

THE METIS ABORIGINAL RIGHTS REVOLUTION

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## ABSTRACT

When the Métis were included in section 35 of the Constitution Act 1982, Métis leaders were euphoric. With the constitutional recognition of the Métis as one of the three Aboriginal peoples of Canada and the protection of Métis Aboriginal rights in section 35 of the *Constitution Act, 1982*, it was thought that the battle for recognition was over. Surely the next step would be the federal government's recognition of its jurisdiction for the Métis and the recognition by the courts and the Crown that Métis have Aboriginal rights that can be exercised along with those of the Indians and the Inuit.

But Métis expectations were short lived. More than twenty years later, Canada refuses to recognize it has legislative jurisdiction for the Métis, arguing that Métis are a provincial legislative responsibility. And both the federal and provincial governments have failed to conduct themselves in keeping with the principle of the "honour of the Crown" because they consistently deny that Métis have Aboriginal rights. Whenever Métis harvesters attempt to exercise their rights, the Crown is there as a game warden, prosecutor or jailor, but never as a fiduciary to maintain the Crown's honour. The Crown often argues that without a clear understanding of Métis definition and identity, Métis Aboriginal rights would be too difficult to administer. More importantly, the Crown has argued that if Aboriginal rights are linked with pre-contact customs practices and traditions, the Métis could not possibly meet the Aboriginal rights test that has been established by the courts.

But then came the decision in *R. v. Powley* making it clear that the Métis are a distinct people, separate from the Indians and the Inuit, with Aboriginal rights flowing from the customs, practices and traditions of Métis communities that emerged subsequent to the period of first contact, and prior to the exercise of "effective control" by the Crown. The Supreme Court of Canada found in favor of Powley by using a "purposive" approach in the analysis of Métis Aboriginal rights and by not mechanically applying the section 35 justification analysis. The purpose of this thesis is to develop a core set of principles that can be used as a framework for a purposive analysis of Métis Aboriginal rights. The principles support the propositions that: Métis fall within the exclusive legislative jurisdiction of the federal government; that Métis have Aboriginal rights that are recognized and affirmed by section 35; and, that Métis Aboriginal rights are immunized from the application of provincial wildlife regulations because of the doctrine of inter-jurisdictional immunity.

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## CHAPTER I

### THE ABORIGINAL RIGHTS REVOLUTION

#### 1.1 Introduction

The *Royal Proclamation, 1763* articulates a number of principles that continue to be the bedrock of the relationship between the Crown and Indigenous peoples.<sup>1</sup> In the modern Canadian context, these principles include the federal government's exclusive legislative jurisdiction over Indigenous or Aboriginal peoples and their lands, the recognition and protection of Aboriginal and treaty rights, and a special trust-like relationship between Aboriginal peoples and the Crown based on the principle of "the honour of the Crown". The first two of these principles are embedded in constitutional language by virtue of section 91(24) of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982*.<sup>2</sup> The third principle involving the "honour of the Crown including the special "trust like" or fiduciary relationship is a constitutional imperative and part of the analysis related to section 35. It is clear that these principles apply to the relationship between the Crown and the Indians and Inuit respectively. The application of these principles to the Métis has been less clear.

The purpose of this thesis is to create a principled approach to understanding Métis and Métis Aboriginal rights. Understanding Métis rights involves an analysis of the following three key propositions: (1) the Métis fall within the federal government's exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians"; (2) the Métis have Aboriginal rights based upon their distinct culture and identity, and such rights are afforded the same protection under section 35 as are the rights of the Indians and Inuit; and (3) Métis Aboriginal rights fall within the "core of Indianness" and are therefore immunized from the application of provincial laws. Flowing from these propositions are principles which ought to frame the analysis of Métis Aboriginal rights.

In addition to a brief discussion of the above propositions, Chapter I will explore Aboriginal rights theory and describe the methodology used to support the thesis. In Chapter II,

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<sup>1</sup> *Royal Proclamation, 1763*, reprinted in R.S.C. 1985, App. II, No. 1.

the important questions of Métis definition and identity are explored. Chapter III proposes that Métis are Indians for the purposes of section 91(24) of the *Constitution Act, 1867* and explores the doctrine of inter-jurisdictional immunity and its implications for the Métis. Chapter IV provides a discussion of Métis Aboriginal Rights, in light of recent key decisions from the Supreme Court of Canada. Chapter V outlines the basic principles that need to frame a purposive analysis of Métis Aboriginal rights and provides some concluding comments.

### 1.1.1 Section 91(24) and the Métis

Section 91(24) of the *Constitution Act, 1867* is at the heart of the relationship between the Crown and Indigenous peoples. The scope of section 91(24) has been the subject of considerable debate, but it is clear that section 91(24) provides Canada with the exclusive legislative jurisdiction over “Indians and lands reserved for the Indians”. Thus, Canada has the discretion to manage and dispose of Indian lands and Indian monies, and this discretion is at the centre of the special fiduciary relationship between the Crown and Indigenous peoples.<sup>3</sup> However, historically Canada has interpreted the provisions of section 91(24) in a relatively narrow fashion. The initial interpretation meant that the federal government had jurisdiction only over status Indians.<sup>4</sup> In other words, Canada assumed that its legislative jurisdiction was restricted to the administrative categories of Indians created by the *Indian Act*, as opposed to the broader category of “constitutional” Indians, which would include the Inuit, the Indians, and the Métis.<sup>5</sup>

In the 1939 Supreme Court of Canada reference *Re the term “Indians”*,<sup>6</sup> the Court clarified that Canada’s constitutional jurisdiction includes the Inuit and that the term “Indians” is used in section 91(24) in a generic sense. Notwithstanding this, Canada has continued to take the view that its constitutional jurisdiction does not include the Métis. However, *Re the term*

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<sup>2</sup> *Constitution Act, 1867*, formerly the *British North America Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

<sup>3</sup> Mark L. Stevenson & Albert C. Peeling, “Probing the Parameters of Canada’s Crown–Aboriginal Fiduciary Relationship” in Law Commission of Canada & Association of Iroquois and Allied Indians, *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin Law, 2002) 7 [Stevenson & Peeling].

<sup>4</sup> The term “status Indian” refers to those Indians who are registered under the *Indian Act*, *infra* note 5, as amended.

<sup>5</sup> *Indian Act (An Act to amend and consolidate the laws respecting Indians)*, S.C. 1876 (39 Vict.), c. 18.

<sup>6</sup> *Reference Re Term “Indians”*, [1939] S.C.R. 104 [*Re the Term “Indians”*].

"Indians" provided an analytical framework for determining the scope of the term "Indians" as it is used in section 91(24). Pursuant to the analytical framework provided in *Re the term "Indians"*, it would appear that the Métis are constitutional Indians and within the exclusive legislative authority of Parliament. This argument is now bolstered by the inclusion of the Métis as one of the three Aboriginal peoples of Canada pursuant to section 35(2) of the *Constitution Act, 1982*.

### **1.1.2 Métis Aboriginal Rights and Section 35**

The debate over the existence of Métis Aboriginal rights has raged for years. According to the standard approach to section 35, the Aboriginal rights of Aboriginal peoples flow from the practices, customs, and traditions that were exercised by Aboriginal peoples before contact. Since Métis peoples did not exist until after contact, it has been argued that the Métis cannot hold section 35-protected Aboriginal rights.

The theory is appealing because of its simplicity, but it is wrong thinking and wrong in law. It is wrong thinking because it denies the Métis their Aboriginality and ignores much of Canadian history which documents both the struggle for and the recognition of the rights of the Métis as a distinct people. It is wrong in law because it applies the wrong test. The section 35 analytical framework should not and cannot be applied mechanically to the Métis. The test for Métis rights must be given different considerations from tests that apply to the Indian nations because their history and cultures are different. Métis Aboriginal rights are linked with but not dependent upon their Indian forebears. While being mindful of this historic link, Métis rights are sourced in a distinct Métis culture that emerged in the post-contact era. It is the recognition of this duality, or the unique status of the Métis and Métis Aboriginal rights, that underlies the protection of Métis rights, as distinct from Indian or Inuit rights, in section 35. Stated otherwise, the purpose of section 35 for the Métis is "to recognize and affirm the rights of Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors."<sup>7</sup>

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<sup>7</sup> *R. v. Powley*, [2003] 4 C.N.L.R. 321 (S.C.C.) at para. 29 [*Powley*].

### 1.1.3 Métis Rights and “The Core of Indianness”

The concept of the “core of Indianness” remains a bit of a mystery in the field of Indian or Aboriginal law. The term describes that aspect of Indians and Indian lands, including section 35 rights, that is protected from provincial jurisdiction because it is the very heart of Aboriginality or the meaning of being Indian. However, it has not been well articulated, and is usually applied on a case-by-case basis when the courts deem that provincial legislation has gone too far and some protection from provincial laws ought to be afforded. The subject matter of the core of Indianness, or those matters that are immunized from provincial jurisdiction, includes the rights recognized by section 35, that is, Aboriginal and treaty rights. The core of Indianness is informed, if not framed, by section 91(24) of the *Constitution Act, 1867*, section 35 of the *Constitution Act, 1982*, and the principle of the honour of the Crown including the fiduciary relationship and corresponding fiduciary duties.

The general rule in Canada is that provincial laws of general application apply to Indians, both on and off Indian reserve lands, either by their own force or by their invigoration as federal laws.<sup>8</sup> As will be discussed later, the interpretation of this general rule is not as straightforward as it might appear. The core of Indianness that is immunized from the application of provincial laws extends beyond status Indians and Indian reserve lands. It falls within the exclusive legislative jurisdiction of the federal government and is protected from the application of provincial laws. At the same time, this federal core does not create an exclusive federal preserve for Indians on reserve lands. For example, unlike Indian reserves in the United States,<sup>9</sup> reserves in Canada are not federal enclaves<sup>10</sup> because provincial laws of general application apply to Indians, even those Indians living on reserves. So, while there is no exclusive federal enclave on Indian reserves, there is a “core of Indianness” which is immunized from the application of provincial laws

<sup>8</sup> *R. v. Dick*, [1985] 4 C.N.L.R. 55 at 71 (S.C.C.) [*Dick*].

<sup>9</sup> See American case law exploring the doctrine of tribal sovereignty and the federal plenary powers, beginning with *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) [*Johnson*]; and then *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831) [*Cherokee Nation*]; and finally *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) [*Worcester*].

<sup>10</sup> Here it is important to note that while Indian reserves are not exclusive federal enclaves, there is nothing preventing the federal government from fully occupying the field and creating a federal enclave through its own legislative efforts, provided that such legislation has valid Indian policy objectives.

notwithstanding the general nature of such laws. Métis Aboriginal rights fall within the core of Indianness and are therefore immunized from the application of provincial laws.

## 1.2 Theory and Methodology

While there is a distinction between theory and methodology in legal research, more often than not, the distinction is blurred. Methodology normally refers to the approach or the “set or system of methods, principles, and rules for regulating a given discipline ... or, the underlying principles and rules of organization of a philosophical system or inquiry procedure.”<sup>11</sup> Theory is defined as “a coherent group of general propositions used as principles of explanation for a class of phenomena.”<sup>12</sup>

Legal reasoning is based upon a prescribed methodology that often dictates a desired outcome. For instance, a traditional doctrinal approach to the law contemplates an approach based on black letter law, or the law based on court precedents. However, the approach taken by the Supreme Court of Canada can hardly be described as a traditional doctrinal approach, particularly when it comes to developing an Aboriginal rights theory. Rather, the Supreme Court of Canada’s approach has been deliberately “purposive”, thereby enabling the Court to undertake a more contextual analysis in reaching its decisions. A purposive approach to the law tends to allow for more creativity than does classic doctrinal methodology. This thesis takes a purposive approach in order to breathe life into Métis Aboriginal rights. This approach necessarily remains faithful to principles of constitutional interpretation, and appropriately adheres to the reasons for, and underlying assumptions about, the protection of Aboriginal rights in section 35 in Canadian jurisprudence.

Critical legal theory, including critical legal studies, rejects many of the assumptions that form the basis for doctrinal research.<sup>13</sup> Critical legal analysis does not mechanically accept and apply traditional legal doctrines. Instead, it assumes that the law cannot be studied in a vacuum, but must be viewed in its social and political context. Critical legal theorists would not, for

<sup>11</sup> *The Random House Dictionary of the English Language* (unabridged) 2nd ed., s.v. “methodology”.

<sup>12</sup> *Ibid.*, s.v. “theory”.

<sup>13</sup> Nicholas K. Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Press, 1994) at 11 [Blomley]. According to Blomley, there are many schools within critical legal theory, including critical legal studies, Marxism, feminism, and the “law and society” movement. In turn, critical legal studies overlaps with the critical approaches of legal realism, postmodernism, and the social sciences.

example, automatically assume that the process of settlement in North America, rationalized by the “doctrine of discovery”, protected by the “act of state doctrine”, and perpetuated by concepts of “terra nullius” and “extinguishment”, is justifiable. For critical legal scholars, legal discourses are about discourses of power, and the scholars are constantly probing and challenging accepted doctrine.

Critical theory deconstructs rights theories and ideologies that support the status quo. In doing so, critical theory provides analytical tools that help one approach problems from a different perspective, or at least help to identify the problems. As a result, the emphasis of critical theory is on problem identification and analysis as opposed to problem solving and presenting alternative approaches. Central to critical analysis is the process of “deconstruction”. Deconstruction is simply the process of taking apart certain given assumptions on which the status quo is based – in this case the taking apart of rights because the rights themselves are rooted in a paradigm replete with bias and assumptions. Deconstruction involves reversing assumptions of privilege and a presumption that language is a tool of the dominant ideology. Balkin describes reversal of privilege as “the inversion of hierarchies”. Simply put, the method involves looking at a set of circumstances (law, power relations, social structure) from an opposite perspective. The point is, according to Balkin, to investigate what happens when the given “common sense” arrangement is reversed.<sup>14</sup>

A thorough analysis of Indigenous legal rights issues should include both an examination of legal doctrines and a critical analysis of such doctrines. This includes a critical approach to the section 35 analytical framework adopted by the courts in assessing Aboriginal and treaty rights. Mechanically applied, an uncritical, doctrinal approach to section 35 would result in an analysis that finds little room for the existence of Métis Aboriginal rights. This is because the traditional section 35 approach would apply a test describing an Aboriginal right as “an element of a practice, custom or tradition [exercised prior to contact] integral to the distinctive culture of the Aboriginal group claiming the right.”<sup>15</sup> Consequently, a more critical and purposive approach is required if Métis Aboriginal rights are to live. Other research methodologies include comparative

<sup>14</sup> See Jack M. Balkin, “Deconstruction Practice and Legal Theory” (1987) 96 Yale L.J. 743. Blomley argues that critical legal studies in Canada is actually more aligned with Marxism, whereas critical legal studies in the United States is more deconstructionist in orientation (*supra* note 13 at 11).

<sup>15</sup> *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 at para. 46 (S.C.C.) [*Van der Peet*].

research, legal history, and interdisciplinary research. These methods are neither exhaustive nor exclusive. Nor are they necessarily prescriptive. They are analytical tools, and do not necessarily propose solutions.

Traditional law reform tends to look at specific situations and then propose reforms to address specific legal problems. Modern law reform also looks at particular legal issues in the context of a changing society and changing norms and values; it looks at the law as lived. Law reform can take on social and political overtones because of the subject matter that it deals with. For example, a comparison between the legal definition of marriage contrasted with a study of the existing law and changing social norms and conjugal relationships indicates that the law of marriage is ripe for law reform; this was the subject of a report of the Law Commission of Canada.<sup>16</sup> Similarly, the Law Commission's recent report on electoral reform<sup>17</sup> does not reflect a traditional law reform approach. Rather, the report and its recommendations are based upon the need to change the electoral system because of a perceived "democratic deficit" caused in part by an inherent unfairness in the "first-past-the-post" system of elections. As the Law Commission's report concluded, the Canadian electoral system is ripe for reform. So too, matters related to Aboriginal law are also ripe for creative law reform.

### 1.2.1 Aboriginal Rights Theory

For the most part, contemporary Aboriginal rights scholars<sup>18</sup> would agree that Aboriginal rights theory is rooted both in international law and in the common law, and the tendency is to adopt a doctrinal approach.<sup>19</sup> Others, particularly Indigenous scholars, locate Aboriginal rights theory in the customary laws of Indigenous nations and are often critical of the more doctrinal approach to Aboriginal rights.<sup>20</sup>

The common law theory of Aboriginal rights is rooted in basic international law principles found in the writings of early jurists, particularly those of Francesco de Victoria and

<sup>16</sup> Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada, 2001).

<sup>17</sup> Law Commission of Canada, *Voting Counts: Electoral Reform for Canada* (Ottawa: Law Commission of Canada, 2004).

<sup>18</sup> The term "Aboriginal rights scholars" is used to describe non-Aboriginal or non-Indigenous academics who write on Aboriginal rights theory.

<sup>19</sup> See generally the writings of Professors Doug Sanders, Kent McNeil, Brian Slattery, and Michael Jackson.

Hugo Grotius. In the context of ruthless colonial expansion which denied that Indigenous peoples understood concepts of governance or property, Francisco de Victoria noted:

[the Indians] are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops and a system of exchange, all of which call for the use of reason; they also have a kind of religion.<sup>21</sup>

Later, de Victoria wrote:

The barbarians undoubtedly possessed as true dominion, both public and private, as any Christians. That is to say, they could not be robbed of their property... It would be harsh to deny to them, who have never done us any wrong, the rights we concede to Saracens and Jews, who have been continual enemies of the Christian religion. Yet we do not deny the right of ownership of the latter, unless it be the case of Christian lands which they have conquered.<sup>22</sup>

Writing a century after de Victoria, Hugo Grotius rejected the notion that discovery of inhabited lands, in and of itself, confers title, “[f]or discovery applies to those things which belong to no one.”<sup>23</sup>

Centuries later, in the landmark decision *Worcester v. Georgia*, United States Supreme Court Chief Justice Marshall made a similar observation:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.<sup>24</sup>

Relying on international law, the common law has also developed principles that recognize Aboriginal rights and title as pre-existing rights, confirm that Indigenous sovereignty has been diminished, and outline the parameters of a special relationship between the Indigenous peoples and the new sovereign. In North America, *Worcester* was only one of a series of

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<sup>20</sup> See generally the writings of Professors June McCue, John Borrows, and Patricia Monture-Angus.

<sup>21</sup> Francisco de Victoria, *Political Writings*, ed. by Anthony Pagden and Jeremy Lawrance (New York: Cambridge University Press, 1991) at 127.

<sup>22</sup> *Ibid.* at 257.

<sup>23</sup> Hugo Grotius, *The Laws of War and Peace*, Bk II, trans. by F.W. Kelsey (Oxford: Clarendon Press, 1925) at 550.

<sup>24</sup> *Worcester*, *supra* note 9 at 494.

decisions rendered by Marshall C.J. that set out the common law principles related to Aboriginal rights and title, and internal or inherent sovereignty.

Essentially the Marshall decisions determined that European nations that “discovered” other lands had the exclusive right to acquire them from the Indigenous occupants. Marshall C.J. contended that even though inherent Indian powers continued to flow through the Indian nations’ status as “domestic dependent nations”, Indian sovereignty was necessarily diminished upon discovery. Furthermore, Indian lands could only be sold or alienated to the discovering nation, and individual states had no jurisdiction to make laws for the Indians or to deal with Indian lands. In *Johnson v. McIntosh*, Marshall C.J. described the rights of the discoverers:

[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments.... The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.<sup>25</sup>

Continuing on, he described the impact of discovery upon the Indians’ right of sovereignty and soil:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.<sup>26</sup>

Consequently, the relationship that developed between the federal and tribal governments was trust-like. These early concepts continue to be the bedrock of Aboriginal rights theory.

In Canada, Aboriginal rights theory, relying on early international law as interpreted by Marshall C.J., has recognized that Aboriginal title is an independent right to exclusive use of the land,<sup>27</sup> and that Aboriginal rights and treaty rights including the inherent right of self-government exist and require protection.<sup>28</sup> The process of settlement based upon European doctrines of international law and principles outlined in the Marshall decisions are rarely challenged.

<sup>25</sup> *Johnson, ibid.* at 688.

<sup>26</sup> *Ibid.* at 688-89.

<sup>27</sup> See for example, *Delgamuukw v. British Columbia* (1997), [1998] 1 C.N.L.R. 14 (S.C.C.) [*Delgamuukw*]; *Van der Peet, supra* note 15.

<sup>28</sup> *Campbell v. British Columbia (A.G.)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.) [*Campbell* (B.C.S.C.)].

### 1.2.2 Critical Aboriginal Rights Theory

In recognizing Aboriginal rights, including Aboriginal title and the inherent right to self-government, the common law presumes the legitimacy of the acquisition of Indigenous territories and the assertion of sovereignty by the European nations. The traditional doctrinal approach to the common law also assumes the validity of a constitutional structure erected on the process of territorial acquisition and settlement.

In contrast to a traditional doctrinal approach to common law, Professor June McCue argues that Indigenous Peoples' rights flow from the inherent sovereignty of nations.<sup>29</sup> Similar arguments are put forward by other Indigenous scholars including: Professors John Borrows, Patricia Monture-Angus, and Taiaiake Alfred.<sup>30</sup> In her work, McCue provides an overview of how international law allows "discovering nations" to acquire territory occupied by Indigenous peoples. She rejects theories of discovery and the process of territorial acquisition as applied to Indigenous nations, because these theories are rooted in legal doctrine and philosophy that in her view are no longer acceptable. Accordingly, McCue questions the legitimacy of Canada's constitutional authority because the principles used in the assumption of sovereignty are flawed: they are Eurocentric, racist, and have not involved Aboriginal consent. McCue comments that "[t]he illegitimacy of doctrines that sustain the rule of law, upon which the constitution of Canada affords territorial integrity and sovereignty over indigenous peoples, will be validated through indigenous consent."<sup>31</sup>

As just one example, support for McCue's views of the Eurocentric nature of international law can be found in concepts that refer to lands occupied by Indigenous peoples as "terra nullius". International law deemed these lands to be unoccupied because the occupants were non-Christian. McCue juxtaposes her approach and that of other Indigenous scholars who question the legitimacy of Canada's assumption of sovereignty with the views of "colonial

<sup>29</sup> June McCue, "Treaty Making from an Indigenous Perspective: a Ned'ut'en-Canadian Treaty Model" (LL.M. Thesis, University of British Columbia, 1998) [unpublished] [McCue].

<sup>30</sup> See for example, Taiaiake Alfred, *Peace Power Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999); John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002); Patricia Monture-Agnus, *Journeying Forward: Dreaming First Nations Independence* (Halifax, N.S.: Fernwood, 1991).

<sup>31</sup> *Supra* note 29 at 52.

authorities” who accept colonial theories of acquisition,<sup>32</sup> or what McCue refers to as the “Theory of Dispossession”.<sup>33</sup> McCue comments that:

The practice by the Canadian judiciary and scholars has been to 1) accept the assertion of Canadian sovereignty over indigenous peoples and indigenous territories as being valid; 2) ascertain whether the colonial settlers’ law afforded indigenous peoples in non-ceded or conquered territories with common law aboriginal rights to land and governance at the time Crown sovereignty was acquired; and 3) validate any Canadian rights acquired during the dispossession era.<sup>34</sup>

McCue adopts a critical approach in her analysis of the common law theory of Aboriginal rights. She deconstructs Canadian sovereignty, rejecting “the common sense” assumptions around it and proposing new relations between Indigenous nations and Canada, based on assumptions that can be validated from an Indigenous perspective. In McCue’s view, validation requires Indigenous consent.

Marlee Kline looks at Aboriginal issues, including views of how the courts have looked at Aboriginal rights, from a critical race perspective.<sup>35</sup> In Kline’s view, the modest victories in the courts respecting Aboriginal rights have come with a cost. Like other critical legal theorists, Kline is of the view that legal rights cannot be divorced from their political and social context. The theory of Aboriginal rights abounds in stereotypes and racist perspectives that are enforced by the judiciary. Central to Kline’s approach is the deconstruction of language. Language is replete with assumptions and stereotypes that reinforce the dominant theories and power relations. Kline cites language in the trial court decision in *Delgamuukw* to argue her point – for

<sup>32</sup> *Ibid.* at 58-59, where McCue refers to the works of Brian Slattery, Doug Sanders, and Kent McNeil

<sup>33</sup> See generally McCue, *ibid.* at Chapter II.

<sup>34</sup> *Ibid.* at 54-55.

<sup>35</sup> Marlee Kline, “The Colour of Law: Ideological Representations of First Nations in Legal Discourse” (1994) 3 *Social and Legal Studies*, 451 [Kline]. Richard Delgado and Jean Stefancic describe the critical race movement as

a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group- and self-interest, and even feelings and the unconscious.... [C]ritical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.

....It not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better (*Critical Race Theory* (New York: New York University Press, 2001) at 2-3).

example, McEachern C.J.'s characterization of the pre-contact life of the Gitksan and Wet'suet'en as "nasty, brutish and short".

One does not have to look far in the language of Aboriginal rights theory to support Kline's view. The courts have described Aboriginal title as a legal interest that is "inferior" and represents a "burden" on the title of the crown.<sup>36</sup> The courts have also developed theories of "discovery" to justify territorial acquisition. In addition, concepts of "Indianness" referred to by the courts imply a homogeneity that does not exist. In Kline's view, this creates and perpetuates a view of Indigenous peoples that is used to justify decisions that often result in displacement and the reinforcement of dominant ideologies.<sup>37</sup>

Both McCue and Kline use critical theory in developing their approaches and this necessarily involves deconstructing rights rather than building on them. McCue would argue that, while it is well and good that the courts have recognized Aboriginal title as a legal interest, the reference that Aboriginal title is a burden on the title of the Crown misses the point. The Crown acquired its title because of racist and Eurocentric ideologies that are no longer legitimate.

### 1.3 Aboriginal Rights Revolution

It is true that the constitutional framework of Canada and within that framework the common law theory of Aboriginal rights, are influenced both by a Eurocentric view of international law and a by colonial approach to the rights of Indigenous peoples. Given this, constitutional recognition and protection of Aboriginal and treaty rights in Canada did not come easily. It was a long political struggle which took years to accomplish. And while it is likely that there were no Indigenous drafters of the *Constitution Act, 1867*, the national Aboriginal organizations<sup>38</sup> were very much a part of the development and entrenchment of section 35.

The rejection of the legitimacy of the constitutional framework because it is based upon a history of colonialism and racism underestimates the significance of rights-based decisions rooted in section 35. So too does the rejection of the development of the common law theory of Aboriginal rights because it may enforce or justify stereotypes and dominant ideologies. The

<sup>36</sup> See for instance *St Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 at 58 (P.C.).

