginal title can only be proven over a definite tract of land the boundaries of which are reasonably capable of definition.¹⁶⁹

The BC Court of Appeal said this was not an 'all or nothing claim.' The court said, at para. 112, that "the idea that a claim for a declaration must be pleaded with precision and that a court cannot grant a declaration that differs from the one sought is not supportable in law." The claim was sufficiently pleaded to allow the court to find that Aboriginal title had been proven in respect of only part of the Claim Area.

...flexibility in the granting of a declaration is particularly important in a case where Aboriginal title is claimed. The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. This was particularly the case with groups such as the Tsilhqot'in, who were semi-nomadic. To require proof of Aboriginal title precisely mirroring the claim would be too exacting.¹⁷⁰

¹⁶⁹ *Ibid*, para. 219-230.

¹⁷⁰ *Ibid*, at para. 112.

That said, the BC Court of Appeal held that the theory advanced by the plaintiffs was a ‘territorial claim,’ which they had not proven, and they should not be able to change the theory in argument at the end of the trial.

The court held that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself.

In the case before us, the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot’in people. The Tsilhqot’in Nation, therefore, is the proper rights holder.¹⁷¹

While the court declined to find aboriginal title in the Claim area, it did uphold in its entirety all of the aboriginal rights claims of the plaintiffs. This included the right to trap for a moderate livelihood and to capture wild horses. The court also held that the Province’s planning and authorization of logging infringed the aboriginal rights of the Tsilhqot’in because “the planning and authorization were incompatible with those rights” and were not justifiable. The BC Court of Appeal upheld the trial judge’s finding that:

Policy and high-level planning, combined with the specific forest tenures, permits and licences granted by British Columbia, led the trial judge to the conclusion that there would be an inevitable detrimental effect on habitat and wildlife populations in the Claim area.¹⁷²

Willison¹⁷³

British Columbia [2006] - On November 26, 2000, near Falkland BC, the defendant shot a 3 x 2 antlered mule deer. The season was open for four-point or better mule deer only. Willison did not produce a provincial hunting licence. Instead he offered his Métis Nation of BC card. At trial, the Crown conceded that Mr. Willison was Métis, that he self-identified as such, had an ancestral connection to the Okanagan Thompson area and if the existence of a contemporary Métis community was proved, then the Crown was prepared to concede that Willison had been accepted by the Salmon Arm Métis local. The Crown further conceded that subsistence hunting was a central and defining feature of the Métis.

What is the site-specific area? The trial judge relied on the terminology from Pow-

¹⁷¹ *Ibid*, at para.150.

¹⁷² *Ibid*, at para. 322.

¹⁷³ *R. v. Willison* [2005] B.C.J No. 924 (BC Prov Ct.); rev’d [2006] B.C.J. No. 1505 (BCSC).

ley where the community was described as the “environs of Sault Ste Marie.” In Willison, the trial judge, therefore, tried to determine the “environs of Falkland.” He concluded that this could only be determined in relation to the Brigade Trail of the fur trade because it was a defining characteristic of the Métis that they were closely associated with the fur trade and had a nomadic lifestyle. The Brigade Trail, which commenced in Fort Kamloops, moved south through the Falklands area and the Okanagan Valley, and continued into the USA to Fort Okanagan. In the result, the trial judge found that the site-specific area, the environs of Falkland, was the area of the Brigade Trail. On appeal to the British Columbia Supreme Court, this finding was left undisturbed.

Did the evidence prove the existence of an historic Métis Community in the area of the brigade trail? The trial judge stated that he gave the term ‘community’ a wide and liberal interpretation. He considered the submissions of counsel as to what constituted a ‘community’ for the purposes of identifying an ‘historic rights-bearing community.’ He considered the obvious characteristics such as a discernible cluster of dwellings of persons who share certain traditions, practices and culture. The trial judge decided that the definition of community must be contextual and site specific and looked at an understanding of ethnic communities within today’s culturally diverse Canada. He asked himself whether a small number of persons could not constitute a meaningful community. In the result, he was satisfied, based on the expert evidence, that for 40 or 50 years the Métis were ‘indispensable’ members of the fur trade economy and contributed massively to European penetration of BC. He limited his findings to the Area of the Brigade Trail, but found that there existed a community of Métis persons during the years of operation of the fur trade in the Brigade Trail area, and that this equated to the Métis community of Sault Ste Marie and disclosed the characteristics of an historic rights-bearing community.

