

The Community Conundrum: Metis Critical Perspectives  
on the Application of *R v Powley* in British Columbia

by

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B.A., University of British Columbia, 1989

M.A., University of British Columbia, 1991

LL.B., University of Calgary, 1998

A Dissertation Submitted in Partial Fulfillment  
of the Requirements for the Degree of

Doctor of Philosophy

in the Faculty of Law

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University of Victoria

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## **Supervisory Committee**

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Jean Barman

University of British Columbia

Department of Educational Studies

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## Abstract

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In this dissertation I argue for the need to develop a Metis Critical Legal Theory, or “MetCrit”, a theory that is particular to the cultures, issues and concerns of Metis people. Suggestions towards the development of MetCrit are proposed in light of the difficulties of Metis rights claimants in British Columbia following creation of the “historic community connection” test in *R v Powley*, the leading case on the constitutional protection of Metis rights in Canada.

Misconceptions about BC Metis history and about Metis communities generally have resulted in legal decisions that hold there are no historic Metis communities in BC, and thus no communities capable of meeting the *Powley* test. The BC situation reveals that *Powley*, as it is currently interpreted, cannot adequately deal with the realities of Metis history or with Metis conceptions of community, and that the community connection test itself is flawed. MetCrit is proposed as a possible lens through which to examine BC Metis rights cases in light of the historiography of the Metis of BC, and through which to critique the *Powley* court’s attempt to concretize Metis

community identities. I suggest that MetCrit could provide spectrums of space for avoiding some of the dualities that are reflected in Canadian legal and historical accounts of Metis people and communities.

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## **Dedication**

This dissertation is dedicated to the Metis people of British Columbia.

## **THE GIFT**

*The young woman has spent most of the day alone in the bush. She is hungry, and she knows her younger brothers and sisters are too. Her father is riding the range, grazing another man's cattle over the hills and plateaus of the interior ranchlands, the once lush bunchgrass now bleached in the late summer sun. Most years he rides the circuit from Merritt as far as Knutsford, Westwold, and clear over to Kelowna. Her mother has a job in Vancouver, canning salmon. It is up to the young woman, she knows, to feed her siblings today.*

*She is used to this responsibility, and to these lands and waters – they are part of her, the grasses, the sage, the squirrels, the chickadees and flickers, the rocks with their mica flashing. The familiar smell of ponderosa pine fills her lungs. She knows the rabbits, the mule deer. She doesn't like to have to kill them, but they know that. Sometimes, they are willing to give themselves to her, and she is always grateful. If a hunt is successful, she talks to the animal lovingly, respecting its body. She leaves an offering as a renewal of the agreement between their families.*

*As her practiced eyes, ears and nose take in the landscape, soundscape and scentscape, the young woman remembers the story her uncle told her long ago, about how the moose had smoked the peace pipe of the humans, and agreed to sometimes give themselves as food and also so that the humans could use the moose's hides, bones and sinews. In exchange, humans had promised never to kill more animals than they needed, and – very importantly – had pledged to protect the moose's chosen living places. This was a covenant of mutual respect, and children were taught about it even before they could speak. That's why her mother was so angry when*

*her little brother refused to eat the marrow from his venison bones, and also why her father was upset when her sister took too much meat.*

*The young woman smiles to herself thinking about the stories of the trickster Little John and how he was always getting into trouble for being wasteful and greedy. Sometimes, he would gorge himself, and leave the rest of his catch roasting over the fire – and then he would fall asleep, and all the meat would get burnt. Usually, the story would end with him getting mad at his bum for failing to wake him up, and with him punishing his bum by sitting in the fire. Her uncle would act this part out, alternately yelling at his rear end and crying, all the while doing what looked like a Red River jig on hot coals. She would laugh, but she knew the message was serious. Killing an animal for nothing was like harming yourself.*

*As her smile fades, the young woman becomes aware of a rustling in the underbrush. Her attention re-focuses and a mature rabbit reveals itself to her. It moves slowly, deliberately, looking her in the eye. She thanks the rabbit, for she and her family will eat tonight.*

## DISSERTATION SUMMARY

This dissertation is about Metis “harvesting rights” and history in BC. It is about how the courts have tried to define who we, the Metis, are – without considering our own views on the matter. It is also about how the history of Metis people in BC has been ignored and misunderstood by the Canadian legal system. Unfortunately, these knowledge gaps have led the courts and the BC government to conclude that Metis people may not have Aboriginal rights to hunt, fish, trap, cut timber or even pick berries in this province. Although we know this isn’t correct, we are still affected by these views. All three Metis harvesting rights cases in BC have been unsuccessful, and for many years the BC government would not negotiate harvesting rights with Metis people.

In this dissertation, I critique how Canadian law looks at Metis rights, history and communities, especially in BC. I try to show that the courts don’t really understand our thinking, and are stuck in their own ways of describing Metis people. At the same time, I try to express how many Metis people think about living on the land, and how we think about our communities, laws and history. In doing this, I refer to both written and oral Metis sources, including interviews with 23 Metis people from the southern BC interior. My research and writing practice has been based on Metis methods and teachings.

One of my key claims is that it is important not to let the courts define who we are as Metis people. I think it is possible that we could influence Canadian law in a positive way by presenting our own perspectives and even our own Metis laws, in court cases and in negotiations about Metis rights. On a practical level, I am arguing that Metis people’s rights in BC and elsewhere should be recognized by provincial and federal law. However, even if this never happens, I still

believe it is important for us to think about how we understand law and history as Metis people. I hope that together we can create ways to do this that reflect Metis values and thinking.

My dissertation is not just a summary of what I have learned during my research but also a collection of shared knowledge, as many people have contributed to the ideas expressed here. These include Metis and other Indigenous (and non-Indigenous) authors and scholars, whose writings and talks inspired and challenged me. Above all, this project reflects the perspectives and concerns of 23 Metis people from the Thompson/Shuswap, Okanagan and Kootenay regions of BC who willingly opened their hearts and thoughts to me, and taught me about how they understand Metis harvesting ethics, communities, territories and history. They also talked with me about the BC harvesting cases and their significance. Some of the people who participated in this research project were directly involved with these cases, either as rights claimants (defendants) or witnesses.

The Metis people I spoke with changed my thinking about this project and how I approached it. Many participants asked questions or provided information or suggestions I had never considered before. Many times I was brought back to real-life problems and the need for practical action. Many times I was reminded of Metis teachings I had forgotten, or was taught something totally new.

I am very grateful to all these people, and will introduce you to them later in this summary. I am also very grateful to other Metis community members in southern BC, especially in Victoria, for being willing to talk with me about some of the ideas expressed in this dissertation.

Some of the knowledge reflected here comes from my mother's Metis family, especially from my grandmother, who had a significant influence on my thinking and being. In fact, she was the reason I decided to research about Metis rights in BC.

It was my grandmother who told me about the *Willison* case, the most important Metis rights case in BC. This case concerned Greg Willison, who was hunting deer for food near his home in Falkland, and was charged with hunting without a licence and out of season. Mr Willison's Aboriginal hunting rights were upheld by the trial judge in Salmon Arm, but the decision was overturned on appeal. Gram told me this had something to do with the question of whether there was a historic Metis community near Falkland. She wasn't sure why this was relevant to Mr Willison's hunting rights, but she was surprised that the appeal judge said there was no historic Metis community in her neighbourhood. My grandparents had lived in Salmon Arm – about 30 kilometres from Falkland – since 1948, so gram knew the area pretty well. She told me there had been Metis people there for years, that they had a large and thriving community. She wondered how the court could get it so wrong.

I wondered too, but wasn't really surprised. I had noticed that most BC residents didn't know Metis people lived in the province. Until recently, even I as a Metis person from BC was unaware of the long presence of Metis communities in the Lower Mainland where I grew up, on Vancouver Island where I lived, or in the Thompson/Shuswap and Okanagan, where I have many relatives. I didn't really even know much about the general history of the southern BC interior from a Euro-Canadian perspective – other than about building the railway – since it wasn't taught to me in school. In fact, high school had given me the distinct impression that Canadian history

was boring, and I got interested in it only when I became a lawyer who worked with Aboriginal people. I began to see how colonialism and history were intertwined, and that maybe our “missing” history wasn’t missing by accident. My developing interest in the law and in BC history and people led me to think about how judges’ and lawyers’ views about history influence how they decide cases.

I began to suspect that one difficulty with the *Willison* case was the perceived invisibility of BC Metis history. This seeming invisibility means that Metis people in BC have difficulty meeting the “historical community connection” test for Metis rights, created in 2003 by the Supreme Court of Canada in the *Powley* case, a case about moose hunting near Sault Ste Marie, Ontario. This test means Metis claimants have to prove that the area where they were harvesting was part of a “historic Metis community”, and that this community still exists today. They also have to prove that they have many generations of family ties to this community and area.

I suspected another difficulty was that most lawyers, judges and government representatives – and most historians – looked at our history differently from the way we do. For instance, while the BC government’s position is that there are no historic Metis communities in BC (with the possible exception of in the Peace River country) most of the people who participated in this research project told me that there are many “historic” Metis communities in BC, especially around all the old fur trading posts. Others questioned the meaning of “history” itself as being defined by European thinking.

The two other harvesting rights cases in BC that followed the *Powley* case were *R v Nunn* (south Okanagan) and *R v Howse* (Kootenays). (The *Howse* and *Nunn* cases followed the *Powley* Ontario

Court of Appeal decision, as the case hadn't yet gone to the Supreme Court of Canada.) As in the *Willison* case, the Metis rights claimants in *Nunn* and *Howse* lost in part because they "failed" the "historic community connection" test. The courts simply decided that there had never been historic Metis communities in these areas.

As I thought about how the *Powley* case had been applied in BC, I returned to my grandmother's question about why it should matter whether historic communities existed where people were harvesting. Why did the court think this was important? What did the court mean by "historic"? What did it mean by "community"? Do Metis people think differently about these ideas?

These questions led to others, some that were more narrow, some that were more broad. The narrower questions included:

Should Metis harvesting rights be portable? For example, if you have a Metis harvester's card from BC, do you have hunting rights in Saskatchewan (and *vice versa*)?

A related question: Should Metis rights have geographic boundaries? In other words, is a right to hunt near Chase only valid near Chase? (In Michif the hunt is *la chaas*, so pardon the Michif pun. Chase is a town about 30 kms west of Salmon Arm.)

Some of the bigger questions included: How do we think about our own communities, about even the idea of community? Are we communities or nations – or one nation? How do we think about the lands where we live, and about how we share these lands with others – for instance when hunting? Does it matter that the Canadian law and governments don't see things our way? What about our own values, our own philosophies, our own laws?

These are some of the questions that made me want to write this paper. I had my own views, but I wanted to know what other Metis people thought. I wanted to encourage people to talk to each other about these issues and ideas even if we didn't always agree.

What I didn't expect was that my research would reveal my own family's "lost" BC history. My grandparents had moved from Saskatchewan to Salmon Arm in 1948, and I thought that was the earliest our family had been in BC. It turned out that some of my distant relatives had worked at the Kamloops trading post as early as the 1820s, and one had married into the Kamloops First Nation. I also learned that other relatives had been in BC in the 1840s as part of the Sinclair expedition from Red River to the Oregon Territory. They had travelled with many other Metis families on this expedition ... and among them were the ancestors of Greg Willison of the *Willison* case, and of Ron Nunn of the *Nunn* case. Other members of my family worked for the Hudson's Bay in Cassiar and Dease Lake beginning in the 1920s, one marrying into the Tahltan First Nation.

My first discovery of my family's historic BC connections was when I learned that Lottie McDougall Kozak, an Elder from Falkland who testified at Mr Willison's trial, was my cousin. Lottie told me that we had relatives all over BC, including in Kelowna, where her great-grandfather John McDougall of Red River settled and built a trading post. The original building is now in the Kelowna Museum. Many of the McDougall clan married into Okanagan First Nation families. I had discovered a web of relatives across the province that had been completely unknown to me before. If this could happen to me, as someone who has spent time trying to

learn about Metis history in BC, I could easily imagine how this history might seem invisible to a non-Metis person.

My journey of discovery while researching and writing this dissertation reflects the journeys of many of the Metis people who spoke with me. Many people expressed a sense of having discovered or rediscovered their “lost” history or culture, and of finding renewal in realizing their connection to the Metis nation.

As I am still in the midst of this discovery (and re-discovery) process, it has been challenging for me to achieve my objective of doing and presenting my research in a way that is consistent with Metis ethics and protocols. I, like many other Metis people, especially in southern BC, was not raised in an explicitly Metis cultural environment, although I learned many Metis ways of thinking and being from my family – only to later realize that that’s what they were.

I now see that I was taught things by my family, particularly by my grandmother, in a way that was often indirect and somewhat circular. That is, certain themes were returned to over and over – especially if I didn’t “get it”! The same message might be taught in different ways.

