March 2006 **by Mark L. Stevenson**

THE MÉTIS NATION AND MÉTIS ABORIGINAL RIGHTS

I Introduction

In 1982, the Constitution of Canada was "patriated". Section 35 recognized and affirmed the Aboriginal and Treaty rights of the Aboriginal peoples of Canada and defined "Aboriginal peoples" to include the Indians, the Inuit and the Métis. But Aboriginal rights were undefined and it was left to the courts, and in particular, the Supreme Court of Canada to give scope and content to the meaning of section 35. Shortly thereafter, the decision by the Supreme Court of Canada in *R*. v. *Sparrow*[1] determined there is an Aboriginal right to fish for food and set out what is now referred to as the section 35 justification analysis. *Sparrow* was soon followed by *R v. Gladstone*[2] that confirmed the commercial aspect of Aboriginal rights. In *R v. Van der Peet*[3], the Court clarified the test for proof of an Aboriginal Right and, then, *Delgamuukw v. British Columbia*[4] confirmed that Aboriginal title is a legal interest in land and that it has not been extinguished in British Columbia.

Yet on questions linked with the Métis, the Supreme Court had been silent. Questions like "Who are the Métis?", "Do the Métis have Aboriginal rights?", and "What is the test for Métis Aboriginal rights?" were left unanswered. It was not until more than 20 years after the recognition and affirmation of Aboriginal and Treaty rights that some clarity was brought to the legal issues surrounding the Métis and Métis Aboriginal rights. The Supreme Court of Canada's decision

1 [1990] 1 S.C.R. 1075.
2 [1996] 2 S.C.R. 723.
3 [1996] 2 S.C.R. 507.
4 [1997] 3 S.C.R. 1010.

in *R. v Powley*[5] was historic. It answered with a resounding "Yes" the question of whether or not the recognition and affirmation of rights in section 35 has any meaning for the Métis.

This paper will explore some fundamental questions related to the Métis and Métis Aboriginal rights in light of the decision in *Powley*. In addition, it will look briefly at the history of the Métis and the circumstances around the emergence of the Métis Nation, explore the difficult question of "Who are the Métis?" and review the issues around Métis definition and identify.

Also, the paper will review key elements of the Supreme Court of Canada's decision in *Powley* with regard to the exercise of Métis Aboriginal rights and attempt to reconcile *Powley* with the decision by the same Court in *R. v Blais.*[6]

II Who are the Métis?[7]

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.[8] According to the Royal Commission on Aboriginal Peoples (Royal Commission), the common theme is that Métis "embrace both sides of their heritage".[9] But Métis are more than that. The Métis are a "people" defined by their rich and distinct heritage and culture, their special relationship with the land, and their connection with the fur trade. More importantly, they are a nation that emerged from the collectivity

5 2003 SCC 43.

6 2003 SCC 44.

7 A more detailed version of this part of the paper is found in Chapter II of the author's LLM thesis.

8 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) 1. According to Chartrand, "The original meaning of the term *Métis* evokes the idea of a 'mixed' or 'in-between' people" (at 24).

9 RRCAP, vol. 1, *ibid.* at 637.

of Métis communities living around the Hudson Bay trading posts in the prairie provinces, and the large Red River Settlement in Manitoba.

According to the Métis National Council ("MNC")[10] website:

> …the Métis People emerged out of the relations of Indian women and European men. While the initial offspring of these Indians and European unions were individuals who possessed mixed ancestry, the gradual establishment of distinct Métis communities, outside of European cultures and settlements, as well as, the subsequent intermarriages between Métis women and Métis men, resulted in the genesis of a new Aboriginal people – the Métis.[11]

a) Early History of the Métis Nation

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.[12] 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".[13]

As the pressure from settlers for agricultural land increased in the eighteenth and early nineteenth centuries, families of mixed Aboriginal and French

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10 The Métis National Council is the national political organization representing the Métis Nation.

11 http://www.metisnation.ca/who/index.html

12 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).

13 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).

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 Aboriginals 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 en masse in the Red River area. 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.[14] 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.[15]

[14] 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].

[15] RRCAP, vol. 4, *supra* note 8 at 220-21.

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 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.[16] 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.[17]

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, into the Dominion of Canada.

b) Manitoba Act, 1870

The negotiations between representatives of the Métis Nation and the government of Canada resulted in many promises, a written agreement, and

16 *Ibid.* at 151, and RRCAP, vol. 4, *supra* note 8 at 221.