<sup>37</sup> See Kline, *supra* note 35 at 468.

<sup>38</sup> The Assembly of First Nations, Inuit Tapirisat of Canada, Métis National Council, Native Council of Canada, and Native Women's Association of Canada.

decisions by the Supreme Court of Canada in *Marshall*, *Delgamuukw*, *Sparrow*, *Sioui*, and *Powley* drive home the point that Aboriginal peoples have powerful rights which are enshrined in the Constitution, and when push comes to shove, the courts will enforce these rights.<sup>39</sup> Albert Peeling and I have made this same point in an earlier article:

We don't particularly like the language associated with the concepts used to address legal problems in the field of Canadian Aboriginal law. The language, while perhaps precise in a legal context, does not accurately fit the Crown-Aboriginal relationship. For example, the language associated with the fiduciary relationship speaks of power and discretion on the one hand and vulnerability on the other. These words, typically used to describe the Crown-Aboriginal relationship, do not speak to a relationship of equality but of one party under the protection and discretion of another. The language for concepts used in international law is similarly troubling. Both the "process of settlement" and the "doctrine of discovery" are concepts that perpetuate a Eurocentric mentality. These are the words of colonizers, and they do not accurately reflect a Nation-to-Nation relationship. At the same time, the law provides us with powerful tools, of which the fiduciary duty is one.<sup>40</sup>

The courts are breathing life into the constitutional promises embodied in section 35, but it is a tedious process. What is also required is a recognition and clarification of the gains that have been made and an approach by governments that acknowledges fully their responsibilities to all Aboriginal peoples of Canada, including the Métis. This is a matter involving the honour of the Crown. In addition, there needs to be a consistent and rational approach to section 35 by governments and the lower courts. Breathing life into existing rights should not be undervalued. The dangers in the critical approach are outlined by Patricia Williams:

I by no means want to idealize the importance of rights in a legal system in which rights are so often selectively invoked to draw boundaries, to isolate, and to limit. At the same time, it is very hard to watch the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who experience and express their disempowerment as nothing more or less than the denial of rights.<sup>41</sup>

Though the merits of the approaches taken by McCue and Kline and others are obvious, the cautionary note from Patricia Williams should not be minimized. In the field of Aboriginal law, Aboriginal peoples have made significant advances. And, while it is undeniably important to look at the social and political context in which rights have been developed, it is equally

<sup>39</sup> *R. v. Marshall*, [1999] 4 C.N.L.R. 161 (S.C.C.) [*Marshall*]; *Delgamuukw*, *supra* note 27; *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.) [*Sparrow*]; *R. v. Sioui (A.G.)*, [1990] 3 C.N.L.R. 127 (S.C.C.) [*Sioui*].

<sup>40</sup> Stevenson & Peeling, *supra* note 3 at 7.

<sup>41</sup> Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22:2 Harv. C. R.-C. L.L. Rev. 401 at 405.

important to build on those rights which have been gained through hard-fought battles. The inclusion of the Métis as one of the three Aboriginal peoples of Canada was an enormous victory. Subsequent court battles to recognize that the Crown has a fiduciary relationship to Aboriginal peoples were heroic.<sup>42</sup> The battle by Aboriginal women to challenge outdated and discriminatory provisions in the *Indian Act* was formidable and ultimately led to the removal of the former section 12(1)(b) and related sections. The heroics of the Wet'suwet'en and the Gitksan nations in achieving their hard-fought victory in *Delgamuukw* is the stuff of legend.<sup>43</sup> And the struggle by Métis to access their rights flowing from the section 35 constitutional promise has been no less heroic.<sup>44</sup> The battles in the courts over the meaning of section 35 and the consultation and accommodation over Aboriginal rights continue. The Haida Nation recently redefined the concept of the honour of the Crown in relation to the duty to consult and accommodate section 35 rights.<sup>45</sup>

And it is not only in the courts that the rights battle is fought. At the negotiation table, after the great decision in *Calder v. British Columbia (A.G.)*,<sup>46</sup> the Nisga'a Nation took their battle to the boardrooms and successfully concluded the *Nisga'a Treaty*.<sup>47</sup> Many First Nations in British Columbia and elsewhere are trying to do the same. Nor is it only the rights battles that deserve to be celebrated; the warriors also need to be honoured. Leaders like Earl Muldoe, Herb George, Frank Calder, Joe Gosnell, and Harry Daniels who have led the battles in both the courtrooms and the boardrooms need to be acknowledged.<sup>48</sup> The fact that these battles were fought under a legal order that perpetuates the myth of colonialism does not tarnish the victories, of which these are but a few.

<sup>42</sup> *Guerin v. Canada* (1984), [1985] 1 C.N.L.R. 120 (S.C.C.) [*Guerin*].

<sup>43</sup> *Supra* note 28.

<sup>44</sup> See *Powley*, *supra* note 7; and *R. v. Blais*, [2003] 4 C.N.L.R. 219 (S.C.C.) [*Blais*].

<sup>45</sup> *Haida Nation v. British Columbia (Ministry of Forests)*, 2004 SCC 73 [*Haida Nation*]; [2002] 2 C.N.L.R. 121 (B.C.C.A.) [*Haida I*].

<sup>46</sup> *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 [*Calder*].

<sup>47</sup> *Nisga'a Final Agreement Act*, R.S.C. 2000, c. 7. and *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2.

<sup>48</sup> Earl Muldoe was the third person to carry the Gitksan name *Delgamuukw* during the *Delgamuukw* trial and appeal. Herb George, a Wet'suwet'en hereditary chief carrying the name Satsan, led the Wet'suwet'en in the *Delgamuukw* litigation and also at the negotiating table. Frank Calder was the Nisga'a plaintiff in *Calder*, *supra*, note 47. Joe Gosnell was the chief negotiator for the Nisga'a Nation in the treaty talks. Harry Daniels was the Métis leader who was responsible, along with others, for the inclusion of the term "Métis" in s. 35.

The rejection of rights based upon an unacceptable superstructure is difficult to reconcile with the underlying purposes of section 35. The section 35 framework was founded on the need to recognize that this country was occupied by Indigenous nations and to reconcile Indigenous occupation with the assertion of Crown sovereignty. And if the underlying purposes of section 35 are properly understood and applied, the section 35 rights framework is a powerful tool. Rights themselves are a powerful tool and are intended to protect the more vulnerable from the terror of the privileged.

Perhaps no one has said it more eloquently than Canadian author and nationalist Michael Ignatieff<sup>49</sup> in his acclaimed work *The Rights Revolution*:

Rights are something more than dry, legalistic phrases. Because they represent our attempt to give legal meaning to the values we care most about – dignity, equality, and respect – rights have worked their way deep inside our psyches. Rights are not just instruments of the law, they are expressions of our moral identity as a people. When we see justice done – for example, when an unjustly imprisoned person walks free, when a person long crushed by oppression stands up and demands her right to be heard – we feel a deep emotion rise within us. That emotion is the longing to live in a fair world. Rights may be precise, legalistic, and dry, but they are the chief means by which human beings express this longing.<sup>50</sup>

In recognizing the importance of democratic rights and freedoms, Ignatieff is also aware that there are competing rights, and that these competing rights often must be balanced. Rights that can be overridden by force, by presidential decree, by the will of the majority, or by corrupt courts are not rights at all. Rights held by a majority cannot be allowed to overrule the rights held by a smaller minority. That is precisely what happened during the colonial period, and this cannot be allowed to happen in the post-1982 era in Canada.

Rights enacted into law by democratically elected representatives express the will of the people. But there are also rights whose purpose is to protect people from that will, to set limits on what majorities can do. Human rights and constitutionally guaranteed rights are supposed to have a special immunity from restriction by the majority. This allows them to act as a bulwark for the freedom of the vulnerable. So the rights revolution has a double aspect: it has been about both enhancing our right to be equal and protecting our right to be different. Trying to do both – that is, enhancing equality while safeguarding difference – is the essential challenge of the rights revolution,...

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<sup>49</sup> I do not necessarily agree with all of Ignatieff's works, but certain passages from *The Rights Revolution* are extremely insightful.

<sup>50</sup> Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000) at 2.

#### 1.4 The Law as Lived

Ignatieff also notes that pointing to the illegitimacy of the settlement process may not be the way to resolve disputes related to Aboriginal rights. Settlement is a fact, as is section 35. There is a need to acknowledge both the rights of the majority and the fact of settlement and to reconcile these with section 35 rights. This approach reflects the Supreme Court of Canada's recognition of rights and the reconciliation of rights with Crown sovereignty, and the approach taken by Marshall C.J. in *Worcester*.

It is also important to bear in mind the reality that rights are not a holy grail. The reliance on rights alone is clearly not enough. Rights without the political will to enforce them, or without a strong independent judiciary or without a sufficient understanding of the underlying purposes of those rights, will ultimately be eroded. Likewise rights that do not evolve as society evolves will become anachronistic. Nathalie Des Rosiers says this with respect to the rights revolution and specifically to the rights-based law reform movement which occurred from the 1960s to the 1980s:

But rights are not enough. Three or four decades later, the results have proved to be mixed. There were some successes, but there were also some failures. As a rule, the failures resulted from the fact that it was impossible for the very poor and the highly vulnerable to assert their rights, to gain access to the courts or even know which laws existed to help them. Blame can be placed on the lack of adequate legal aid, the lateness of the judicial process, the lack of access to justice to explain how some social legislation seemed to have little impact on the people who needed it most. There are still door-to-door salesperson who sell overpriced vacuum cleaners. There are still landlords who increase their tenants' rents with impunity and leave their premises in appalling conditions. Women still earn less than men and racism continues to exist in our society. And the poor still make up the majority of the inmates in our penitentiaries and prisons. [footnotes omitted]<sup>52</sup>

In another context, notwithstanding the promises of section 35, rights are being ignored. Harvesters who hold Aboriginal rights are being prosecuted, compensation is not being paid to Aboriginal title holders, and infringements of rights and title are occurring as these words are being read. As well, little is being done to remove economic barriers, nor are consultations with Indigenous land holders being conducted in a meaningful way.

Until recently, Métis Aboriginal rights have only been honoured in the breach. Whenever Métis harvesters go out into the bush to exercise their Aboriginal rights, the Crown is there as

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<sup>51</sup> *Ibid.*

inquisitor and prosecutor. So, it is not enough to simply sit on one's rights. Rights must be lived by those who cherish them. Rights must be vigorously defended from incursion by the state or by powerful vested interests. It is only by embracing rights and vigorously standing up for those rights in the courts, in the boardrooms, or through civil disobedience that rights will be honoured.

The law is alive and always in need of reform. The Law Commission of Canada advocates constantly revisiting the law to ensure that it keeps up with changes in society, so that the law in the statutes is reflected in the law as lived. Statute makers must look beyond the words of the law and look at the law as it is lived by the people who are affected, and at the society in which the laws are being administered. Des Rosiers writes: "Law reform is no longer possible unless it consults with the people who will be affected by the reform, and not only the lawyers and the judges. They are the people who will have to live with it and who make it.... ...They renew the law by living it."<sup>53</sup>

It is the law as lived that must be reflected in the law as described in statutes. The true law reformers are those who embrace their rights, live them, and defend them. The efforts of people like Powley, Sioui, and Sparrow, and their contribution to law reform must also be celebrated. Without those who have the courage to live the law, law reform would be in danger of losing touch with reality and become the exclusive reserve of the law makers and law reform commissioners.

In any event, the limits of a purely rights-based approach must be acknowledged. A technical focus on the rights analysis without an appreciation of the underlying purposes of the rights, or without the capacity to enforce those rights, is inadequate. The purposes behind the entrenchment of the rights must be fully understood by the decision makers. There needs to be a greater willingness to breathe life into the legal language. Breathing life into section 35 must not be done in a mechanical way, but in a way that reflects the underlying purposes of that section. In order to ensure that the law is alive, we must constantly reflect upon those underlying purposes. If those underlying purposes become a straitjacket as opposed to a tool for giving fuller expression to section 35 rights, then the underlying purposes themselves must be reconsidered.

The underlying purposes of section 35 include a balance that recognizes rights flowing

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<sup>52</sup> Nathalie Des Rosiers, "Rights Are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers" (2002) 18:3 *Touro L. Rev.* 443 at 447.

<sup>53</sup> *Ibid.* at 454.

from the fact of prior Aboriginal occupation and the reconciliation of those rights with the assertion of Crown sovereignty. For the Métis, the underlying purposes of section 35 include recognition by the framers of the Constitution that Métis rights, flowing from a distinct culture that emerged in the post-contract and pre-effective control era, require protection. Section 35 involves a careful balancing act, and skewing towards one or the other of these purposes makes the accommodation of rights more difficult. Likewise, narrowly interpreting those purposes in a way that would see the rights of one of the three Aboriginal peoples of Canada ignored or given less attention would also make the accommodation of rights more difficult. It is this balanced approach that is required if we are to live together in this country and if the rights of Aboriginal peoples are to be given the respect they deserve.

### **1.5 Methodological Approach**

The legal methodology used in this thesis is a purposive one as well as an approach rooted in the “law as lived”. The approach recognizes that the rights protected in section 35 are a result of balancing the interests of the European settlers with the rights of Indigenous peoples. And though there is a power imbalance between Indigenous peoples and the interests represented by the Crown, section 35 provides a powerful tool to address this imbalance. The recognition of section 35 rights has been the result of hard fought battles in the courts, the boardrooms and on the land, by those that live the law through the exercise of their rights. The importance of such rights should not be minimized, but celebrated.

For the Métis, it is the law as lived by Métis harvesters that contributed to the Métis Aboriginal Rights Revolution culminating in the *Powley* decision and the recognition that Métis Aboriginal rights stand on par with the rights of the Indians the Inuit. It has also been through a purposive approach to section 35 that the courts have been able to find space for the recognition and affirmation of Métis harvesting rights.

But in finding space for the recognition of Métis harvesting rights, the courts have entered the debate around Métis identify. The question of “Who are the Métis?” will be explored in the next chapter.

## CHAPTER II

### WHO ARE THE METIS?

#### 2.1 Introduction

It is primarily culture that sets the Métis apart from other Aboriginal peoples. Many Canadians have mixed Aboriginal/non-Aboriginal ancestry, but that does not make them Métis or even Aboriginal. Some of them identify themselves as First Nations persons or Inuit, some as Métis and some as non-Aboriginal. What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis.<sup>1</sup>

It is difficult to give succinct response to the question, Who are the Métis? Identification with a distinct Métis culture may be the common thread in any attempt to define or describe the Métis, but even this begs further questions – questions involving matters of history, politics, culture, law, personal preferences, and a variety of precise definitions, such as, anyone with “mixed blood”, a specified blood quantum, links to specific geographic areas, or a combination of the three. Questions of Métis definition and identity are critical because only those persons who fall within an established definition, that is, those persons who meet the criteria of Métis identity, are entitled to exercise Métis Aboriginal rights. This chapter will provide a brief history of the Métis and address the knotty question of Métis identity.

#### 2.2 Who are the Métis?

At the most basic level, the term “Métis” refers to peoples of mixed Aboriginal and European (mainly French/British) heritage who historically developed distinct cultural practices and institutions.<sup>2</sup> According to the Royal Commission on Aboriginal Peoples (Royal Commission), the common theme is that Métis “embrace both sides of their heritage”.<sup>3</sup> To better understand

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<sup>1</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 202 [RRCAP, vol. 4]. I will refer to this commission as the “Royal Commission”, and to its five-volume report in its entirety simply as “RRCAP”.

<sup>2</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 634-37 [RRCAP, vol. 1]; Paul L.A.H. Chartrand, “Introduction” in Paul L.A.H. Chartrand, ed., *Who are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (Saskatoon: Purich, 2002) 15 [Chartrand, *Who Are Canada's Aboriginal Peoples?*]. According to Chartrand, “The original meaning of the term *métis* evokes the idea of a ‘mixed’ or ‘in-between’ people” (at 24).

<sup>3</sup> RRCAP, vol. 1, *ibid.* at 637.

who the Métis are, a brief historical overview of the emergence of the Métis Nation on the prairies is essential. An understanding of the emergence of other Métis communities is helpful.

### 2.2.1 Early History

The group history of the Métis begins with early post-contact relationships between European colonialists – principally fur traders and fishermen – and the Indian, or Indigenous, nations who inhabited the lands before their arrival. During the early years of colonialism, when resource extraction for transport to Europe was the primary motivation for the presence of foreigners on North American soil, neither France nor Britain paid much attention to establishing or administering colonial institutions or communities. Instead, they relied on a network of individuals who would live in the new land and reap its bounty for the benefit of the European nations. This network included Indigenous peoples who would serve as allies, guides, and the source of furs, fish, and other resources. Foreigners who remained in the new land for extended periods of time often integrated with the communities and lifestyles of the Indian nations, marrying and having families with Indian women. Over the course of generations, communities of mixed-ancestry developed in their own right, with distinct social systems, economic and cultural practices, and languages. For example, *Michif*, a distinct dialect incorporating parts of the vocabularies and structures of its Indian and French precursors, was widely used amongst the Métis of the Red River Settlement.

The first Métis to self-identify as a distinct social and political group with its own history and power lived along the old trading routes of the North-Western Territory.<sup>4</sup> The nucleus of this group formed in what is now southern Manitoba, but also encompassed large parts of present-day Saskatchewan, Alberta, sections of British Columbia, the Northwest Territories, and Ontario. This large geographic area is now referred to as the Métis homeland, and its footprint roughly covers the boundaries of the territory formerly referred to as “Rupert’s Land”.<sup>5</sup>

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<sup>4</sup> The present-day Northwest Territories evolved as follows: Before 1870, the British divided western Canada into the North-Western Territory (Yukon, N.W.T., B.C., Alta., and Sask.) and Rupert’s Land (Hudson Bay drainage basin). These two regions were united in 1870 as the North-West Territories, which they remained until 1905. (*The Canadian Oxford Dictionary*, 1998).

<sup>5</sup> For a description of the history and boundaries of Rupert’s Land, see Kent McNeil, *Native Rights and the Boundaries of Rupert’s Land and the North-Western Territory*, Studies in Aboriginal Rights No. 4, (Saskatoon: University of Saskatchewan, Native Law Centre, 1982).

### 2.2.2 Emergence of the “Métis Nation” in the Prairies

As the pressure from settlers for agricultural land increased in the eighteenth and early nineteenth centuries, families of mixed Indian and French descent in southern Quebec consistently found their untitled lands being taken by the settlement process and their lifestyles and economic resources threatened. During this time, many of these families moved to the Great Lakes region, but when similar patterns of settlement surrounded them again, they moved west to join communities of fur-traders and Indians and their descendants who had settled around the confluence of the Red and Assiniboine Rivers. This location was strategically important for the fur trade because the two rivers were key transportation routes for both the Hudson’s Bay Company trading to the north and the North West Company operations to the east. This junction became a convenient trading post and supply centre, and during the first few years of the nineteenth century, the “Red River Settlement” became well established. Many of the Métis inhabitants shared a history of working for the fur trade and migrating to keep ahead of settlement.

In 1810, Hudson’s Bay Company administrators decided to promote increased immigration by Scottish farmers to settle in the Red River area en masse. In 1811, approximately 116,000 square miles of land in present-day southern Manitoba were granted for settlement to Lord Selkirk, a prominent shareholder in the Hudson’s Bay Company.<sup>6</sup> Both the Indians and the Métis living in the region recognized the threat to their lands and lifestyles, and began organizing to oppose the immigration plans. Escalating tension culminated in the Battle of Seven Oaks, in which the Métis confronted the Hudson’s Bay Company’s armed force. Twenty-one members of the Company’s force, including Governor Semple, were killed.<sup>7</sup> In this battle, according to the Royal Commission, the Métis “showed remarkable resolve to retreat no more. Their victory that day in June dramatized their proclamation of a ‘New Nation’ that was no mere rhetorical affirmation.”<sup>8</sup>

In the decades following the Battle of Seven Oaks, inhabitants of the Red River Settlement and Rupert’s Land had to contend with the merger of the Hudson’s Bay Company

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<sup>6</sup> Dick, L., “The Seven Oaks Incident and the Construction of a Historical Tradition, 1816 to 1970”, *Journal of the C.H.A.* 1991 *Revue de la S.H.C.*, quoted in Métis Culture and Heritage Resource Centre, “Battle of Seven Oaks”, online: Métis Resource Centre <http://www.metisresourcecentre.mb.ca/history> [Battle of Seven Oaks].

<sup>7</sup> RRCAP, vol. 4, *supra* note 1 at 220-21.

<sup>8</sup> RRCAP, vol. 1, *supra* note 2 at 151.

and the North West Company, which rendered 1,300 employees redundant. In addition to this, there was a reduction in the east–west fur trade, and this coincided with the Hudson’s Bay Company’s strategy to restrict trading activities in order to suppress the growth of the Métis communities.<sup>9</sup> In the face of these pressures, the Métis managed to maintain an economic base in traditional resource harvesting combined with a range of other activities, and to consolidate their distinctive lifestyle and burgeoning political identity.<sup>10</sup>

The context changed significantly in the late 1860s when the newly formed Dominion of Canada was negotiating the 1870 purchase of Rupert’s Land and the North-Western Territory from the Hudson’s Bay Company. It quickly became clear that the intention of the federal government was to advance large-scale immigration to settle the region and cultivate the lands. In 1869, a contingent of surveyors and administrators headed to the Red River area to prepare for the planned distribution of land for settlement. The Métis reacted by ordering the surveyors to stop their efforts, and further prevented other federal administrators from entering the area. This Métis group formed the Métis Nation’s provisional government headed by Louis Riel. The provisional government sent a delegation to Ottawa to negotiate the terms for the entry of the territory under its control, its into the Dominion of Canada.

### 2.2.3 *Manitoba Act, 1870*

The negotiations between representatives of the Métis Nation and the government of Canada resulted in many promises, a written agreement, and the intention to implement that agreement by the *Manitoba Act, 1870*.<sup>11</sup> The Act included terms that recognized Manitoba as a province, preserved the French language and Roman Catholic education there, and gave legal title to settled and common lands. Section 31 provided for the distribution of 1.4 million acres to the children of Métis heads of households “towards the extinguishment of the Indian title to the lands in the Province ... for the benefit of the families of the half-breed residents”.

<sup>9</sup> *Ibid.* at 151, and RRCAP, vol. 4, *supra* note 1 at 221.

<sup>10</sup> John Giokas & Robert K. Groves, “Collective and Individual Recognition in Canada: The *Indian Act* Regime” in Paul L.A.H. Chartrand, ed., *Who are Canada’s Aboriginal Peoples?* *supra* note 2 at 87.

<sup>11</sup> *Manitoba Act*, S.C. 1870 (33 Vict.), c. 3, reprinted in R.S.C. 1985, No. 8. The *Manitoba Act, 1870* was given retroactive constitutional status in the *Constitution Act, 1871* (U.K.), formerly the *British North America Act, 1871*, (U.K.), 34 & 35 Vict., c. 28, reprinted in R.S.C. 1985, App. II, No. 11 [*Manitoba Act*].

The terms of the *Manitoba Act* make it clear that the Métis Nation was entering into the agreement as a cohesive and distinct social group, and that the government of Canada would respect and preserve that integrity while pursuing the growth of the Canadian nation. In effect, however, the Act yielded little benefit for Métis families.<sup>12</sup> Significant land distribution did not occur until at least five years after the Act had become law. During that period, Métis residents of Manitoba witnessed waves of immigration and the continued undermining of their economic base. By the time individual Métis actually received their land allotment, many were in desperate economic circumstances. Often the land allotment was far from family and community and of little value to the Métis.<sup>13</sup> Land agents and some administrators took advantage of the plight of the Métis by purchasing their land, bestowed in the form of “scrip”, for next to nothing.<sup>14</sup>

The combination of abuse, delays in implementation, and poor administration of the *Manitoba Act* had devastating consequences for the Métis. Many Métis left the province and integrated into or began new communities further west. Those who stayed lived in an increasingly foreign environment of European immigrants and an agriculturally based economy. The federal government, although aware of the situation, did little to stop unscrupulous behaviour, protect the Métis, or even ensure that the Act was properly implemented. At various times, the federal government set up commissions to study the matter, but the condemning observations of the commissions – and several individual administrators – resulted in little by way of redemptive federal policy or castigation of abusive federal agents. In the end, less than fifteen per cent of distributed land stayed with the Métis.<sup>15</sup>

#### **2.2.4 Dominion Lands Act**

In 1870, the Dominion of Canada purchased from the Hudson’s Bay Company the North-Western Territory and Rupert’s Land, which included all of the basin of Hudson Bay – an area

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<sup>12</sup> RRCAP, vol. 4, *supra* note 1 at 223-26, 333-43. Also see Catherine E. Bell, *Contemporary Métis Justice: The Settlement Way* (Saskatoon: Native Law Centre, 1999) at 3-9 [Bell, *Contemporary Métis Justice*].

<sup>13</sup> RRCAP, vol. 4, *ibid.* at 224.

<sup>14</sup> *Ibid.* There are many examples of corrupt agents and administrators. See RRCAP, vol. 4, *supra* note 1 at 224-25; and Linda Goyette, “The X Files” *Canadian Geographic* 123:2 (March/April 2003) 70.

<sup>15</sup> John Giokas & Paul L.A.H. Chartrand, “Who are the Métis in Section 35? A Review of the Law and Policy Relating to Métis and ‘Mixed Blood’ People in Canada” in Chartrand, *Who are Canada’s Aboriginal Peoples?* at 89 [Giokas & Chartrand].

far more vast than the land designated to be the province of Manitoba under the *Manitoba Act*.<sup>16</sup> In 1872, the federal government enacted the *Dominion Lands Act* to apply to the newly acquired territory.<sup>17</sup> Unlike the *Manitoba Act*, the *Dominion Lands Act* was implemented without agreement or consultation with the Métis and was not given constitutional status. But just as had been the case with the *Manitoba Act*, the implementation of the *Dominion Lands Act* was plagued by delays, misadministration, and abuses. In 1879, the Act was amended to include a provision granting discretionary power to the federal government to distribute land to the Métis – and linking the land distribution to the extinguishment of any Aboriginal title.<sup>18</sup> However, the Act was never applied to large segments of the Métis homeland, nor to Quebec, and Labrador.