Sometimes, instruction took the form of teasing, or joking. Sometimes it took the form of storytelling. Sometimes I was simply shown how to do things. Even as a child, I wasn’t talked down to – I was respected ... but I was also expected to listen to and respect others, even if I didn’t agree with them. Gram always told me, with a little sparkle in her eye, that there was a reason God had given me two ears but only one mouth – it was more valuable to listen than to speak. I am not sure how successfully I have followed this teaching, but I have tried to do my

best. I hope this paper reflects the value of respectful listening, even though, of course, it will also reflect my own voice.

I am particularly grateful to all of my research participants, especially Elders, who were patient with me and my lack of knowledge, especially of Metis protocol.

In addition to reflecting Metis thinking and values in conducting my research, I have tried to create a written form that presents ideas in a Metis way, talking sometimes directly, sometimes indirectly, returning to similar themes through different modes of expression. This is one reason I have used various voices that are braided together like a Metis sash. Each voice is meant to be distinct, but to work together to form a recognizable Metis fabric. At the same time, I have not tried to make the voices all agree or to create a seamless whole. As one of the Elders jokingly expressed it, “Where there are two Metis there are three opinions”. I do not want to reduce Metis thinking because part of what I am claiming is that it is complex, just like Metis identity. It is not reducible. At the same time, I think there is something recognizable and distinctive about Metis thinking and Metis culture.

In creating this dissertation, I have found it challenging to reduce everything to writing. I wanted to give a sense of being in relationship and conversation with others – I didn’t want to just write an academic paper. Thus, I have chosen to use different voices. One is the voice of the storyteller: she tells both new and traditional Metis stories – and sometimes both are woven together. Another voice consists of short reflections on the process of researching and writing as a Metis person. Sometimes, I show dialogues with others. I use direct quotations from research participants. In this preface, I have tried to explain some of the ideas in my dissertation in a voice

that is more like speaking than writing. I have also written in an academic voice, to reflect the influences the academic world has had on me. I hope all these voices and perspectives reflect relationships and express some of the complexity of what it means to be Metis.

This complexity is evident in the knowledge provided by the research participants about Metis history, identity and community affiliation; it is apparent in the histories and identities of the participants themselves. Similarly, participants stressed that Metis ideas of territory are complex and are linked to history, identity and territory. We may identify differently at different times and for different purposes. Our community networks are like webs that stretch across North America and even beyond. Throughout our history we have always been highly mobile, with connections to territory that fan out in webs from various centres, such as Red River, northern Saskatchewan and the former fur trading posts in BC.

This complexity does not mean we are not distinctive; however, it does mean that efforts by the Canadian law, as in the *Willison* case, to describe us as either “distinctive”/“identifiable” or as simply “people of mixed ancestry”; as either “living together in the same geographic area” or living in an area that is “geographically wide”; and as either “sharing a common way of life” or being part of a “loosely affiliated group of people” are not accurate and serve to erode our Aboriginal rights.

The participants outlined two major difficulties with the application of the Canadian law of Metis rights in BC. One is the law’s ignorance about Metis history in BC. The other is the courts’ ignorance of Metis perspectives about history, community and territory.

According to participants, solutions to the overriding problems they identified include increasing awareness about Metis people in BC through education and research, and learning, teaching and practising Metis values and ways of thinking about law. I follow up on the discussion of the first problem by describing how the lack of knowledge of BC Metis history influenced the decisions in the *Willison*, *Howse* and *Nunn* cases. I follow up on the discussion of the second problem by suggesting that we as Metis could benefit from developing our own ways of looking at law, based on Metis thinking, and that the Canadian law itself could benefit from considering our views.

Metis ways of looking at law would stress the webs of interconnection among individuals and communities and between people and nature. Metis approaches would also resist efforts by governments, courts and scholars to try to place us in “either/or” categories, or to force us into legal molds created by assumptions about how Metis communities operate.

Despite the difficulties in the Canadian law, participants were mostly positive in their assessment of the future of Metis people and rights in BC. The key, they felt, was to “keep on being Metis”, to keep on practising our culture, including harvesting – with or without licences – and to teach the youth to do the same.

Because Metis people from southern BC have spent a lot of time teaching me and helping me with this project, I would like to give back by providing copies of my dissertation, and copies of summaries (including this one) that explain my research. I would also be happy to travel to talk with communities about this research project and about Metis rights and history in BC. I hope to continue to be in touch with everyone involved with this project and with the Metis communities of the southern BC interior.

I hope this research project will benefit Metis people in BC and beyond and I look forward to any feedback you may have about the ideas discussed here.

## **INTRODUCTION TO PARTICIPANTS**

In this section, I would like to introduce the 23 research participants who contributed their knowledge to this study. Participants include Elders from Falkland, Salmon Arm and Lumby, who serve people in neighbouring areas, as well as an Elder from the Kootenays and an Elder from the south Okanagan. Participants also include those directly affected by the three harvesting cases, either as claimants or as witnesses. Finally, community members from the regions affected by the three harvesting cases also participated in this study.

While some of the research participants may be known to you, others may not be. Some people are formally affiliated with Metis organizations, others are not – although all associate with other Metis people in various “communities”, and all are part of the wider Metis nation, which exists beyond provincial or national organizations.

I interviewed people who were referred to me by Metis Elders, and occasionally by Metis community leaders. I interviewed all people who wished to be interviewed, as long as we were able to arrange a mutually convenient time. I am pleased that the participants reflect a diversity of family, work, political and geographic affiliations. Each of the three harvesting case areas is represented by at least one Elder and/or community member and one litigant.

In the introductions below, I highlight the research participants’ roles in the Metis nation, their family connections, work background, and special knowledge and skills, especially as they relate

to harvesting. I also describe people's roles in my research process and connections to the three harvesting rights cases. People are listed in the order I interviewed them within each category (Elder, litigant, community member).

#### Eldon Clairmont, Salmon Arm

Eldon Clairmont is an Elder and former president of the Salmon Arm Metis Association (SAMA). He and his wife Shirley are originally from Manitoba, have lived in BC (including Vancouver Island) for many years, and in Salmon Arm for more than 12 years. Eldon grew up knowing he was Metis; he knows some Michif. He is an artisan and does leatherwork, beadwork and woodwork. His specialty is making model Red River carts. He used to work in logging camps and is now retired.

Health troubles keep Eldon from hunting these days, but he has participated in SAMA youth camps, and in the Roots Aboriginal youth camp, both of which teach traditional outdoor skills. Eldon was also recently was chosen as a Metis Elder (along with an Inuit and a First Nations Elder) to work with Aboriginal youth in Victoria, BC who are in the Canadian military. He participates in this program every summer.

Eldon provided me with many research contacts, both from the SAMA membership and among related communities, and Eldon and Shirley hosted me on my first research trip.

Eldon attended parts of the *Willison* trial.

#### Lottie Kozak, Falkland

Lottie is a Metis Elder recognized throughout BC, and is also well-known as an artisan. She carves, paints, draws, beads, is a silversmith and a jeweller, and also does leatherwork. Lottie grew up in the bush near Merritt and lived off the land for many years. She raised seven children, and worked in farming, logging, canning, as a camp cook, and as a hunting guide. She still hunts every year with other Metis hunters in various parts of BC. She is very knowledgeable about medicinal and edible wild plants and mushrooms, and has harvested these throughout her life.

Lottie and I are related – my great-great-grandmother Emelie (“Grandma Millie”) McDougall and her great-grandfather John (Jean-Baptiste) McDougall were siblings. John McDougall first moved to BC from the Red River Settlement in the 1840s to work for the Hudson’s Bay Company and eventually ran the trading post at Kelowna (Westbank). Lottie is also related by marriage to my

cousin Sherry (Sloan) McLeod's husband, Scott McLeod. Sherry and Scott live on their ranch in Westwold, about 15 kilometres down the road from Falkland. Lottie has Red River, Shuswap (Secwepemc), Okanagan (Syilx), Nicola (Scw'exmx), Interior Salish (Nlaka'pamux), and Mexican *mestiza* (Indigenous/non-Indigenous) ancestry.

Lottie was incredibly helpful to me, putting me in touch with people to interview, and also hosting me on my second research trip. Lottie's co-hosts were her husband Bill Kozak and their friend and housemate Barry Ward. (Sadly, both are now gone: Bill passed away in 2013 and Barry in 2015.) Lottie also travelled with me when I went to interview people in Trail.

Lottie was a witness for Greg Willison in the *Willison* case, and gave evidence about Metis culture and history in the Falkland area.

#### Anne and Don McBeth, Lumby

Anne and Don are Elders and members of the Vernon and District Metis Association, and I interviewed them together. They serve the Vernon area and the Lumby (Coldstream) Valley. Don and Anne are managers of the trailer park where they live.

Don has Red River and Scottish ancestry and grew up in Saskatchewan. His parents didn't say much to him and his siblings about being Metis, but it wasn't a complete secret. Anne's mother's family is Metis from the Great Lakes, but they ended up settling in Québec. Her father's background is Cherokee and Jewish, and he grew up in the southern US. She spent time as a child in both the US and Canada.

Anne and Don have a number of children who have married and are raising families. They stated proudly that their children's spouses were from many different countries, including India and Israel.

Don and Anne have participated as Elders in many youth and other community events.

#### Goldie McDougall, Trail

Goldie is an Elder and a member of the local Trail Metis community. Goldie has Red River and German ancestry; her mother was a Fiddler and her grandmother was a Regnier. There are other Regniers who moved to Trail. She is also related to me by marriage through the Boyer family (and related through the Boyers and the Bousquets to Brenda Boyer Percell and Wayne Bousquet, see below). Goldie was married to Angus McDougall, another cousin of trader John McDougall (and thus a cousin of mine and Lottie's), who died a few years ago.

Although Angus had many family connections to BC, Goldie and Angus were from the Duck Lake area (St Louis, Saskatchewan) and came to Trail in 1948, along with many other prairie Metis families, so that Angus could work in the smelter. Goldie has a daughter who still lives in Trail – her other children live in various parts of BC.

Goldie is recognized as an Elder throughout the Kootenay region.

#### Margaret Penner, Oliver

Margaret is an Elder and member of the South Okanagan Similkameen Metis Association. She is also a Metis Nation of British Columbia (MNBC) senator. Margaret grew up in Saskatchewan being only vaguely aware of her Metis heritage, which is originally from Red River. She didn't really explore her Metis identity until she was in her 60s (she is now in her 80s). She has lived in the Oliver area since the 1970s and is now retired. She and her husband, whose parents immigrated from England, had two children. Margaret has a Maori grandchild, as her son-in-law is Maori.

Margaret serves as an Elder in the south Okanagan and Similkameen areas and travels around BC in her role as a senator.

#### Ron Nunn, Oliver

Ron Nunn was the Metis claimant in the *Nunn* case. He is a member of the South Okanagan local. He used to live in Penticton before moving to the outskirts of Oliver. He is the former Hunt Captain of Region 3 (South Okanagan) under the MNBC system and the former informal Hunt Captain of the Thompson-Okanagan region before the MNBC system. He is an artisan, creating mixed media pieces, leatherwork, drums and making custom hunting and skinning knives. Ron is retired and has a degree in Native Studies from the University of Northern BC. His former wife has Metis and Okanagan ancestry.

Ron grew up in a central Manitoba community where there were many other Metis people. He grew up hunting and fishing with his family and continued to harvest in BC since he moved here about 20 years ago. He also harvests plants such as spruce, from which he gathers the new tips in the spring to make tea. Ron doesn't hunt much these days because he has had surgery on his knees and can't stand for long periods without pain. Ron is related to the Flett family who participated in the first Sinclair Expedition, and the Duchoquette family, who were involved with the fur trade in the south Okanagan.

The *Nunn* case arose out of Ron being charged with possession of a deer carcass. The person who actually shot and gave him the deer was not charged. Ron represented himself at trial. He did not call any witnesses, but submitted a trial binder containing his own historical research.

Ron also testified on behalf of Greg Willison in the *Willison* case. He testified in his role as Hunt Captain about the importance of hunting to Metis people and the connection between traditional and modern hunting practices.

#### Greg Willison, Salmon River

Greg was the rights claimant in the *Willison* case. He is a descendant of the Red River Klyne family that migrated to BC in the mid-1840s, and of their patriarch Michel Klyne who worked as a trader between the prairies and Kamloops via Rocky Mountain House and Jasper a generation earlier. Greg's family is from Lebreton, Saskatchewan, and he was born in Calgary. His immediate family moved to BC when he was one year old, and when he was 30, he moved to the Salmon River area (about 30 kms from Salmon Arm, and about 15 kms from Falkland). The family retained ties to the Metis community in Lebreton. Greg is not currently a member of any Metis political organization but is connected to members of the broader Metis community in southern BC. Greg and his wife have two sons who live in Vernon.