17 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 8 at 87.

the intention to implement that agreement by the *Manitoba Act, 1870*.[18] 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".

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 *Manitoba Act* yielded little benefit for Métis families.[19] Significant land distribution did not occur until at least five years after the *Manitoba 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.[20] Land agents and some administrators took advantage of the plight of the Métis by purchasing their land, for almost next to nothing.[21]

The combination of abuse, delays in implementation, and poor administration of the *Manitoba Act* had devastating consequences for the Métis. Many Métis

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[18] *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*].

[19] 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.

[20] RRCAP, vol. 4, *ibid.* at 224.

[21] *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.

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 *Manitoba 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.[22]

c) 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 far more vast than the land designated to be the province of Manitoba under the *Manitoba Act.*[23] In 1872, the federal government enacted the *Dominion Lands Act* to apply to the newly acquired territory.[24] 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, *Dominion Lands 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

22 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?, supra note 8* at 89.

23 Rupert's Land and North-Western Territory Order (U.K.). June 23, 1870.

24 *Dominion Lands Act*, S.C. 1872 (35 Vict.), c. 23.

extinguishment of any Aboriginal title.[25] However, the *Dominion Lands Act* was never applied to large segments of the Métis homeland, nor to Quebec, and Labrador.

d) 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 claiming Métis identity living beyond the homeland.

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

> 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.[26]

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.[27] The

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25 *Dominion Lands Act*, S.C. 1879 (42 Vict.), c. 31.

26 *Ibid.* at 203.

27 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*

Congress and some of its affiliates have expressed the view that the term "Métis" refers to a broad category of persons with mixed Aboriginal and European ancestry. This would include all people of "mixed blood" who identify themselves as Métis.[28] 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 MNC, representing the Métis from primarily the prairie provinces, argue the Métis are a distinct socio-cultural entity which emerged primarily in the valleys of the Saskatchewan, the Red, and the Assiniboine Rivers out of special historical and political circumstances, uniting to oppose Canadian expansion into the Northwest.[29] 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.[30] As these Métis were entitled to be allotted parcels of land under the *Manitoba Act* and the *Dominion Lands Act*, the MNC 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.[31]

During the negotiations around the failed *Charlottetown Accord*, the MNC, Canada, and several provinces worked out an accord to address specific Métis

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.

[28] 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?*, *supra* note 8 268 at 289-90.

[29] Catherine E. Bell, "Who are the Métis People in Section 35(2)?" (1991) 29:2 Alta. L. Rev. 351 at 357, 359.

[30] 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).

[31] D. Purich, *The Métis* (Toronto: James Lorimer & Company, 1988) at 133-50, reprinted in Bell, "Who Are the Métis?, *supra* note 29 at 374.

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.[32]

This definition is similar to definitions adopted by the MNC provincial affiliates. For example, the Métis Nations of Saskatchewan define the term Métis in their Constitution under Article 10:

> Métis means an Aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit, and:
> - is 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 Act, and enacted from time to time, or
> - a person of Aboriginal descent who is accepted by the Métis Nation and/or Métis Community

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 *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 Aboriginal and European forebears.[33] In so doing, the Court put an end to the debate around whether the term

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[32] *Métis Nation Accord*, s.1(a)), online: Indian and Northern Affairs http://www.ainc-inac.gc.ca/2002-templates/ssi/print_e.asp;Also found at: *Métis Nation Accord*, s. 1(a), reprinted in RCAP, vol. 4, *supra* note 8 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.

[33] *Supra*, note 5.

"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.[34]

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.
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> Second, the claimant must present evidence of an *ancestral connection* to a historic Métis community. This objective requirement ensures that beneficiaries of s.35 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.
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> 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 participation in a shared

[34] *Ibid.* at para. 10.

> culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups.[35]

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. 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 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 decide whether these historic Métis communities must be somehow linked with the Métis Nation. 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 is necessarily linked with the nation of Canada.

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[35] *Ibid*. at paras. 31-33.

e) The Métis Nation

The Métis are an Aboriginal people of Canada who are distinct from the Indians, and the Inuit. The Métis Homeland encompasses the three Prairie Provinces, northwestern Ontario and northeastern British Columbia. Modern Métis communities are scattered throughout the Homeland. Some of these communities have their own land base, as in the Métis settlements in Alberta, as well as Kelly Lake in northeastern British Columbia. However, most Métis communities do not have a formally recognized land base, and consequently, the establishment of a land claims process is at the top of the agenda for the Métis Nation. While the numbers of Métis will vary with the definition of Métis, according to the MNC website, there are approximately 400,000 Métis people. The collectivity of Métis people, living in Métis communities within the Métis Homeland, constitutes the Métis Nation.