In the meantime, the ongoing erosion of the Métis economic base was exacerbated by relentless immigration and the disappearance of the buffalo herds. In 1884, Métis in Saskatchewan convinced Louis Riel to leave his exile in the United States (where he had fled to escape government repression against the Métis in Manitoba in the 1870s) to negotiate on their behalf with the Canadian government. Negotiations proved fruitless, and the Métis formed a new provisional government as well as an armed force to intensify pressure on the Canadian government to recognize their claims that the purposes behind the negotiation of Manitoba into Confederation had not been honoured and that the land entitlement provision of the *Manitoba Act* was not being implemented. They found moral and armed support among neighbouring Indian nations similarly threatened by official policies. In 1885, the federal government responded by sending a large military expedition to confront both the Indians and the Métis. The most notable battle took place in Batoche, Saskatchewan. After Batoche, the federal government went on to root out any remaining Indian and Métis resistance. Its parting response to Indian and Métis claims was to sentence the Indian leaders Big Bear and Poundmaker to three years' incarceration, and hang Riel for treason.<sup>19</sup>

In sum, while paying lip service to the protection of and benefits to the Métis, the *Manitoba Act* and the *Dominion Lands Act* essentially gave Métis people the right to exchange their "Indian title" for land allotments. Though both these enactments included provisions for

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<sup>16</sup> Rupert's Land and North-Western Territory Order (U.K.). June 23, 1870.

<sup>17</sup> *Dominion Lands Act*, S.C. 1872 (35 Vict.), c. 23.

<sup>18</sup> *Dominion Lands Act*, S.C. 1879 (42 Vict.), c. 31.

<sup>19</sup> RRCAP, vol. 4, *supra* note 1 at 226.

land distribution, the legislation, combined with government repression<sup>20</sup> ultimately served to fragment the Métis Nation, undermine Métis identity, culture, and governance, and open up the Métis homeland for settlement.

### 2.2.5 Ontario

In 1876, the government of Canada introduced the *Indian Act*,<sup>21</sup> which barred persons of mixed-ancestry who had received scrip from claiming Indian status.<sup>22</sup> And in treaty negotiations, Métis who had received scrip even if no value or benefit had been derived from it were excluded from claiming treaty benefits or Indian status. Through the new Act and the treaty process, the government effectively added another level of injustice to the Métis burden. According to John Giokas and Paul Chartrand,

The net result of the issuance of scrip to mixed-ancestry persons living an Indian lifestyle who were not connected to the historic Red River Métis Nation or to the related Rupert's Land Métis communities ... was to create a large population of persons of Aboriginal descent, culture, and lifestyle who were not recognized by Canada as being Indians and who therefore had no legal right to live as members of bands on Indian reserves.<sup>23</sup>

The *Indian Act* (1876) and government treaty policy had a particular effect in Ontario. There was a large Métis population there, but no scrip system and therefore no specific legislative mechanism to distribute lands to the Métis because of the limited application of the *Manitoba Act* and the *Dominion Lands Act*. Many members of the Métis Nation in the Prairie provinces and communities in the North-Western Territory had ancestors in Ontario, mainly in the Great Lakes region. Some who remained in that area integrated into Indian or settler societies; others established distinct Métis communities that never integrated with their neighbouring Indian nations and never had the opportunity to claim scrip lands. Several of these

<sup>20</sup> The military action at Batoche was only the most notable example.

<sup>21</sup> *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876 (39 Vict.) Cap. 18 [*Indian Act* (1876)].

<sup>22</sup> For example, s. 3(e) reads:

Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that 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, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty.

<sup>23</sup> Giokas & Chartrand, *supra* note 15 at 91. The authors also discuss the term "half-breed" *ibid.* at 86.

communities still exist today, notably Sault Ste. Marie and Rainy River.<sup>24</sup> When the Crown negotiator, W.B. Robinson, treated with the Indian nations of north-western Ontario in 1850, he did not directly include the Métis who had not received scrip, although he left it up to individual chiefs to “give as much or as little to that class of claimants as they pleased.”<sup>25</sup> Only a few chiefs and fewer administrators included the Métis as treaty beneficiaries. In 1873, a “half-breed adhesion” was added to *Treaty No. 3* at Rainy River, but soon after, the government repudiated it.<sup>26</sup>

### 2.2.6 Labrador and the Maritimes

Beginning in the sixteenth century, French fishermen came to harvest the rich stocks off the east coast of Canada. Most of them came only seasonally and many of those lived on the fishing vessels, but some stayed on to live amongst the Innu and Inuit people inhabiting the shores of Labrador. By the eighteenth century, distinctive mixed-heritage communities had formed there. The development of these “mixed-blood” communities of Labrador was, to a certain extent, fostered by their relative isolation and protection from large-scale settlement and governmental administration. For many years, their members were known as *livyers*. Their cultural practices combined traditions from their European and Indigenous ancestors to suit the specific context of their communities, and their economy was based on harvesting the land and the sea.<sup>27</sup> This life continued for generations with little interference by the government, but in recent decades that relationship has changed. As the government intensifies its efforts to regulate the fisheries of the approximately twenty “mixed-blood” communities, the inhabitants are becoming increasingly conscious of and protective of their traditional practices, and have come to identify and organize themselves around a Métis history and identity.<sup>28</sup>

Elsewhere in Maritime Canada, intermarriage and cultural exchange between the Mi’kmaq and Wuastukwiuk (Maliseet) people and traders, settlers, and French and British

<sup>24</sup> *Ibid.* at 260.

<sup>25</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, (Toronto: Belfords, Clarke: 1880) at 20.

<sup>26</sup> *Treaty No. 3 (Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods; The Northwest Angle Treaty)*, October 1873, reprinted in *ibid.* at 44-76.

<sup>27</sup> RRCAP, vol. 4, *supra* note 1 at 203. Also see Giokas & Chartrand, *supra* note 4 at 101.

<sup>28</sup> For example, see *Labrador Métis Assn. v. Canada (Minister of Fisheries & Oceans)* (1997), 126 F.T.R. 115 (F.C.T.D.).

fishermen also resulted in the formation of geographically and socially distinct communities. In fact, "One of the earliest recorded uses of the word Métis ('Isle Metisse') occurs on a map drawn in 1758 of the area drained by the Saint John River."<sup>29</sup> These communities suffered the effects of the British expulsion of the Acadians in the 1750s and 60s, and were similarly excluded from treating with the government. These communities have no relationship with the Métis Nation and the Métis homeland.

### 2.3 Métis Definition and Identity

Today, there are many distinctive Métis communities across Canada and there is more than one Métis culture. While the three Prairie provinces and portions of British Columbia and Ontario are generally described as the Métis Nation homeland, there are other Métis groups living beyond the homeland. It is estimated that there are approximately 140,000 self-identifying Métis people in Canada today.<sup>30</sup> However, the question of Métis definition or identity has been ongoing, and this has had a bearing on Métis demographics.

The different views of who the Métis are have been the subject of much debate among the Métis National Council and the Congress of Aboriginal Peoples and others. In its contribution to the debate, the Royal Commission recommended the following:

#### 4.5.2

Every person who

- (a) identifies himself or herself as Métis and
- (b) is accepted as such by the nation of Métis people with which that person wishes to be associated, on the basis of criteria and procedures determined by that nation be recognized as a member of that nation for purposes of nation-to-nation negotiations and as Métis for that purpose.<sup>31</sup>

The Congress of Aboriginal Peoples was originally incorporated to act as a lobbying group at the national level for the Métis and Non-Status Indians.<sup>32</sup> The Congress and some of its affiliates have expressed the view that the term "Métis" refers to a broad category of persons

<sup>29</sup> RRCAP, vol. 4, *supra* note 1 at 257.

<sup>30</sup> RRCAP, vol 1, *supra* note 2 at 19.

<sup>31</sup> *Ibid.* at 203.

<sup>32</sup> The Congress of Aboriginal Peoples was formerly known as the Native Council of Canada. The term "non-status Indian" has a number of meanings. Prior to the 1985 amendments to the *Indian Act*, "non-status" was often used to refer to women and their offspring who had lost their status under the *Indian Act* because of the former s. 12(1)(b) and other provisions. More generally, it refers to those Indians who are not registered under the *Indian Act*. It may or may not be used to refer to the Métis.

with mixed Aboriginal and European ancestry. This would include all people of “mixed blood” who identify themselves as Métis.<sup>33</sup> It is important to note that it was the Native Council of Canada, the predecessor of the current Congress of Aboriginal Peoples, which negotiated the inclusion of the term “Métis” as one of the Aboriginal peoples of Canada referred to in section 35 of the *Constitution Act, 1982*.

The Métis National Council, representing the Métis from primarily the Prairie provinces, views them as a distinct socio-cultural entity which emerged primarily in the Saskatchewan, the Red, and the Assiniboine River valleys out of special historical and political circumstances, uniting to oppose Canadian expansion into the Northwest.<sup>34</sup> As earlier suggested, this distinct socio-cultural entity culminated in the birth of the Métis Nation under the political and spiritual leadership of Louis Riel.<sup>35</sup> As these Métis were entitled to be allotted parcels of land under the *Manitoba Act* and the *Dominion Lands Act*, the Métis National Council has been of the view that the Métis today are the descendants of those Métis who were entitled to receive allotments of land under the provisions of these two acts.<sup>36</sup>

During the negotiations around the failed *Charlottetown Accord*, the Métis National Council, Canada, and several provinces worked out an accord to address specific Métis issues. The *Métis Nation Accord* was an appendix to the *Charlottetown Accord* and defined Métis as follows:

Métis means an Aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit and is a descendant of those Métis who received or were entitled to receive land grants and/or scrip under the provisions of the *Manitoba Act, 1870* or the *Dominion Lands Acts*, as enacted from time to time.<sup>37</sup>

<sup>33</sup> Paul L.A.H. Chartrand & John Giokas, “Defining the Métis People: The Hard Case of Canadian Aboriginal Law” in Paul L.A.H. Chartrand, ed., *Who Are Canada’s Aboriginal Peoples?* (Saskatoon: Purich, 2002) 268 at 289-90 [Chartrand & Giokas, *Defining the Métis People*].

<sup>34</sup> Catherine E. Bell, “Who are the Métis People in Section 35(2)?” (1991) 29:2 Alta. L. Rev. 351 at 357, 359 [Bell, “Who are the Métis?”].

<sup>35</sup> RRCAP, vol. 4, *supra* note 1 at 220-23. Also see generally D. Bruce Sealey & A. Lussier, *The Métis: Canada’s Forgotten People* (Winnipeg: Manitoba Métis Federation Press, 1975).

<sup>36</sup> D. Purich, *The Métis* (Toronto: James Lorimer & Company, 1988) at 133-50, reprinted in Bell, “Who Are the Métis?”, *supra* note 34 at 374.

<sup>37</sup> *Métis Nation Accord*, s.1(a), online: Indian and Northern Affairs [http://www.ainc-inac.gc.ca/2002-templates/ssi/print\\_e.asp](http://www.ainc-inac.gc.ca/2002-templates/ssi/print_e.asp); Also found at: *Métis Nation Accord*, s. 1(a), reprinted in RRCAP, vol. 4, *supra* note 1 at 377. The accord was agreed to by the Métis National Council, the four Western Provinces (and later the Northwest Territories), and Canada during the round of negotiations leading to the *Charlottetown Accord* (“Consensus Report on the Constitution: Final Text”, Charlottetown, August 28, 1992), online: UNI.ca <http://www.uni.ca/Charlottetown.html>.

Catherine Bell holds an interesting position on the Métis definition question.<sup>38</sup> Bell has observed that while there are three distinct groups of Aboriginal peoples – the Indians, the Inuit, and the Métis – there are numerous distinct collectivities within these groups and each of these distinct collectivities is a people. Each of these sub-groups of the broader categories of Aboriginal peoples might, in Bell’s view, have the same qualities as a “people” in international law, as proposed by the International Commission of Jurists. The commission proposed the use of the following criteria for the purposes of identifying a “people” in International Law: “a common history; racial or ethnic ties; cultural or linguistic ties; religious or ideological ties; a common territory or geographical location; a common economic base; and a sufficient number of people.”<sup>39</sup> Bell postulates that the Métis might be better served by focusing their attention on the international arena rather than resting their aspirations with the federal government in the hope that Canada will accept its responsibilities under section 91(24). Similarly, Paul Chartrand argues that the focus should be on “peoplehood”.<sup>40</sup> In a similar vein, Clem Chartier rightly argues that being Métis is much more than simply a question of genetics or biology and having parents of mixed Indian and European ancestry. Chartier argues that there must be a link to a people or a nation and that the Métis Nation meets the criteria of a “people” as outlined by the International Commission of Jurists.<sup>41</sup> This view has also been expressed by the Métis National Council publication which states:

The essence of Metis existence can best be described as Metis nationalism which embodies the political consciousness of that newly emerged community of aboriginal people. This political consciousness, which also found expression in cultural activities and values, was confined to a specific geographic area of North America. This geographic area, commonly referred to as the Metis Nation or Homeland, encompasses the Prairie Provinces, north-eastern British Columbia,

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<sup>38</sup> See Bell, “Who are the Métis?”, *supra* note 34.

<sup>39</sup> International Commission of Jurists Secretariat, “The Events in East Pakistan: 1971” (1972) 8 Int’l Comm. Jur. Rev. 23, reprinted in Bell, *ibid.* at 364. Note: Bell references this quotation to Indian Law Resource Centre, *Indian Rights – Human Rights: Handbook for Indians on International Human Complaint Procedures* (Washington: Indian Law Resource Centre, 1984) at 14. If you use this, add it to the Bibliography. See also Michael Jackson, “Aboriginal Rights Litigation and International Law: The Gitksan and Wet’suwet’en Case” (Paper prepared for the Canadian Bar Association Conference on Aboriginal Peoples in the Canadian Constitutional Context, Montreal, April 29-30, 1995) [unpublished]. In this article, Jackson notes that the Commission is careful to point out that no single criteria, if unmet, would be fatal to peoplehood.

<sup>40</sup> Chartrand & Giokas, *Defining the Métis People*, *supra* note 33 at 295.

<sup>41</sup> Clem Chartier, *In the Best Interests of the Métis Child* (University of Saskatchewan, Native Law Centre, 1988) at 7 [Chartier].

part of the Northwest Territories, northwestern Ontario and a portion of the northern United States.<sup>42</sup>

While scholars, historians and Métis political organizations have debated the questions of Métis definition and identity, the Supreme Court of Canada has also entered the fray. In the historic decision in *R. v. Powley*, the Supreme Court of Canada adopted the view that the Métis are a distinct people with a distinct culture and identity, separate from their Indian and European forebears.<sup>43</sup> In so doing, the Court put an end to the debate around whether the term “Métis” refers to anyone of mixed European and Aboriginal ancestry or to a distinct people with their own cultures and traditions: “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.”<sup>44</sup>

On the question of Métis identity, the Court agreed with the general criteria that had been articulated by the lower courts as well as the general criteria promoted by many Métis political organizations: self-identification, ancestral connection, and community acceptance. More specifically, the Court said this:

First, the claimant must *self-identify* as a member of a Métis community. The self-identification should not be of recent vintage: While an individual’s self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s.35 right will not satisfy the self-identification requirement.

Second, the claimant must present evidence of an *ancestral connection* to a historic Métis community. This objective requirement ensures that beneficiaries of s35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum “blood quantum”, but we would require some proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative. In this case, the Powleys’ Métis ancestry is not disputed.

Third, the claimant must demonstrate that he or she is *accepted by the modern community* whose continuity with the historic community provides the legal foundation for the right being claimed. 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

<sup>42</sup> Métis National Council *The Métis: A Western Canadian Phenomenon* quoted from Chartier, *Ibid*, at 8.

<sup>43</sup> *R. v. Powley*, [2003] 4 C.N.L.R. 321 (S.C.C.) [*Powley*].

<sup>44</sup> *Ibid.* at para. 10.

participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups.<sup>45</sup>

The three criteria – self-identification, ancestral connection to a historic Métis community, and community acceptance – are generally reflective of the definitions accepted by many Métis organizations. These criteria make sense and eliminate the notion that anyone of “mixed-blood” descent alone is Métis.

However, the third criterion does require closer attention. Here, the claimant must demonstrate acceptance by the modern community “whose continuity with the historic community provides the legal foundation for the right being claimed.” Under the test laid out in *Powley*, no matter how a modern community defines itself, there must be some continuity with a historic Métis community. It is these historic communities which provide the legal basis for the right being claimed. As discussed later in Chapter IV, the historic communities are those that emerged in the period of time subsequent to the contact era, but prior to the imposition of effective control by the colonizers. While some Métis communities may have coalesced after effective control was asserted by the colonizers because of forced or voluntary migration, the rights claimants must show an ancestral connection to the original communities that emerged during the critical time period. It is only these historic Métis communities and descendants from these communities that can demonstrate continuity that satisfy the *Powley* test. The Supreme Court of Canada did not however address the question of whether these historic Métis communities must be somehow linked with the Métis Nation, or linked with “peoplehood” as suggested by Chartier, Chartand and other Métis scholars.<sup>46</sup> This leaves open the question of whether it is possible to be Métis without an affiliation to the Métis Nation. However, logic would seem to dictate that affiliation with a nation is important, just as being Canadian necessarily linked with the nation of Canada.

Chapter III explores the question of federal jurisdiction with respect to the Métis, and the question of inter-jurisdictional immunity.

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<sup>45</sup> *Ibid.* at paras. 31-33.

<sup>46</sup> For a thorough review of different Métis definitions and a discussion of the Métis National Council view, see Chartier *supra* note 41 at 7-27.

## CHAPTER III

### SECTION 91(24) AND THE FEDERAL GOVERNMENT'S LEGISLATIVE JURISDICTION OVER THE MÉTIS<sup>1</sup>

#### 3.1 Introduction

This chapter will explore the meaning of the term “Indians” for the purposes of section 91(24) of the Constitution Act, 1867 with a view of determining the scope of Canada’s legislative jurisdiction under that section. In addition, this chapter will explore the content of the heart of section 91(24), or the “core of Indianness” and examine the implications for the Métis, particularly in relation to the doctrine of inter-jurisdictional immunity.

In Canada, there are few constitutional provisions fraught with the enormous social, economic, and political difficulties, and yet unresolved uncertainties, as those dealing with Aboriginal peoples and their rights.<sup>2</sup> The ongoing controversies in New Brunswick and Nova Scotia regarding MicMac (Mi’kmaq) treaty rights to harvest seafood for a “moderate livelihood” described as “food, clothing and housing supplemented by a few amenities”<sup>3</sup> are a case in point. Similarly in British Columbia, the Supreme Court of Canada’s decision in *Delgamuukw*<sup>4</sup> has resulted in political and economic uncertainty and associated social tensions. More recently, decisions related to the duty of the Crown to consult and accommodate Aboriginal rights and title have redefined the obligations of the Crown to consult and raised the ante in treaty negotiations in British Columbia<sup>5</sup>

There are numerous reasons for the tensions and behaviour patterns that flow from these and similar Aboriginal and treaty rights-based decisions. Some of the reasons are related to ignorance, intolerance, and pure racism, while others are directly related to the economic consequences that may result from a reallocation of natural resources. At the heart of these

<sup>1</sup> For an earlier version of this chapter, see Mark L. Stevenson, “Section 91(24) and Canada’s Legislative Jurisdiction with Respect to the Métis” (2002) 1 *Indigenous L.J.* 237 [Stevenson].

<sup>2</sup> See generally Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, B.C.: Theytus Books, 2003).

<sup>3</sup> *R. v. Marshall*, [1999] 4 C.N.L.R. 161 at para. 59 (S.C.C.) [Marshall].

<sup>4</sup> *Delgamuukw v. British Columbia* (1997), [1998] 1 C.N.L.R. 14 (S.C.C.) [Delgamuukw].

<sup>5</sup> See decisions in *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, 2004 SCC 74; [2002] 2 C.N.L.R. 312 (B.C.C.A.) [Taku Tlingit (B.C.C.A.)]; and *Haida Nation v. British Columbia (Ministry of Forests)*, 2004 SCC 73; [2002] 2 C.N.L.R. 121 (B.C.C.A.) [Haida (B.C.C.A.)].

tensions is the inherent lack of clarity around some of the most fundamental provisions of the Canadian constitutional framework, which serve to recognize the rights of Aboriginal peoples.

For example, section 91(24) of the *Constitution Act, 1867*<sup>6</sup> provides that the federal government has the exclusive legislative jurisdiction over “Indians, and Lands reserved for the Indians”. On its face, it is a seemingly clear constitutional provision. Yet even today, we are unclear as to its scope. Section 91(24) has been the subject of extensive debate. Historically, Canada has interpreted the provisions of section 91(24) in a relatively narrow fashion. The courts have generally considered section 91(24) as encompassing two subject matters: Indians, and Indian lands, or “Lands reserved for the Indians”.

Today, there is not much doubt about the breadth of the expression “Lands reserved for the Indians”, though the scope of Indian lands was not understood at the outset. Prior to a number of early Privy Council cases, it was thought that “Lands reserved for the Indians” included only Indian reserves under the *Indian Act*.<sup>7</sup> It is now clear that the expression includes lands reserved in any way for the use and benefit of Indians, including Aboriginal title lands<sup>8</sup> and lands set aside for individual Indians “in severalty” pursuant to treaty provisions.<sup>9</sup> The debate now is around the extent to which such lands are protected under section 35 and immunized from provincial intrusion.

With respect to the first element – “Indians” – Canada interpreted this provision to mean that the federal government has jurisdiction only for status Indians.<sup>10</sup> In other words, Canada assumed that its legislative jurisdiction was restricted to the administrative categories of Indians created by the *Indian Act*<sup>11</sup> as opposed to the broader category of “constitutional” Indians, which would include Inuit and Métis as well as Indians. Even more puzzling has been the federal government’s policy of attempting to distinguish between on- and off-reserve status Indians, claiming that while it has jurisdiction over status Indians, the provinces have the responsibility for those Indians residing off-reserve. Canada has used the distinctions between legislative jurisdiction and responsibility to rationalize an on-reserve and off-reserve allocation of responsibilities. This on- and off-reserve distinction, while creating a tidy division of

<sup>6</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (formerly the *British North America Act, 1867*) [*Constitution Act, 1867*].

<sup>7</sup> See in particular, *St Catherine’s Milling and Lumber Co. v. Ontario* (1888), 14 App. Cas. 46 (P.C.).

<sup>8</sup> *Delgamuukw*, *supra* note 4.

<sup>9</sup> *Chingee v. British Columbia (A.G.)*, 2002 B.C.S.C. 1568.

<sup>10</sup> The term “status Indian” refers to those Indians who are registered under the *Indian Act*. *infra* note 11.

<sup>11</sup> *Indian Act*, R.S.C. 1985, c. 1-5.

responsibilities, has no basis in law as a mechanism for allocating legislative jurisdiction between Canada and the provinces.

With the inclusion of sections 35(1), 35(2), and 37.1 in the *Constitution Act, 1982*, there was some hope that the jurisdictional issue would be settled.<sup>12</sup> The provisions of section 35(1) provide for the recognition of Aboriginal and treaty rights. More importantly for the Métis, section 35(2) includes the Métis as one of the Aboriginal peoples of Canada who would presumably be entitled to exercise the section 35(1) rights.<sup>13</sup> However, although the provisions of section 35 recognized and affirmed rights and gave a general view of who would be entitled to exercise those rights, they lack clarity and precise definition. For this reason, section 37.1 (formerly section 37) established a process to help clarify the rights of Aboriginal peoples as provided for in section 35. One of the items on the agenda for the section 37 process was the issue of jurisdiction over the Métis. Métis hopes that the jurisdiction question would be clarified were short lived.<sup>14</sup> The section 37 promise of constitutional reform ended in bitter disappointment, there was no resolution of the jurisdiction question. The section 37 process failed, leaving it to the courts to consider and examine what the politicians should have resolved. This has left the constitutional framework with the interesting anomaly of having the federal government clearly with the legislative jurisdiction over two of the three Aboriginal peoples of Canada, the Indians and the Inuit, while there is a de facto jurisdictional vacuum around the Métis. At the same time, the Constitution identifies the Aboriginal peoples of Canada as the Indians, the Inuit, and the Métis, and recognizes their Aboriginal and treaty rights.

So, there remains an outstanding question of whether or not the legislative jurisdiction with respect to the Métis rests with Canada or with the provinces. Oddly enough, Canada continues to hold the view that although it has the legislative jurisdiction over the Indians and the Inuit, jurisdiction over the Métis rests with the provincial governments. According to the Report of the Royal Commission on Aboriginal Peoples (RRCAP), while academic opinion supports the

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<sup>12</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*].

<sup>13</sup> The Métis constitute one of the three Aboriginal peoples of Canada and have mixed Aboriginal and European ancestry. Until s. 35 of the *Constitution Act, 1982* was introduced, there was some question as to whether the Métis would be considered an Indigenous or an Aboriginal people.

<sup>14</sup> At the outset, not all Métis were convinced that an amendment to s. 91(24) of the *Constitution Act, 1867* would be beneficial. The Alberta Métis were particularly concerned about the implications that changes to s. 91(24) would have respecting their relationship with the Province of Alberta and the Métis settlement legislation enacted by the Province.

view that Métis are Indians under section 91(24) of the *Constitution Act, 1867*,<sup>15</sup> the federal government has consistently refused to accept this view.<sup>16</sup> However, it is arguable that the federal government acknowledged its jurisdiction over Métis in the *Manitoba Act, 1870*<sup>17</sup> which, as discussed in the previous chapter, set aside vast tracts of land for Métis heads of families.<sup>18</sup> Likewise, the *Dominion Land Act*<sup>19</sup> also provided for land grants to Métis.<sup>20</sup> In any event, in spite of Canada's refusal to acknowledge it has legislative jurisdiction over the Métis, a reasonable analysis is likely to conclude that, for the purposes of section 91(24) of the *Constitution Act, 1867*, Métis are Indians, over whom the federal government has exclusive jurisdiction.<sup>21</sup>

### 3.2 Federal Perspective

The issue of legislative jurisdiction over the Métis has been debated on several occasions during the various constitutional conferences dealing with Aboriginal matters. The federal government has consistently stated that the Métis fall within the authority of the provincial governments, notwithstanding the federal government's jurisdiction over Indians and Indian lands. This view was clearly stated by former Prime Minister Pierre Elliot Trudeau in his opening statement at the 1983 First Ministers Conference on Aboriginal Constitutional Matters. In outlining the federal view, Trudeau stated: "The provincial governments are mainly responsible for the Métis. While in the view of the federal government they do not fall within the definition of the word "Indians"

<sup>15</sup> *Constitution Act, 1867*, *supra* note 6. Also see *Reference Re Term "Indians"*, [1939] S.C.R. 104 [*Re the Term "Indians"*] and s. 3.3.1 of this paper. This case decided that Inuit were considered Indians for the purpose of s. 91(24).

<sup>16</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1966) at 209 [RRCAP, vol. 4]. Also see Peter Hogg, *Constitutional Law of Canada, Student Edition* (Toronto: Carswell, 1997) at 560 [Hogg].