Greg has hunted and fished since he was a youth and has taught his sons to hunt. He believes strongly in the inherent rights of Metis people to harvest and live off the land. This is why he fought the charges against him of hunting antlered deer without a licence. Shortly after he was charged for that, he also shot a moose, but this did not result in charges. Following the crown's successful appeal of his case, he has obtained hunting licences and still hunts, but feels disappointed that he has to do this. However, he thinks it is important to continue to exercise his rights whether he has a licence or not.

Greg did a lot of his own historical research for his trial, and asked Elder Lottie Kozak to testify about Metis history in BC. Greg also found an expert witness on the written sources, Dr Michael Angel: a librarian from Winnipeg with expertise in Aboriginal studies, and an interest in BC Metis history.

Greg strongly identifies with his Red River Metis ancestry.

#### Dan LaFrance, Whitley Lake

Dan was one of the Metis litigants in *Howse*, a case that arose out of a planned subsistence hunt in the Flathead area of the Kootenays, a traditional hunting area for many BC Metis. John Grant Howse, another litigant, was the "unofficial" Hunt Captain of the Kootenays at that time, while

Dan LaFrance was the “unofficial” Hunt Captain of all of BC before the MNBC set up its formal Hunt Captain system.

Dan was born in New Westminster, BC, although his parents were originally from Manitoba. He grew up partly in the Cowichan Valley on Vancouver Island, and partly in Manitoba. His father was one of the many Metis people who were brought from the prairies to BC to work for West Fraser Mills. Dan’s wife Cathie has Metis ancestry, but wasn’t told about this growing up. Dan and Cathie have two sons. One is married to a Metis woman, and the other, a carver, to a Laichwiltach woman from Campbell River. Dan and his family received names from his daughter-in-law’s First Nation. Dan’s first language was Michif, which his parents spoke at home, but he doesn’t remember much of it.

Dan has hunted, fished and trapped since he was a youth. His sons can hunt, fish and trap. He and his family have lived on their traplines up near Smithers and Vanderhoof. They had a trapline near the cattle ranch that they were managing at the time of our interview, at Whitley Lake (near 100 Mile House). They have since sold their trapline and now manage a cattle ranch near Kamloops. Dan has lived and harvested all over BC, including on Vancouver Island, Haida Gwaii, the Lower Mainland, Whistler, Skeena, the Kootenays and the Cariboo. He has done many different kinds of work, including being a faller, trapper, rancher, guide, snowboarding instructor, legal assistant/paralegal and farrier.

Dan was one of the original founders of MNBC and published the first newsletter for Metis people in BC, which later became *Whispering Winds*, the MNBC monthly magazine. He is currently not a member of any Metis local, but still keeps in contact with Metis people throughout BC.

*Howse* was the first Metis harvesting rights trial in BC. It related to charges that were laid against Dan and five other Metis hunters in 1997. Dan did some historical research in preparation for his trial. Neither he nor the other claimants had money to hire expert witnesses.

Since his conviction, Dan now gets hunting licences as, like Greg, he believes it is better to exercise his rights in this way than not at all.

Dan and Cathie hosted me on my third research trip.

### Lois McNary, Tappen

Lois, who is from Salmon Arm, only found out she was Metis as an adult. She knew my family in Salmon Arm, but wasn’t aware they were Metis. She went to school with my aunt Patricia.

Lois is a Christian and is also learning about Cree and other Indigenous religious practices and finds all these practices helpful in healing from past difficulties, including being a child of a residential school survivor. Lois is a mother and grandmother and a retired nurse. She recently moved to Tappen (about 15 kilometres west of Salmon Arm), and lives in a leased house on the Shuswap IR #2.

Lois used to go berry picking and hunting with her family as a child. Although she is not a harvester now, her sons hunt for her.

#### Brenda Boyer Percell, Kamloops

Brenda is from Batoche, Saskatchewan, and is descended from the Boyer, Tourond, Laderoute, and Dumas Red River families, as well as from James McMillan, one of the Orcadian founders of Fort Langley, and his Metis wife Marie Letendre. I am related to the Boyer family by marriage.

Brenda lived for many years in Revelstoke and helped to establish a Metis association there, and worked with the Aboriginal Education Enhancement Working Committee in Revelstoke for 15 years. Now in Kamloops, she is connected with the Two Rivers Metis Association, and is also a member of the Salmon Arm Metis Association and of MNBC. She has done a great deal of research on her family history and is mentioned by Diane Payment in her book *The Free People*, a history of Metis people in Batoche. She has also participated in an event honouring Fort Langley descendants.

Brenda thinks Metis harvesting rights are important, and has a MNBC harvesting card.

#### Wayne Bousquet, Salmon Arm

Wayne was adopted by an uncle but not told that he was Metis until he was an adult. He grew up in Saskatchewan but has lived in Salmon Arm for many years. He and his wife and two sons run an insulation business and live in Gleneden, a rural suburb of Salmon Arm, not far from where my grandparents lived.

Wayne gave evidence at the *Willison* trial. He is not a member of a Metis local, although he is connected with Metis people in the area, including Elder Lottie Kozak. At one time Wayne was in touch with John Grant Howse of the *Howse* case.

Wayne identifies strongly with his Red River ancestry, and has done historical research about some of his relatives who settled in the United States after the Riel Resistance of 1885. Members of his family tried to get their land back in the US, without success.

Wayne hunts and fishes and has taught his sons to do the same. He is involved in a periodic hunt organized by Metis and Shuswap people.

#### Warren Ogden, Salmon Arm

Warren grew up in Westwold and now lives in Salmon Arm with his wife, Pat, who used to go to school with my uncle Barry. Warren worked as a heavy duty mechanic in oil and gas and is now retired. He is an artisan, doing bone carving, drum making and leatherwork, and until recently was a member of a local art gallery.

Warren is descended from the Ingrams and the Kings of Westwold. Warren's mother did not speak much about her Aboriginal ancestry, but his grandmother did. Warren was close to his grandmother, Mildred King Ness, who taught him about wild plants. Mildred was the daughter of Annie Ingram King, a skilled hunter and horsewoman, and Annie was the daughter of Henry Ingram and Jennie Klarminak, a Nlaka'pamux woman from Boston Bar. Warren continues to be connected to First Nations people in Lytton and Boston Bar, and to Metis people in the region. Another research participant (Pat Normand, see below) has suggested that Warren might be a descendant of fur trader Peter Skene Ogden, but so far this has not been proven. Warren is related to Lottie Kozak by marriage.

Warren used to hunt and fish, and still fishes sometimes, and smokes his own fish.

Warren believes that many of the families in the Westwold area have Metis ancestry.

#### Dean Trumbley, Falkland

Dean Trumbley is a wildlife biologist who worked for many years for MNBC, as part of their natural resource management body, BCMANR. At one time he was the MNBC provincial Director of Natural Resources. Dean's family is originally from Saskatchewan. His late father was a senator with MNBC and his aunt, Marlene Beattie, is the Hunt Captain of Region 3 (Thompson/Okanagan). Dean and his wife and children live in Falkland.

Dean gave evidence at the *Willison* trial, and followed the case with interest.

Dean hunts and fishes, for his family and for others, including for Elder Lottie Kozak, who lives down the road. Dean was involved in conducting and recording wildlife counts for BCMANR and now works as an independent wildlife management consultant.

#### John Sayers, Salmon Arm

John Sayers recently retired from his work as an Aboriginal support worker at Salmon Arm Senior Secondary School. He was in his last year of work in that position when we did our interview.

Most of the students John worked with were Shuswap, although there were some Metis students. John's wife is Shuswap.

John grew up in Maillardville, a francophone district of Coquitlam (a suburb of Vancouver) near where I grew up. According to John, many of the people who grew up in this area were Metis, and knew each other to be Metis. However, John didn't know until he was an adult that he is a direct descendent of Guillaume Sayer, the Metis trader who broke the Hudson's Bay Company fur trade monopoly and was defended at his trial by Louis Riel, Sr. After learning about this, he felt a lot more pride in being Metis, learning that his own ancestors had played an important role in the history of the Metis and of Canada.

John has been involved with Aboriginal youth events in the Salmon Arm area.

### Pat Normand, Eagle Bay

Pat Normand is a descendant of fur trader/explorer Peter Skene Ogden and one of his Aboriginal wives, Julia Rivet, who was Flathead, or possibly Nez Percé. Ogden was a trader with the HBC's Columbia District and worked as far north as the Nass River, and throughout the Oregon Territory. After his death, his family (by Julia) settled in Lac la Hache, where there were many Metis people. Some of his descendants lived in Kamloops, Savona, Cache Creek and Westwold and also had First Nations and Metis spouses. Pat grew up knowing about her heritage, and has always been very proud of it. She identifies as Metis, but doesn't relate particularly to Red River Metis culture. She thinks her husband is Metis, but hasn't yet found any documents to support this (he did not grow up with a Metis identity).

Pat grew up in Vancouver, then moved to Salmon Arm, eventually settling in Eagle Bay (about 30 kms from Salmon Arm) about 28 years ago. She and her husband knew my late aunt and uncle, Audry and Don ("Boy"), who lived in Eagle Bay, but she hadn't been aware they were Metis. (According to my family, Audry (née Turgeon) was likely from a Metis family from northern Alberta, but we haven't done her genealogy.) Pat swears she must be related to Warren Ogden, but they haven't been able to establish the connection. She is a mother and grandmother. Pat's daughters identify as being Metis as well, and participate in SAMA. They all do beadwork and other crafts. Some of Pat's grandchildren are also members of SAMA.

Pat picks berries, and her father used to hunt. She supports Metis harvesting rights as long as people don't waste food or other parts of the carcass.

### Mark Carlson, Trail

Mark is a member of the Trail local, and is the Hunt Captain for the Kootenay region (Region 4) under the MNBC system. Mark and his wife Cindy hosted me and Elder Lottie Kozak while we were in Trail.

Mark's family is from Saskatchewan, but he grew up in Trail. He has worked for the Cominco smelter in Trail for over 30 years and will be retiring soon. His wife Cindy is a retired electrician. They each had children from previous marriages and now have grandchildren. Mark has Red River and Swedish ancestry.

Mark is a hunter, and goes on a group hunt every year in the Flathead Valley in the Kootenays, a traditional Metis hunting area.

### Bill Gagné, Vernon

When I interviewed him, Bill was the president of the Vernon and District Metis Association and had been for six years or so. Bill has been actively involved with the Vernon Metis community for many years, including with youth. He was instrumental in getting a space for Metis community members in downtown Vernon and in promoting community involvement. He and his sister Janet set up a community library that contains books on Metis history and culture, and also has genealogical resources.

Born in northern Alberta, Bill and his family came to BC when he was a young boy. He grew up in the Coldstream area, not far from Vernon, and he has lived in Vernon all his adult life. He is single and is retired. He used to fish, but doesn't anymore.

Bill was very helpful to me, providing me with a lot of contacts in the Vernon area, including his sister, Janet (see below).

Bill grew up only being vaguely aware that he was Metis. His francophone identity was stressed within his family more than his Aboriginal identity, perhaps because they lived in an area of northern Alberta that was predominantly francophone. Bill's first language was French, and his parents knew Michif, but Bill became exclusively anglophone when they moved to BC.

### Lori Michon Nicholson, Enderby

Lori is from Moose Jaw, Saskatchewan, and used to be actively involved in Metis politics there. When she moved to Enderby she joined SAMA.

Lori is a single parent and at the time of our interview lived with her teenaged son, who was also involved in SAMA and played in a mostly Metis soccer league. Her son is very keen on promoting

sports among Metis youth. Lori also has a daughter and is a grandmother. Her first husband, who died young, was Metis.

Lori has always known she was Metis and was involved with Metis communities from an early age. She practises Cree/Anishinabe religion and knows some Michif. She harvests wild plants for food, medicine and ceremonial purposes.

#### Lenore Willison, Salmon River

Lenore is the mother of Greg Willison. Lenore has two other children and a number of grandchildren. She is a member of SAMA but doesn't attend meetings much anymore, as she doesn't like to drive at night and she lives about 30 kms from Salmon Arm. However, she visits with Metis people in the area, including Lottie Kozak, who lives about 10 kms away.

Lenore and Greg are related to the Klyne family from Red River, who came to BC in the 1840s. This is documented in the *Willison* trial. However, other relatives went to Saskatchewan and the US from Red River (e.g. Parisien, Daniels and Pelletier families).

Lenore was orphaned at a young age and went to live at a Ukrainian Catholic boarding school in Ituna, Saskatchewan. She knew Michif as a child, but was not allowed to speak it at school and now doesn't remember it at all. She does remember some Ukrainian, because she and her brother had to study it along with the other children.