The trial judge’s findings on this issue were overturned by the Supreme Court appeal judge. The appeal judge agreed with the Crown’s submissions that the trial judge erred in importing a 21st century multicultural philosophical precept into the determination of whether there was an historic Métis community. The appeal judge found that the evidence did not demonstrate an historic Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. The evidence, according to the appeal judge, was sparse. While there were a small number of Métis people in the area of the fur brigade trail, they were employees of the Hudson’s Bay Company and left the area after the fur trade declined. The evidence also did not disclose a distinctive and identifiable lifestyle

of culture of a Métis people. Such evidence as was produced (about the buffalo hunt on the Prairies and about the Métis clothing, dance and customs) was not site-specific. Evidence by the defence expert at trial was with respect to the Pacific Northwest generally and not specific to the Kamloops-Okanagan area.

The characteristics of the people were found to be descriptive of ‘a type of employment’ not of a Métis culture. Evidence of similarities of dress and hunting practices of the Red River Métis was ‘sparse evidence of community’ and there was no evidence of how it might define a culturally distinct people in the environs of Falkland. In the end the appeal judge found that the trial judge erred in concluding that the evidence supported the existence of an historic Métis community in the fur brigade area.

How to identify the contemporary rights-bearing community? The trial judge held that the existence of a contemporary rights-bearing community does not hinge on precise numbers of persons, but rather on the conclusion that a meaningful number of persons are Métis and work together to preserve their community. He also noted that under the Métis National Council definition, there is a requirement of historic Métis Nation ancestry which requires real and meaningful pre-conditions demonstrating membership.

These findings were overturned by the appeal judge. The appeal judge agreed with the Crown that the trial judge had erred in expanding the definition of community to include a geographically wide, loosely affiliated group of people of mixed ancestry rather than a group with a distinctive, collective identity, living together in the same geographic area and sharing a common way of life.

What is the date of effective control in the Thompson-Okanagan area? The Crown proposed a time frame of 1858-1862, while the defendants proposed 1859-1864. The trial judge incorporated both and determined that the date of effective control was 1858-1864. The beginning of the gold rush, among other things, in 1858 was cited as the likely determining factor. This finding was not overturned by the appeal judge.

Was there continuity between the historic and contemporary Métis community? The appeal judge found that there was no evidence of sufficient continuity of practice, custom or tradition. The appeal judge found that the trial judge erred by con-

centrating upon the community rather than the practices of the members of that community. The appeal judge noted that there was no discussion of members of the community continuing identifiable Métis practices over the period of time from the assertion of European control to the present. Evidence of ‘going underground’ and the impact of the waning of the fur trade was not sufficient to sustain a finding of the essential continuity. The appeal judge noted that evidence could dispel the purported tendency of the Métis community to go ‘underground’ and stated that oral history could be called to this effect. He also noted that the evidence was deficient in proving a continuation of the relevant practices of members of the community from the time of the historic community to the present.

What is required to prove ancestral connection? At the appeal the Crown argued that Mr. Willison had not demonstrated a sufficient ancestral connection to the relevant historic Métis community. In *Powley*, the Supreme Court of Canada held that it was necessary to provide “some proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption or other means.” Mr. Willison proved that he was a fourth generation descendent of Jane Klyne’s brother. The evidence disclosed that Jane Klyne lived in the Falklands area in the 1840s for a few years. The evidence did not prove that Jane Klyne lived a distinctive Métis lifestyle. On the contrary it disclosed that Jane Klyne was,

the epitome of a respectable Victorian matron ... and when McDonald [her husband] retired to St. Andrews near Montreal in 1849, his wife adapted to her new role with skill and dignity.

The appeal judge described this genealogical evidence as ‘tenuous,’ but did not overturn the trial judge’s finding that there was an appropriate ancestral connection to Métis people who were living in the Falkands area in the 19th century. He noted however that to say Mr. Willison is descended from a Métis woman who was in the area in the 1840s was not the same as saying there was an historic Métis community in the area.