<sup>17</sup> The *Manitoba Act*, S.C. 1870 (33 Vict.), c. 3 [*Manitoba Act*] became part of the Constitution of Canada pursuant to the *Constitution Act, 1871*, formerly the *British North America Act, 1871*, (U.K.), 34 & 35 Vict., c. 28, reprinted in R.S.C. 1985, App. II, No. 11.

<sup>18</sup> Chartrand, Paul L.A.H., "Aboriginal Rights: The Dispossession of the Métis" (1991) 29:3 Osgoode Hall L.J. 457 [Chartrand, *Dispossession*] at 466.

<sup>19</sup> *Dominion Lands Act* (1879) 42 Vict. c. 31 at s. 125(e) [*Dominion Lands Act*].

<sup>20</sup> RRCAP, vol. 4, *supra* note 16 at 209.

<sup>21</sup> Clem Chartier. "'Indian': An Analysis of the Term as Used in Section 91(24) of the *British North American Act, 1867*" (1978) 43:1 Sask. L. Rev. 37. See also Stevenson, *supra* note 1.

in section 91(24) of the *Constitution Act, 1867*, the federal government accepts a measure of responsibility to them as disadvantaged peoples.”<sup>22</sup>

The federal view was subsequently elaborated at a later meeting of justice ministers by then federal Minister of Justice John Crosbie. At that meeting, Mr. Crosbie stated: “The federal Department of Justice has concluded ... has reached a legal opinion that Parliament cannot legislate for Métis as a distinct people. That is a legal opinion. We cannot legislate for Métis as a distinct people. On the other hand, Parliament can legislate for Indians irrespective of whether they are registered or not because of section 91(24).”<sup>23</sup>

The federal view seems to be based on the fact that the Métis identify themselves as a people, distinct from Indians, as do the Inuit. The view as presented by then Minister of Justice, Mr. Crosbie represents an interesting theory but the legal basis is somewhat dubious. One can illustrate the point by extending by analogy the federal reasoning to section 91(25) of the *Constitution Act, 1987*. Pursuant to that section, the federal government has legislative jurisdiction over “naturalization and aliens”. The federal government would not be relieved of its jurisdiction if a specific group of aliens identified themselves as other than aliens. Such persons would remain within Canada’s legislative jurisdiction over “naturalization and aliens” notwithstanding the manner in which they chose to identify themselves. If the Métis are indeed included as Indians and fall within the federal government’s exclusive legislative jurisdiction, the federal government may only divest that jurisdiction by way of a constitutional amendment. There are no provisions for amendments through self-identification. And, as already noted, the Inuit identify themselves as distinct from the Indians and this does not affect their inclusion under section 91(24).

### **3.3 Purposive Analysis of Section 91(24)**

#### **3.3.1 *Re the Term “Indians”***

A purposive examination of the scope of the federal government’s exclusive legislative jurisdiction respecting section 91(24) and the meaning of the term “Indian” should begin with a

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<sup>22</sup> Then Prime Minister Pierre Elliot Trudeau, (Opening statement presented to the First Ministers Conference on Aboriginal Constitutional Matters, Ottawa, March 8-9, 1983).

<sup>23</sup> Transcript of the December 17-18, 1984 Federal Provincial Meeting of Ministers on Aboriginal Constitutional Matters, at 237.

discussion of the Supreme Court of Canada's 1939 decision in *Re the term "Indians"*.<sup>24</sup> This matter involved a dispute between Quebec and Canada about legislative jurisdiction over the Inuit. The question was referred to the Supreme Court of Canada. The Court was asked to determine whether the Inuit inhabitants of Quebec were Indians for the purposes of section 91(24) of the *Constitution Act, 1867*. In determining the meaning of the word "Indians", the Court looked at documents relating to the Aboriginal inhabitants of North America around the time of Confederation. In its decision, the Court stated that in the interpretation of constitutional provisions related to the 1867 Act, it was necessary to rely on documents contemporaneous with Confederation. The Court relied heavily on documents relating to the treatment of Indians in the former Rupert's Land just prior to Confederation. The principle source examined by the Court was the *Report from the Select Committee on the Hudson's Bay Company*.<sup>25</sup> In its report the select committee was considering the desires of Canada to assume possession of the British territories in North America administered by the Hudson's Bay Company. In commenting on the report, Duff C.J. noted: "It is quite clear from the material before us that this Report was the principle source of information as regards the aborigines in those territories until some years after Confederation."<sup>26</sup>

After studying the select committee's report, including the map and the census found in the appendix, the Chief Justice concluded that these documents use the term "Indians" in a generic sense, interchangeable with the term "aborigines". The Chief Justice stated: "It is indisputable that in the census and in the map the 'esquimaux' fall under the general designation 'Indians' and that, indeed, in these documents, 'Indians' is used as synonymous with 'aborigines'."<sup>27</sup>

Kerwin J. also thought that the term "Indians" was used in its generic sense in 1867 and that it included all the aborigines of the territory subsequently included in the Dominion of Canada. He made the following observation:

There are also a few other publications to which our attention has been called where "Indians" and "Esquimaux" are differentiated but the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867,

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<sup>24</sup> *Re the Term "Indians"*, *supra* note 15.

<sup>25</sup> U.K., "Report from the Select Committee on the Hudson's Bay Company", British Parliamentary Papers, vol. 3, 1857 Session, (Shannon: Irish University Press, 1969) [Hudson's Bay Report].

<sup>26</sup> *Re the Term "Indians"*, *supra* note 15 at 109.

<sup>27</sup> *Ibid.* at 106-107.

adopt the interpretation that the term "Indians" includes all the aborigines of the territory subsequently included in the Dominion.<sup>28</sup>

### 3.3.2 *British Parliamentary Papers*

The *Report from the Select Committee on the Hudson's Bay Company* relied upon by the Supreme Court of Canada as the principle source of information regarding the Aboriginal peoples in the territories administered by the Hudson's Bay Company is from the series *British Parliamentary Papers*, which deals with numerous issues referred to the British Parliament. Several of these volumes address issues related to Indians and "Aborigines".

The *Report from the Select Committee on the Hudson's Bay Company* was submitted as a study of the desirability of transferring the territories administered by the Hudson's Bay Company to Canada. As well, it was an investigation of the manner in which the company was treating the Indian inhabitants. In referring to the report, it should be remembered that the Hudson's Bay Company acted as the government of the day in Rupert's Land, a vast territory covering the Hudson's Bay drainage system, including most of Western Canada and parts of the Territories.<sup>29</sup> The chief administrator of the Hudson's Bay Company was also the governor of those territories.

The *Report from the Select Committee on the Hudson's Bay Company* deals with all manner of relationships between the Hudson's Bay Company and the original inhabitants of Rupert's land. It addresses issues related to the treatment of the Indians, the Inuit, and the Métis, including their industriousness, levels of poverty, education, religious study, and general well being.<sup>30</sup> The report also looks into the relationships within the Métis and Indian communities. With regard to the language used to describe the Métis, the words "half-breed", or "half-caste" or "half-Indian" are used interchangeably.<sup>31</sup> The way in which the Métis are treated is consistent with the treatment of the Indians. At times, they are referred to as Indians, and receive the same treatment as their Indian relatives. In some cases, they are treated as a unique class of Aboriginal

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<sup>28</sup> *Ibid.* at 121.

<sup>29</sup> For a discussion of the boundaries of Rupert's land, see Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territories* (Saskatoon: University of Saskatchewan Native Law Centre, 1982); and Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory, Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

<sup>30</sup> Hudson's Bay Report, *supra* note 25. See generally the statements by Sir George Simpson, Chief Administrator of the Hudson's Bay Company in response to the report beginning at para. 1448 at 78.

<sup>31</sup> *Ibid.* at paras. 1748-51 at 91-92.

inhabitants of the territories. In almost all cases, they are treated as “aborigines”.<sup>32</sup> The Hudson’s Bay Company did not administer justice among the Métis or the Indians unless a crime was committed against a non-Indian.<sup>33</sup> Likewise, the Company considered the administration and control of the internal affairs of the Métis and the Indians to be generally outside its jurisdiction.<sup>34</sup>

The following dialogue between members of the Select Committee and Sir George Simpson, Chief Administrator of the Hudson’s Bay Company is telling.

1747. *Mr. Grogan*] What privileges or rights do the native Indians possess strictly applicable to themselves? - They are perfectly at liberty to do what they please; we never restrain Indians.

1748. Is there any difference between their position and that of the half-breeds? – None at all. They hunt and fish, and live as they please. They look to us for their supplies, and we study their comfort and convenience as much as possible; we assist each other.

1749 *Lord Stanley*] You exercise no authority whatever over the Indian tribes? – None at all.

1750. If any tribe now were pleased now to live as the tribes did live before the country was opened up to Europeans; that is to say, not using any article of European manufacture or trade, it would be in their power to do so? – Perfectly so; we exercise no control over them.

1751. *Mr. Bell*] do you mean that, possessing the right of soil over the whole of Rupert’s Land, you do not consider that you possess any jurisdiction over the inhabitants of that soil? – No, I am not aware that we do. We exercise none, whatever right we possess under our charter.

1752. Then is it the case that you do not consider that the Indians are under your jurisdiction when any crimes are committed by the Indians upon the Whites? – They are under our jurisdiction when crimes are committed upon the Whites, but not when committed upon each other; we do not meddle with their wars.

1753. What laws do you consider in force in the case of Indians committing crimes upon the Whites; do you consider that the clause in your licence to trade, by which you are bound to transport criminals to Canada for trial refers to the Indians, or solely to the Whites? – To the Whites, we conceive.

1754 *Mr. Grogan*] Are the native Indians permitted to barter skins *inter se* from one tribe to another? – Yes.

1755. There is no restriction at all in that respect? – None at all.

1756. **Is there any restrictions with regard to the half-breeds in that respect? – None, as regard dealings amongst themselves [emphasis added].**<sup>35</sup>

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at para. 1752 at 92.

<sup>34</sup> *Ibid.* See particularly paras. 1747-56 at 91-92. See also the testimony of the Right Reverend David Anderson, Bishop of Rupert’s Land, at paras. 4387-95 at 244, where he notes that there is a total Indian population of 2,600 in the Red River Settlement, including the half-breeds.

<sup>35</sup> *Ibid.* at paras. 1747-56 at 91-92.

Eighty years later, in *Re the term "Indians"*, the Court placed much emphasis on the census submitted by the Hudson's Bay Company in the 1857 report. In that census, the Inuit ("Eskimos") were treated as a tribe of Indians.<sup>36</sup> The Métis were put in the same class as non-aboriginals. It is worth noting that in the report, the census is the only occasion when the Métis are categorized as non-Indians. Throughout most of the oral reports, Métis are treated as a class of "aborigines". This becomes apparent when Sir George Simpson, governor and chief administrator of the Hudson's Bay Company, is directly questioned on the treatment of the Métis and on the census itself. In response to questions from a member of the select committee, Mr. Roebuck, Governor Simpson groups the Métis population with the Indians:

1681. In that census which you have given in, is there an account of the number of the half-breeds in the Red River Settlement? – Yes; 8000 is the whole population of the Red River; that is the Indian and half-breed population.

1682. Can you give any notion of how many of those are half-breeds? – About 4,000 I think.<sup>37</sup>

Of equal interest is an earlier report considering what measures should be adopted with regard to the Aboriginal inhabitants in the countries where there are British settlements. *The Report of the Select Committee on the Aborigines*<sup>38</sup> deals exclusively with the "Aborigines" and their communities, and contains a specific section dealing with the Red River Settlement. At that time, the settlement was predominantly Métis, and the authors of the report clearly considered the community to be an aborigine settlement. When asked what measures had been taken to civilize the "native" population, then Chairman of the Hudson's Bay Company John Henry Pelly Esq. noted that a school had been established. When asked how many "native" children were being taught, he said there were from 200-300, and this number included "half-breed".<sup>39</sup> In response to questions about the "native" population, he indicated that the Red River Settlement had about "5000 souls" which included both Indians and Métis.<sup>40</sup> Given these statements, and the finding in *Re the term Indian* that the term "Indians" includes all the aborigines in the territories that were to become Canada, it appears that at a minimum this would include the Métis in the Red River Settlement.

<sup>36</sup> *Ibid.* at 367. See also *Re the term "Indians"*, *supra* note 15 at 107.

<sup>37</sup> *Ibid.* at paras. 1681-82 at 89.

<sup>38</sup> U.K., "Report from the Select Committee on the Aborigines (British Settlements)" *British Parliamentary Papers, Anthropology Aborigines*, vol. 2, Session 1837, (Shannon: Irish University Press, 1968) [Committee on the Aborigines].

<sup>39</sup> *Ibid.* at para. 375 (22 March 1837).

<sup>40</sup> *Ibid.* at para. 351 (22 March 1837).

In addition to the select committee reports, there are other British parliamentary papers dealing with the Métis and the Red River Settlement that give further insight into the treatment of the Métis. One such collection is entitled *Reports Correspondence and Other Papers Relating to the Red River Settlement the Hudson's Bay Company and Other Affairs in Canada*.<sup>41</sup> Responding to complaints by the inhabitants, it examines the Hudson's Bay Company's treatment of the Indians and Métis in the Red River Settlement. The complaints, or "Memorial and Petition", were filed by the "Deputies from the Natives of *Rupert's Land, North America*".<sup>42</sup> This document contains a discussion about the census, noting that "The heads of families are 870; of whom 571 are Indians, or half-breeds, natives of the territory."<sup>43</sup>

The three British parliamentary papers – the two select committee reports and the report on the Red River Settlement – are no doubt the most authoritative documents dealing with the manner in which the Métis were treated by the British government and the Hudson's Bay Company contemporaneously with Confederation. In all of these reports (excluding the census), the Métis were considered as and treated as "natives of the land", or "aborigines", like the Indians and the Inuit. In many cases, particularly in the *Report from the Select Committee on the Hudson's Bay Company*, the manner in which the Métis were treated was indistinguishable from that in which the Indians were treated.

By simply using the guidelines established by the Supreme Court of Canada in *Re the Term "Indians"*, along with the testimony provided by the *British Parliamentary Papers*, there is sufficient evidence to draw the conclusion that Métis were considered Indians for the purpose of the *Constitution Act, 1867*. A brief review of legislation contemporaneous with Confederation, Métis land grants, the issuing of scrip to the Métis, the inclusion of Métis in treaties, the use of

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<sup>41</sup> U.K., "Reports Correspondence and Other Papers Relating to the Red River Settlement the Hudson's Bay Company and Other Affairs in Canada", *British Parliamentary Papers*, Colonies Canada, vol. 18, Session 1849 (Shannon: Irish University Press, 1969) [Red River Settlement Papers].

<sup>42</sup> *Ibid.* at 297.

<sup>43</sup> *Ibid.* at 339, 354. The testimony in this report is quoting Alexander Simpson from an earlier publication entitled *The Life and Travels of Thomas Simpson. The Arctic Discoverer. By his brother Alexander Simpson* (Toronto: Baxter, 1963). Alexander was a former employee of the Hudson's Bay Company. The view that the Métis and the Indians are natives of the land with rights that flow from being natives was expressed in the "Memorial and Petition", which had been filed against the Hudson's Bay Company (Red River Settlement Papers, *ibid.* at I.U.P. 299). The Hudson's Bay Company seemed to think that the petitioners were troublemakers trying to stir up the Indians, and tried to make a distinction between the Métis and the Indians, adding that the use of the term "natives" was "an ambiguity calculated to mislead"

the term “Indian” in the *Natural Resource Transfer Agreements*<sup>44</sup> and recent case law, will provide a more complete picture.

### 3.3.3 Legislation

In his seminal article “‘Indian’: An Analysis of the Term as Used in Section 91(24) of the *British North America Act, 1867*”, Clem Chartier undertakes a detailed discussion of the various pieces of legislation contemporaneous with Confederation in an attempt to determine what the understanding of the term “Indians” was at the time of Confederation.<sup>45</sup> The study includes a complete review of the pre-confederation and post-confederation legislation, and need not be repeated here. Of particular interest is *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*.<sup>46</sup> This 1850 Act of the Legislature of Lower Canada includes the following definition of the term “Indians”:

First.— All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.

Secondly.— All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons

Thirdly.— All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be so considered as such: And

Fourthly.— All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.<sup>47</sup>

*An Act Respecting Indians and Indian Lands*, passed in 1860 also includes a definition of the term “Indian” similar to the 1850 definition.<sup>48</sup> In 1868, the Dominion of Canada passed *An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands*.<sup>49</sup> This was the first piece of legislation enacted pursuant to section 91(24) of the *Constitution Act, 1867*. The Act provides that for the purposes of determining who is entitled to enjoy Indian lands and immovable property, the following shall be considered as Indians:

Firstly.— All persons of Indian Blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;

<sup>44</sup> *Natural Resources Transfer Agreement*, Schedule to the *Constitution Act, 1930*, reprinted in R.S.C. 1985 Appendix II, No 26 [NRTA].

<sup>45</sup> Chartier, *supra* note 21.

<sup>46</sup> *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S. Prov. C. 1850 (13 & 14 Vict.) Cap. 42.

<sup>47</sup> *Ibid.* at s. 5.

<sup>48</sup> *An Act Respecting Indians and Indian Lands (Lower Canada)*, C.S.L.C. 1860, c. 14.

<sup>49</sup> *An Act Providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, S.C. 1868 (31 Vict.), c. 42.

Secondly.— All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And

Thirdly.— All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.<sup>50</sup>

Both of these statutes provide a fairly flexible definition of the term Indian. The earlier statute is particularly interesting. The second paragraph of the 1850 Act would include those intermarried with Indians and living among them as well as all their descendants. Clearly this category is broad enough to include many Métis. The 1850 Act also contemplates adopted infants, whether Indian or not. The 1868 Act, while still fairly broad, excludes infant adoptions and tries to connect the definition of Indians more directly to those having an interest in Indian immovable property. Yet the definition is still broad because it includes all the descendants of the three classes or categories of persons defined as Indians: those belonging to a band or tribe with an interest in certain lands, and their descendants; those residing amongst them and their descendants; and those women lawfully married to members of the preceding categories, and their descendants.

The difficulty with much of the legislation defining the term “Indians” examined by Chartier is that, while the language is broad and includes women married to Indians and their descendants, the legislation also ties recognition as an Indian to a “particular tribe, band or body of Indians” with an interest in immoveable Indian property. And while it is true that all Métis, would have at some point in their lineage membership in a particular band, body, or tribe of Indians with an interest in certain immoveable property, the genealogical link is often difficult if not impossible to prove. In addition, in the post-contact era, the Métis emerged as a unique people, distinct from their Indian forebears. At the same time, it is simply illogical to conclude that most if not all Métis are not descendants from the above categories. This point did not escape the Dominion government.

In 1876, the federal government enacted the first *Indian Act*<sup>51</sup>, which was a consolidation of the various laws dealing with Indians. The 1876 Act specifically excludes Métis who had received “scrip” pursuant to the *Manitoba Act* from the definition of term “Indian”. This is stated quite specifically in section 3.3.(e):

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<sup>50</sup> *Ibid.* at s. 15.

Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of 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, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian Treaty.<sup>52</sup>

Presumably the 1876 *Indian Act* included the definition in 3.3.(e) because the earlier definitions of "Indian" would have been broad enough to include the Métis.

The Chartier approach is based on an analysis of the Indian legislation contemporaneous with Confederation and the early post-Confederation Indian legislation. Catherine Bell argues that this is a double-edged sword, because the various statutes that Chartier relies on can be used to argue either for or against the Métis being considered Indians at the time of Confederation. Bell goes on to say that the strongest argument in favour of the Métis being considered Indians at or about the time of confederation is found in section 31 of the *Manitoba Act, 1870*, which on its face recognizes Métis Aboriginal rights to "Indian title."<sup>53</sup>

In 1869, the Hudson's Bay Company relinquished its charter and transferred Rupert's Land to the Dominion of Canada. By this time, a large number of Métis had settled in the lands being transferred to Canada. Fearing a loss of their proprietary rights, as discussed in Chapter II the Métis under Louis Riel established a provisional government in what is now the province of Manitoba.<sup>54</sup> Under the auspices of the provisional government, the Métis negotiated the entry of Manitoba into the federation of Canada. In order to accommodate concerns of the Métis over their land rights, section 31 set aside lands for the half-breed families 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 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....<sup>55</sup>

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<sup>51</sup> *An Act to Amend and Consolidate the Laws Respecting Indians*, S.C. 1876 (39 Vict.), c. 18 [*Indian Act* (1876)].

<sup>52</sup> *Ibid.* at s. 3.3.(e).

<sup>53</sup> Catherine E. Bell, "Métis Aboriginal Title" (LL. M. Thesis, University of British Columbia, 1989) at 66 Bell, "Métis Aboriginal Title"]. See also RRCAP, vol. 4, *supra* note 16 at 298.

<sup>54</sup> Bell, *ibid.* at 285.

<sup>55</sup> *Manitoba Act*, *supra* note 17 at s. 31.

It is of course interesting to note that section 31 provides the Métis families lands “towards the extinguishment of the Indian title”. On its face, section 31 recognizes Indian or Aboriginal title for the Métis and promotes the view that during the Confederation era, the Métis were considered to be Indians. The paradox is that, according to Bell’s analysis, the Métis are recognized as “Indians” for the purposes of section 91(24) because of the interpretation of provisions of the *Manitoba Act*. However, as a result of the same enactment, Métis Aboriginal title was arguably extinguished, or at a minimum, the lands were granted “towards the extinguishment” of Métis title. Could this have been the intention of the Fathers of Confederation?

Bell makes a distinction between whether the Métis are Indians and subject to federal jurisdiction and whether the Métis are an Aboriginal people with rights that flow from being one of the Aboriginal peoples of Canada. Bell argues that at the time of Confederation, there were at least four distinct types of Métis: “those who lived with the Indians; those who had permanent homes close to the trading post and adopted the way of life of the white settlers; those who were semi-settled and lived by the buffalo hunt and freighting; and those who were semi-settled and lived by hunting, trapping and by the buffalo hunt.”<sup>56</sup> Bell argues that the latter two groups formed the Métis Nation, which negotiated a land grant to the Métis population in Manitoba. Provisions similar to those of section 31 were included in the *Dominion Lands Act* of 1879 and 1883 for the North-West Territories.<sup>57</sup> These provisions, combined with the fact that Métis who were living a lifestyle like the Indians were granted the option of taking treaty, are “consistent with the view that they were considered an Aboriginal people by the government at the time of Confederation”<sup>58</sup> and considered to be Indians.

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<sup>56</sup> Bell, “Métis Aboriginal Title”, *supra* note 53 at 65. Also see, for example: Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories, including the Negotiations on which they were based, and other information relating thereto* (Toronto: Belfords, Clarke: 1880) reprinted by Coles Publishing (Toronto: 1971) at 294-95 [Morris]; D. Bruce Sealey, *Statutory Land Rights of the Manitoba Métis* (Winnipeg: Manitoba Métis Federation Press, 1975) at 4-50; D. Bruce Sealey & A. Lussier, *The Métis: Canada’s Forgotten People*, (Winnipeg: Manitoba Métis Federation Press, 1975) at 13-73.

<sup>57</sup> *Supra* note 19.

<sup>58</sup> Bell, “Métis Aboriginal Title”, *supra* note 53 at 66.

Thomas Flanagan and Bryan Swartz do not share this view.<sup>59</sup> Their negative views on Métis rights are supported by an after-the-fact comment made by Sir John A MacDonal in the House of Commons. MacDonal states:

In that Act [the Manitoba Act] it is provided that in order to secure the extinguishment of the Indian title 1,400,000 acres land should be settled upon the families of the half-breeds living within the limits of the then Province. Whether they had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of that Province.... 1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian title. That phrase was an incorrect one, because the half-breeds did not allow themselves to be Indians.<sup>60</sup>

Curiously, MacDonal's rationale is similar to that of the federal government today. As mentioned earlier, the federal position is based on the desire by the Métis to define themselves as distinct from the Indians. With respect to Sir John A. MacDonal, whether the Métis allowed themselves to be Indians is not the point. The point is, they were treated as Indians by the government of the day (Hudson's Bay Company) just prior to Confederation, the early *Indian Act* legislation did not exclude Métis from the definition of those entitled to be Indians, and the *Manitoba Act* was enacted towards the extinguishment of their Indian or Aboriginal title. The fact that the Métis considered themselves as distinct from the Indians, or did not wish to be referred to as Indians, does not alter the legislative jurisdiction of governments. As mentioned earlier, this can only be done by way of a constitutional amendment.

### 3.3.4 Métis Land Grants and Treaty Entitlement

Much work has been done on the Métis land grants, scrip, and Métis participation in treaties. Some of this has been discussed in Chapter II, and it is not the intention in this chapter to undertake a comprehensive assessment of Métis land entitlement and treaty adhesion. However, it is necessary to reference some of the work in order to provide some background and context. More importantly, an analysis of the scrip system, particularly in relation to the *Manitoba Act*, provides further arguments in favour of federal jurisdiction with respect to the Métis.

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<sup>59</sup> See Thomas E. Flanagan, "The History of Métis Aboriginal Rights: Politics, Principles and Policy" (1990) 5 Can. J.L. & Soc. 71; and Bryan Swartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 245.

<sup>60</sup> *House of Commons Debates*, vol. 4 (6 July 1885) at 3113 (Rt. Hon. John A. MacDonal).

Scrip was the way the government of Canada distributed land to various groups of people, including members of the army, settlers, and Métis.<sup>61</sup> Scrip was issued in different monetary and land values. Land scrip and money scrip were originally interchangeable. For example, 160-acre land scrip could be redeemed for the equivalent in cash. When Manitoba entered into Confederation, residents were granted lands pursuant to sections 31 and 32 of the *Manitoba Act*. Section 31 deals with the “half-breed” land grants. Section 32 provides for all residents, regardless of their ancestry, that the lots they had settled upon would be protected. The *Manitoba Act* made no specific mention of scrip. It merely stated the amount of land to be awarded and that such land was for the benefit of “children of half-breed heads of families”. In 1879, the “half-breed” grants were extended throughout the North-West Territories, Alberta, and Saskatchewan by way of amendments to the *Dominion Lands Act*.<sup>62</sup>

The apparent purpose, of the Métis land grants, from the Crown’s perspective and based upon section 31 of the *Manitoba Act*, was “towards the extinguishment” of Indian or Aboriginal title. Arguably, Métis Aboriginal title was extinguished pursuant to section 31 of the *Manitoba Act*, and potentially by the *Dominion Lands Act* and subsequent amendments. However, a number of scholars have pointed out that while the purpose may have been to put in place a system of land distribution that was intended to contribute “towards the extinguishment of Indian title”, the system was so fraught with mismanagement and allegations of fraud that the actual purpose was never achieved.<sup>63</sup> In addition, it has been strongly argued that the “exchange” contemplated under section 31 was to include benefits other than land that had been agreed to. These additional benefits were referred to in a letter from Sir George-Etienne Cartier on behalf of Canada, to Abbe Ritchot, who headed the Métis negotiation team around the provisions of section 31.<sup>64</sup> Accordingly, even if section 31 was intended to extinguish the Indian title of the Métis, the system that was put in place to do so was not implemented as intended and the “exchange” was never perfected.