Although Lenore identifies as Metis (both her parents were Metis), she also identifies as being an Indian, and doesn't see that there is a big division between these identities. Some of her relatives in the US lived on reserve and married into the Dakota nation there.

Lenore used to harvest wild plants in the past and continues to garden and preserve fruit, vegetables and fish.

Lenore attended some of her son's appeal hearing.

#### Sandy Milner, Vernon

Sandy is from Saskatchewan, but has lived in BC for many years. She is related to the Caron family from Red River, but didn't know she was Metis until a few years ago (she is in her mid-60s). Her mother never spoke about it, and she only found out about her ancestry after her mother died. Sandy and her children are members of the Vernon Metis local, and she is a member of the women's circle.

Sandy is also a citizen of MNBC and has an MNBC harvester's card that is designated "without hunting". Sandy picks wild berries and other plants. She applied for her harvester's card to support Metis harvesting rights, environmental management and self-government.

#### Janet Gagné, Vernon

(See entry for Bill Gagné, above, regarding family background.) Janet is a member of the Vernon local and has been involved for the last few years as an Aboriginal support worker, teaching about Metis culture and history in schools in the Vernon school district. Metis students who wish to be are formally "sashed" (they receive a Metis sash, or *ceinture flechée*) – that is, they are publicly acknowledged as members of the Metis nation.

At the time of our interview, Janet was a program director at the Vernon Native Friendship Centre, which is just across the street from the Metis association office.

Janet has been involved with the Metis community in Vernon for quite a few years.

#### Beryl Beaupré, Vernon

Beryl is a visual artist and is well-known in Vernon and the Okanagan for her artwork, some of which is prominently displayed at the Metis community office in Vernon, and at local galleries. Beryl, her two sisters and her mother all moved to the Vernon area from Saskatchewan. Beryl is a former home care worker for seniors, and is a mother and grandmother. Beryl's art explores themes of identity, and connections with nature and the spirit world.

Beryl has always known that she was Metis. She has been involved with the Vernon local's women's group and has been a member of the Vernon community for the last 15 years or so. Her sisters and mother also participate. The partner of one of her daughters (and the father of her grandson) is First Nations.

Beryl is very supportive of Metis harvesting rights.

## Chapter 1

### ADDRESSING THE “COMMUNITY CONUNDRUM”

#### INTRODUCTION: THE NATURE OF THE COMMUNITY CONUNDRUM

“There is a lot of Métis people here ... a lot did leave; a lot stayed ... so being a forgotten people ... we didn’t apparently exist because nobody really looked for us. You know, there is nothing written about us after a certain period of time ... very little, only anecdotal stories ... So we being just an unidentifiable group, a group that ... wasn’t visible, it was assumed that ... we didn’t exist, but we do.”

Ronald Nunn, witness for the defence  
in *R v Willison*, Trial Transcript,  
June 21, 2004, page 131

“Much of what I have read has said that we do not exist, that if we do exist it is in terms which I cannot recognize, that we are no good, and that what we think is not valid.”

Linda Tuhiwai Smith, *Decolonizing Methodologies*

This dissertation investigates the intersection of Metis<sup>1</sup> history, philosophy and rights in British Columbia. When explaining my research project I often get the response: “Oh, are there Metis people in BC?” This question reflects a common misperception that Metis people exist on the prairies, perhaps in Ontario, but not in the rest of Canada. It is in part this lack of awareness about Metis people in BC that has contributed to all three BC Metis harvesting rights cases –

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<sup>1</sup> I use “Metis” without the *accent aigu* on the “e” to denote all Metis people, regardless of whether they are of French descent. “Métis” is used to denote people of Indigenous/French ancestry; this term is also used where it appears in other works. Throughout this dissertation, I use the term “Metis” to denote all self-identifying Metis people, keeping in mind that this is a contested and often fetishized term. For a discussion of the debates about using the term “Metis”, see Chapter 2. I also use the terms “Native”, “Aboriginal” and “Indigenous” fairly interchangeably, following the use of the research participants in describing themselves.

*R v Willison*,<sup>2</sup> *R v Nunn*<sup>3</sup> and *R v Howse*<sup>4</sup> – being decided against the claimants. *Willison*, the most recent case, follows the landmark Supreme Court of Canada case *R v Powley*,<sup>5</sup> the country’s leading Metis rights decision, while the older *Nunn* and *Howse* decisions are based on similar reasoning in the Ontario Court of Appeal decision in *Powley*.

In this introduction, I explain why the application of *Powley* in BC been so disappointing for Metis and, in particular, I elaborate on the “community conundrum”<sup>6</sup> created by the *Powley* “historic community connection” test for Metis rights. This test requires a claimant to prove, among other things, that 1) the claimant has an ancestral connection to a historic Metis community where the harvesting rights were exercised; and that 2) there is continuity between the historic and the contemporary community. These requirements are problematic, in part because of the lack of awareness about the Metis of history of BC, and in part because the Canadian law of Metis rights is rooted in colonialist assumptions about Metis history, territories and communities.

In the chapters that follow, I analyze the leading BC Metis harvesting rights case *R v Willison* in light of Canadian and BC Metis historiography, and in light of the perspectives of Metis people

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<sup>2</sup> *R v Willison*, [2005] BCJ No. 924; rev'd (2006) BCSC 985 [*Willison* or *Willison BCSC*].

<sup>3</sup> *R v Nunn*, [2003] BCJ No. 3229 (BC Prov Ct) [*Nunn*].

<sup>4</sup> *R v Howse, et al*, [2000] BCJ No. 905 (BC Prov Ct); rev'd [2002] BCJ No. 379 (BCSC); leave to appeal to BCCA granted [2003] BCJ No. 508 (BCCA) [*Howse*].

<sup>5</sup> *R. v. Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff'd [2000] OJ No. 99 (Ont SC); aff'd [2001] OJ No. 607 (Ont CA); aff'd 2003 SCC 43 [2003] SCR 207 [*Powley*].

<sup>6</sup> I have used this phrase throughout my work on this topic, but it was used independently by one of my research participants, Ron Nunn. Interview with Ron Nunn, Oliver, BC, August 5, 2012.

in the southern BC interior, to illustrate why the historical community connection test creates a conundrum for many Metis rights claimants.

The community conundrum illustrates the difficulties the state has of navigating the complexities of Metis history and Metis concepts of territory and community. In light of these difficulties, I propose the need for developing Metis critical perspectives and theories about law, collectively “MetCrit”, that can deal with particularly Metis concerns. While providing robust statements of MetCrit would require ongoing community efforts of research and conversations with many Metis people, I do venture some suggestions about what Metis theories of law might look like and what they might be able to accomplish. For instance, I provide a critique of the *Willison* appeal court’s decision grounded in Metis philosophy. This critique is not meant to be a model, but an illustration of the kinds of analysis MetCrit might be designed to undertake.

Suggestions towards MetCrit in this dissertation have been informed by: information shared by the research participants in this study; evidence given by Metis witnesses and claimants in the *Willison*, *Howse* and *Nunn* cases; writings by Metis and other Indigenous authors, and by critical theory scholars; Metis oral literature; conversations with Indigenous and settler colleagues; and teachings I received from family and community members.

## **PART 1            METIS RIGHTS IN BC: THE INTERSECTION OF LAW AND HISTORY**

In 2003, Metis history took centre stage as a result of the Supreme Court of Canada’s urgent directive in *R v Powley* to develop a systematic method of identifying Metis rights-holders for

the purpose of correctly enforcing harvesting laws. According to *Powley*, such identification involves history. A holder of Metis harvesting rights must prove an ancestral connection to an historic rights-bearing community in the region where the right is exercised. “Historic” in this context implies continuity from the date of “effective European control”<sup>7</sup> in the relevant region. Proof of individual Metis identity and acceptance by a current Metis community is required, but still insufficient to ground Metis rights. Historic community continuity must be shown,<sup>8</sup> although the focus on history at the expense of contemporary self-government reveals the court’s bias towards finding cultural authenticity rather than acknowledging Metis political realities.

As a consequence of *Powley*, Metis groups across Canada have been launching historical research projects, identifying historic communities in order to defend their harvesting rights in court.<sup>9</sup> The Métis National Council and its provincial subsidiaries have created citizenship and

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<sup>7</sup> *Ibid* at para 18. This test was adapted from the pre-European-contact test outlined in *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] for determining which practices, customs and traditions were “integral to the distinctive culture” of Aboriginal rights claimants. For an Indian proving an Aboriginal right, the court in *Van der Peet* held that the impugned practice, tradition or custom must be shown to have been integral to the Indian community prior to “contact” with Europeans. See *R v Sparrow*, [1990] 1 SCR 1075; *Van der Peet*, *supra*. The test was modified in *Adams*, wherein the court held that “contact” meant “effective control”. See *R v Adams*, [1996] 3 SCR 101. For a Metis proving an Aboriginal right, the court in *Powley* modified the time period to be “post-contact but pre-control”, taking into account that Metis societies necessarily arose after contact: *Powley*, *supra* note 5 at para 37. The origins of the “historic community connection test” will be discussed further in Chapter 3.

<sup>8</sup> *Ibid* at para 33.

<sup>9</sup> For example, Metis oral history projects have been launched by the Gabriel Dumont Institute in Saskatchewan, and by the University of Alberta. The Congress of Aboriginal Peoples (“CAP”) published its *Powley Final Report* detailing the evidentiary and cultural difficulties facing Metis in asserting their harvesting rights before the courts. The CAP project was originally intended to identify Metis communities and rights-holders in central Canada, but it was decided to undertake that research as part of a future project. See CAP *Powley* Implementation Project Team 2007-2008, *Powley Final Report 2006-2007*, vol 1 (Ottawa: CAP, May 2007). In British Columbia, documentary and oral history projects are currently being conducted in collaboration with the Metis Nation of BC. For more information, see Chapter 2.

harvester registries that closely follow the *Powley* criteria.<sup>10</sup> The Standing Senate Committee on Aboriginal Peoples (SSCAP) conducted a study on Metis identity, with one of the stated goals being an examination of “the implementation of Métis Aboriginal rights, including those that may be related to lands and harvesting”. The SSCAP submitted its report in 2013, after hearing the testimony of Metis people from across Canada, as well as from academics.<sup>11</sup> At the same time, negotiations have been ongoing between Metis political associations and the provinces to create agreed-upon Metis harvesting laws.<sup>12</sup> These talks are taking place in part due to a healthy skepticism about the usefulness of *Powley* – at least at this stage of its implementation.

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<sup>10</sup> For the MNC *Métis Registration Guide*, for example, see online: <[www.metisnation.ca/wp-content/uploads/2011/04/M%C3%A9tis-Registration-Guide.pdf](http://www.metisnation.ca/wp-content/uploads/2011/04/M%C3%A9tis-Registration-Guide.pdf)>.

<sup>11</sup> Senate of Canada, “*The People Who Own Themselves*”: *Recognition of Métis People in Canada* (June 23, 2013), Report of the Senate Standing Committee on Aboriginal Peoples, online: <<http://www.parl.gc.ca/Content/SEN/Committee/411/appa/rep/rep12jun13-e.pdf>>. The federal government has also created “A Program of Research Related to Historical Métis Communities”. While the findings have not been made public, a short summary is available online: <<http://www.justice.gc.ca/eng/rp-pr/jr/jr15/p5.html>>. This paper is a partial summary of “Researching Historic Métis Communities: Applied Research on Métis Ethnogenesis in the post-*Powley* Era”, a paper presented at the 2006 Aboriginal Policy Research Conference in Ottawa.