What if any is the role of First Nations in Métis harvesting trials? On appeal the Okanagan Nation Alliance (“ONA”) applied for intervener status. The ONA argued first that it had a right to be consulted with respect to the charges against Mr. Willison because its aboriginal rights might be affected. The ONA also argued that it should be allowed to participate at trial to present its perspective on whether Métis had aboriginal hunting rights in territory it asserted as its own. The Superior

Court judge declined to grant the ONA leave to raise this issue on the appeal, but did grant them intervener status to speak to the application of the *Powley* test.

At the appeal, the ONA again argued that it should be permitted to present evidence at trial on the position of whether Métis had harvesting rights in the Okanagan area. The appeal judge stated that:

A first instance trial of a person, claiming to be Métis, for the offence of hunting out of season is not the place for other interest groups to have status to intervene ... Such groups would not have standing as a “party” to the proceeding. That is demonstrated by asking: if a member of the ONA faced such a summary charge in Provincial Court, would the Métis Nation of British Columbia, or an association of hunters, have such a right? I think it unlikely. That one Métis individual may have a constitutionally protected right to hunt cannot supersede a first nation member’s constitutionally protected right to hunt. I would add that a finding that an individual was exercising a Métis right does not have the same impact as a finding of aboriginal title, a potential finding that might attract submissions from interested parties.

Wright v. Battley¹⁷⁴

Manitoba [1905] - Battley assigned her scrip to the plaintiff. After delivery she took it back. The issue before the court was whether the assignment was lawful. An Order in Council dated June 6th 1901 stated that land scrip was not assignable. It was argued by the defendant that the Order in Council had the full effect of the statute under which it was passed. The court held that the effect of the Order in Council was to prevent the Commissioner from recognizing or accepting assignments of land scrip and from delivering the scrip to the assignees. However, that did not prevent the allottee from disposing of scrip once she had received it. The court noted that it was in Battley’s power only to locate the scrip and that the plaintiff, if she chose not to locate, might end up in possession of no land. The court found that Battley had lawfully purchased the scrip itself. The court distinguished the scrip document from the land. In the result, the court ordered that the plaintiffs were entitled to recover the scrip.

¹⁷⁴ *Wright v. Battley* (1905), 15 Man. R. 322 (Man. K.B.)



Cases by Subject Matter

1870 ORDER – *Ross River Dena*

19th CENTURY CASES – *Desjarlais, Hardy; Desjarlais, Kerr; L’Hirondelle; Sayer*

ABORIGINAL RIGHTS CANNOT BE ASSERTED BY INDIVIDUALS – *Kane, Moulton Contracting, Blais (Ont)*

ANCESTRAL CONNECTION (to historic Métis community)

No evidence – *Blais (Ont) Blais (Mb), Caissie; Guay; Langan; Vautour*

Too distant – *Hopper*

Not required for s. 91(24) – *Daniels*

BURIAL GROUNDS

Failure to protect – *Gladue & Kelly Lake*

CANADIAN BILL OF RIGHTS – *Rocher*

CLASS ACTIONS– *Adams; Aubichon; Rumley; Vanfleet*

CHARTER OF RIGHTS AND FREEDOMS

Only asserted by individuals – *Métis National Council of Women; Misquadis Equality*

s. 15 of the Charter – *Cunningham; Deschambeault; Gladue & Kelly Lake; Langan; Lovelace, McIvor; Métis National Council of Women; Misquadis; Morin & Daigneault; Watier; Vicklund;*

s. 28 of the Charter – *Métis National Council of Women*

COLD LAKE WEAPONS RANGE – *McCallum; Maurice*

COMMERCIAL HARVESTING– *Blais; Marshall #3; Bernard*

COMMUNITY – *Belhumeur; Buckner; Burns; Chiasson; Goodon; Hirsekorn; Langan; Laviolette; Powley; Willison; Hirsekorn*

Continuity between historic and contemporary community - *Powley; Lavio-*

lette; Langan; Goodon; Hirsekorn
Insufficient evidence – *Beaudry; Blais (Ont & Mb); Burns; Caissie; Caston-
guay; Chiasson; Guay; Hirsekorn; Hopper; Vautour*
Mobility – *Goodon; Willison, Hirsekorn*
No historic community prior to effective control – *Caissie; Hirsekorn; Langan;
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