> The Métis Nation grounds its assertion of Aboriginal nationhood on the well-recognized international principles. It has a shared history, a common culture (song, dance, national symbols, etc.), and unique language (Michief with various regional dialects), extensive kinship connections from Ontario westward, a distinct way of life, territory and a collective consciousness.[36]

The Métis Nation is represented at the national level by the MNC. The MNC is composed of representatives from each of the five democratically elected provincial governing bodies: the Métis Nation of Ontario, the Manitoba Métis Federation, the Métis Nation of Saskatchewan, the Alberta Métis Nation and the Métis Nation of British Columbia.

National Definition of Métis

[36] *Supra,* note 11.

On September 27, 2002, at a gathering of the Métis Nation, as represented by the MNC and the affiliate organizations reached agreement of the definition of Métis. The definition provides that:

> Métis means a person who self-identifies as Métis, is of historic Métis Nation Ancestry, is distinct from other Aboriginal Peoples and is accepted by the Métis Nation.[37]

III *R. v Powley*

There is no doubt that the most important court decision to date, in the history of Crown-Métis relations has been *Powley*. The question before the Court was whether Métis community members (Steve and Roddy Powley) in and around Sault St. Marie have a constitutionally protected right to hunt for food.

The facts are not in dispute. On October 22, 1993, Steve Powley and his son Roddy shot and killed a moose for food. Moose hunting in Ontario is subject to strict regulation and requires "Outdoor Cards", hunting license and validation tags. Neither Steve nor Roddy had an Outdoor Card, a validation tag or a valid hunting license. After shooting the moose, Steve Powley affixed a handwritten tag to the ear of the moose. The tag indicated the date, time and location of the kill, as required by the hunting regulations. It stated that the animal was

[37] The MNC has also provided defined terms to the definition in accordance with the following resolution:
WHEREAS on September 27, 2002 the Métis Nation adopted a national definition of Métis; and
WHEREAS within the definition there are defined terms;
THEREFORE BE IT RESOLVED that the Métis Nation adopts the following defined terms for its national definition of Métis;
"Historic Métis Nation" means the Aboriginal people then known as Métis or Half-Breeds who resided in Historic Métis Nation Homeland;
"Historic Métis Nation Homeland" means the area of land in west central North America used and occupied as the traditional territory of the Métis or Half-Breeds as they were then known;
"Métis Nation" means the Aboriginal people descended from the Historic Métis Nation, which is now comprised of all Métis Nation citizens and is one of the "aboriginal peoples of Canada" within s.35 of the Constitution Act of 1982;
"Distinct from other Aboriginal Peoples" means distinct for cultural and nationhood purposes.

for food. Steve Powley signed the tag, and affixed his Ontario Métis and Aboriginal Association membership on it. Later that day they were visited by two conservation officers. The Powleys told the officers they had shot the moose. One week later they were charged with unlawfully hunting in contravention of the *Game and Fish Act (Ontario).*

a) Legal Context of *Powley*

The rights of Aboriginal peoples are protected under section 35 of the *Constitution Act, 1982*. Section 35 recognizes and affirms the Aboriginal and Treaty rights of the Aboriginal Peoples of Canada and defines the Aboriginal Peoples of Canada to include the Indians, the Inuit and the Métis. Since 1982, the courts have elaborated and continue to clarify the content of section 35. A test has now emerged in the analysis of section 35, which asks four questions:

- Is there sufficient proof of the Aboriginal or Treaty Right?
- Has the right been extinguished?
- Has the right been infringed? and
- Is the infringement justifiable?

For the Métis, it is the first question that has been difficult to answer. This is because the Métis do not have treaty rights and the layperson's understanding of Aboriginal rights usually includes those rights that Aboriginal peoples exercised prior to the arrival of the Europeans. By definition, this would exclude the Métis. The test for Aboriginal rights has been outlined in *Van der Peet* where the Court stated:

> [T]he 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.[38]

More importantly, the Court in *Van der Peet* indicated that only those present day practices, customs and traditions which have continuity with pre-contact practices customs and traditions are protected by section 35. In other words, Aboriginal rights could only be exercised by Indians or Inuit. However, the Court also indicated that as regards to the Métis, a different test may be required and that the determination of such a test would be left for another day.