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<sup>61</sup> See Paul L.A.H. Chartrand, *Manitoba’s Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991); Chartrand, “Dispossession”, *supra* note 18; Paul L.A.H. Chartrand, “The Obligation to Set Aside and Secure Lands for the ‘Half-breed’ Population Pursuant to Section 31 of the *Manitoba Act*, 1870” (LL.M. Thesis, University of Saskatchewan, 1988); D.N. Sprague, *Canada and the Métis, 1869-1885* (Waterloo, Ont.: Wilfred Laurier University Press, 1988); D.N. Sprague, “Government Lawlessness in the Administration of Manitoba Land Claims, 1870–1887” (1980) 10 *Man. L.J.* 415.

<sup>62</sup> *Dominion Lands Act*, *supra* note 19.

<sup>63</sup> RRCAP, vol. 4, *supra* note 16 at 324–29. See also Chartrand and Sprague, *supra* note 60.

<sup>64</sup> RRCAP vol. 4, *ibid.* at 288, 326–27.

While scrip and land grants were being distributed to the Métis in the West and Northwest, the federal government continued its policy of attempting to extinguish Indian or Aboriginal title through the treaty process. In implementing the policy, it was often difficult to distinguish whether the beneficiary was an Indian or a Métis. This was especially true in the Northwest where there was apparently almost no ability to discern between the two. In the *Treaty 8* area, both the treaty commission and the scrip system were implemented in tandem. The individuals were left to identify themselves as either Indians or Métis. The Indians received treaty benefits, the Métis received scrip – which could be immediately converted to cash.<sup>65</sup> To the commissioners it hardly mattered how the individual identified himself.<sup>66</sup> The Crown's intent behind both the scrip and the treaty was to extinguish title, though this was evidently not understood by the Indians and the Métis.

In Ontario, there was no system specifically designed for allotting land to the Métis, but they were included in a number of the Ontario treaties. In addition to the Ontario treaties, some of the Manitoba treaties also included references to half-breed beneficiaries. In W.M. Simpson's report concerning *Treaty 1*, Simpson noted that a number of the individuals, particularly in the Broken Head River Band, were Métis entitled to share in the land grants provided under the *Manitoba Act*. Simpson explained to these Métis that they had an option of either Métis land grants or taking treaty entitlement. Simpson explains:

I was most particular, therefore, in causing it to be explained, generally, and to individuals, that any person now electing to be classed with Indians, and receiving the Indian pay and gratuity, would, I believed, thereby forfeit his or her right to another grant as a half-breed; and in all cases where it was known that a man was a half-breed, the matter, as it affected himself and his children, was explained to him, and the choice given to him to characterize himself. A very few only decided upon taking their grants as half-breeds.<sup>67</sup>

Alexander Morris had also given the matter a great deal of consideration, although he did not appear to determine conclusively how the Métis as a distinct people ought to be dealt with. Morris considered that there were three categories of Indians in the Northwest: those who were married to and living among the Indians, those who had taken up homes and farms and were

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<sup>65</sup> This fluidity between categories increased when the *Indian Act* was amended to allow status Indians to enfranchise (sign off treaty and get half-breed scrip). This was apparently done to undercut the status population and was the main device used to disestablish the Paspaschase reserve in present-day Alberta.

<sup>66</sup> For details of Alberta Métis participation in both the treaty process and the scrip system, see Métis Association of Alberta & Joe Sawchuck, Patricia Sawchuck, & Theresa Ferguson, *Métis Land Rights in Alberta: A Political History* (Edmonton: Métis Association of Alberta, 1981).

<sup>67</sup> Morris, *supra* note 56 at 41. For more details of the Métis participation in the treaties, see also RRCAP, vol. 4, *supra* note 16 and particularly at 278-79.

living as whites, and those who lived a life similar to the Indians and who depended on the buffalo for survival.<sup>68</sup> For this last class, Morris had the following to report:

I refer to the wandering Half-breeds of the plains, who are chiefly of French descent and live the life of the Indians. There are a few who are identified with the Indians, but there is a large class of Métis who live by the hunt of the buffalo, and have no settled homes. I think that a census of the numbers of these should be procured, and while I would not be disposed to recommend their being brought under the treaties, I would suggest that land should be assigned to them, and that on their settling down, if after an examination into their circumstances, it should be found necessary and expedient, some assistance should be given them to enable them to enter upon agricultural operations.<sup>69</sup>

With the foregoing references in mind respecting both the treaty process in parts of Ontario and Western Canada and the Métis land grants or scrip under the *Manitoba Act* and the *Dominion Lands Act*, it is possible to make a number of observations. It appears that for both the land/scrip grants and the treaty process, as these applied to the Métis and the Indians, the underlying Crown policy was to extinguish Indian or Aboriginal title in order to open the frontier for settlement, although this was likely not understood by the Métis and the Indians. For the most part, the western Métis either received (or were entitled to receive) land grants or scrip, and the Indians in the majority of cases received treaty entitlement. In a number of instances, where it was difficult to distinguish the Métis from the Indians, the Métis were allowed to come under treaty. When this occurred, the Métis were to forfeit any benefits they may have been entitled to under the either *Manitoba Act* or the *Dominions Lands Act*. The Crown's intent related to the Métis land entitlement and the treaty system was to ensure that there was a comprehensive policy of extinguishment to allow settlement to proceed uninterrupted by competing claims to the land. That the Métis were entitled to benefits under the *Manitoba Act* or the *Dominions Land Act* and the Indians to treaty benefits was more a question of administrative and political expediency than an attempt to deny claims by the Métis to "Indian title" based upon their Aboriginality or their Indianness. Clearly, the Dominion was of the view that Métis had land rights linked to their Aboriginality, just as did the Indians. This understanding, linked with the legislative framework for land allocation, strengthens the argument that Métis fall within the federal government's exclusive legislative jurisdiction over Indians and lands reserved for the Indians.

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<sup>68</sup> Morris, *ibid.* at 294-95.

<sup>69</sup> *Ibid.* at 295.

### 3.3.5 *Natural Resource Transfer Agreements*

The *Natural Resource Transfer Agreements (NRTA)* were not contemporaneous with Confederation, so the manner in which the term “Indians” was used in the NRTAs should not be determinative of the meaning of the term as used in 1867. However, a discussion of the Indian provisions in these agreements is pertinent.

Unlike the four original provinces that entered Confederation, the three Prairie provinces did not, at the outset, have jurisdiction over the lands and resources within their boundaries. In 1929 and 1930, each of them entered into an agreement with Canada. These agreements, schedules to the *Constitution Act, 1930*, are referred to as the *Natural Resource Transfer Agreements*.<sup>70</sup> They were each confirmed by acts of their provincial legislature, the Parliament of Canada,<sup>71</sup> and the British Parliament.<sup>72</sup> They transferred to each of the three Prairie provinces the ownership of the lands and resources within their respective boundaries. In addition to providing for the lands and resources transfer, the *NRTAs* also have identical provisions dealing with the continued exercise of the Aboriginal peoples’ hunting, fishing, and trapping rights. For example, section 12 of the Saskatchewan *NRTA* provides as follows:

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 land to which the said Indians may have a right of access.<sup>73</sup>

Section 12 (section 13 in Manitoba) of the *NRTAs* has been subject to a considerable amount of litigation. A large portion of the litigation has dealt with the meaning of the term “Indians” for the purposes of the *NRTAs* and whether that term includes either Métis or non-status Indians.

In *R. v. Laprise*, the Saskatchewan Court of Appeal had to consider whether Laprise would be protected by the provisions of section 12 of the Saskatchewan *NRTA*.<sup>74</sup> Laprise was a Chipewyan but not registered as an Indian under the *Indian Act*, and was charged under provisions of the Saskatchewan *Game Act* for being in possession of game, contrary to the Act.<sup>75</sup>

<sup>70</sup> *NRTA*, *supra* note 44.

<sup>71</sup> Thomas Isaac, *Aboriginal Law* (Saskatoon: Purich, 1999) at 280.

<sup>72</sup> *Constitution Act, 1930*, formerly the *British North America Act, 1930* (U.K.), 20-21 Geo. V, c. 26.

<sup>73</sup> *Natural Resources Transfer Agreement*, Schedule to the *Constitution Act, 1930*, reprinted in R.S.C. 1985 Appendix II, No 26, and enacted in the Province of Saskatchewan by S.S. 1930, c. 87 at s. 12 [Sask. *NRTA*].

<sup>74</sup> *R. v. Laprise*, [1978] 6 W.W.R. 85, (Sask. C.A.) [*Laprise*, C.A.].

<sup>75</sup> *Game Act*, S.S. 1967, c. 78.

The Court determined that, as Laprise was not a status Indian under the provisions of the *Indian Act*, he could not avail himself of the provisions of the *NRTA*. The decision has since been criticized for wrongfully applying statutory rules of interpretation to the *NRTA* because the *NRTA* is a constitutional document and not a federal statute. The case has also been criticized for implying that provinces may define the term “Indians” in provincial game control legislation.<sup>76</sup>

Twenty years later, the issues in Laprise were revisited by the Saskatchewan Court of Appeal in *R. v. Grumbo*.<sup>77</sup> Grumbo was a Métis from Saskatchewan who had been charged pursuant to section 32(1) of the *Wildlife Act*, which prohibits persons other than Indians from being in possession of wildlife that has been taken by an Indian for food.<sup>78</sup> The main question before the Court was the same as in *Laprise*: whether the accused was an Indian for the purposes of section 12 of the *NRTA*. The Court of Queen’s Bench had acquitted Grumbo,<sup>79</sup> but the Crown appealed. Grumbo invoked the doctrine of *per incuriam*, asking the Court to declare that *Laprise* had been wrongly decided and that the Court was not bound by that decision.

Upon reviewing the earlier Court of Appeal decision in *Laprise*, the Court of Appeal ruled:

[T]he judges showed no consciousness that the confirmatory legislation made it [NRTA] a part of the constitution of Canada, and that when they were dealing with the defence of Mr. Laprise, they were dealing with a claim to a constitutional right to hunt and to possess game, beyond the jurisdiction of the province to limit.

The failure to take into account that the issue was one of interpretation of the constitution is sufficient, by itself, to require that the decision in *Laprise* be declared to have been made *per incuriam*.<sup>80</sup>

After deciding that *Laprise* should no longer be followed, the Court of Appeal then looked at the Court of Queen’s Bench decision to determine whether that decision should be upheld or a new trial ordered.

The Court of Appeal decided that in order to determine whether Grumbo could take advantage of the provisions of section 12 of the *NRTA*, Grumbo had to show that he had Aboriginal rights. To do this, there had to be sufficient evidence before the Court. While much evidence was provided on the use of the term “Indians” and “Métis”, and on whether the Métis are Indian, no evidence was put forward on whether the Métis of Saskatchewan had Aboriginal rights, or if they had, whether those rights were extinguished. The Appeal Court found it

<sup>76</sup> In particular, see A.J. Jordan, “Who Is an Indian?” (1977) 1 C.N.L.B. 22.

<sup>77</sup> *R. v. Grumbo*, [1998] 3 C.N.L.R. 172 (Sask. C.A.) [*Grumbo*, C.A.].

<sup>78</sup> *Wildlife Act*, S.S. 1979, c. W-13.1, as amended.

<sup>79</sup> *R. v. Grumbo*, [1996] 3 C.N.L.R. 122 (Sask. Q.B.) [*Grumbo*, Q.B.].

“difficult to see how one could decide the question of whether the word Indians in the *Natural Resources Transfer Agreement* included Métis without considering those matters.”<sup>81</sup>

A new trial was ordered. One of the reasons given for the new trial was that the parties to the litigation and the public in Saskatchewan had expected the Appeal Court to deal definitively with the question of whether the Métis were Indians for the purposes of the *NRTA*. The Court also required sufficient evidence to deal with both the legal and the public policy issues involved. The Court also noted that the questions before it were live questions, having recently been examined by the Royal Commission on Aboriginal Peoples.<sup>82</sup>

The courts in both Alberta and Manitoba have also looked at the same question that the Saskatchewan Court of Appeal considered in *Grumbo* (C.A.). In Alberta, in *R. v. Ferguson*, the provincial court declined to follow the decision in *Laprise*. A decision in the lower court found that the term “Indians” as used in the Alberta *NRTA* did include “non-Treaty Indians”, and the accused, who was a Métis, was acquitted.<sup>83</sup> An appeal to the Court of Queen’s Bench was dismissed.<sup>84</sup> In Manitoba, in *R. v. Blais*, the Court of Queen’s Bench rejected the view that Métis are Indians for the purposes of section 13 of the Manitoba *NRTA* (which is identical to the section 12 of the Saskatchewan and Alberta *NRTAs*).<sup>85</sup> The Court also held that section 13 of the Manitoba *NRTA* was intended to protect existing rights, and Métis Aboriginal rights were long extinct,<sup>86</sup> through a combination of the *Manitoba Act*, the *Dominion Lands Act*, and related legislation including *An Act Respecting the appropriation of certain Dominion Lands in Manitoba*.<sup>87</sup> While the Queen’s Bench decision in *Blais* (Q.B.) was a bit of an anomaly in its reasoning, the Court of Appeal agreed with the conclusion that the term “Indians” for the purposes of the *NRTA* does not include the Métis.<sup>88</sup> On appeal, the Supreme Court of Canada agreed with the Manitoba Court of Appeal and held that the term “Indians” as used in the

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<sup>80</sup> *Grumbo* (Sask. C.A.), *supra* note 77 at para. 22-23.

<sup>81</sup> *Ibid.* at para. 28.

<sup>82</sup> *Ibid.* at para. 34.

<sup>83</sup> *R. v. Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct. (Crim Div.)) [*Ferguson* (Prov. Ct.)].

<sup>84</sup> *R. v. Ferguson*, [1994] 2 C.N.L.R. 117 (Alta. Q.B.) [*Ferguson* (Q.B.)].

<sup>85</sup> *R. v. Blais*, [1998] 4 C.N.L.R. 103 (Man. Q.B.) [*Blais*, Q.B.].

<sup>86</sup> *Ibid.* at para. 11.

<sup>87</sup> *An Act Respecting the Appropriation of Certain Dominion Lands in Manitoba*, S.C. 1874 (37 Vict.), (1874), c. 20. This latter act was intended to satisfy a perceived shortfall in s. 31 of the *Manitoba Act*, *supra* note 17, 54, whereby children of Métis families were given grants of land but heads of families were not.

<sup>88</sup> *R. v. Blais*, [2001] 3 C.N.L.R. 187 (Man. C.A.) [*Blais*, C.A.].

Manitoba *Natural Resource Transfer Agreement* does not include the Métis.<sup>89</sup> The Supreme Court concluded its analysis by stating:

We find no reason to disturb the lower courts' findings that neither the Crown nor the Métis understood the term "Indians" to encompass the Métis in the decades leading up to and including the enactment of the NRTA. Paragraph 13 does not provide a defence to the charge against the appellant for unlawfully hunting deer out of season. We do not preclude the possibility that future Métis defendants could argue for site-specific hunting rights in various areas of Manitoba under s.35 of the *Constitution Act, 1982*, subject to the evidentiary requirements set forth in *Powley, supra*. However, they cannot claim immunity from prosecution under the Manitoba wildlife regulations by virtue of para. 13 of the *NRTA*.<sup>90</sup>

The Supreme Court of Canada's decision in *Blais* is problematic. The actual fact pattern before the Court was unfortunate. Blais was hunting in an area that was not a part of his traditional territory, so he was unable to rely on an Aboriginal rights argument. Rather, the sole question before the Court was whether Blais fell under the definition of "Indians" as used in the Manitoba *NRTA* and therefore could take advantage of the Indian provisions of that agreement. While arguably the purposes of the Indian provisions of the *NRTAs* are broad and include the protection of Indian harvesting activities on the basis of their Indianness,<sup>91</sup> the placement of paragraph 13 of the Manitoba *NRTA* together with two other Indian provisions was given considerable weight. The fact that paragraph 13 was one of three Indian provisions in the *NRTA* and was located under the general heading "Indian Reserves" was significant. On this point the Court had this to say:

In the midst of these transfer provisions, three out of 28 paragraphs in the Manitoba *NRTA* come under the separate heading "Indian Reserves". Paragraph 13 is one of them. These paragraphs are identical to paras. 10-12 of the Alberta and Saskatchewan *NRTAs*. The three provisions indicate that, notwithstanding the transfer and control over land to Manitoba, responsibility for administering Indian reserves will remain with the federal Crown (para. 11); that the rules set out in the March 24, 1924 agreement between Canada and Ontario will apply to these Indian reserves and to any others subsequently created in the Province (para. 12); and that provincial hunting and fishing laws will apply to Indians *except* that these laws shall not prevent Indians from hunting and fishing for food on unoccupied Crown lands (para. 13).<sup>92</sup>

Further in the judgment, in support of its conclusion that the Métis are not included within the Indian provisions of the Manitoba *NRTA*, the Court said this:

<sup>89</sup> *R. v. Blais*, [2003] 4 C.N.L.R. 219 (S.C.C.) [*Blais*].

<sup>90</sup> *Ibid.* at para. 42.

<sup>91</sup> This is discussed in greater detail in Chapter IV.

<sup>92</sup> *Blais, supra* note 89 at para. 11.

This interpretation is supported by the location of para. 13 in the *NRTA* itself. Quite apart from formal rules of statutory construction, common sense dictates that the content of a provision will in some way be related to its heading. Paragraph 13 falls under the heading “Indian Reserves”. Indian reserves were set aside for the use and benefit of Status Indians, not for the Métis. The placement of para. 13 in the part of the *NRTA* entitled “Indian Reserves” along with two other provisions that clearly do not apply to the Métis, supports the view that the term “Indian” as used throughout this part was not seen as including the Métis. This placement weighs against the argument that we should construe the term “Indians” more broadly than otherwise suggested by the historical context of the *NRTA* and the common usage of the term at the time of the *NRTA*’s enactment.<sup>93</sup>

The Court correctly suggested that when looking at the use of the term “Indians” in documents, including legislation contemporaneous with the enactment of the *NRTAs*, the *Indian Act* cannot be ignored. And at that time, the *Indian Act* excluded the Métis from being registered as Indians. So, it was in this context that *Blais* could have been decided – that is, by looking at the placement of section 13 in relation to the other Indian provisions of the *NRTA* and by looking at the use of the term “Indians” contemporaneous with the enactment of the *NRTA*, that would be, documents available in the early part of the 1900s, including the *Indian Act*.

However, the Court did not do this. In its reasoning, the Court relied heavily on its interpretation of documentation available in the mid-1800s (as opposed to documents contemporaneous with the *NRTAs*), including documentation contemporaneous with Confederation but linked specifically to the Métis land provisions of the *Manitoba Act*. Among these documents was the letter from John A. MacDonald, referred to earlier in this chapter, in which MacDonald wrote that the use of the language “Indian title” in section 31 of the *Manitoba Act* was a mistake. While the language of mistake may be a way of explaining the use of the term “Indian title” when referring to Métis land rights in the *Manitoba Act*, it does not explain the language in the 1879 *Dominion Lands Act*, which states an intention to satisfy claims of Indian title. Could this also have been a mistake? Or is the language of mistake a bit of historical revisionism? The relevant provision in the *Dominion Lands Act* states that the purpose of the Act is to “satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories ... by granting land to such persons, to such extent and on such terms and conditions, as may be deemed expedient.”<sup>94</sup>

The Court also relied heavily on the Hudson Bay census in which the Métis were included on the same side of the ledger as the white settlers. This was the same census relied

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<sup>93</sup> *Ibid.* at para. 30.

<sup>94</sup> *Dominion Lands Act*, *supra* note 19 at s. 125(e), quoted in RRCAP, vol. 4, *supra* note 16 at 328.

upon in *Re the Term "Indians"*, in which the Inuit census was recorded on the same side of the ledger as the Indians. Surprisingly, the Court did not look to the volumes of evidence available from the various select committee reports and parliamentary papers that were discussed in some length earlier in this chapter, and which confirm that the term "Indians" was used in a generic sense around the time of Confederation and includes the Métis.

Unfortunately, and largely through a lack of resources, legal counsel for Mr. Blais did not rely on the British parliamentary reports in oral argument and did not cite them in the defence factum. Even more surprising, and perhaps shocking, the Supreme Court of Canada noted the following: "At trial, the Appellant's expert, Dr. Shore, could not cite any source in which the Canadian government used the term 'Indian' to refer to all Aboriginal peoples, including the Metis."<sup>95</sup> This is simply not accurate.<sup>96</sup> Given the foregoing, it may be that *Blais* was decided *per incuriam*, particularly in light of the comments in *Re the term "Indians"*, in which the Court noted that information from the British parliamentary reports "was the principle source of information as regards the aborigines in those territories until some years after Confederation".

The Court also relied heavily on the fact that Métis define themselves as distinct from the Indians today, and viewed themselves as distinct from their Indian brothers in the mid-nineteenth and early twentieth centuries. However, what is important is not how the Métis viewed themselves, but rather, how they were treated by government and whether the term "Indians" was used in a generic sense at the time of the enactment in question. That Métis considered themselves distinct from Indians has no more significance than the Haida considering themselves as different and distinct from the Tsimshian. Under federal policy, they are still "Indians". More importantly, it has already been established (in *Re the term "Indians"*) that whether the Inuit consider themselves distinct from Indians has no bearing on the meaning of the term "Indians" as used in constitutional documents in which the term "Indian" is used in a generic sense.

Also, in reviewing the *Blais* decision, it should be noted that both the Court of Appeal and the Supreme Court agreed that the *NRTA* is a constitutional document and that proper constitutional canons of interpretation must apply. In doing so, the Court of Appeal quoted the following excerpt from *Hunter v. Southam Inc*:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily

<sup>95</sup> *Blais, supra*, note 89 at para. 29.

<sup>96</sup> Sources were cited, but the Court was not prepared to listen (author discussion with Lionel Chartrand, counsel for Mr. Blais, July 12, 2004).

repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.<sup>97</sup>

The approach to be taken for the interpretation of constitutional documents must be “purposive” and forward looking. Curiously, at the Court of Appeal, after examining canons of constitutional interpretation, Scott J. on behalf of the Court, concluded that the purpose of section 13 of the Manitoba *NRTA* was to “change the provisions of the existing treaties with Indians in Manitoba”.<sup>98</sup> However, with all due respect to the Court of Appeal, that was not the purpose of the *NRTA*. That was the effect of the *NRTA* on treaty rights, as noted in *R. v. Badger*<sup>99</sup>. Here, it seems the Manitoba Court of Appeal ignored its own observations and failed to look at the underlying purposes of the *NRTAs*, focussing rather on a narrow interpretation of the word “Indians” and the effect of the *NRTAs* on the rights of treaty Indians. The Court of Appeal decision served as the basis for the decision made by the Supreme Court of Canada.

The purposes of the Indian provisions in the *NRTAs* are broader than changing the provisions of existing treaties. Section 13 of the Manitoba *NRTA* was drafted to protect the exercise of the Indians’ hunting, trapping, and fishing rights because of their “Indianness”, and to allow the provincial regulatory regime to apply as it relates to conservation. The effect of section 13 may have been to “modify” the exercise of treaty rights, but that was not the underlying purpose. Like the Court of Appeal, the Supreme Court of Canada also failed to fully take into account the language in *Southam*, which notes that constitutional provisions must be “capable of growth and development over time” and constitutional interpretation must take into account “new social, political and historical realities often unimagined by its framers.”<sup>100</sup>

<sup>97</sup> *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 155 [*Southam*].

<sup>98</sup> *Blais (C.A.)*, *supra* note 88 at para. 84.

<sup>99</sup> *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.) [*Badger*].

### 3.3.6 Inter-Jurisdictional Immunity

There is a stream of Aboriginal rights cases that raise the question of inter-jurisdictional immunity, and this in turn is linked to the question of the federal governments exclusive jurisdiction pursuant to section 91(24). In *R. v. Maurice*,<sup>101</sup> two Métis were charged with unlawfully using a searchlight for the purpose of hunting wildlife, contrary to section 11.1(3) of the Saskatchewan wildlife regulations made pursuant to the *Wildlife Act*. The parties agreed that the accused were Métis hunting pursuant to an Aboriginal right. The defence argued that Métis are included as Indians within the meaning of section 12 of the *NRTA* and were entitled to harvest resources in accordance with that section.<sup>102</sup> The Crown argued that it did not matter whether the appellants were Indians within the *NRTA* or whether they had rights independent of that agreement – the appellants were subject to the Saskatchewan regulation that prohibits night hunting with artificial lights because the primary legislative objective of the specific sections was safety.

The Court assumed that "Indians" in the *NRTA* included Métis, but stated that this determination did not affect the final result. Instead, the Court determined that the issue was whether the legislation resulted in a *prima facie* infringement, and if so, whether it was justified.<sup>103</sup> The Court accepted the trial judge's findings that: (1) the limitation was not unreasonable, since hunting at night with artificial lights was highly dangerous; (2) the regulation presented no undue hardship; and (3) hunting at night with an artificial light was never the preferred means of hunting by people of Sapwagamik.<sup>104</sup> The Court decided that the infringement was justified.

A key argument in *Maurice* concerns the doctrine of inter-jurisdictional immunity. The defence argued that the Province was incapable of passing legislation regulating Métis harvesters because Métis are Indians within the meaning of section 91(24) of the *Constitution Act, 1867*. Further, as Métis Aboriginal rights fall within the heart of section 91(24), or the core of Indianness, the provincial wildlife regulations must be read down. The Court noted that the provincial law in question did not single out Indians, including Métis, or extinguish Aboriginal

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<sup>100</sup> *Supra* note 97.

<sup>101</sup> *R. v. Maurice*, [2002] 2 C.N.L.R. 273 (Sask. Q.B.) [*Maurice* (Q.B.)].

<sup>102</sup> *NRTA*, *supra* note 73.

<sup>103</sup> *Maurice* (Q.B.), *supra* note 100 at para. 13.

<sup>104</sup> *Ibid.* at para. 15.

hunting rights, but only regulated them. Consequently the Saskatchewan laws did not touch upon the core of Indianness, which is immune from the application of provincial laws.