<sup>12</sup> Prior to the Supreme Court decision in *Powley*, provincial Metis political groups entered into harvesting-related MOUs with Saskatchewan (1995) and Manitoba (2002). A *Harvesting Memorandum of Agreement* was entered into in 2010 in Saskatchewan. Following *Powley*, in September of 2004, the Metis Nation of Alberta (“MNA”) entered into an *Interim Métis Harvesting Agreement* (“IMHA”) with the Province of Alberta. The Agreement gave eligible Metis the right to harvest for food year-round on all unoccupied Crown lands in Alberta. After the Alberta Queen’s Bench decision in *R v Kelley*, 2006 ABPC 17, 2007 ABQB 41 [*Kelley*], which upheld a Metis claimant’s right to rely on the IMHA, and after subsequent negotiations between the MNA and the province, Alberta terminated the IMHA on July 1, 2007 and implemented a unilateral harvesting policy that recognizes 17 Metis communities north of Edmonton. According to the new policy, each of these communities may harvest within a 160 km radius only. In response to the termination of the IMHA, the Métis Nation of Alberta has launched its “hunt for justice”, taking Metis rights claims to court; however, the key case, *R v Hirsekorn*, [2010] AJ No. 1389; aff’d in part 2011 ABQB 682; aff’d 2013 ABCA 242, leave to appeal to SCC denied [*Hirsekorn*], was not successful for the Metis claimant. In July of 2004, the Metis Nation of Ontario and the Ontario Ministry of Natural Resources entered into an interim agreement. This was litigated successfully by the defendant in *R v Laurin*, 2007 ONCJ 265, on the issue of whether a geographic limitation could apply, with the court finding that the agreement was binding on Ontario throughout the province. For a more detailed history of these developments, other than in BC, see Jean Teillet, “The Métis and Section 35: How Constitutional Protection for Métis Rights Has Led to the Loss of the Rule of Law” (2012) 58 *Supreme Court Law Review* (2d) 333. In BC, the Metis Nation of BC (MNBC), attempted to negotiate harvesting agreements with various First Nations and the provincial government. These latter negotiations follow signing of the *Métis Nation Relationship Accord* by the MNBC and the province of BC: online <[www.mnbc.ca/pdf/metis\\_accord.pdf](http://www.mnbc.ca/pdf/metis_accord.pdf)>. These negotiations were stalled at the time of my interview with research participant Mark Carlson, MNBC Hunt Captain for Region 3

Since *Powley* was decided, it has been followed 50 times (with about half of those cases pertaining to Metis rights), and in only three cases have the Metis claimants been successful. Significantly, these cases have all been situated in the so-called “Metis heartland” of the prairies, an area in which the existence of historic Metis communities is generally accepted, both by many Metis and by historians and Canadians generally.<sup>13</sup>

Fortunately, the three successful prairie cases – *R v Laviolette*,<sup>14</sup> *R v Belhumeur*<sup>15</sup> and *R v Goodon*<sup>16</sup> – have expanded the *Powley* definition of community to include greater acceptance of community mobility and interconnection with other Aboriginal communities, as well as a recognition that Metis territories can be located in relatively large geographic regions.<sup>17</sup> It remains to be seen whether this trend will continue; unfortunately, there have been no cases in

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(Kootenays) on July 27, 2012, but have since resumed. See Chapter 2 for discussion of the BC crown’s position with respect to historic Metis communities in the province.

On January 10, 2005, the federal Cabinet adopted its *Federal Interim Guidelines for Métis Harvesting*, which purport to apply to natural resources within federal jurisdiction. For instance, Metis can legally hunt migratory birds according to the provisions of the federal *Migratory Birds Convention Act*, SC 1994, c 22.

<sup>13</sup> For some, the existence of Metis communities outside of Ontario and the prairies is controversial, as the members of such communities are less likely to be descendants of the Red River Metis. See Chapter 2 for further discussion.

<sup>14</sup> *R v Laviolette*, 2005 SKPC 70, [2005] 3 CNLR 202 [*Laviolette*]. In this fishing case, a Metis community was found to exist in the Qu’Appelle Valley and environs, including the city of Regina.

<sup>15</sup> *R v Belhumeur* 2007 SKPC 114 [*Belhumeur*]. In this subsequent fishing case, the court recognized an historic Metis community in the area of northwest Saskatchewan bounded by Green Lake, Île a la Crosse, Lac la Biche and Meadow Lake.

<sup>16</sup> *R v Goodon*, 2008 MBPC 59 [*Goodon*]. In this hunting case, the court recognized an historic Metis community in a loosely-defined area of southern Manitoba, including the city of Winnipeg south to the US border and west to the Saskatchewan border.

<sup>17</sup> Note also that the appeal judge in the Alberta case *Kelley*, *supra* note 12, says in obiter that arbitrarily limiting the site of site-specific rights is not correct and that in looking at site specificity, the courts should consider the historical context. See para 38. In para 27, partially on this point, Verville J refers to Mr Kelley’s authorities, which include *Laviolette* and *Willison BCSC*.

line with these since 2008. In Alberta, the court in *Hirse Korn*<sup>18</sup> established a test for mobility of Metis rights, which at least recognizes an important Metis reality (although it is not based on Metis perspectives); however, Mr Hirsekorn lost because the court held there was no historic Metis community in southern Alberta, which was where he had been hunting.

In British Columbia, the success rate of Metis rights claimants is even more dismal. Of the three BC harvesting cases decided since the *Powley* case began,<sup>19</sup> all have been decided against the Metis claimants, in great part because the claimants could not meet the historic community connection test. This was because of 1) the perceived lack of reliable historical evidence showing continuous Metis presence in areas at issue; 2) the difficulties courts have had with the complexities of BC Metis history and community identity; and 3) the courts' lack of understanding of Metis perspectives, particularly about history, community and territory. The provincial crown has actually taken the position that there are no historic Metis communities in BC<sup>20</sup> and, thus, the principles of *Powley* do not apply in the province.

Regardless, many Metis people throughout BC (including those in this study) assert that their communities are "historic", and that some have existed since the earliest days of the fur trade.

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<sup>18</sup> *R v Hirsekorn*, *supra* note 12. For a critique of the new "traditional territory test" in this case from a Metis perspective, see Karen Drake, "R v Hirsekorn: Are Métis Rights a Constitutional Myth?" (2013) 92:1 Canadian Bar Review 149.

<sup>19</sup> There is one more BC case, which deals with the fishing rights of a Metis person fishing on the Fraser River with Stó:lō people from Cheam, near Chilliwack, BC. In this case, *R v Douglas*, 2004 BCPC 606, the Provincial Court judge held that there was no evidence that the claimant Mr Hourie was Metis or that the Metis had historically fished with Stó:lō people on the Fraser River. The court's findings on Mr Hourie's rights consisted of one paragraph without any legal analysis. While the Stó:lō claimants appealed their convictions, Mr Hourie did not.

<sup>20</sup> The BC crown has grudgingly acknowledged the possibility that Kelly Lake, in the Peace River country, is a historic Metis community, in part because a white schoolteacher lived there for two years in the 1920s and wrote about the community. See Gerald Smedley Andrews, *Metis Outpost: The History of Kelly Lake* (Victoria: GS Andrews, 1985). For more discussion, see Chapter 3.

This assertion is supported by, for example, Metis oral history and the work of scholars Jean Barman and Mike Evans.<sup>21</sup> However, while Metis people<sup>22</sup> are very much a part of BC's history, we *are* conspicuous in our absence from the written chronicles of the province. This result is frustrating and curious because Metis migration, along with the creation of local Indigenous/non-Indigenous unions and families, was as common west of the Rockies as it was elsewhere.<sup>23</sup> In what became BC, people of Indigenous mixed ancestry<sup>24</sup> frequently intermarried with Metis migrants, including those from Red River, often over many

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<sup>21</sup> This claim is also based in part on information provided by the research participants, and on many informal discussions with Metis people across the province, who all allege Metis people lived in and around the principal fur-trading posts of Fort Victoria, Fort Rupert, Fort Langley, Fort Okanagan, Thompson's River/Fort Kamloops, Stuart's Lake/Fort St James, and Fort Alexandria, and suggest that descendants continue to live in the areas surrounding these former posts. This is also suggested by Jean Barman & Mike Evans, "Reflections on Being, and Becoming, Métis in British Columbia" (Spring 2009) 161 *BC Studies* 59; Bruce McIntyre Watson, *Lives Lived West of the Divide: A Biographical Dictionary of Fur Traders Working West of the Rockies, 1793-1853*, vol 1 (Kelowna: Centre for Social, Spatial, and Economic Justice, University of British Columbia, 2010); George Goulet & Terry Goulet, *The Métis in British Columbia: From Fur Trade Outposts to Colony* (Vancouver: FabJob, 2008). For a discussion about whether people of Indigenous mixed ancestry in BC are Metis, see Chapter 2.

<sup>22</sup> I use "people" in this context, but section 35 of the *Constitution Act, 1982* (*infra* at 33), *Powley* and the Royal Commission on Aboriginal Peoples (RCAP) all recognize the possibility that there may be more than one Metis people in Canada. See RCAP, vol 4, "Métis Perspectives" (Ottawa: Ministry of Supply & Services, 1996). However, note that *Powley* does not require proof that a claimant is part of a Metis people, only that s/he is part of an historic Metis community. For judicial interpretation of the meaning of "community" in *Powley* and the cases following it, see Chapter 3.

<sup>23</sup> See, for example, Hugh JM Johnston, ed, *The Pacific Province: A History of British Columbia* (Vancouver: Douglas & McIntyre, 1996); Olive P Dickason, "From 'One Nation' in the Northeast to 'New Nation' in the Northwest: A Look at the Emergence of the Métis", in Jacqueline Peterson & Jennifer SH Brown, eds, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) 19; and Leah Dorion & Darren R Préfontaine, "Deconstructing Métis Historiography: Giving Voice to the Métis People", in Lawrence J Barkwell, Leah Dorion & Darren R Préfontaine, eds, *Métis Legacy: A Métis Historiography and Annotated Bibliography* (Winnipeg: Pemmican, 2001).

<sup>24</sup> I recognize the term "mixed ancestry" is problematic, as it foregrounds people's ancestry rather than political agency, and generalizes people who may refer to themselves and their collectivities in various ways. However, I have not been able to find or invent a more useful general term. Other terms, such as "mixed blood", "mixed race" or "interracial" are, in my view, more problematic, since ideas of "race" and "blood" are social rather than scientific categories.

generations;<sup>25</sup> the genealogies of some of the research participants reflect this. Indigenous mixed ancestry communities not connected to the wider Metis nation also likely existed, and their persistence is something that is currently being debated and researched.<sup>26</sup> Metis communities – related to Red River Metis families or otherwise<sup>27</sup> – have arguably existed in BC for over 200 years,<sup>28</sup> and more than 59,000 people identify as Metis in BC today.<sup>29</sup>

While relevant primary written materials do exist (e.g. explorers' journals; fur trade company, government, church and school records; newspaper articles; court cases),<sup>30</sup> they have not been much studied; thus secondary source publications are few.<sup>31</sup> This dearth of material gives the impression that the Metis of BC are at best insignificant, and at worst non-existent. However,

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<sup>25</sup> Mike Evans, Jean Barman & Gabrielle Legault, "Métis Networks in British Columbia: Examples from the Central Interior" in Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, eds, *Contours of a People: Metis Family, Mobility, and History* (Norman: University of Oklahoma Press, 2012) 331.

<sup>26</sup> See Jean Barman, *French Canadians, Furs and Indigenous Women in the Making of the Pacific Northwest* (Vancouver: University of British Columbia Press, 2014) [Barman, *French Canadians, Furs and Indigenous Women*].

<sup>27</sup> The politics of Metis identity are complex. Many view the descendants of Red River families as being the only "true" Metis, while others disagree. For some, the focus on Red River has to do with ancestry, for others it is related to beliefs about Metis nationhood and political self-determination. For an overview of perspectives about who meets the definition of "Metis", see Chapter 2.

<sup>28</sup> See, for example, Jean Barman, "At the Edge of Law's Empire: Interraciality, Citizenship and the Law in British Columbia" (2006) 24 *Windsor Yearbook of Access to Justice* 1 [Barman, "Edge of Law's Empire"]. I am not attempting here to prove that historic Metis communities exist in BC; rather, I am suggesting that, given the available evidence, it is likely that they do, and that further research is required.

<sup>29</sup> Statistics Canada, *Census of Canada, 2006*. Of course, this figure does not include the many people who may wish to conceal their Metis identities. The Metis Nation of BC claims there are more than 70,000 Metis people in the province. Note Chris Andersen critiques the lack of specificity in the census questions, which do not distinguish between different ways of identifying as Metis (and in his view may allow people to "incorrectly" identify as Metis). See Maggie Walter & Chris Andersen, *Indigenous Statistics: A Quantitative Research Methodology* (Walnut Creek, CA: Left Coast Press, 2013) at 123-27.

<sup>30</sup> For instance, the fourth *Census of Canada, 1901*, vol 1, states at 284-85 that there were 3,461 Metis in BC in 1901.

<sup>31</sup> It was only in 2008 that the first full-length dedicated history of the Metis in BC was published. This is a popular history. See Goulet & Goulet, *supra* note 21. For a historiography of the Metis in BC see online: <[http://www.indigenouststitute.ca/Summer\\_Institute\\_2/MNBC\\_Research.html](http://www.indigenouststitute.ca/Summer_Institute_2/MNBC_Research.html)> (work in progress as part of a research partnership of the Métis Nation of BC and UBC Okanagan campus); and see Kerry Sloan "Many Tenuous Ties: Toward an Historiography of the Métis of BC" (August 29, 2007) [unpublished].

oral histories are now beginning to be collected which demonstrate the richness of the Metis experience in British Columbia,<sup>32</sup> and other primary sources are now being investigated. This research will be discussed further in Chapters 2 and 6.