In *Powley*, in addition to answer the specific questions related to Steve and Roddy Powley, the Court explored a number of broad questions including:

- Who are the Métis?
- Where do Métis Aboriginal rights come from?
- What criteria should be used for Métis Identify?

b) Analysis by the Court

In its analysis, the Court undertook a "purposive approach" – in other words it looked at the underlying purposes of section 35 with respect to the Métis and determined that the underlying purpose was to protect the customs practices and traditions of Métis communities that emerged in the period between the arrival of the Europeans and the exercise of "effective control" . At the same time, the Court had to deliberate on each of the key questions in the section 35 analysis. In doing so, the Court focussed on the first question, that is, whether there was a Métis Aboriginal right that provided protection for the

[38] *Supra,* note 3 at para. 46.

Powleys. On this matter, the Court provided a detailed discussion of some further points that are discussed below.

i) Is there sufficient proof of the Right?

- **Characterization of the Right**

The Court first considered whether the right should be characterized as a right to hunt for moose, or the broader right to hunt for food. The Court concluded that the relevant right is not a right to hunt moose, but the right to hunt for food in the designated area. It is interesting to note that the right was not characterized as a right to hunt for "food, social and ceremonial purposes" but a right to hunt for food.

- **Historic Métis Rights Bearing Community**

Next, the Court looked at whether there was an historic Métis community from the Sault St. Marie area in which to root the modern day rights exercised by the Powleys. The existence of an identifiable historic Métis community must be demonstrated and there must be a degree of continuity and stability between the historic community and the contemporary community. On the historical evidence available, the Court concluded there was historic Métis community at Sault St. Marie and that the community was a "rights bearing" community.

- **Contemporary Métis Community**

Aboriginal rights are communal in nature and for there to be Métis Aboriginal rights, it is not enough that the individual exercising the rights be a descendant from the rights bearing community. There must also be a contemporary Métis

community that is able to demonstrate ancestral lineage between the historic rights bearing community and the modern community. On the facts, the Court determined that there is a modern Métis community in Sault St. Marie that has an ancestral linkage to the historic Métis community.

- **Verification of Membership**

The Court considered the issue of membership and noted that:

> As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights holders can be identified[39].

It is important therefore that the modern Métis communities engage in formal membership exercises in which requirements are established and that these requirements become standardized. In the meantime, courts will have to ascertain Métis identity on a case by case basis. And, while the Court refused to set down a comprehensive definition for the Métis, it looked to the three broad criteria set out in the lower courts. As discussed earlier, these criteria are:

- Self – identification (must not be of recent vintage for the purpose of taking the benefit of section 35)
- Ancestral connection to a historic Métis community
- Accepted by the modern community whose continuity with the historic community provides the legal basis for the right

The Court noted that membership in a political organization may be relevant to community acceptance. More importantly, the Court noted that:

[39] *Supra,* note 5 at para. 29.

> The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis communities identity and distinguish it from other groups[40].

The Court noted also that not everyone of mixed ancestry will be able to demonstrate Métis Aboriginal rights and that to do so one must be a member of a contemporary rights bearing community and have ancestral links with a historic Métis community.

- **Relevant Time Frame**

As noted earlier, the pre-contact test articulated in *Van der Peet* would bar the Métis from being able to exercise Aboriginal rights. This would effectively gut section 35 of any content for the Métis. The Court concluded that the pre-contact test in *Van der Peet* requires adjustment to take into account the post-contact origins of Métis communities.
The Court noted that:

> 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[41].

More importantly, the Court noted that this can be accomplished by the application of a post-contact and pre-effective control test. The Court rejected the argument that Métis rights must find their source in the pre-contact practices of their Indian forbearers as this would deny the Métis their

40 Ibid. at para. 33.
41 Ibid. at para. 37.

distinctiveness. The parties agreed that "effective control" passed from the Aboriginal peoples of the area to European control" in the period around 1850**.**

It is important to note that this test appears to be one test that needs to be applied from community to community and the 1850 date would likely not be applicable in the Prairie Provinces.

- **Integral to the "distinctive culture"**

While the Court modified the rights test in *Van der Peet,* it also kept in place the key elements of that test. In particular, the Court had to determine whether the right being exercised was a practice integral to the "distinctive culture" of the Métis community. The Court concluded that subsistence hunting – hunting for food - was an important aspect of Métis life and a defining feature of their special relationship with the land.