In its decision, the Court failed to make the distinction between the question of “validity” and the question of “applicability”. If the provincial laws in question singled out Indians or Métis, the law would be invalid. But that was not the question. However, if the laws in question touched upon the core of Indianness in their application, they would have to be read down because of the doctrine of inter-jurisdictional immunity, and would therefore be inapplicable. In any event, the Court noted that the specific regulations were applicable to all residents of the province and had safety as an objective.

Even so, it is of fundamental importance to keep in mind the distinction between the core of Indianness on the one hand, and on the other, the matter of exclusive federal jurisdiction over Indians and their lands. For example, under its authority over Indians and lands reserved for the Indians pursuant to section 91(24), the federal government can establish schools and enact regulations concerning traffic, oil and gas, and the conduct of referenda, etc. In fact, the federal government can likely make laws or regulations for almost any subject matter, provided it is for valid Indian policy objectives. However, not all of these subject matters would go to the essence of being Indian, and therefore not all would fall within the core of Indianness, or the heart of section 91(24), which is immunized from provincial jurisdiction. But those matters that do fall within the federal core are unaffected by provincial laws.

The doctrine of inter-jurisdictional immunity prevents the application of provincial laws on core aspects of federal subject matters. That is because provincial laws, even though general in their application cannot bear upon matters that are in their substance federal. See for example the comments of Beetz J. in *Bell Canada v. Quebec*:

works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction: *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (“Bonsecours”); *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 (“Natural Parents”); *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.<sup>105</sup>

<sup>105</sup> *Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749 at 762 [*Bell Canada*]. [quote not checked]

As a result of Canada's exclusive legislative jurisdiction over "Indians and lands reserved for the Indians" pursuant to section 91(24) of the *Constitution Act, 1867*, the provinces are prohibited from legislating for Indians *qua* Indians, or Indian lands *qua* Indian lands.<sup>106</sup> This is because Indians and Indian lands are subject matters, the pith and substance of which are entirely federal. Provincial laws that purport to legislate for such matters would be *ultra vires* and therefore invalid. However, any provincial laws of general application apply to Indians, just as they do to all members of the public. Also, provincial laws in relation to land or that purport to regulate land do not apply to Indian lands, though the legislation may be general in nature. This is because Indian lands fall within the heart of section 91(24), and by virtue of the doctrine of inter-jurisdictional immunity, such laws would be read down. That is why the provincial forestry legislation or provincial mining legislation or provincial land-use planning laws do not apply to Indian reserves, and at least in theory, to Aboriginal title lands.

The same applies to other provincial laws that go to the heart of section 91(24), including laws that purport to regulate Aboriginal harvesting, such as provincial wildlife regulations. On their own, such laws or regulations would normally be read down because they touch upon the core of Indianness. However, the courts have found that provincial wildlife regulations and other provincial laws of general application that touch upon the core of Indianness are referentially incorporated by section 88 of the *Indian Act* and apply to status Indians as federal laws.<sup>107</sup>

Section 88 states:

Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act, or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under the Act.<sup>108</sup>

Section 88 makes no reference to Indian lands and therefore that section does not incorporate by reference those provincial laws that purport to regulate Indian lands, including Aboriginal title lands. This analysis is consistent with the language in *Delgamuukw* where Lamer C.J. says this:

Second, as I mentioned earlier, s.91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of

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<sup>106</sup> This is not to say that the provinces cannot confer benefits; the prohibition is more with respect to the regulation of Indians and Indian lands. This point is somewhat controversial and requires a separate investigation.

<sup>107</sup> *R. v. Dick*, [1985] 2 S.C.R. 309 [*Dick*].

<sup>108</sup> *Indian Act*, R.S.C. 1985, c. 1-5 at s. 88.

interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indianness” (*Dick, supra*, at pp. 326 and 315...; also see *Four B, supra*, at p 1047... and *Francis, supra*, at pp. 1028-29...). The core of Indianness at the heart of s.91(24) has been defined in both negative and positive terms. Negatively, it has been held not to include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were “at the centre of what they do and who they are” (*supra*, at p. 320)... But in *Van der Peet*, I described and defined the Aboriginal rights that are recognized and affirmed by s.35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive Aboriginal culture of the group claiming the right. It follows that Aboriginal rights are part of the core of Indianness at the heart of s.91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.<sup>109</sup>

The same analysis applies to the Métis Aboriginal rights. Consequently, valid provincial laws of general application that purport to regulate Métis rights would have to be read down pursuant to the doctrine of inter-jurisdictional immunity because such rights fall within the heart of section 91(24). As the *Indian Act* does not apply to the Métis, there is no federal legislation that invigorates or incorporates by reference the application of provincial laws of general application that touch upon the core of Indianness by purporting to regulate Métis Aboriginal rights. Consequently, provincial natural resource laws on their own are constitutionally incapable of regulating the exercise of Métis section 35 harvesting rights. This matter was discussed at some length in *R. v. Alphonse* where the B.C. Court of Appeal stated the following, in reference to the application of the *Wildlife Act*:<sup>110</sup>

Section 27(1)(c) affects the core of Indianness for status Indians, non-status Indians and Métis alike, because for all of them it affects or may affect the exercise of their Aboriginal rights. Accordingly, it reaches into the exclusive federal nature of the federal legislative power under s.91(24) of the *Constitution Act, 1867*. Therefore, it does not apply to them of its own provincial vigour. Only by the operation of s.88 can s.(27)(1)(c) of the *Wildlife Act* be given federal vigour, and so be made to apply to status Indians under the *Indian Act*. However, it still would not apply to non-status Indians and Métis in the exercise of their Aboriginal rights, because they are not considered to be Indians for the purposes of the *Indian Act*. In my opinion, because s.27(1)(c) of the *Wildlife Act* applies to status Indians and to non Indians but does not apply to non-status Indians and Métis, it cannot be said to be a law of general application. It *singles* out status Indians for special treatment in comparison to non-status Indians and Métis in relation to the exercise of similar Aboriginal rights, and it *discriminates* against status Indians and in favour of non-status Indians and Métis.<sup>111</sup>

<sup>109</sup> *Delgamuukw, supra* note 4 at para. 181.

<sup>110</sup> *Wildlife Act*, S.B.C. 1982, c. 57 as amended.

<sup>111</sup> *R. v. Alphonse*, [1993] 4 C.N.L.R. 19 at para. 143 (B.C.C.A.) [*Alphonse* (C.A.)].

Briefly then, the provinces are precluded from legislating for Indians *qua* Indians or Indian lands *qua* Indian lands. However, provincial laws of general application apply to Indians. But provincial laws that touch on the core of Indianness would generally be read down because of the doctrine of inter-jurisdictional immunity. Section 88 of the *Indian Act* referentially incorporates provincial laws that touch upon Indianness so that they apply as federal laws. Section 88 makes no reference to Indian lands and therefore that section does not incorporate by reference those provincial laws that purport to regulate Indian lands, including Aboriginal title lands.

The same analysis applies to the Métis Aboriginal rights. Consequently, valid provincial laws of general application that purport to regulate Métis Aboriginal rights would have to be read down pursuant to the doctrine of inter-jurisdictional immunity because such rights fall within the core or the heart of section 91(24). As the *Indian Act* does not apply to the Métis, there is no federal legislation that invigorates or incorporates by reference the application of provincial natural resource laws to the Métis. Consequently, provincial natural resource laws, on their own, are constitutionally incapable of regulating the exercise of Métis section 35 harvesting rights.

Here it should be noted that, had the Court in *Blais* accepted that the Indian provisions of the *NRTA* apply to the Métis and “merge and consolidate” Métis Aboriginal rights into the *NRTA*, the Métis would have had the same rights as their treaty and non-treaty Indian relatives as outlined in the *NRTA*, and would also be subject to the same regulatory regimes – not by virtue of section 88, but by virtue of the *NRTA*. However, that is not the case, and as a result of the doctrine of inter-jurisdictional immunity, the provincial regimes regulating natural resource harvesting are inapplicable to Métis exercising Aboriginal rights. This is a result that had not been contemplated by the Supreme Court of Canada in *Blais*. And, while this does not necessarily help to resolve the jurisdictional question, it certainly opens the door for serious negotiations between the Métis and the Crown regarding the regulation of Métis harvesters.

While not directly related to the issue of Métis rights, it is worth noting that the anomaly created by section 88 of the *Indian Act* is troubling. There is no logical reason for Métis Aboriginal rights harvesters to be in a sense, better off than Indians. To avoid this outcome, courts will no doubt contrive arguments to ensure that provincial wildlife legislation applies to Métis. But the answer is not with creative reasoning to ensure uniformity of application of the provincial wildlife regimes. The answer is in law reform and ensuring that the peculiar consequences of section 88 are eliminated by amending that section so that it does not

incorporate by reference provincial laws that touch on the core of Indianness. This would provide to the Indians, the same level of immunity as the Métis now have.

### 3.3.7 Section 35

One of the most compelling arguments in favour of federal jurisdiction over the Métis is perhaps the least complex. The Métis are an Aboriginal people of Canada, along with the Inuit and the Indians. Section 35 of the *Constitution Act, 1982* defines the Métis as one of the three Aboriginal peoples of Canada and recognizes and affirms their Aboriginal rights. In *R. v. Powley*, the Court of Appeal was very clear about this: “The constitution formally recognizes the existence of distinct ‘Métis peoples’, who, like the Indian and Inuit, are a discrete and equal subset of the larger class of ‘aboriginal peoples of Canada’”.<sup>112</sup>

Clearly the Métis are a subclass of a larger class of Aboriginal peoples which also includes the Indians and the Inuit. All three share the same constitutional status as Aboriginal people. To have one class of Aboriginal people fall within section 92 of the *Constitution Act, 1867* while the other two Aboriginal peoples fall within section 91(24) does not make sense. The result would be absurd: two of the three Aboriginal peoples of Canada would fall under the legislative jurisdiction of the federal government, while jurisdiction over the third, the Métis, would rest with the provinces. That would defeat the purposes of establishing a central authority to deal with Indians and Indian lands, and be inconsistent with the finding by Kerwin J. (Cannon and Crocket JJ. concurring) in *Re the term “Indians”* that in his opinion, “when the Imperial Parliament enacted that they should be confined to the Dominion Parliament power to deal with ‘Indians and lands reserved for the Indians’ the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation.”<sup>113</sup>

Similarly, all three of the Aboriginal peoples of Canada have rights that are afforded the same constitutional protection. This inclusion of Métis and Métis rights in section 35 flows from the recognition by the constitution makers that Métis rights and culture need protection in the same manner as do Inuit and Indian rights and culture. Again, the Court stated in *Powley*: “The inclusion of the Métis in s.35 represents Canada’s commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the

<sup>112</sup> *R. v. Powley*, [2001] 2 C.N.L.R. 291 at para. 101 (Ont. C.A.) [*Powley*, C.A.].

<sup>113</sup> *Re the Term “Indians”*, *supra* note 15 at 119.

framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other Aboriginal communities.”<sup>114</sup>

The jurisprudence around section 35 makes it clear that the underlying purposes of the section is to protect the rights of the Indians, the Inuit, and the Métis. While clearly each of these three Aboriginal peoples is distinct, having distinctly different cultures, history, and Aboriginal rights, each has the same constitutional status. Because the same constitutional status and protection is afforded to all three of the Aboriginal peoples of Canada, it simply makes sense that the same level of government should have jurisdiction over all of them.

### 3.3.8 The Alberta Dilemma

In Alberta, the legislature has enacted special rights and a system of Métis land ownership and management on behalf of Métis settlement members.<sup>115</sup> Assuming that Canada does indeed have the exclusive legislative authority for all Aboriginal peoples, this Alberta Métis settlement legislation is problematic in that it was enacted by the province. As long as the jurisdictional issue is unresolved, the constitutional uncertainty allows the provincial regime to stand. Clarification of section 91(24) may cause the Alberta legislation to be challenged. In that case, Alberta could argue that its legislation is simply an extension of provincial spending powers to assist a certain class of Albertans. However, for greater clarity, the Constitution should be amended both to clarify that Canada has the legislative jurisdiction over the Métis and to save the Alberta legislation. This was the approach adopted in the *Charlottetown Accord*,<sup>116</sup> and once again, the matter may be ripe for law reform. The Alberta dilemma should not stand in the way of the federal government doing what is right and clearly accepting its legislative jurisdiction and associated responsibilities for the Métis.

<sup>114</sup> Powley, [2003] 4 C.N.L.R. 321 at para. 17 (S.C.C.) [Powley].

<sup>115</sup> For more information on the Métis Settlements in Alberta, see Catherine E. Bell, *Alberta Métis Settlement Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Centre, University of Regina, 1994).

<sup>116</sup> The proposed *Charlottetown Accord* (“Consensus Report on the Constitution: Final Text”, Charlottetown, August 28, 1992), online: UNI.ca <http://www.uni.ca/Charlottetown.html>), would have created a s. 95E in the *Constitution Act, 1867*. This was to compliment the clarification of s. 91(24) and would have allowed Alberta to make laws for the Métis. The proposed amendments are included in RRCAP, vol. 4, *supra* note 16 at 383-84.

### 3.4 Conclusion

From a discussion of *Re the term "Indian"*, it is apparent that the Supreme Court of Canada has given some guidance for the interpretation of section 91(24). The Court indicated that, in order to understand how the term "Indians" is used in section 91(24), it is necessary to look at reliable sources of information contemporaneous with Confederation. Among the documents examined, the Court thought that the *Report from the Select Committee on the Hudson's Bay Company* was the principle source of information regarding the Aboriginal peoples in the territories administered by the Hudson's Bay Company. Relying on this, the Court determined that the term "Indians" was used in section 91(24) in its generic sense, and was synonymous with the term "aborigines". The same analysis must be applied to determine whether Métis are constitutional Indians.

The three British parliamentary papers<sup>117</sup> are no doubt the most authoritative documents dealing with the manner in which the Métis were treated by the British government and the Hudson's Bay Company contemporaneously with Confederation. In each of these reports, the Métis were considered and treated as Indians. In many cases, particularly in the *Report from the Select Committee on the Hudson's Bay Company*, the manner in which the Métis were treated was indistinguishable from the way in which the Indians were treated. On their own, and with a view to the analysis in *Re the term "Indians"*, these reports are sufficient to conclude that the Métis were included in the meaning of the term "Indians" at the time of Confederation and are therefore "Indians" for the purposes of section 91(24) of the *Constitution Act, 1867*.

The Métis are however not Indians for the purposes of the *Indian Act* and therefore provincial laws that purport to regulate Métis harvesters are not invigorated by section 88 of that act. Section 88 incorporates by reference provincial laws that touch on the core of Indians and has such laws apply as federal laws. Without section 88, much of the provincial wildlife regime would be inapplicable to Indians. As section 88 does not apply to Métis, provincial laws that purport to regulate Métis harvesters would have to be read down, according to the doctrine of inter-jurisdictional immunity.

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<sup>117</sup> Hudson's Bay Report, *supra* note 25; Select Committee on the Aborigines, *supra* note 38; Red River Settlement Papers, *supra* note 41.

The conclusion that Métis are Indians for the purposes of section 91(24) of the *Constitution Act 1867* is consistent with the recommendations of the Royal Commission,<sup>118</sup> with the amendments proposed in the *Charlottetown Accord*, with the approach taken by the Supreme Court of Canada in *Re the term "Indians"*, and with a purposive approach to the constitutional interpretation of section 91(24). And, as noted earlier, one of the underlying purposes of section 91(24) was to have one central authority responsible for the Aboriginal inhabitants of the Dominion. With the inclusion of the Métis as an Aboriginal people along with the Indians and the Inuit, and the recognition of their existing rights in section 35 of the *Constitution Act, 1982*, the argument that Métis are within the federal government's exclusive legislative jurisdiction is even more persuasive.

Chapter IV will discuss the details around Métis Aboriginal rights and the section 35 justification analysis.

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<sup>118</sup> Canada, *Report of the Commission on Aboriginal Peoples: Renewal: A Twenty Year Commitment*, vol. 5 (Ottawa: Supply and Services Canada, 1966) at 241.

**The Commission recommends that**

**"4.5.3**

"The government of Canada either

- (a) acknowledge that section 91(24) of the *Constitution Act, 1867* applies to Métis people and base its legislation, policies and programs on that recognition; or
- (b) collaborate with appropriate provincial governments and with Métis representatives in the formulation and enactment of a constitutional amendment specifying that section 91(24) applies to Métis people.

If it is unwilling to take either of these steps, the government of Canada make a constitutional reference to the Supreme Court of Canada, asking that Court to decide whether section 91(24) of the *Constitution Act, 1867* applies to Métis people.

## CHAPTER IV

SECTION 35 AND MÉTIS ABORIGINAL RIGHTS: PROMISES MUST BE KEPT<sup>1</sup>

## 4.1 Introduction

It has been more than twenty years since patriation of the *Constitution Act, 1982* and the recognition and affirmation of Aboriginal and treaty rights in section 35. And while over the last twenty years there has been a significant amount of litigation respecting the scope and content of section 35, there is still much unexplored territory. Though the courts have articulated a relatively clear framework for the analysis of section 35 rights, issues of compensation and accommodation respecting unjustifiable infringements of Aboriginal and treaty rights are just now being considered. More importantly, the entire question of a “justiciable” inherent right to self-government has not been explored. Even more surprisingly, while there has been general language around the nature and scope of Aboriginal title, there has been no declaration by the Supreme Court of Canada that Aboriginal title has been proven to exist. Clarification of the content of section 35 has proved to be a testy, laborious, and sometimes gut-wrenching process.

At the same time, the recognition and affirmation of Aboriginal and treaty rights has had a huge impact on the relationship between Indigenous peoples and Canada. Crown resource management decisions will be challenged if Crown decision makers fail to consult meaningfully about section 35 rights. And for the Métis, the inclusion of section 35 in the *Constitution Act, 1982* has had a dual significance. After almost two centuries of neglect, not only are Métis Aboriginal rights recognized and affirmed, but in addition, the Métis have been included as one of the three Indigenous, or Aboriginal, peoples of Canada.

This chapter explores the law regarding Métis Aboriginal rights as clarified in the historic decision of the Supreme Court of Canada in *R. v. Powley*,<sup>2</sup> including the test for proving Métis

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<sup>1</sup> For an earlier version of this chapter, see Mark Stevenson, “Section 35 and Métis Aboriginal Rights: Promises Must Be Kept” in Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, B.C.: Theytus Books, 2003) 63.

<sup>2</sup> *R. v. Powley*, [2003] 4 C.N.L.R. 321 (S.C.C.) [*Powley*]. See also: *R. v. Blais*, [2003] 4 C.N.L.R. 219 (S.C.C.) [*Blais*]; Catherine E. Bell, “Métis Constitutional Rights in Section 35(1)” (1997) 36:1 Alta. L. Rev. 180 [Bell, *Métis Constitutional Rights*]; John J. Borrows & Leonard I. Rotman, *Aboriginal Legal Issues* (Toronto: Butterworths, 1998) at 465-97; Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Canada Communications Group, 1996) [RRCAP,

Aboriginal rights, the application of the section 35 justification analysis, and the underlying purposes for protecting Métis rights.

## 4.2 Background

In the post-1982 euphoria, the Métis – or at least their leaders – thought that since they were now included as one of the three Aboriginal peoples of Canada, the next logical steps would be for Canada to acknowledge its legislative jurisdiction and any associated responsibilities respecting the Métis, and for both levels of government to facilitate the exercise of Métis Aboriginal rights. The euphoria was short lived. Notwithstanding their inclusion in section 35, the exercise of Métis Aboriginal rights has been a hotly contested affair.

It is almost as though governments had hoped that section 35 would have no content for the Métis. Over the last twenty years, section 35 rights for the Métis have been an elusive goal rather than the celebration of a constitutional victory. For twenty years, the constitutional promises held out to the Métis by section 35 have been all but illusional. Governments have only honoured these promises in the breach. Whenever the Métis have attempted to assert Aboriginal rights, the Crown has been present as inquisitor or prosecutor, and not as a fiduciary honouring the implementation of section 35. On the other hand, the debate around the question of Métis identity has not helped. There have also been unanswered questions around the theory of Métis Aboriginal rights. Put simply, at least until *Powley* the issue was this: Must the Métis meet an Aboriginal rights test that links their customs, practices, and traditions with those customs practices and traditions exercised by an Aboriginal group prior to European contact? If so, the test is a very difficult one for the Métis to meet.

Catherine Bell has argued that there is a need for a comprehensive theory of Métis Aboriginal rights that could include rights derived from Indian lineage and lifestyle as well as unique Métis rights that inhere to the Métis Nation as a distinct Aboriginal people.<sup>3</sup> According to Bell, recognition of Métis constitutional rights requires an understanding of the various original

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vol. 4]; *Clem Chartier, In the Best Interest of the Métis Child* (Saskatoon, Native Law Centre, University of Saskatchewan, 1988) [Chartier]; Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 *Osgoode Hall L.J.* 457 [Chartrand, *Dispossession*]; Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991) [Chartrand, *Manitoba's Métis*].

<sup>3</sup> Bell, *Métis Constitutional Rights*, *supra* note 2 at 183.

sources of rights and law that shape the Métis Aboriginal rights framework. In particular, Bell considers the following sources:

- (a) s. 35 of the *Constitution Act, 1982*, which recognizes and affirms the existence of the Métis as an Aboriginal people and thereby confirms the fiduciary obligation of the Crown to Aboriginal people;
- (b) Aboriginal ancestry and the continuance of practices integral to a judicially constructed traditional Indian lifestyle;
- (c) Métis culture, Métis political organization and the continuance of practices integral to a distinct Métis way of life at the date of effective colonization; and
- (d) the human rights of peoples.<sup>4</sup>

Paul Chartrand writes that "by 1870, the Métis of the Red River region had acquired a distinct national identity as a new 'people,' distinct from both their European and 'Indian' forebears."<sup>5</sup> He contends that both ancestral and legal origins must be considered in order to move the Aboriginal rights analysis beyond rights sourced in racial descent to rights sourced in peoplehood or nationhood. Furthermore, section 35 specifically includes "peoples", and according to Bell and Chartrand and also Clem Chartier it is peoplehood or nationhood that is a source of Métis rights distinct from their Indian ancestry.<sup>6</sup> This approach creates a dual source of Métis constitutional rights – Aboriginal ancestral rights and rights as autonomous, distinct peoples. So then, according to Métis Aboriginal rights scholars, at the heart of Métis Aboriginal rights are both Métis lineal descent from their Indian forebears and their emergence as a distinct Métis people or nation.

While theories of Métis Rights and peoplehood are being pursued by scholars, the courts also have now had an opportunity to join the debate. The basic section 35 justification analysis used in relation to Indian-Aboriginal rights, and first articulated by the Supreme Court of Canada in *R. v. Sparrow*,<sup>7</sup> is being adapted and applied to Métis Aboriginal rights. Furthermore, as with Indian-Aboriginal rights jurisprudence, much of the Métis' jurisprudence arises from charges being laid against Métis people participating in traditional harvesting activities.

<sup>4</sup> Bell, *Métis Constitutional Rights*, *supra* note 2 at 183, 190. For the Métis Nation, the suggested effective date of colonization is 1870 after the negotiation of the *Manitoba Act*, S.C. 1870 (33 Vict.), c. 3. For other Métis, another date will likely have to be determined that reflects when the group became a distinct people and when the peak of colonization occurred.

<sup>5</sup> Chartrand, *Dispossession*, *supra* note 2 at 460.

<sup>6</sup> Bell, *Métis Constitutional Rights*, *supra* note 2 at 184-85. Also, according to RRCAP, vol. 4, *supra* note 2 at 206, "peoplehood" includes collective attributes such as "social cohesiveness, collective self-consciousness, cultural distinctiveness, and effective political organization."; Chartrand, *Dispossession*, *supra* note 2 at 460; Chartier, *In the Best Interests of the Métis Child*, *supra* note 2 at 7.

<sup>7</sup> *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 at 182-83. (S.C.C.) [*Sparrow*].

### 4.3 Section 35 Justification Analysis

The section 35 analytical framework flows from the decision in *Sparrow*. Although subsequently elaborated in jurisprudence on section 35, the essentials of the test remain the same, with three basic questions that must be considered:<sup>8</sup>

- Is there an existing Aboriginal right?
- Has there been a *prima facie* infringement of that right? and
- Has the infringement been justified?

#### 4.3.1 *Van der Peet, Adams*

This first question has always been a difficult test for the Métis because of some of the language in *R. v. Van der Peet*,<sup>9</sup> in which the Supreme Court of Canada provided some further guidance respecting proof of the right. In order to determine what is “integral to the distinctive culture”, the Court said, “the following test should be used to identify whether an applicant has established an Aboriginal right protected by s.35(1): in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.”<sup>10</sup>

More importantly, the Court in *Van der Peet* indicated that only those present practices, customs, and traditions that have continuity with pre-contact practices, customs, and traditions are protected by section 35. However, the Court did add that an unbroken chain of continuity is not necessary for establishing an Aboriginal right.<sup>11</sup> The pre-contact distinctive culture test has not been met when practices, customs, or traditions have arisen solely because of European influence.<sup>12</sup> In effect, this test involves: (1) characterizing the right; (2) determining whether the practice, custom, or tradition on which the right is based is integral to the distinctive culture of an Aboriginal group; and (3) determining whether the current practice, custom, or tradition is rooted in a pre-contact time frame. Because the Métis people, by definition, emerged in the post-contact era, the test that was established in *Van der Peet* is unworkable for their purposes.

<sup>8</sup> *Sparrow* effectively posed four questions: Is there a right? *Has the right been extinguished?* If not, has there been a *prima facie* infringement? Is the infringement justifiable? Subsequent cases have combined the first and second questions, making it a three-part test.

<sup>9</sup> *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.) [*Van der Peet*].

<sup>10</sup> *Ibid.* at para. 46.

<sup>11</sup> *Ibid.* at paras. 59-65.

<sup>12</sup> *Ibid.* at para. 73.