Following entrenchment of Metis Aboriginal rights in section 35 of the *Constitution Act, 1982*,<sup>33</sup> Canadian courts have had difficulty contending with the complexity of Metis community identities, and have coped in part by trying to essentialize (e.g. aboriginalize) or “contain” them. This impulse can be seen in *Powley*, which requires that a claimant belong to a Metis community that was distinct from Indigenous and European communities prior to “effective European control”. Related to this drive is the court’s imposition of modern, Eurocentric notions of community identity, which are analogous to the criticized “frozen rights” approach to the characterization of Aboriginal rights.<sup>34</sup> Similarly, concepts of Metis community and territory in *Powley* are rooted in assumptions based in English property law,<sup>35</sup> which do not

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<sup>32</sup> See, for example, Mike Evans *et al*, eds, *What It Is to Be a Métis: The Stories and Recollections of the Elders of the Prince George Métis Elders Society* (Prince George: University of Northern British Columbia Press, 1999). The 2007 web-based edition can be accessed online: <<http://web.ubc.ca/okanagan/ccgs/faculty/mevans.html>>; Mike Evans, *et al* with the Prince George Métis Elders Society (“PGMES”), *A Brief History of the Short Life of the Island Cache* (Prince George: PGMES, CCI Press and Alberta Acadre Network, 2004); Leona Point & The Metis Curriculum Committee, *Metis People of Quesnel: People of Mixed Heritage Living in the North Cariboo of British Columbia* (Quesnel: Quesnel Tillicum Society, 1994).

<sup>33</sup> Section 35(1) states that “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. Section 35(2) states “In this act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada”. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>34</sup> The “frozen rights” approach holds that there must be a connection between the way Aboriginal rights are practised and the way they would have been exercised at the time of contact between Aboriginal and European m cultures. This approach, which ignores the fact that cultures change and evolve, has been criticized by many Aboriginal law scholars, as in John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22 *American Indian Law Review* 37; and Brent Olthuis, “Defrosting *Delgamuukw* (or ‘How to Reject a Frozen Rights Interpretation of Aboriginal Title in Canada’)” (2001) 12 *National Journal of Constitutional Law* 385.

<sup>35</sup> Jean Teillet, *Métis Law in Canada* (Toronto: Pape Salter Teillet, 2013) [Teillet, *Métis Law in Canada*] at 1-37, online: <[www.pstlaw.ca/resources](http://www.pstlaw.ca/resources)>.

reflect the historical realities of Metis communities. Contrary to the strictures of *Powley*, actual Metis history involves cultural, linguistic and religious diversity, geographic dispersion and migration, political fragmentation and re-invigoration, past repression and current expression. It is complex, multi-faceted, and rich – while at the same time being distinctive. As Metis people, we have ties among our own communities, and with other Indigenous and non-Indigenous communities.<sup>36</sup> We have local as well as geographically far-reaching connections. “Territory”, in the Metis sense, is similarly complex, and may be better represented by expansive, overlapping network regions than by sections and townships.<sup>37</sup> Contrary to some detractors’ views, however, Metis communities and lands have not become so vaguely defined as to be non-existent.<sup>38</sup> There are still many “historic” territories and communities that we and our neighbours recognize, even if they are not recognized by the courts of Canada.<sup>39</sup> Historic and modern communities may be connected in ways that are more or less continuous,

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<sup>36</sup> This is recognized, for instance, in *Lavolette, Belhumeur and Goodon*, as well as in *Paul and North Slave Métis Alliance v Canada, NWT and Dogrib Treaty 11 Tribal Council*, 2002 FCT 615, and in *Cunningham v Alberta*, [2011] 2 SCR 670, which examine the connections between Metis and First Nations people, and the potential for Metis people to have both Metis and First Nations identities.

<sup>37</sup> Teillet, *Métis Law in Canada*, *supra* note 35 at 1-30 to 1-39. This is not to deny that there are distinct Metis territories, which may have been conceived of in similar ways as First Nations or Inuit traditional territories, or that many of the lands held by the Metis at Red River were held based on the French seigneurial system; Metis lots on Red River were later acknowledged by the imported English law as being held in fee simple. Unfortunately, the French derivation of this form of land holding was the reason the Supreme Court of Canada in *Manitoba Métis Federation v Canada*, [2013] 1 SCR 623 held that a fiduciary duty had not arisen with respect to Metis lands in Red River; because Metis people had adapted European-derived land use laws to suit themselves, this was not seen as sufficiently Aboriginal.

<sup>38</sup> This is the position taken by the crown in most of the Metis harvesting rights cases since *Powley*.

<sup>39</sup> This is the case in BC. According to the research participants (Metis people from southern BC), many Metis people in BC recognize historic communities in the “environs of Falkland” (see *Willison*), in the Kootenays, in the Prince George and Quesnel areas, in the Peace Country, and in the Fraser Valley. This list is not exhaustive. See Chapters 5 and 6 for more detail.

depending on the effects of racism, and economic, political or other forces, which may have led individuals or entire communities to downplay their Metis identities.<sup>40</sup>

The leading Metis harvesting rights case in BC following *Powley* is *R v Willison*.<sup>41</sup> This case concerns the Falkland region of the southern BC interior, located not far from Salmon Arm between the Thompson and Okanagan river valleys. This region boasts a long-established and vibrant Metis community,<sup>42</sup> which arguably has its origins in the fur trade of the Brigade Trail.<sup>43</sup> While the appeal court in *Willison* recognized that the claimant was a Metis belonging to this community, and that Metis in the area were once involved in the fur trade, it also held that the claimant had not proven community continuity necessary to satisfy the *Powley* legal test. There were two similar BC judgments: in *R v Howse*,<sup>44</sup> the court held that there was no rights-bearing Metis community in the Kootenays; and in *R v Nunn*<sup>45</sup> it was held that there was no rights-bearing community in the south Okanagan. In part, these decisions turned on a lack of

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<sup>40</sup> For some conjectures about why this happened in BC, see Barman, "Edge of Law's Empire", *supra* note 28; Olive P Dickason, *supra* note 23; Dorion & Préfontaine, *supra* note 23. This topic will be discussed further in Chapter 2.

<sup>41</sup> *Willison*, *supra* note 2.

<sup>42</sup> This is based in part on personal observation. My mother's Metis family migrated to this area from Saskatchewan in 1948, and I have spent a great deal of time there over the years. The Metis of Kamloops, Salmon Arm and Vernon, for example, are very active and host many community events, and are also involved in wildlife harvesting and management activities in the area. My own research for this dissertation has revealed that members of my own family settled in and travelled through what became known as BC as early as the 1810s. For an account of these discoveries, see Kerry Sloan "'Lost Okanagan' No More: How I Discovered My BC Metis History" (2013) 78 *Okanagan History* 8.

<sup>43</sup> For perspectives on the significance of the fur trade in BC and northwest history, see Jean Barman, *The West beyond the West: A History of British Columbia*, 2nd ed (Toronto: University of Toronto Press, 1996); Barman, *French Canadians, Furs and Indigenous Women*, *supra* note 26; Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997); James R Gibson, *The Lifeline of the Oregon Country: The Fraser-Columbia Brigade System, 1811-47* (Vancouver: UBC Press, 1997); John C Jackson, *Children of the Fur Trade: Forgotten Métis of the Pacific Northwest* (Missoula, MT: Mountain Press, 1995).

<sup>44</sup> *Howse*, *supra* note 4.

<sup>45</sup> *Nunn*, *supra* note 3.

sufficient (or, in the court's mind, credible) historical evidence. I will return to these cases shortly.

While I applaud recent efforts to compile documentary and oral histories of the Metis in BC, and while I would suggest that the "historic community connection" test in the *Powley* case could be interpreted to more appropriately reflect the realities of Metis communities, I am not trying to argue that merely doing better research or creating a better interpretation of *Powley* is sufficient. Rather, I am suggesting that, as Metis people, we should define who we are for ourselves, not so that we can fit ourselves within the *Powley* criteria. While it is undoubtedly useful to have the state agree that we have constitutionally protected harvesting rights, I am concerned that *Powley* is changing the way we look at ourselves in ways that we may not have anticipated. I also contend that the premises upon which *Powley* is based are fundamentally flawed, despite the efforts of the court to deal with issues that are admittedly complex and even divisive for Metis people. This contention will be discussed at length in Chapters 5 and 6, in Chapter 8, and in the final reflective section.

Of course, I hope that the position of the BC Crown will change and that Metis rights will be protected by the courts in BC. *Lavolette*, *Goodon* and *Belhumeur* may offer some guidance in interpreting *Powley* so that Metis people will be more likely to see recognition of their rights before the courts. In my view, these cases more closely represent a Metis understanding of community than does the appeal decision in *Willison*, although they are still flawed. There has been some recognition that there is a historic Metis community in the Peace River/Treaty 8 region of BC. Metis historical land use mapping in this area has triggered a "medium" degree of

consultation in talks between BC Hydro and the Metis on the Site C Dam proposal.<sup>46</sup> Perhaps even more positive is that the *Daniels* Federal Court of Appeal decision led BC to resume its negotiations with MNBC regarding a potential harvesting agreement.<sup>47</sup> It will be interesting to see the effect of the Supreme Court of Canada's recent decision in *Daniels*, given that the court has confirmed the federal government has jurisdiction with respect to Metis people and lands.<sup>48</sup>

Whether outcomes for Metis harvesting rights claimants in BC<sup>49</sup> might be improved with a combination of greater understanding of Metis history and perspectives, along with a broader interpretation of *Powley*'s historic community connection test, is a matter of debate. However, the application of *Powley* in BC raises issues that go beyond the outcomes of individual cases, and go to the core of how, as Metis people, we understand ourselves, our rights, territories, communities and histories.

In this dissertation, I will look at the problems created by the "community conundrum" for the Metis of BC, and suggest some solutions. The term "community conundrum" refers to the difficulty of proving the existence of "historic" Metis "communities". I will also discuss the

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<sup>46</sup> Personal communication with Chris Gall, MNBC Consultation Coordinator, July 7, 2015.

<sup>47</sup> *Daniels v Canada*, 2014 FCA 101, [2014] 4 FCR 97.

<sup>48</sup> *Daniels v Canada*, 2016 SCC 12 [*Daniels SCC*]. To my mind, there is an inconsistency between the SCC's decision in this case on the lack of need for "community acceptance" for the purposes of determining who Metis people are, and this requirement in *Powley*. While the court distinguishes *Powley* as having the purpose of "protecting historic community-held rights" – thus necessitating community acceptance – *Powley*'s community connection test "presumptively and arbitrarily" excludes from constitutional protection those Metis people who are not seen as having historic communities. See *Daniels SCC* at para 49.

<sup>49</sup> The failure of the BC Metis hunting cases has led the MNBC to try to negotiate harvesting agreements with the province, which for now has led to a lull in litigation. But the possibility that the constitutional protection of Metis harvesting rights might, in effect, be non-existent in BC is still important to investigate, and certainly has implications for other claimants belonging to less widely recognized Metis communities.

significance of the larger issues created by the community conundrum and how they might be addressed by Metis philosophy, values and law.

## **PART 2            A METIS RESPONSE TO THE COMMUNITY CONUNDRUM**

### **Seeing the Community Conundrum through a New Metis Lens: Metis Critical Legal Theory**

In presenting my research and analysis, I will be proposing the need for legal interpretive approaches based on Metis philosophy and cultural practices. While I do not purport in this dissertation to present a complete theoretical or methodological structure for MetCrit, I argue that the intersection of Metis rights and history in BC – the community conundrum – suggests the utility of creating a critical theory of law that is particular to the concerns of Metis people in Canada and the United States.<sup>50</sup> While critical race theory and Indigenous critical legal theory<sup>51</sup> provide important analytical tools for looking at Metis legal issues, I believe Metis-specific approaches could be more appropriate – and ultimately more useful.

I envision MetCrit as Metis lenses through which to view Indigenous legal systems, including Metis law, as well as the Canadian law of Aboriginal rights, and law more broadly. MetCrit would be based in traditional and developing Metis philosophies. It might also adapt and

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<sup>50</sup> This dissertation will mostly focus on Metis issues in what is now Canada, but much of the theoretical discussion is also applicable to the Metis of the United States. Works on the Metis in the US include: Michel Hogue, *Metis and the Medicine Line: Creating a Border and Dividing a People* (Chapel Hill: University of North Carolina Press, 2015); Martha Harroun Foster, *We Know Who We Are: Métis Identity in a Montana Community* (Norman: University of Oklahoma Press, 2006); Irma R Miller, *French-Indian Families in America's West*, 2nd ed (Victoria: Trafford, 2005); Louise Seymour Houghton, *Our Debt to the Red Man: The French-Indians in the Development of the United States* (Boston: Stratford, 1918); Barkwell, Dorion & Préfontaine, *supra* note 23; and Jackson, *supra* note 43. See also the work of Lucy Eldersveld Murphy, Tanis Thorne and Nicholas Vrooman. See Chapter 7 for a discussion about *mestiza/os* in the US and differences between Metis and *mestiza/o* identity.