- **Continuity between the Historic Practice and the Modern Right**

In this matter, the Court noted that:

> Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular Aboriginal communities. A certain margin of flexibility might be required to ensure that Aboriginal practices can evolve and develop over time…[42].

In this particular case, flexibility is not required as hunting for food was an important feature of the historic Sault St Marie Métis community, and the practice continues today.

[42] Ibid. at para. 45.

In reviewing all of the above criteria, the Court concluded that there was sufficient proof of the Métis Aboriginal right to hunt for food. The Court went on to apply the next part of the test.

ii) Has the right been extinguished?

Prior to the constitutional protection of Aboriginal and treaty rights in 1982, extinguishment of rights could be accomplished by clear and plain language, either in treaties or by way of legislation. The Crown argued that Métis Aboriginal rights were extinguished by virtue of the extinguishment provisions of the Robinson Huron Treaty. However, the Court noted that Métis were excluded as a group from the Robinson Huron Treaty so their rights could not have been extinguished in the manner argued by the Crown.

iii) Has there been an infringement?

Ontario currently does not recognize any Métis rights, whatsoever. The Court noted that this lack of recognition and the consequent application of the hunting regulations to the Métis constitutes an infringement of the Métis Aboriginal right to hunt for food.

iv) Is the infringement justified?

In its argument, the Crown attempted to use conservation as a justification for the infringement. However, there was no evidence that the moose population was under threat. The First Nation population was hunting moose without restrictions, and there was a sports hunting harvest. If the moose population was under threat, the Métis would still be entitled to a priority allocation, above the non-Aboriginal hunters. The Court concluded that the infringement

was not justifiable and that Métis Aboriginal rights have the same priority as the First Nation hunting rights and must be treated in the same way.

In answer to the four questions in the section 35 test, the Court found that:

- Steve and Roddy Powley were exercising a Métis Aboriginal right to hunt for food;
- The Aboriginal right has not been extinguished;
- There has been an infringement of the right; and
- The infringement is not justifiable.

c) Related Litigation

While *Powley* set out a clear test for Métis Aboriginal rights, Métis Aboriginal rights litigation is in its infant stage. There are many unanswered questions around Métis Aboriginal rights which were only touched upon by *Powley*. Probably the most vexing question is the identification of Métis rights-bearing communities. Unlike First Nations traditional territories, reserves under the *Indian Act*, and treaty lands, there is little agreement around the identification of Métis rights-bearing communities. Litigation subsequent to *Powley* will likely focus on: whether the Métis claimant is a member of a modern Métis community and whether the modern community has ancestral links with an historic Métis community which existed prior to "effective control". These issues have emerged in litigation coming from both British Columbia and Saskatchewan and will no doubt be the subject of litigation in years to come.

R v. Willison[43]

On November 6, 2000, near Falkland, B.C., Gregory Willison, a self-identifying Métis, shot and killed a mule deer. Mr. Willison was subsequently charged under British Columbia wildlife legislation. At issue was whether the BC licensing requirements constitute an infringement of Mr. Willison's Aboriginal right to hunt for food. *Willison* provided the first opportunity in British Columbia for a court to apply the principles established in *Powley.*

As Mr. Willison's Métis heritage reaches back to Saskatchewan, the central issue was whether Willison is a member of a modern Métis community in the relevant geographic area (Falkland area) and whether there is an ancestral link between the modern Métis community and an historic rights-bearing Métis community.

At trial, there was much debate on the meaning of the term "community" in the context of Métis hunting cases. Here the Court decided it was necessary to take a liberal and contextual approach to the term "community", in a manner consistent with the interpretation of section 35. The Court also found that one of the defining characteristics of the Métis community in the geographic area in question, along the historic Brigade Trail, was the Métis community's association with the fur trade and its nomadic lifestyle. Also, the Court relied upon *Powley* which provided that in determining whether a Métis community exists, it is not necessary for the Métis community to be a part of a larger Métis people. Using this flexible approach to the term "community", and based on the evidence before it, the Court found that there had been a historic Métis community along the Brigade Trail. The trail itself extended from just north of Kamloops, south through the Okanagan Valley (including the Falkland area)

43 http://www.provincialcourt.bc.ca/judgments/pc/2005/01/p05_0131.htm.

then to Fort Okanagan which is now part of the United States. The Court also held that subsistence hunting was a central and defining feature of Métis life associated with the Brigade Trail. On the evidence before it, the Court also found that there exists today a contemporary rights-bearing Métis community of which Mr. Willison is a member. Interesting to note, when the Court was looking at the question of who is a Métis, the Court referred to the Métis Nation definition referred to earlier in this paper. The Court also noted the importance of having a central registry for identifying members of Métis rights-bearing communities.