Of particular importance to the Métis are some points clarification made in *Van der Peet* as well as some comments in *R. v. Adams*.<sup>13</sup> In *Van der Peet*, the Court specifically referred to the unique circumstances of the Métis in the following commentary:

Although s.35 includes the Métis within its definition of "Aboriginal peoples of Canada", and thus seems to link their claims to those of other Aboriginal peoples under the general heading of "Aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s.35, are quite distinct from those of other Aboriginal peoples in Canada. As such, the manner in which the Aboriginal rights of other Aboriginal peoples are defined is not necessarily determinative of the manner in which the Aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s.35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s.35's protection of the Aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s.35(1)'s scope when the claimants are Métis. The fact that, for other Aboriginal peoples, the protection granted by s.35 goes to the practices, traditions and customs of Aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.<sup>14</sup>

Here the Court specifically acknowledged that a mechanical application of the section 35 analytical framework will not be sufficient for the analysis of Métis Aboriginal rights. In doing so, the Court noted that a closer look at the purposes underlying the protection of the section 35 rights of the Métis will be required. In addition to the comments in *Van der Peet*, the Court in *Adams* clarified that Aboriginal rights are not determined or dependent upon the existence of Aboriginal title:

The *Van der Peet* test protects activities which were integral to the distinctive culture of the Aboriginal group claiming the right; [and] 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.<sup>15</sup>

Both of these comments have had a bearing on the successful outcome of Métis Aboriginal rights arguments related to the first stage in the *Sparrow* test or the section 35, analysis, and will be discussed later. Of particular importance are the comments in *Van der Peet* indicating that the courts will have to closely consider the underlying purposes for the protection of Métis section 35 rights.

<sup>13</sup> *R. v. Adams*, [1996] 4 C.N.L.R. 1 (S.C.C.) [*Adams*].

<sup>14</sup> *Van der Peet*, *supra* note 9 at para. 67.

<sup>15</sup> *Adams*, *supra* note 13 at para. 26.

In the section 35 analysis, once an Aboriginal right has been proved, one moves to the second stage where the question to be determined is whether there has been a *prima facie*<sup>16</sup> infringement. The onus for this lies with the party challenging the legislation. A *prima facie* infringement occurs if on its face the legislation in question interferes with the exercise of a right. And in order to determine whether or not there has been a *prima facie* infringement, several ancillary questions must be explored. These include:

- Is the legislation unreasonable?
- Does it impose undue hardship?
- Does it deny to Aboriginal groups their preferred means of exercising the right?<sup>17</sup>

If it has been determined on the basis of the preceding inquiry that there has been a *prima facie* infringement, the analysis moves to the third stage, referred to as the justification stage, which in turn has two steps: The first step is to determine whether the law in question has a valid legislative objective. The second step is to determine whether the matter proposed, or the legislation in question, is consistent with the honour of the Crown. The Court in *Sparrow* described the first step of the justification stage as follows:

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional Aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid.<sup>18</sup>

#### 4.3.2 *Delgamuukw, Gladstone*

In order to determine whether the legislative objective is valid, it is necessary to look at the underlying purposes of section 35. In both *R. v. Gladstone*<sup>19</sup> and *Delgamuukw v. British Columbia*,<sup>20</sup> the court explained that the underlying purposes of section 35(1) are twofold: the recognition of prior occupation by the Aboriginal peoples of Canada, and the reconciliation of Aboriginal and treaty rights with Crown sovereignty.<sup>21</sup> As noted in *Van der Peet*, it is the

<sup>16</sup> *Prima facie* is a Latin term that means “At first sight; on the appearance ... on the face of it; so far as can be judged from the first disclosure ... a fact presumed to be true unless disproved by some evidence to the contrary.” *Black’s Law Dictionary*, 6<sup>th</sup> ed., s.v. “prima facie”.

<sup>17</sup> *Sparrow*, *supra* note 7 at 162.

<sup>18</sup> *Ibid.* at 183.

<sup>19</sup> *R. v. Gladstone*, [1996] 4 C.N.L.R. 65 [*Gladstone*].

<sup>20</sup> *Delgamuukw v. British Columbia* (1997), [1998] 1 C.N.L.R. 14 (S.C.C.) [*Delgamuukw*].

<sup>21</sup> *Gladstone*, *supra* note 19 at para. 72, quoted in *Delgamuukw*, *ibid.* at para. 161.

underlying purpose of section 35 that must be fully considered in order to give life to Aboriginal and treaty rights, particularly those of the Métis.

While there is no doubt that Métis communities arose in the post-contact era, Métis ancestry is clearly linked to their Indian forebears whose prior use and occupation of the land is a simple fact. That Métis communities emerged in the post-contact era does not diminish the simple fact that in the pre-contact era the Métis forebears used and occupied the Métis homeland and carried out traditional activities which the Métis inherited. These inherited pre-contact traditional activities or rights require protection, as do the customs, practices and traditions that emerged in the post-contact era as part of a unique and distinct Métis culture. It would seem that this duality is at the heart of the purposes for the protection of Métis Aboriginal rights which were cited so eloquently in *Van der Peet*. As discussed later, this is similar to the approach that was adopted by the Supreme Court of Canada in *Powley*.

In any event, this stage of the analysis is the beginning of the justification stage that requires a consideration of the underlying purposes of section 35 – the recognition of rights based upon prior occupation, and the reconciliation of pre-existing Aboriginal rights with Crown sovereignty. But in its application by the courts, the test has been skewed towards reconciliation by turning the underlying purpose away from the recognition of prior occupation and towards reconciliation with Crown sovereignty. Consequently, it has been relatively easy for the Crown to comply with this part of the test and so it has been rendered almost meaningless. For example, the decisions in both *Gladstone* and *Delgamuukw* have made it clear that a wide range of objectives will be found to be “compelling and substantive” and linked to the purpose of reconciliation. In *Gladstone*, the court extended the list of compelling and substantive objectives to a host of economic initiatives that fall within the concept of “economic and regional fairness”. According to *Delgamuukw*, compelling and substantive legislative objectives include: “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims....”<sup>22</sup>

Curiously, it was the current chief justice who resisted the consideration of economic interests as compelling and substantive. McLaughlin J., as she then was, said this in her dissenting opinion in *Van der Peet*:

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<sup>22</sup> *Delgamuukw*, *supra* note 20 at para. 165.

The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that that this is required for the reconciliation of Aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of economic demands of non-Aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.<sup>23</sup>

#### 4.3.3 *Mikisew, Marshall*

The question of the underlying purposes of section 35 was carefully considered in *R. v. Mikisew*.<sup>24</sup> Though the trial judge's decision was overturned by the Federal Court of Appeal<sup>25</sup> and leave to appeal has been granted by the Supreme Court of Canada, the analysis is important because of its approach to recognition and reconciliation of rights. The decision in *Mikisew* took an approach similar to that of the dissent in *Van der Peet*, but rooted its analysis in the more recent Supreme Court of Canada decision in *R. v. Marshall*.<sup>26</sup> The *Mikisew* decision shifted the emphasis away from accommodating economic and non-native interests and back to prior occupation and the recognition of section 35 rights, thereby rebalancing the test:

Writing for the majority in *Marshall*, Binnie J.'s approach to s.35(1) focuses on upholding the honour of the Crown. The decision makes no mention of "reconciliation" as a purpose underlying s.35(1). The focus is not on accommodating economic and non-Native interests with Aboriginal rights, but on the obligations and responsibilities of the Crown toward First Nations.

Having regard to Binnie J.'s approach in *Marshall* and considering the direction in *Adams* to judge an objective by asking whether it is "informed by the same purposes" as the provision which provides constitutional protection for the rights, I find that an enhanced regional transportation network for the communities surrounding the Park is not a compelling and substantial objective. Allowing the social and economic interests of other communities to justify diminishing Mikisew's right to trap and hunt cannot be said to be in recognition of the prior occupation of this land by Mikisew.<sup>27</sup>

If it can be established that the legislative objectives are valid, the second step in the justification stage is to determine whether the law in question is consistent with the honour of the Crown, or with the trust-like relationship between Aboriginal people and the sovereign. It seems to be this stage of the analysis that becomes a dilemma for governments, as the standard required of a fiduciary is strict. This was recognized by the *Sparrow* Court:

<sup>23</sup> *Van der Peet*, *supra* note 9 at para. 306.

<sup>24</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2002] 1 C.N.L.R. 169 (F.C.T.D.) [*Mikisew*].

<sup>25</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2004] 2 C.N.L.R. 74 (F.C.C.A.).

<sup>26</sup> *R. v. Marshall*, [1999] 4 C.N.L.R. 161 [*Marshall*].

<sup>27</sup> *Mikisew*, *supra* note 24 at paras. 121-22.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.<sup>28</sup>

It is this requirement for ensuring that the conduct of the Crown is consistent with the principle of “the honour of the Crown” including the fiduciary relationship and any ensuring fiduciary duties that gives the justification analysis some teeth. In order to ensure this (and thus preserve the Crown’s honour), the courts have outlined further inquiries that need to be made, including the answers to three questions:

- Do the proposed means infringe the right as little as possible?
- Has compensation been made available?
- Has there been sufficient consultation/consent?<sup>29</sup>

It is at this point in the analysis that questions of compensation and consultation come into play. Although *Delgamuukw* dealt specifically with Aboriginal title lands as opposed to the exercise of harvesting rights, the case provided that compensation for infringements will ordinarily be required. Aboriginal title has an economic component which must be taken into account, but the compensation referred to in *Delgamuukw* is also linked to breaches of fiduciary duties, and not necessarily to the distinction between rights and title. The Court in *Delgamuukw* stated:

Second, Aboriginal title, unlike the Aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to Aboriginal title can be put. The economic aspect of Aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of Aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of Aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.<sup>30</sup>

<sup>28</sup> *Sparrow, supra* note 7 at 183-84.

<sup>29</sup> *Ibid.* at 163.

<sup>30</sup> *Delgamuukw, supra* note 20 at para. 169.

In spite of the emphasis in *Delgamuukw* on compensation and minimizing economic barriers, it is the question of consultation that has received the most attention. In *Delgamuukw*, the Court described meaningful consultation accordingly:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.<sup>31</sup>

It is interesting to note that, notwithstanding the consultation requirements, very little consultation has taken place with respect to Métis harvesting rights. This is likely attributable to two factors: First, was a view that in order for the consultation obligation to be triggered, the existence of an Aboriginal or treaty right must be proved conclusively in a court of law. This view developed because of the manner in which the justification analysis has been framed, with the question of the proof of the right being at the front end of analysis and the issues of consultation being linked only with the justification or final stage of the section 35 analysis. Second, for the most part, governments have essentially treated the question of Métis Aboriginal rights as non-consequential and something that can be ignored because of the pre-contact test. In any event, further comment on the question of consultation is called for.

#### **4.3.4 Haida Nation**

The question of the timing of the duty to consult was raised by the Haida Nation in its challenge to the issuing of Tree Farm Licence 39. In *Haida Nation v. British Columbia (Minister of Forests)* [*Haida I*],<sup>32</sup> the British Columbia Court of Appeal held that not only was there a moral duty to consult, but there was also both a legal and equitable duty to consult on the part of both the provincial Crown and the tenure holder, Weyerhaeuser.

<sup>31</sup> *Ibid.* at para. 168.

<sup>32</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121 (B.C.C.A.) [*Haida I*].

In rendering its decision, the Court found as follows:

[T]he roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the Aboriginal people of Canada. That trust-like relationship was reflected in the *Royal Proclamation of 1763*....

The trust-like relationship is now usually expressed as a fiduciary duty owed by both the federal and Provincial Crown to the Aboriginal people. Whenever that fiduciary duty arises, and to the extent of its operation, it is a duty of utmost good faith.”<sup>33</sup>

Notably, the duty arises in relation to Aboriginal people, and not just status Indians, and it arises because of the special trust-like relationship. Again, in relation to the duty to consult, the Court found:

How could the consultation aspect of the justification test with respect to a *prima facie* infringement be met if the consultation did not take place until after the infringement? By then it is too late for consultation about that particular infringement. By then, perhaps, the test for justification can no longer be met and the only remedies may be a permanent injunction and compensatory damages.<sup>34</sup>

In the *Haida I* decision, Lambert J.A. made it clear that the duty to consult arises prior to the infringement and that it is a free-standing duty based upon the special fiduciary relationship between the Crown and Aboriginal people:

But where there are fiduciary duties of the Crown to Indian peoples it is my opinion that the obligation to consult is a free standing enforceable legal and equitable duty. It is not enough to say that the contemplated infringement is justified by economic forces and will be certain to be justified even if there is no consultation. The duty to consult and seek accommodation does not arise simply from a *Sparrow* analysis of s.35. It stands on the broader fiduciary footing of the Crown’s relationship with the Indian peoples who are under its protection.<sup>35</sup>

The Court’s finding that the duty to consult was also owed by the tenure holder was challenged by Weyerhaeuser who subsequently sought and was granted permission to make submissions respecting both the decision that Weyerhaeuser had a duty to consult and the question of the Court’s jurisdiction to make an order about Weyerhaeuser obligations.

The primary issue the Court dealt with in *Haida Nation v. British Columbia (Minister of Forests)* [*Haida II*]<sup>36</sup> was the question of Weyerhaeuser’s duty to consult. But the *Haida II* Court also revisited the issue of proof of the right. Here Lambert J.A. used the trespass analysis:

In order to sustain a claim for trespass, it is not necessary for the land owner to have gone to court before the trespass occurred and to have established title. There is no reason why that should not also be true for the people holding Aboriginal title. If the claim to Aboriginal title is supported by a good *prima facie* case, then anyone who violates the title will be liable when title is either conceded or proved. Again, the Aboriginal people

<sup>33</sup> *Ibid.* at para. 33-34.

<sup>34</sup> *Ibid.* at para. 42.

<sup>35</sup> *Ibid.* at para. 55.

<sup>36</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 4 C.N.L.R. 117 (B.C.C.A.) [*Haida II*].

collectively holding the title would be entitled to compensatory damages and, depending perhaps on the strength of the *prima facie* case or the purposefulness of the violation, to aggravated and punitive damages.<sup>37</sup>

Lambert J.A. also commented on the issue of justification as a possible exception to paying fully compensatory and possibly aggravated and punitive damages. But in order to justify an infringement, the Crown must have jurisdiction to justify. Arguably, the provincial Crown does not have jurisdiction to justify infringements of Aboriginal rights and title because these matters fall within the exclusive jurisdiction of Parliament. Lambert J.A. then referred to a principal of constitutional law that raises the legitimate issue of whether the provincial Crown is able to justify any infringements:

And, as a matter of constitutional analysis, Aboriginal title must lie at the core of Indianness, so provincial laws of general application do not apply to Aboriginal title of their own force and, arguably, can not be constitutionally invigorated by s.88 of the *Indian Act* because s.88 applies to Indians but not to Indian lands, a distinction drawn from the wording of s.91(24) of the *Constitution Act, 1867*.<sup>38</sup>

Here, Lambert J.A. was alluding to the debate that is going on primarily in British Columbia with respect to the application of provincial land-use laws to lands that are subject to Aboriginal title and that fall within the heart of section 91(24). Under the current law, provincial laws that “touch on Indianness” are referentially incorporated as federal laws because of the language in section 88 of the *Indian Act*. Provincial laws relating to the use of land do not apply to Indian reserves because they are not “invigorated” by section 88. The logical extension of this principle is that such laws would also not apply to lands subject to Aboriginal title, though because of some confusing language in *Delgamuukw*, this proposition has been put into question. In any event, the proposition put forward by Lambert J.A. is extremely important for the Métis and will be discussed later.

The law emerging from the BC Court of Appeal in the *Haida* decisions was clarified by the Supreme Court of Canada.<sup>39</sup> In *Haida Nation* while rejecting the notion that third parties are under an obligation to consult and accommodate, the Supreme Court of Canada agreed that the Crown has a duty to consult arising prior to the establishment of a right, but that duty is not necessarily a fiduciary duty, it is an obligation that flows from the principle of the “honour of the Crown”, “Where the Crown has assumed discretionary control over specific Aboriginal

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<sup>37</sup> *Ibid.* at para. 76.

<sup>38</sup> *Ibid.* at para. 78.

<sup>39</sup> *Haida Nation v. British Columbia* (Minister of Forests) 2004 SCC 73 [Haida Nation].

interests, the honour of the Crown gives rise to a fiduciary duty...<sup>40</sup> So, the duty to consult is rooted in the “honour of the Crown” and not in the fiduciary duty, unless there is a specific Aboriginal interest over which the Crown exercises discretion, at that point, the fiduciary duty is engaged. And, as the duty to consult is a “part of a fair process of dealing and reconciliation that begins with the assertion of sovereignty”<sup>41</sup>, and emerges prior to the proof of a claim. The Court stated:

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming Aboriginal rights and title: Sparrow, supra at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.<sup>42</sup>

In providing further clarification, the Court noted that the duty arises when the Crown has knowledge, “real or constructive” of the potential existence of the Aboriginal right or title. “Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate.”<sup>43</sup> As regards to the degree of accommodation required, the Court indicated that this depends upon the strength of the case to Aboriginal rights or title, and the seriousness of the impact on those rights by the decisions being made.<sup>44</sup>

*Haida Nation* resolved one of the two major hurdles facing the Métis to engage the Crown in a serious dialogue around the duty to consult and accommodate Métis harvesters. It is now clear that the duty to consult arises, prior to the establishment of a right. But the Métis still had to content with the belief by Crown decision makers that the Métis have no rights at all because they cannot meet the section 35 test requiring a link between current practices and pre-contact customs, practices and traditions.

#### **4.4 Métis Aboriginal Right to Harvest**

So it is within the framework of the section 35 justification analysis that Métis claims must be considered. There have been a number of important cases dealing with Métis harvesting rights and the application of provincial laws. The most important of these are the recent Supreme Court

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<sup>40</sup> *Ibid.* at para. 17.

<sup>41</sup> *Ibid.* at para. 32.

<sup>42</sup> *Ibid.* at para. 32.

<sup>43</sup> *Ibid.* at para. 37.

<sup>44</sup> *Ibid.* at para 37.

of Canada decisions in *Powley*<sup>45</sup> and *Blais*.<sup>46</sup> Métis rights jurisprudence can be divided into two streams: The first stream involves those cases in which Métis are relying on Aboriginal rights and the protection afforded by section 35. The second stream involves a reliance on the *Natural Resource Transfer Agreements (NRTAs)* and the definition of the term “Indians” for the purposes of those agreements.<sup>47</sup> The Natural Resource Transfer Agreement cases were discussed in the previous chapter.

#### 4.4.1 *Powley*

In *Powley*, two Métis men shot and killed a bull moose near Sault Ste. Marie.<sup>48</sup> They were charged with hunting and being found in possession of moose contrary to the *Game and Fish Act*.<sup>49</sup> The decision by the Ontario Court of Appeal<sup>50</sup> requires some attention as it provides a well considered and forward-thinking analysis of Métis Aboriginal rights and sets the stage for the Supreme Court of Canada’s historic *Powley* decision. In its analysis, the Court of Appeal had to first determine whether the accused were Métis hunting pursuant to an Aboriginal right. The Court found that membership of the accused in the Métis Nation of Ontario and the Ontario Métis and Aboriginal Association was proof of their acceptance in the Métis community. The Court also considered and noted that the respondents were politically active in local Métis affairs.<sup>51</sup> This, along with self identification and some Aboriginal ancestral connection was sufficient to prove their Métis identity.

The Court determined that the respondents were hunting pursuant to a Métis Aboriginal right, characterized as a right to hunt for food. In applying the test that had been laid out in *Van der Peet*, the Court had to determine whether the accused were hunting pursuant to a practice, custom, or tradition that was integral to a distinctive Aboriginal culture. In addition, according to *Van der Peet*, only present practices for which there is a demonstrated continuity with pre-

<sup>45</sup> *Powley*, *supra* note 2.

<sup>46</sup> *Blais*, *supra* note 2. See also *R. v. Blais*, [2001] 3 C.N.L.R. 187 (Man C.A.) [*Blais* (C.A.)].

<sup>47</sup> *Natural Resource Transfer Agreement*, a schedule to the *Constitution Act, 1930*, s. 1, Sch. 3, R.S.C. 1985, Appendix II, No. 26 [*NRTA*]. The *Natural Resource Transfer Agreements* were negotiated between the federal government and each of the three prairie provinces in order to transfer Crown lands to the provinces. These agreements were enacted in 1930 and given constitutional status by an amendment to the *Constitution Act, 1930*.

<sup>48</sup> There is some debate about whether the men involved were Métis or non-status Indians, but this does not seem to have mattered to the Court.

<sup>49</sup> *Game and Fish Act*, R.S.O. 1990, c. G.1.

<sup>50</sup> *R. v. Powley*, [2001] 2 C.N.L.R. 291 (Ont. C.A.) [*Powley* (C.A.)].

<sup>51</sup> *Ibid.* at paras. 144-49.

contact practices, customs, and traditions are protected by section 35. Arguably, under *Van der Peet*, the accused would have had to prove they were exercising harvesting rights that were a part of a pre-contact tradition of the Sault Ste. Marie Métis community. This would have been an impossible test to meet because by definition, Métis communities did not exist in the pre-contact era. Notably, the Court ignored, or at least modified, the pre-contact requirement of the Aboriginal rights test and held that the determining date was 1850 for the Sault Ste. Marie Métis. Powley argued that 1850 was the date in which the colonizers took or exercised "effective control" over the traditional hunting territory of the Sault Ste. Marie Métis, while the Crown argued that 1850 was the date of "effective Crown sovereignty". Since both parties agreed on the date, the Court accepted 1850 without further analysis.<sup>52</sup>

However, the Crown did argue that, while 1850 was the date to assess practices, customs, and traditions, only those practices of the pre-contact Indian ancestors of the Métis were capable of supporting section 35 rights. Otherwise stated, the Crown argued that Métis claims are "derivative" and entirely dependent upon the claims of their Aboriginal ancestors. To this, the Court of Appeal made the following observation:

The constitution formally recognizes the existence of distinct "Métis peoples", who, like the Indian and Inuit, are a discrete and equal subset of the larger class of "Aboriginal peoples of Canada." ... [W]e must fully respect the separate identity of the Métis peoples and generously interpret the recognition of their constitutional rights. The rights of one people should not be subsumed under the rights of another. To make Métis rights entirely derivative of and dependant upon the precise pre-contact activities of their Indian ancestors would, in my view, ignore the distinctive history and culture of the Métis people and the explicit recognition of distinct "Métis peoples" in s.35.<sup>53</sup>

As a part of the section 35 analysis, the Court referred to the two fundamental purposes of section 35 which had been articulated in *Van der Peet*: the recognition and respect of prior occupation by distinctive Aboriginal societies, and the reconciliation of that prior occupation with the assertion of Crown sovereignty. In commenting upon the underlying purposes articulated in the *Van der Peet* test, the Ontario Court indicated that the underlying purposes for the recognition of Métis rights needed to be explored further, adding:

I agree with Dale Gibson, "General Sources of Métis Rights", RCAP Report, vol. 4, Appendix 5A at 281, that while Métis rights "spring from the same source as First Nation Aboriginal Rights" they should not be seen as "subordinate to those rights". The *Van der Peet* judgment explicitly reserved for future consideration the purposive interpretation of Métis rights, and we should not slavishly apply the pre-contact requirement to people who only came into existence post-contact....

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<sup>52</sup> *Ibid.* at para. 96.

<sup>53</sup> *Ibid.* at para. 101.

As the Métis culture was not a mere "cut and paste" affair, it may well be difficult in some cases to determine whether a Métis practice, custom or tradition was inherently Aboriginal in nature. There is, however, a discernable conception of Aboriginal rights arising from the distinctive relationship the Aboriginal peoples have with the lands and waters of their traditional territories, and one would expect the nature of Métis rights to correspond in broad outline with those of Canada's other Aboriginal peoples.<sup>54</sup>

With these observations, the Ontario Court of Appeal seems to have captured the spirit of the comments in *Van der Peet* which provided that, to address Métis Aboriginal rights issues, the courts will have to look closely at the underlying purposes for protecting Métis Aboriginal rights as distinct from the rights of the Indians and the Inuit. However, the Court of Appeal also decided that it could not ignore that section 35 protects "Aboriginal" rights and that it is the Aboriginality of the Métis that is constitutionally protected.<sup>55</sup> In its conclusion, the Court stated that Aboriginal rights arise from the distinct relationship that Aboriginal people have with their ancestral lands. At the same time, the Court indicated that Métis rights are not subordinate to those of other Aboriginal peoples and therefore not derivative. Métis Aboriginal rights are a part of a distinct culture and identity, as well as the link with their Indian forebears.

The Court of Appeal also found that hunting was integral to the culture of the Sault Ste. Marie Métis community and reiterated the proposition in *Van der Peet* that the Court did not require evidence of an unbroken chain of continuity between pre-contact and current practices, customs, and traditions.<sup>56</sup> On the matter of continuity, the Court accepted the key findings of the trial judge: "Accordingly, I agree ... that there was a continuing Métis presence in the Sault Ste. Marie area, and that to an extent sufficient for the purposes of s.35, the Métis maintained their distinctive community in continuity with the past."<sup>57</sup>

The Court was also persuaded by the evidence supporting hunting as an important aspect of current Métis life. This included evidence of contemporary Métis organizations that organized communal hunting under local "Captains of the Hunt". Moreover, the Métis respondents were found to be harvesting within the traditional hunting territory used by members of the Sault Ste. Marie Métis community.<sup>58</sup>

Having found that there was an existing Aboriginal right, the next question was whether there had been a *prima facie* infringement. Here the Crown admitted that if the Court were to

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<sup>54</sup> *Ibid.* at para. 102, 104.

<sup>55</sup> *Ibid.* at para. 103.

<sup>56</sup> *Ibid.* at paras. 125-27.

<sup>57</sup> *Ibid.* at para. 137.

<sup>58</sup> *Ibid.* at paras. 140-41.

find an Aboriginal right, the legislation would constitute an infringement of that right. The Court then reviewed the question of justification and looked at whether there was a valid legislative objective. The Court noted that conservation is a valid legislative objective, and this was not in dispute. However, the Court went on to say that this was not a sufficient rationale to justify the blatant disparity between the manner in which rights exercised by status Indians are provided with some accommodation and the failure to accommodate Métis rights. The Court proceeded to the second part of the justification stage to determine whether the legislative scheme was in keeping with the honour of the Crown. On this point, Sharpe J. stated: “The regulatory scheme fails to accord *any* recognition or priority to the Métis right. In my view, this is fatal to the contention that the limitation is in keeping with the Crown’s trust-like relationship with the Métis people.”<sup>59</sup>

The Court went on to reason as follows:

First, in relation to other holders of Aboriginal rights – Indians who enjoy a Treaty right to hunt – the current scheme places Métis rights holders at an obvious disadvantage. Indian hunting rights are given full recognition while those of the Métis are completely ignored. While I accept that conservation may justify some restrictions on the protected right, I fail to see how the legislative objective of conservation can justify this blatant disparity in treatment between two rights holders....