<sup>51</sup> For an overview of these critical theories, see Chapter 7. For a discussion of the relevance of these theories to Metis legal and historical concerns, see Chapters 7 and 8.

transform ideas from critical race theory, Indigenous critical legal theory and other theoretical perspectives.<sup>52</sup> As I imagine it, MetCrit might in some ways resemble “LatCrit”, or Latina/o critical legal theory, which employs elements of various branches of critical legal theory, but also takes into account the mixed ethnic, cultural and philosophical heritage of Latina/o peoples.<sup>53</sup> *Mestiza/o*<sup>54</sup> critical perspectives would also be relevant. Although I do not view Metis people as being simply mixed, other “crit” theories such Asian crit, multiracial crit, and queer theory, which deal with perceived mixed identities, may provide important insights. As I will explain in Chapter 7, while Metis peoplehood is not founded in the mixedness of Metis people, theories that bust dualities and question boundaries resonate in many ways with Metis philosophy. MetCrit would also share some commonalities with critical approaches to the concerns of diasporic or nomadic peoples, although I do not view Metis people as being simply diasporic or nomadic. While Metis theories that incorporate diasporic or nomadic people’s concerns may make Metis nationalists nervous, I hope to explain how such concerns reflect many issues confronting Metis people today.<sup>55</sup>

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<sup>52</sup> For a discussion of various theories and their implications for MetCrit, see Chapter 7.

<sup>53</sup> Francisco Valdes, “Forward Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self Empowerment” (1997) 2 *Harvard Latino Law Review* 1. For a critique of the identification of Metis people as merely mixed, see Chris Andersen, “*Métis*: Race, Recognition, and the Struggle for Indigenous Peoplehood” (Vancouver: University of British Columbia Press, 2014).

<sup>54</sup> *Mestiza* (feminine) and *mestizo* (masculine) are Spanish terms analogous to “metis” in the broad sense, and refer to the various cultures created throughout the Americas as the result of biological and cultural mixing between Indigenous and non-Indigenous peoples. The work of various *mestiza/o* theorists will be referred to in Chapters 4 and 7.

<sup>55</sup> On references to both diasporic and nationalist leanings in Metis literature, see Sophie McCall, “Diaspora and Nation in Metis Writing” in Christine Kim, Sophie McCall & Melina Baum Singer, eds, *Cultural Grammars of Nation, Diaspora and Indigeneity in Canada* (Waterloo, ON: Wilfrid Laurier University Press, 2012). Brenda Macdougall, Carolyn Podruchny and Nicole St-Onge critique the application of “nomad” to Metis people, suggesting it is inaccurate and reflects colonialist notions of cultural inferiority. See their “Introduction: Cultural Mobility and the Contours of Difference” in Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, *supra*

In looking towards a critical Metis legal scholarship, I propose developing research methodologies that would examine the intersections between non-Indigenous and Indigenous law, history and culture. These methodologies would include the recognition of multiplicities and intersectionalities of personal and community identities while avoiding essentializing those identities. Conflict and unsettling themes would not be suppressed, but would be approached with intellectual curiosity. Metis methodologies would seek to acknowledge and respect differences of perspective and opinion within communities, as well as internal conflicts within the minds and hearts of individuals. At the same time, MetCrit would not attempt to necessarily resolve tensions or encompass all views into an overarching perspective.

Important for the development of MetCrit would be the idea of creating spectrums of space<sup>56</sup> between and outside the binaries often imposed on Metis people: Indigenous/non-Indigenous, other/non-other, inside/outside, traditional/modern, sovereign/colonized, assimilated/unassimilated, urban/rural, authentic/inauthentic.<sup>57</sup> These binaries are reproduced in Canadian culture, and are thus reflected in the Canadian law of Metis rights, and in the

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note 25, 3. However, in evidence in the three BC cases, many witnesses, including claimant Dan LaFrance, describe the Metis as nomadic.

<sup>56</sup> Homi Bhabha describes hybridity as an interstitial “third space”. See Bhabha, *The Location of Culture* (London: Routledge, 1994). Here, I am suggesting that this space is not unitary, but could encompass a range of positionalities. This idea was developed in conversation with John Borrows. Debates concerning the idea of the “third space” will be discussed further in Chapters 2, 3 and 8. A possible alternative to the third space could be illustrated by the Metis infinity symbol. Tara J Turner also proposes this in *Re-Searching Metis Identity: My Metis Family Story* (PhD Thesis, University of Saskatchewan, 2010) [unpublished].

<sup>57</sup> Kevin Bruyneel asserts that claiming a “third space” helps Indigenous people in the US to subvert the colonial power, which seeks to impose political binaries, and to thus short-circuit expressions of Indigenous sovereignty. See Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007) at 217. Cathy Richardson proposes using the “third space” as a response to oppression and racism directed at Metis people. See Richardson, “Metis Identity Creation and Tactical Responses to Oppression and Racism” (2006) 2 *Variations* 56. However, Chris Andersen charges that the discourse of hybridity ignores Metis political legitimacy and authenticity and “represents the space into which we have been shoehorned as part of the Canadian state’s growing racial imaginary”. Andersen, *supra* note 53 at 38.

historiography of Metis peoples. These binaries and their possible “antidotes” will be addressed throughout this dissertation.

These boundaries/binaries are particularly evident in the *Willison* appeal court’s opposition of the following concepts: 1) “distinctive collective identity”/ “identifiable” vs. “people of mixed ancestry”; 2) “living together in the same geographic area” vs. “geographically wide”; and 3) “sharing a common way of life” vs. “loosely affiliated group of people”.<sup>58</sup> These oppositions arise from *Powley*, which defines a Metis community as “a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life”.<sup>59</sup> In the *Willison* decision, the Metis community in the environs of Falkland was held to be a “loosely affiliated group of people of mixed ancestry living in a wide geographic area”,<sup>60</sup> and therefore not a group that fit the “proper” description of an historic Metis community. As will be seen in Chapters 5 and 6, in the view of the research participants in this study, this is an incorrect categorization. However, as will be explored throughout this dissertation, these three polarities in the *Powley/Willison* analysis miss the mark; none truly reflects Metis perspectives on history, territory or community.

Similarly, the historiography of the Metis of BC reflects polarity: there has been a tendency to assume the absence of the Metis; descendants of Indigenous/non-Indigenous families in the province were historically and legally categorized as either First Nations or “white”, regardless

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<sup>58</sup> *Willison BCSC, supra* note 2 at para 48.

<sup>59</sup> *Powley, supra* note 5 at para 12.

<sup>60</sup> *Willison BCSC, supra* note 2 at para 48.

of how those descendants might have viewed themselves and their communities.<sup>61</sup> The historiography of the Metis more generally has tended to reflect the notion that Metis were simply “mixed”, and thus did not have distinctive cultures or nationalities, or similarly that the Metis were diasporic, disenfranchised and doomed to disappear into the general population.<sup>62</sup> On the other hand, some historiography, even Metis oral historiography, has occasionally erased the multiplicity and complexity of Metis histories and historic identities in favour of something more rigid and easy to comprehend, perhaps occasionally in response to Canadian legal dictates, such as those in *Powley*.

In formulating MetCrit, the binaries expressed in legal and historiographical representations of Metis communities could be analyzed taking into account two Metis views of community: 1) one based on notions of loss, mixing, absence, and exile, as illustrated by some realities of Metis history, particularly in BC, and often expressed by Metis storytellers and writers; and 2) one argued for in its presence, distinctiveness and continuity, as illustrated by some recent Metis scholarship, and by the Metis nationalist/sovereigntist ethos. While these tensions themselves may not be binaries, they do reflect recognizable strains that exist within Metis dialogues and may be present even within single discourses, such as in Maria Campbell’s autobiographical novel *Halfbreed*<sup>63</sup> and in Louis Riel’s trial speeches.<sup>64</sup> I suggest that these

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<sup>61</sup> See Barman, “Edge of Law’s Empire”, *supra* note 28; Renisa Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921* (Vancouver: University of British Columbia Press, 2009); John Lutz, “Making ‘Indians’ in British Columbia: Power, Race, and the Importance of Place” in Richard White & John M Findlay, eds, *Power and Place in the North American West* (Seattle; University of Washington Press, 1999) 61.

<sup>62</sup> George FG Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961). Reprint of 1936 edition first published by Longmans, Green.

<sup>63</sup> Maria Campbell, *Halfbreed* (Toronto: McClelland & Stewart, 1973).

tensions are instructive, and do not necessarily need to be resolved. In some ways, they may be mutually supportive. Further, in developing MetCrit, I suggest investigating two strains of critical legal theory that reflect these supposedly binary views about Metis communities: the “critical race/feminist/Indigenous theory” strain that validates particular individual and community experiences; and the “deconstructionist” strain that critiques all knowledge and experience as “empty”. This tension also exists in hybridity theory, in the debates between essentialism and anti-essentialism.<sup>65</sup>

In proposing the need to develop Metis critical legal theories, I am suggesting that all of the above (absence/presence, mixing/distinctiveness, loss/continuity) may be valid, and that these realities need not be dichotomized. I am suggesting that there may also be spaces that can be occupied by Metis individuals and communities that avoid and challenge duality, where these “elements encounter and transform each other”.<sup>66</sup>

While MetCrit would of course be particularly concerned with Metis issues, I hope it might also open up the larger discussion on Indigenous critical perspectives and research methodologies by suggesting we are all dealing with “shifting identifications amid a field of interpenetrating communities and power relations”.<sup>67</sup> Research methodologies employed in this project will be discussed in Chapter 4.

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<sup>64</sup> Newly-edited versions of these speeches are reproduced in Hans V Hansen, ed, *Riel's Defence: Perspectives on His Speeches* (Montréal; Kingston: McGill-Queen's University Press, 2014) at 25-71.

<sup>65</sup> See Chapter 7 for a discussion of these debates, as well as of the ideas and proponents of critical race theory, including feminist and Indigenous approaches.

<sup>66</sup> Homi Bhabha (2006) cited in Richardson, *supra* note 57 at 66.

<sup>67</sup> Kirin Narayan, “How Native is a ‘Native’ Anthropologist?” (1993) *American Anthropologist* 95.

In this dissertation, I will also address some possible objections to creating and implementing MetCrit, and the difficulties that might be encountered in engaging with it. Such objections/difficulties include 1) Indigenous (e.g. Christie)<sup>68</sup> and other critiques of hybridity theory as erasing difference and being simply a more subtle tool of colonialism; 2) critiques that the creation of ever smaller divisions of interests among groups suffering discrimination diffuses the effectiveness of practical action, and related philosophical problems with “intersectionality”;<sup>69</sup> 3) that the complexities and multiplicities of Metis history might overwhelm the capacity of Canadian law; 4) whether MetCrit has any practical utility. However, I will posit that very existence of these issues argues for the relevance of MetCrit. In fact, I will suggest that some forms of MetCrit already exist, either in Metis critiques of the Canadian law of Aboriginal rights, in debates about Metis identity, in attempts to document Metis history, and in the rich literature on Indigenous/non-Indigenous interactions in North America.

While binaries feed the dilemmas of the community conundrum – especially as it plays out in BC – Metis people have developed many strategies to cope with and to move within and beyond boundaries. Such particularly Metis approaches will form the foundations of MetCrit and will hopefully provide insight into the problematic conjunction of law and history in Canadian Metis law cases.

### **PART 3            OUTLINE OF CHAPTERS AND PARTS**

This dissertation is divided into ten chapters.

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<sup>68</sup> See the discussion in Chapter 7 of the critique of Gordon Christie.

<sup>69</sup> See, for example, Richard Delgado, “Roderigo’s Reconsideration” (2011) 96 Iowa Law Review 1247.

## **Introductory Sections**

In the introductory section, I describe the nature of the community conundrum and provide some necessary background.

### ***Dissertation Summary and Introduction to Participants***

In this part, I summarize my dissertation and acknowledge the contribution of the research participants and other Metis community members who helped me.

### ***Chapter 1: Description of the Community Conundrum and Proposal of Need for MetCrit***

In Chapter 1, I provide an overview of the legal, historical and philosophical issues raised by the community conundrum. This chapter consists of three parts: Part 1 contains a description of the problem and how it was created by the case law and by philosophical and historiographical misunderstandings, and Part 2 contains a description of some responses to the problem, including a summary of the reasons for proposing MetCrit. This overview of the structure of my dissertation forms Part 3 of this chapter.

### ***Chapter 2: Background to the Community Conundrum***

Part 1 includes, briefly, some necessary background to Metis history in Canada generally, and in BC in particular. Controversies about Metis community identities and territories are also canvassed in this part.