On the question of the date of "effective control", the Court simply used the dates submitted by the Crown and the defence and determined that "effective control" was established along the Brigade Trail sometime between 1858 and 1864. In concluding, the Court stated:

> It has not been demonstrated that British Columbia currently recognizes any Métis right to hunt for food, nor any "special access rights to natural resources" for the Métis. This lack of statutory or equivalent recognition, and the consequent application to Mr. Willison of the provincial hunting licensing legislation at issue in this proceeding, infringes his Aboriginal right.[44]

R v. Laviolette[45]

Ron Laviolette is a Métis person residing at the Flying Dust First Nation around the Meadow Lake area in Saskatchewan. He was fishing, in Green Lake, at a time when fishing was closed. He was charged with unlawfully angling during a closed time, contrary to section 13(1) of the Saskatchewan Fisheries Regulations.

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44 Ibid. at para. 143.

45 http://www.lawsociety.sk.ca/dbtw/exec/dbtwpub.dll?AC=GET_RECORD&XC=/dbt.

The central issue in this case was the definition of "community". Mr. Laviolette was from around the Meadow Lake community and was not from Green Lake. However, evidence was adduced that indicated that the Métis communities in northern Saskatchewan were interrelated and that there was a larger network of fixed settlements that developed as trade and transportation hubs. It was shown that there was strong kinship between these settlements and that the Métis intermarried and moved between the hub settlements. Based on the mobile nature of the Métis community and the inter-connectivity of kin, the Court found that Laviolette was a member of the Métis community within the geographic area in question and that he demonstrated an ancestral link to an historic rights-bearing community. In commenting on the nature of the Métis community, the Honourable Judge E. Kalenith stated:

> I find that the evidence led at this trial contains sufficient demographic information, proof of shared customs, traditions and collective identity to support the existence of a regional historic rights-bearing Métis community, which regional community is generally defined as the triangle of fixed communities of Green Lake, Ile a la Crosse and Lac la Biche and includes all of the settlements within and around the triangle, including Meadow Lake.[46]

The Court concluded that Mr Laviolette is a member of the northern Saskatchewan Métis community that has ancestral connections to an historic Métis community and therefore has an Aboriginal right to fish for food within the territory of his rights-bearing community.

[46] Ibid. at para. 30.

IV Reconciling *Powley* and *Blais*[47]

At the same time the Court deliberated in *Powley*, it also deliberated over another Métis case in the matter of *Blais*. On February 10, 1994 Ernest Blais and two other men were hunting for deer in the District of Piney in the Province of Manitoba. Blais, a Métis, was charged with unlawfully hunting deer out of season. Although hunting in the Métis Homeland, Blais was not hunting in the traditional territory of his historic rights bearing community. At the Supreme Court of Canada, Blais did not argue that he was exercising an Aboriginal right, rather, he argued that Métis were "Indians" for the purposes of para. 13 of the Manitoba Natural Resource Transfer Agreement (NRTA).

The Manitoba NRTA is a federal provincial agreement entered into in 1930 in which Canada transferred the lands and resources to the province. Unlike the four founding provinces, when prairie provinces joined Confederation, Canada retained ownership as well as administration and control of the lands and resources within the provincial boundaries. These lands and resources were later transferred to the Provinces of Manitoba, Saskatchewan and Alberta. One of the conditions of transfer was that the Indians would be allowed to hunt, fish and trap on Crown lands and on private lands to which they had a right of access. Mr. Blais argued that he was an Indian under the NRTA and therefore entitled to hunt, fish and trap under the same conditions as the status Indians in Manitoba. Based upon a contextual reading of the relevant provisions of the NRTA as well as the available historical evidence, the Court concluded that the Métis were not "Indians" for the purposes of the Manitoba NRTA. The term "Indians" in the NRTA refers to status Indians under the *Indian Act*. As Ernest Blais was Métis, he was not entitled to hunt pursuant to the Manitoba NRTA.

47 *Supra,* notes 5 and 6.