Second, in relation to non-Aboriginal hunters, Métis rights holders are given no priority. The failure to attach any weight whatsoever to the Aboriginal right flies in the face of the principle that Aboriginal food hunting rights are to be accorded priority.<sup>60</sup>

As the scheme accorded no priority to Métis Aboriginal rights, the Court determined that the limitation on the right was not justified. In sternly worded language, Sharpe J. noted:

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. While I do not doubt that there has been considerable uncertainty about the nature and scope of Métis rights, this is hardly a reason to deny their existence. There is an element of uncertainty about most broadly worded constitutional rights. 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. The appellant failed to satisfy the trial judge, the Superior Court judge on appeal, and has failed to satisfy me that it has made any serious effort to come to grips with the question of Métis hunting rights.<sup>61</sup>

The Court concluded by upholding the decision of the Supreme Court of Ontario and acquitted the accused. On appeal, the Supreme Court of Canada unanimously agreed in substance with the decision of the Court of Appeal, and in doing so brought greater clarity to questions related to Métis and Métis rights. The Supreme Court of Canada has directly addressed

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<sup>59</sup> *Ibid.* at para. 164.

<sup>60</sup> *Ibid.* at paras. 164-65.

<sup>61</sup> *Ibid.* at para. 166.

several questions that have been the subject of a good deal of debate since the inclusion of the Métis rights in section 35. As discussed in Chapter II, at the outset, the Court addressed the question of “Who are the Métis?” and provided a test for Métis identity.

Next, the Court turned to the question of the underlying purposes of section 35, and elaborated on the earlier comments in *Van der Peet* that acknowledged that the purposes for protecting Métis rights would have to be reconsidered when a specific set of facts come before the Supreme Court of Canada. Here, in commenting on the underlying purposes of section 35, the Court stated:

As indicated above, the inclusion of the Métis in s.35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s.35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s.35 represents Canada’s commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other Aboriginal communities.<sup>62</sup>

The preceding comments by the Supreme Court of Canada explicate the rights question because the Court makes it clear that the Métis are different from the Indian and Inuit and that the underlying purposes for protecting Métis rights are linked to their special status as a people emerging subsequent to contact and prior to the imposition of European control. If the Métis have a distinct status different from their Indian forbears, then logically the test for Métis Aboriginal rights needs to take into account that distinct status. At the same time, the protection afforded to Métis section 35 rights is rooted in the same framework as is the protection afforded to Indian and Inuit rights. The Court also noted that the inclusion of the Métis and Métis Aboriginal rights in section 35 is a recognition by the framers of the Constitution that Métis culture can only survive if the Métis are protected in the same manner as the Indians and the Inuit. This point might be used to strengthen the jurisdiction arguments advanced in the previous chapter.<sup>63</sup>

Again, speaking to the underlying purposes of section 35, the Court stated: “[Section] 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of

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<sup>62</sup> *Powley*, *supra* note 2 at para.. 17.

<sup>63</sup> However, it should be noted that the “special status” of the Métis as a people emerging in the era after contact but before effective control may have an impact on the question of legislative jurisdiction over the Métis, as the Court makes it clear that the Métis status differs from that of the Indians and the Inuit.

Métis held by virtue of their direct relationship to this county's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors."<sup>64</sup>

And on the critical question of the time frame for determining the existence of a right, the Court rejected the pre-contact test and adopted a test of "effective control", or the period after a particular Métis community arose and before it came under the effective control of the settlers. The Court arrived at the radically modified test in this manner:

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 postcontact 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.<sup>65</sup>

For the Métis – and Canada – *Powley* is not only significant; it is historic. It is the first time since the recognition and affirmation of rights in section 35 that the Supreme Court of Canada has had an opportunity to determine the existence of Métis Aboriginal rights. The Court did so by not "slavishly" applying the same section 35 analytical framework developed in the series of cases beginning with *Sparrow* and modified somewhat by *Van der Peet*. Significantly, the Court in *Van der Peet* modified the test requiring that the Aboriginal rights must be rooted in pre-contact practices, customs, and traditions by adopting a test based upon the time when "effective control" over the traditional territory was exercised by the colonizers. This is a welcome innovation of the test that was set down by *Van der Peet*, and simply makes sense. It is also a bold decision, and for two good reasons: It accords Métis Aboriginal rights the same degree of respect and recognition as are accorded to the rights of other Aboriginal peoples. And by upholding the decision of the Ontario Court of Appeal, it admonishes the government of Ontario for its failure to develop a harvesting regime in a manner consistent with the honour of the Crown and its trust-like obligations towards the Métis. *Powley* also sends a warning to other governments that believe they can simply ignore a constitutional promise. Specifically, *Powley* answers the question of whether the promises made to the Métis in 1982 will be kept.

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<sup>64</sup> *Powley*, *supra* note 2 at para. 29.

<sup>65</sup> *Ibid.* at para. 37.

#### 4.4.2 *Morin*

There are other Métis Aboriginal rights cases emerging that deserve attention, particularly in light of *Powley*. In *R. v. Morin*,<sup>66</sup> two Métis hunters were charged for fishing in contravention of the Saskatchewan fishery regulations enacted pursuant to the federal *Fisheries Act*.<sup>67</sup> Under the regulations, Saskatchewan Métis are required to secure a domestic Métis fishing licence, issued entirely at the discretion of the regulator. The accused relied primarily on an Aboriginal rights defence. At the trial, the Crown argued that any Métis Aboriginal right to fish was extinguished by the issuance of scrip. On appeal to the Court of Queens Bench, the Court relied on the trial judge's finding that, at the time of the scrip issue, the Métis understanding was that their fishing, hunting, and trapping lifestyle would not be disturbed.

Of note, the Court of Queen's Bench reviewed the evidence submitted at trial and determined that there is little distinction between the cultures and lifestyles of Métis and Indians in northern Saskatchewan. According to the Court, the distinction was artificial and linked primarily, if not exclusively, to whether one's ancestors opted for scrip or treaty. Both the Métis and the Indians of northern Saskatchewan are in similar circumstances, but the fishing regulations did not take this into account. In fact, the regulations created a disparity by treating Indians and Métis differently.

The Court also found that the domestic food fishing licence requirement for Métis was an infringement of Métis Aboriginal rights because the licencing scheme was entirely discretionary and without specific criteria. Here the Court referred to *Adams*, where the Court said this:

In light of the Crown's unique fiduciary obligations towards Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of Aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of Aboriginal rights under the *Sparrow* test.<sup>68</sup>

The Court found that the Crown could not justify the infringement since the infringement did not relate to a legislative objective and the administrative regime was without sufficient

<sup>66</sup> *R. v. Morin*, [1998] 1 C.N.L.R. 182 (Sask. Q.B.) [*Morin* (Q.B.)].

<sup>67</sup> *Fisheries Act*, R.S.C. 1985, c. F-14.

<sup>68</sup> *Adams*, *supra* note 13 at para. 54.

instructions to allow the statutory decision maker to carry out the required duties in a manner consistent with the honour of the Crown.

#### 4.5 Conclusion

Though it has been over twenty years since the recognition and affirmation of Aboriginal and treaty rights and the inclusion of Métis as one of the three Aboriginal peoples of Canada, the governments have been consistently remiss in honouring the constitutional promises of 1982 with respect to the Métis. At almost every turn, where Métis harvesters have exercised their rights, the Crown has been there, not in honour of its commitments, but in order to prosecute those who have dared to pursue a rights agenda.

As a consequence, the courts have had to be pro-active. In the late 1980s, an Aboriginal rights framework began to develop. In 1991 that framework was finally articulated by the highest court in the land in the *Sparrow* decision. But the rights framework articulated by *Sparrow* and subsequently modified in *Van der Peet*, if applied mechanically, left little room for the creation of an Aboriginal rights test unique to the Métis.

But then came the decision in *Powley*. Here, the Court added some content to section 35, which had been for the most part an empty box for the Métis and an unfulfilled constitutional promise. Rather than slavishly applying the first stage of the section 35 justification analysis, the Court decided that proof of Métis Aboriginal rights would be determined in a manner that was distinct from the tests applied to Indians. The Court modified the Aboriginal rights test that requires continuity between pre-contact practices, customs, and traditions of an Aboriginal group, and current practices. In doing so, the Court accepted that, as opposed to pre-contact being determinative, Métis practices, customs, and traditions would be measured at the point at which the sovereign exercised control of the traditional territory. In the case of *Powley* and the Sault Ste. Marie Métis community, the date was 1850.

But *Powley* is just the beginning. There are many more battles on the horizon, because the Crown will likely not respond in the manner that it should. No doubt the courts will be called upon again to breathe further life into section 35. For Métis Aboriginal rights to have life, it is not necessary for the courts to abandon the section 35 analysis. It is necessary for the courts to apply the justification analysis in a meaningful and purposive way, and in a manner reflecting the reasons underlying the constitutional protection of Métis Aboriginal rights referred to in *Van der*

*Peet*, and decided upon in *Powley*. And, the *Constitution* must be “capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”<sup>69</sup>

If the constitutional promises held out by section 35 for the Métis are to have more substance, the Supreme Court of Canada needs to be vigilant because governments will not be. In fact, by their conduct, governments have acted in a way that is inconsistent with the honour of the Crown. As is the case of the government of Ontario, other governments may simply refuse to acknowledge the existence of the Métis as a distinct Aboriginal people with Aboriginal rights. More than twenty years ago, the constitutional promises were made by governments, but not remembered. In spite of this, the Métis have finally prevailed. And the Supreme Court of Canada has sent a strong message to the Crown. And that message is plain and clear: Promises must be kept.

Chapter V outlines the essential principles that service as a basis for a purposive analysis of Métis Aboriginal rights, and provides some concluding comments.

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<sup>69</sup> *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 155.

## Chapter V

### Reconciling Differences

Since the time of first contact between Indigenous peoples and the European settlers, there has been a constant struggle by Indigenous peoples to protect their communities and their lands and resources. This struggle is a well documented period of Canadian history and lore.<sup>1</sup> For the Métis, the initial period of struggle occurred after the emergence of distinct Métis communities, particularly in the prairies. This has been documented in numerous accounts of the war between the followers of Louis Riel and Gabriel Dumont and the legions of soldiers sent from Upper Canada by Sir John A. MacDonald and others. Most notably, the Métis struggle was marked by two significant and seemingly contradictory events: The first was the successful establishment of the Métis provisional government in Manitoba along with negotiations for the inclusion of Manitoba in Confederation. Coincidental to this was the subsequent election of Louis Riel as a federal member of parliament. The second was the Battle of Batoche and the subsequent hanging of Louis Riel. With these events in mind, it is fair to say that the Métis struggle for political autonomy is unparalleled in Canadian history. Never before and never again has the battle for Aboriginal rights and autonomy been waged so fiercely against the Canadian government, only to be so quickly forgotten?

Although the Métis' struggle continued, it was not until patriation of the *Constitution Act, 1982*, with the recognition of the Aboriginal and treaty rights of the Aboriginal peoples of Canada and the subsequent creation of the constitutional process from 1983 to 1987, that once again Métis rights became a national issue.<sup>2</sup> But the constitutional euphoria was short lived, and the issues around the recognition of the Métis as a people and the recognition and affirmation of Métis rights quickly faded into the background. The Métis were left to their own devices and to the creative arguments of their lawyers. And the Crown was ever present, as Crown prosecutors and armed game wardens, ignoring the constitutionally guaranteed rights of the Métis with all the arrogance of a colonizing nation.

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<sup>1</sup> See for example, Robin Fisher, *Contact and Conflict* (Vancouver: UBC Press, 1997).

<sup>2</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*]; *Ibid.* at s. 37.1; and "Consensus Report on the Constitution: Final Text" (Charlottetown Accord), Charlottetown, August 28, 1992).

Nevertheless, the Crown prosecutors and game wardens were not to have the last words. The last words were to come from the lawyers, and the final say from the Supreme Court of Canada. But unlike Indian litigants who used legions of white lawyers, the Métis were represented by their own able counsel. Names like Lionel Chartrand, Clem Chartier, and Jean Teillet, all direct descendants of the Métis who waged war against the regiments of John A. Macdonald, now do battle in the courthouses with the best legal minds at the disposal of the provincial attorneys general and the Government of Canada.

Now the Supreme Court of Canada has spoken.<sup>3</sup> And though the jurisdiction question remains unresolved, questions of Métis Aboriginal rights have been answered with a resounding “Yes!” The constitutional promises made twenty years ago have meaning for the Métis, at least where the courts are concerned. The task for those who cherish their rights is to ensure that governments do more than honour those rights in the breach. If governments are to be honourable, they will now be required to recognize Métis Aboriginal rights and afford space within the context of their wildlife harvesting and other legislative regimes to ensure that the Aboriginal rights of the Métis are accorded the protection required by the courts. And to do so, decision makers will have to ensure that they adopt a purposeful and principled approach to Métis Aboriginal rights. Decision makers will have to bear in mind the purposes behind the inclusion of Métis Aboriginal rights in section 35: to protect the rights of Métis that flow from their links to their Indian forbears as well as those rights that are sourced in the emergence of the Métis as a distinct people subsequent to the period of first contact and prior to the exercise of control by the colonizing governments. At the same time, while keeping the underlying purposes of section 35 in mind, both the courts and the decision makers will have to approach the interpretation of Métis Aboriginal rights based upon a set of rational principles.

But what are those rational principles that need to be honoured? Based upon principles of constitutional law and the section 35 justification analysis that has been provided since *Sparrow*, *Van der Peet*, and now *Powley*,<sup>4</sup> a framework has emerged that will assist in the interpretation of Métis Aboriginal rights. In doing so, it must take into account some of the fundamental principles that have guided Crown-Indigenous relationships since the arrival of the settler

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<sup>3</sup> See *R. v. Powley*, [2003] 4 C.N.L.R. 321 (S.C.C.) [*Powley*]; *R. v. Blais*, [2003] 4 C.N.L.R. 219 (S.C.C.) [*Blais*].

<sup>4</sup> *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.); *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.) [*Van der Peet*]; *Powley*, *supra* noted 3.

nations.<sup>5</sup> These include: the recognition of the rights of Indigenous peoples; the assertion of Crown sovereignty and the exclusive nature of that assertion; and, the special relationship between Indigenous peoples and the Crown.

The first principle, that is the recognition of the rights of Indigenous people was embodied in the language of the *Royal Proclamation, 1763*<sup>6</sup> and has subsequently become a constitutional imperative through the recognition and affirmation of Aboriginal and treaty rights in section 35.<sup>7</sup> The second principle, that of exclusivity, arises by virtue of the doctrine of discovery and the assertion of sovereignty through which the imperial Crown claimed the exclusive right to buy and sell Indigenous lands and to have the exclusive monopoly with respect to any dealings with the Indigenous tribes.<sup>8</sup> The effect of this was that the Indigenous nations could only alienate their lands by way of “surrender” to the Crown. This exclusivity or monopoly in favor of the discovering nation became reflected in Canada’s exclusive jurisdiction over Indians and Indian lands by virtue of section 91(24) of the *Constitution Act, 1867*.<sup>9</sup> A third principle underlying the special Crown-Indian relationship engages “the honour of the Crown” including the fiduciary relationship and any ensuing fiduciary duties that may arise from the Crown’s exercise of discretion over established rights.<sup>10</sup> The hallmark of this special relationship is rooted in, on the one hand, the discretion exercised by the Crown over Indigenous lands and their governing structures, and on the other hand, the vulnerability of Indigenous peoples to that discretion, flowing from the assertion of Crown sovereignty.

Stated otherwise, these same propositions have evolved into: the recognition and affirmation of Aboriginal and treaty rights now embodied in section 35; the exclusive jurisdiction to deal with Indigenous peoples and their lands, once vested in the imperial Crown and now residing in section 91(24) of the *Constitution Act, 1867*; and the special relationship between the Crown and Indigenous peoples that engages the “honour of the Crown. These propositions, or overarching principles, still apply today and remain a part of the bedrock of the Crown-Aboriginal relationship, including the Aboriginal rights framework.

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<sup>5</sup> Some of these principles, or propositions, were discussed in Chapter I.

<sup>6</sup> *Royal Proclamation, 1763*, reprinted in R.S.C. 1985, App. II, No. 1.

<sup>7</sup> *Constitution Act, 1982*, *supra* note 2 at s. 35.

<sup>8</sup> See Chapter I.

<sup>9</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>10</sup> *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.

While the forgoing principles are also a part of the foundation of the Métis Aboriginal rights framework, the Métis Aboriginal rights framework has its own unique character. The framework can be summarized as follows: The Métis are a distinct Aboriginal people, with Aboriginal rights that are independent from those of the Indians and the Inuit. The approach used in the interpretation of Métis Aboriginal rights should be a purposive one. A test for Aboriginal rights based upon a rigorous requirement to demonstrate continuity with pre-contact practices, customs, and traditions would ignore the fact that Métis are a distinct Aboriginal people that emerged in the post-contact era. A distinct test is required to accommodate Métis needs. A test for Métis Aboriginal rights that requires continuity with customs, practices, and traditions of historic Métis communities that emerged in the period subsequent to contact but prior to the “exercise of control” by the colonizers accommodates Métis Aboriginal rights in a manner that is consistent with the underlying purposes for the inclusion of Métis Aboriginal rights in section 35. This has now been established as a principle of law. Consequently, courts and decision makers will no longer be able to slavishly apply the *Van der Peet* pre-contact test respecting Métis Aboriginal rights.<sup>11</sup>

Also, the federal government has the exclusive legislative jurisdiction over Indians and lands reserved for the Indians by virtue of section 91(24) of the *Constitution Act, 1867*. The term “Indians” as used in section 91(24) is broad in scope and includes the Inuit and the Métis, as well as Indians. This interpretation is consistent with the analysis used by the Supreme Court of Canada in *Re the term “Indians”*,<sup>12</sup> and with the purposive approach required in interpreting constitutional documents. Within the scope of Canada’s jurisdiction over Indians and lands reserved for the Indians is a “core of Indianness” that is immunized from provincial laws by virtue of the doctrine of inter-jurisdictional immunity. According to that doctrine, provincial laws cannot bear upon those subject matters that fall within the core of the federal government’s legislative jurisdiction. The content of the core of Indianness, or the heart of section 91(24), includes rights protected by section 35, including Métis Aboriginal rights. Provincial laws that touch on this core of Indianness must be read down. As Métis Aboriginal rights fall within the core of Indianness, or the heart of section 91(24), they are protected from the application of provincial laws.

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<sup>11</sup> *Van der Peet*, *supra* note 4 at para. 44.

<sup>12</sup> *Reference Re Term “Indians”*, [1939] S.C.R. 104.

The Aboriginal rights of Indians also fall within the core of Indianness or the heart of section 91(24). Section 88 of the *Indian Act* incorporates by reference provincial laws of general application that touch on the core of Indianness, making such laws apply to status or registered Indians as federal laws.<sup>13</sup> Consequently, those aspects of the provincial wildlife regime that touch upon the core of Indianness apply to status Indians, subject of course to the section 35 justification analyses. But Métis rights are to be treated differently than those of Indians because Métis are not status Indians; Métis are a distinct people and are not subject to the *Indian Act*. Section 88 does not apply to Métis. Therefore provincial natural resource laws that touch on the core of Indianness of the Métis – perhaps more correctly referred to as the “core of Métisness” – are inapplicable to the extent that they attempt to regulate Métis exercising Aboriginal rights.

The principles embodied in this Métis Aboriginal rights framework can be succinctly stated as follows:

- Métis are one of the Aboriginal peoples of Canada, and are distinct from Indians and the Inuit.
- Métis, along with Indians and Inuit, fall within the federal government’s exclusive legislative jurisdiction over Indians and lands reserved for the Indians, pursuant to section 91(24) of the *Constitution Act, 1867*.
- Métis have Aboriginal rights linked to their Indian forbears and sourced in the emergence of the Métis as a distinct people subsequent to the period of first contact with the European settlers and prior to the exercise of control by the colonizing governments.
- Métis Aboriginal rights are protected by section 35 and subject to the section 35 justification analysis.
- The section 35 justification analysis is to be applied by using a purposive approach, not by proceeding with slavish application of the section 35 analytical framework as it applies to Indians.
- In applying the justification analysis, it is necessary to consider the underlying purposes for the protection of Métis rights.
- The underlying purposes for protecting Métis rights in section 35 are to recognize those Métis rights linked to their Indian forbears and those Métis rights that flow from the emergence of the Métis as a distinct people.

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<sup>13</sup> *Indian Act*, R.S.C. 1985, c. 1-5.

- Métis Aboriginal rights fall within the core of Indianness, or the heart of section 91(24).
- The doctrine of jurisdictional immunity protects the core of Indianness, or the heart of section 91(24), including Métis Aboriginal rights, from the application of provincial laws that purport to touch on the core of Indianness, or the heart of section 91(24).
- Section 88 of the *Indian Act* does not apply to the Métis and therefore does not incorporate by reference provincial wildlife regulations that touch on the core of Indianness, or the heart of section 91(24), with respect to the Métis.
- Those aspects of the provincial wildlife regulatory regime that touch on the core of Indianness with respect to the Métis, must be read down and are therefore inapplicable.

This framework flows from an analysis of the meaning of the term “Indians” as used in section 91(24) of the *Constitution Act, 1867*, a distinct and purposive approach to the interpretation of section 35 Métis Aboriginal rights, a review of the Supreme Court of Canada’s decision in *Powley*, and the application of the doctrine of inter-jurisdictional immunity.

The implications of the Métis Aboriginal rights framework would appear to call for some law reform. Chapter III provided a detailed discussion around the need to clarify section 91(24) to confirm that it also includes the Métis and the corresponding need to ensure that the Métis settlement legislation in Alberta would not be struck down. Reference has been made to the provisions developed during the *Charlottetown Accord* process that proposed to both clarify section 91(24) and protect the Alberta Métis Settlement legislation from any adverse consequences of this clarification. These provisions need to be revisited by government law and policy makers. In order to provide greater clarity with respect to jurisdiction over the Métis, these changes ought to become a part of a constitutional reform package. If this does not happen, governments will simply fall into their old habits of ignoring Métis issues and using the appearance of jurisdictional uncertainty as an excuse for maintaining the status quo.

In addition, as a result of the Supreme Court of Canada’s decision in *Blais*,<sup>14</sup> further law reform work may be required and linked with the doctrine of inter-jurisdictional immunity. This is because before the decision in *Blais* there was an open question as to whether Métis were Indians for the purposes of the *NRTAs*. If indeed the Métis were considered as Indians for the purposes of those agreements, then there would be two results: The first would be that, under the *NRTAs*, the Métis could pursue their traditional activities of hunting, trapping and fishing game

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<sup>14</sup> *Blais*, *supra* note 3.

and fish for food, in the same manner as do the Indians, that is, on unoccupied land, throughout the year, and on private lands to which they have a right of access. The second would be that those activities could not have been exercised without restrictions. Aboriginal peoples carrying out their traditional harvesting activities under the *NRTAs* are subject to laws respecting game in force in the Province from time to time.

In other words, the *NRTAs* defined what rights were to be exercised and placed restrictions on the manner in which those rights were to be exercised by allowing for the application of provincial laws. Had *Blais* been decided differently, the provincial regulatory regime would have applied to Métis harvesters because of the Indian provision in the *NRTAs*, subject of course to the section 35 justification analysis. But this is now not the case and that has caused a bit of a conundrum for the provinces. The conundrum is that Métis have harvesting rights, but as discussed above and in more detail in Chapter III, the provincial wildlife regime is inapplicable to the extent that it touches on the core of section 91(24), or attempts to regulate the exercise of Métis Aboriginal rights.

And, as the three prairies Provinces the heart of the Métis homeland, for the most part, Métis harvesters will not be subject to the application of certain aspects of the provincial wildlife regimes. This will no doubt be of some concern to the provincial governments, and should be the subject of law reform considerations that will ensure the application of a regulatory regime without the gaps caused when certain aspects of the provincial regime are read down by virtue of the doctrine of inter-jurisdictional immunity. The regulatory regime needed to fill the gaps might be federal, it might involve a federal-provincial agreement, or it might be best served by the development by the Métis of a Métis wildlife harvesting regime. This could require the Métis to develop and enforce their own regulations. In any event, the area is ripe for law reform and will require some attention in the future.

But care must be taken in developing any such regime. If the Crown intends to establish a regime that would interfere with the exercise of Métis harvesting rights, in addition to addressing the issues related to the doctrine of inter-jurisdictional immunity, a meaningful consultation process related to the development of such regulations needs to be put in place. This simply flows from the section 35 justification analysis already established by the courts and ought not to be the subject of great debate. With respect to Métis wildlife harvesting, and the necessary consultation arrangements, one need only recall the words of the Supreme Court of Canada in

*Delgamuukw*,<sup>15</sup> which made it quite clear that the duty to consult may require consent, particularly when the provinces are attempting to enact hunting and fishing regulations:

Moreover, the other aspects of Aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between Aboriginal title and the Aboriginal right to fish for food in *Sparrow*. First, Aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The Aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of Aboriginal title suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified, in the same way that the Crown's failure to consult an Aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. **Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands [emphasis added].**<sup>16</sup>

And, equally as important, any regime that is put in place must provide clear criteria for the statutory decision makers to be able to exercise their discretion in a manner that is consistent with the honour of the Crown and any ensuing fiduciary duties, as required in *Adams*.<sup>17</sup> The Crown cannot without some clear guidelines simply adopt an unstructured administrative regime that risks infringing Aboriginal rights.'The Supreme Court of Canada has clearly recognized this:

...Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights in a substantial number of application sin the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of Aboriginal rights.<sup>18</sup>

The implications of both *Powley* and *Blais* are highly significant for the Métis and governments, particularly in relation to wildlife harvesting, and particularly when read in conjunction with other Supreme Court of Canada decisions. A proper understanding of the Métis Aboriginal rights framework will lead to the conclusion that the current provincial wildlife harvesting regimes will have some gaps in their application to Métis wildlife harvesters.

<sup>15</sup> *Delgamuukw v. British Columbia* (1997), [1998] 1 C.N.L.R. 14 (S.C.C.) [*Delgamuukw*].

<sup>16</sup> *Ibid.* at para. 168

<sup>17</sup> *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*].

<sup>18</sup> *Ibid.* at 132.

Resource managers will want to ensure that those gaps are addressed in a manner consistent with the proper interpretation of section 35. Both the Crown and the Métis have much work to do if there is to be a sensible response to the decisions in *Powley* and *Blais*, and to address the jurisdictional vacuum left by a failure by the federal government to exercise its authority in a manner consistent with the obligations attached to “the honour of the Crown”. A starting point would be for the Crown to adopt a law reform agenda that includes clarification of section 91(24) and the development of a wildlife harvesting regime that takes into account the Métis Aboriginal rights framework. This of course needs to be done with the Métis, and in a process involving good faith negotiations and meaningful consultation. Unless some of this happens, Aboriginal rights of the Métis will become like the treaty rights of old – forgotten promises, more honoured in the breach.

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