As a result of the decisions in both *Powley* and *Blais*, an interesting dilemma has emerged. While the Métis are not "Indians" for the purposes of the NRTAs, it is clear now, as a result of *Powley*, that Métis have Aboriginal rights. Previous decisions of the Supreme Court of Canada have held that Aboriginal rights fall within the heart of section 91(24) of the Constitution Act 1867, or what is referred to as the "core of Indianness"[48]. Canada has legislative jurisdiction over Indians and lands reserved for Indians. While provincial laws of general application apply to Indians, provincial laws cannot bear upon the core or heart of a federal subject matter. This core of Indianness includes section 35 rights. According to the "doctrine of inter-jurisdictional immunity", provincial laws that purport to regulate harvesting of fish and game pursuant to an Aboriginal or treaty right must be interpreted so as not to regulate that right, otherwise it will be found inapplicable.

This is the case for Indians harvesting wildlife pursuant to an Aboriginal or treaty right, and arguably applies as well to the Métis because such rights fall within the "core of Indianness"[49].

However, for status Indians, section 88 of the *Indian Act* incorporates by reference those provincial laws that touch on the "core of Indianness" and such laws apply as federal laws. But, as the Métis are not status Indians and are not regulated by the *Indian Act*, the provincial wildlife regulatory regime would have to be read down. In other words, such regulatory regimes would be inapplicable to the extent that such regime purports to regulate the exercise of a section 35 right. In the prairie provinces, this dilemma would have been avoided had the Indian provision of the NRTAs applied to the Métis. This is because the NRTA Indian provisions also ensure that provincial laws apply to

[48] For a detailed discussion of these see Mark L. Stevenson, *Métis Aboriginal Rights and the "Core of Indianness"* (2004) 67(1) Sask. L. Rev. 301.

[49] Ibid.

those Indians while harvesting fish or wildlife. The result is that because of the effect of both *Powley* and *Blais* and the doctrine of inter-jurisdictional immunity, Métis harvesting pursuant to an Aboriginal right is arguably not subject to the provincial fish and wildlife regulatory regimes to the extent that such regimes purport to regulate the exercise of section 35 rights.

In other words, Métis have Aboriginal rights to harvest wildlife for food and such rights can only be regulated in the same manner as Indian Aboriginal rights to harvest wildlife for food, through the application of section 88 of the *Indian Act*. Section 88 allows the provincial wildlife regime to regulate Indians harvesting game. However, section 88 of the *Indian Act* does not apply to the Métis, and therefore Métis wildlife harvesters exercising Aboriginal rights should not be subject to the provincial wildlife regime. This causes a potentially serious conundrum for the provinces and will likely be the subject of negotiation and litigation over the next several years.

V Conclusion

So, from all of the above, there are several key points that need to be remembered. On the question of Métis identity, not all persons of mixed Aboriginal-European ancestry are Métis. Métis are defined by their rich culture and heritage that is unique to the Métis and distinct from the Indians and the Inuit.

The general criteria that a court will use to define who is a Métis include:

- Self-identification;
- Ancestral connection to an historic Métis community; and

- Acceptance by the modern community – and, membership in a Métis political organization is evidence towards acceptance by a modern Métis community.

The Métis Nation emerged in the prairie provinces around the time of confederation when the Dominion of Canada was acquiring the Métis Homeland or Rupert's Land from the Hudson's Bay Company. It consists of the collectivity of Métis communities that had developed primarily around the old Hudson's Bay Company trading posts in the three prairie provinces and parts of Ontario and north-eastern British Columbia. The Métis Nation is now represented at the national level by the MNC and at the provincial level by the provincial affiliates of the MNC.

Métis Aboriginal rights are recognized and affirmed by section 35 of the *Constitution Act, 1982*. The purpose underlying the inclusion of the Métis in section 35 is to protect those customs practices and traditions exercised by members of Métis communities that emerged subsequent to "contact" and prior to the exercise of "effective control" by the European settlers. For Métis to be able to exercise Aboriginal rights they must be able to demonstrate they are members of a modern Métis community that has ancestral linkages to an historic rights bearing Métis community.

Métis Aboriginal rights fall within the "core of Indianness" and therefore, in accordance with the doctrine of inter-jurisdictional immunity, it may be argued that provincial fish and game legislation that purport to regulate Métis Aboriginal rights may be inapplicable.

About the Scow Institute

The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal people and Aboriginal rights. For additional information, please visit our website at www.scowinstitute.ca.