Part 2 illustrates that the Metis of BC are, for the most part, absent from the literature about BC history. A brief overview is given here (Metis historiography is discussed at length in Chapter

6). The absence of the BC Metis from the historical literature reflects the roots of the community conundrum and rationales for conducting this study.

### ***Chapter 3: The Legal Genealogy of the Community Conundrum***

In Part 1, I trace the origins of the historic community connection test in *Sparrow*, *Van der Peet* and in *Powley*. I refer briefly to the application of this test in various Metis rights cases.

In Part 2, I show how the historic community connection test was applied in *Willison*, *Howse* and *Nunn*. Particular focus will be placed on the *Willison* case.

In Part 3, I discuss the lack of critique of the BC cases among the literature on *Powley*.

### **Approach Section**

### ***Chapter 4: Research Process and Concerns***

In this chapter, I outline my research goals and questions. I also describe my research and writing methods and explain how they intersect with Metis and other Indigenous research ethics and methods. In this part, I also describe some of the limitations of my research.

Throughout this chapter, I discuss the implications of Metis research methodologies for legal critique.

### **Analysis Sections**

In the next four chapters of this dissertation, I present and analyze the intersection of BC Metis legal, historical and philosophical issues, with a view to proposing the need for MetCrit.

**Chapter 5: *Metis Responses to the Community Conundrum***

This chapter will provide Metis perspectives on the issues in *Willison*, using summaries and quotations from interviews with the 23 research participants and from the trial transcript. The *Willison* issues deal with hunting ethics, ancestry, identity, history, territory and mobility.

Two of the most prominent critiques from the interviews will be followed up in the next two chapters: 1) the view of the courts that Metis are missing from the history of BC; and 2) the fact that Metis perspectives are missing from Canadian law.

**Chapter 6: *Missing History: Historiography, Evidence and the Community Conundrum***

In Part 1, my overview of the historiography of the Metis in BC reveals that there has been very little consideration of primary sources relating to Metis history in the province, and that studies in this area are in their infancy. It also reveals how colonialist perspectives on Metis history have contributed to the community conundrum in BC.

In Part 2, I will discuss the historiography in light of the historical evidence tendered in the BC harvesting cases, with a focus on the *Willison* case.

**Chapter 7: *Missing Metis Perspectives: MetCrit as a Response to the Community Conundrum***

In this chapter, I follow up on the second overriding critique of the research participants: the lack of Metis perspectives in the Canadian law of Aboriginal rights. I consider how Metis-grounded views of law might remedy this.

In Part 1, I posit some principles of Metis philosophy that could be foundational to legal critique. These are derived from family teachings and interviews with research participants, and are supported by Metis writers, orators, and storytellers.

In Part 2, I address other possible sources of MetCrit, such as other Indigenous philosophical sources; ideas adapted from critical race theory, Indigenous critical legal theory; ideas from LatCrit, multiracial crit, queer theory and hybridity theory; and ideas from nomadic and diaspora studies.

In Part 3, I address critiques by Indigenous and Latina/o scholars of critical race theory, hybridity theory and of theory generally that might apply to MetCrit.

In Part 4, I investigate how MetCrit could provide useful ways of dealing with the community conundrum and other Metis legal issues. Among other things, I posit that Metis approaches illustrate how to avoid falling into the essentialist trap, which is one of the errors the courts make in trying to delineate Metis concepts.

### **Chapter 8: A Proto Met-Crit Analysis of Willison**

In this chapter, I apply a proto-Met-Crit analysis to the appeal court judgment in *Willison*. I investigate the following court-opposed concepts: a) “distinctive collective identity”/ “identifiable” vs. “people of mixed ancestry”; b) “living together in the same geographic area” vs. “geographically wide”; and c) “sharing a common way of life” vs. “loosely affiliated group of people”. I also examine the concepts of “continuity and stability” in terms of the required connection between “historical” and “modern” Metis communities.

## **Reflective Sections**

### ***Chapter 9: In Full View: Metis Perspectives on Resolving the Community Conundrum***

In this chapter, I present participants' suggestions for resolving the community conundrum. Participants discuss litigation, negotiation, self-government, education, cultural practices and resistance/persistence. They also describe the impacts of the BC harvesting cases on their sense of community and on awareness about Metis people in BC.

### ***Chapter 10: MetCrit beyond Conundrums***

In this final reflective chapter, I suggest that MetCrit could further the understanding of Metis legal, cultural and political situations in BC, and could help to address the broader questions of how to contribute to Metis self-government, positive identity formation, and successes in dialogue with other Indigenous nations and the state.

Finally, in this chapter, I emphasize the importance of Metis legal and political concepts of community. I suggest that Metis understandings of community could contribute to the development of Canadian law, as well as to Metis self-determination.

## **MISSING IN FULL VIEW**

*The young woman had a dream in which she and her relatives shared a precious and sacred knowledge, a knowledge that preserved them in times of trouble and reminded them that the idea of separation of all beings was a lie. This knowledge was a source of life, joy, and was a guide for harmonious living.*

*She talked about this dream with her youngest aunt, who laughed, saying that she'd always known that their family were a pack of witches. Later, she tried asking her mother, who merely snorted, and told her that her naiveté was cute, but wasn't going to help her with her law school exams. She had more luck with her grandmother, who was momentarily startled, but recovered and said, "What is it that you want us to be? That was a long time ago."*

*This made the young woman think. What was she hoping to learn? She had a sense that there was something missing, but she wasn't sure what. She had grown up knowing she was Metis, but wasn't sure what that meant. Her family didn't seem to worry about their Metis identity. Nevertheless, her grandmother became willing, over the years, to divulge more about their family history. Because her grandmother wouldn't allow anything to be written down, the young woman had to really pay attention. She ate up all these stories, but they weren't enough. Why didn't they associate with other Metis people? Why didn't they engage in Metis "cultural practices"? Her grandmother poked fun at this mannered phrase, and told her that too much schooling had addled her brains. She told her granddaughter, sharply, that nobody went around thinking about being Metis in those days. Most of the time they were worrying about getting enough to eat.*

*The young woman left it for a while, not wanting to antagonize. But she thought about the few Michif words her grandmother unintentionally taught her, naming one cat “Manoose”, the other “Babee”; she thought about the French her mother wished she could have learned at home. She thought about the bannock that was called “soda bread” or “scones”, the “soupe” or traditional hamburger soup, that was called “slumgullion”. Even the names of things went missing sometimes.*

*She also thought about her feeling of not belonging, the sense of not being trusted by either “whites” or First Nations people. She thought of the hierarchy of “Indianness”. She was near the bottom, she knew, but there was another hierarchy, a Metis one. On that ladder, she was near the top rung, having Red River ancestry. But her father’s family was Jewish. Did that make her less Metis? Was she a half-breed half-breed? Her father didn’t figure prominently in her upbringing, which was carried out by her mother, her aunts and uncles, her grandparents – especially her grandmother. Her search for her missing father and his missing history was another story, a more distant one. But her search for what was missing about being Metis became more urgent, especially as she learned about the Canadian law.*

*In the law, the concerns of Metis people were overshadowed by the concerns of their First Nations cousins. The Metis, she realized, were, for the courts, an afterthought, a watered-down version of Indianness, even though the court in Powley had tried to change that to some extent. Maybe lawyers and judges were also perplexed about what was missing. Maybe no one had told them the stories she was only starting to learn.*

*After law school, in working for a prairie First Nation on litigation and land claims, she was confronted with the “missing” history of Canada. Holed up in the archives, she had to focus on the criss-cross of paths she had only been vaguely aware of before: of settlers, governments, resistance. In this web, sometimes she caught the traces of her extended family. She saw them in textbooks and records groups – fur traders, merchants, hunters, politicians. She had thought her family were obscure, living life on the margins. She began to see them as part of the fabric of history.*

*This fabric seemed to fray as she crossed back over the Rockies to BC to begin grad school. Where were the other Metis in her home province? She had met a few of them in her neighbourhood, even some with her great-grandmother’s name, LaRocque. Her mother and grandparents were recent migrants from Saskatchewan. She went back to the beginning to try to re-trace their steps.*

*On a visit to Salmon Arm during this time, she and her grandmother went for lunch in town. Her gram, uncharacteristically, had left the breakfast dishes unwashed. The young woman offered to do them. Her grandmother said, no, it was OK, she would just get her bible and put it on the counter – they were in a hurry. The young woman laughed. “Why would you do that?” she asked. “To apologize to God for the mess,” her grandmother answered. The young woman thought this was odd and made fun of the impulse. Her gram merely smiled.*

*A few years later, the young woman had uncovered some of their family’s long history in BC, and had met many of her relatives all over the province. She had found some of these people in textbooks, too. She had joined a Metis organization in Victoria, eventually sitting on their*

*governing board. She learned to jig, she was starting to learn Michif. But it was hard to find people who could teach her about Metis spirituality, Metis philosophy. She hoped for an illustrious guide, someone who could explain the dream she had had long ago about the beautiful way – but, frustratingly, none appeared. By this time, her mother and her grandmother were both dead. It seemed they could no longer teach her. So she went to sweats, she consulted with Elders. She appreciated their wisdom, but felt none the wiser. Finally, one Elder told her that her sense of separateness existed only in her mind. “What is it that you want us to be that you are not already, yourself?” he asked.*

*This made the young woman think. What was she hoping to know? She had a sense that there was something missing, but she wasn’t sure what. Was this exile just a reflex, a habit of mind?*

*Later that night, the young woman dreamt of her mother and grandmother. Her mother, an agnostic, and her grandmother, a Catholic, reminded her of all the times they had taught her of the beauty of Creation, its intricacy – and, sometimes, its harshness. It was all part of the same story. There was interconnection between all beings, all actions. There was the goal of balance, a goal that could never be achieved but was nevertheless worth seeking. Then the young woman dreamt her grandmother opened a book, and pointed to an important page.*

*Upon awakening, the young woman knew this book. It was a book in her collection, about Metis culture. She found the page her grandmother had indicated. It read, “Among many Metis, there was the custom of placing a bible on the kitchen counter when dishes were left dirty. This was a way of apologizing to the Creator for leaving work undone.” “Sorry, gram. I’m*

*sorry I laughed at you," the young woman whispered. Her grandmother smiled. The things that were missing had been there all along.*

## Chapter 2

### HISTORY, TERRITORY AND COMMUNITY CONSTRUCTION: BACKGROUND TO THE COMMUNITY CONUNDRUM

#### INTRODUCTION: MULTIPLICITY AND ABSENCE

I suggested in the last chapter that Metis history is complex, as are Metis understandings of territory. These complexities encompass multiplicity and distinctiveness; they impact on Metis understandings of “community”,<sup>1</sup> which encompass nationalist/sovereigntist views, as well as expressions of diaspora. Thus, Metis experiences transcend colonialist dichotomies that essentialize Metis people and communities.

In this chapter, I provide a brief outline of the debates concerning Metis history, territory and communities that are relevant to the community conundrum. These debates reveal a variety of ways of thinking about being and becoming Metis, and thus the richness of Metis community constructions. This richness and variety is juxtaposed against the Canadian law’s over-categorizing of Aboriginal people, whether through the *Indian Act* and subsequent amendments, or through case law that attempts to force people to choose between Aboriginal identities.

One of the goals of this chapter is to reveal how the community conundrum is reflected in the relative absence of Metis people from the historiography of British Columbia. I offer some

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<sup>1</sup> I place “community” in quotation marks to indicate that the meaning of this term is contested, as is the appropriateness of applying it to Metis collectivities. These issues will be discussed in this chapter.

thoughts about community construction in the BC context that highlight the conjunction between history and the Canadian law.

While my dissertation is not meant to fill the gap in the literature on BC Metis history, or to prove that historic Metis communities exist (although I believe they do), it is meant to show how colonialist assumptions have entered into the Canadian law through erroneous interpretations of history. This will be addressed throughout the dissertation.

This chapter is divided into three parts. In Part 1, I summarize some of the debates about Metis history and territory that affect community construction. In Part 2, I provide some internal and external factors that might influence Metis community construction. Finally, in Part 3, I reflect on the relevance of the complexity and contentiousness of Metis community construction for legal critique.

## **PART 1            COMPLEX AND CONTENTIOUS: AN OVERVIEW OF DEBATES SURROUNDING METIS HISTORY, TERRITORY AND COMMUNITY**

### **An Introduction to Metis History:    Complexity and Distinctiveness**

At the intersection between Metis history and the Canadian law of Metis rights is the idea of a “historic Metis community”. The terms “historic”, “Metis” and “community” have multiple meanings, and are thus contestable. While the court in *Powley* may have left these terms deliberately undefined, or only partially defined in order to avoid placing unrealistic limits on their significance, the court makes assumptions about Metis people, history and communities that reflect colonialist understandings. Such assumptions illustrate the inadequacies of the *Powley* test in view of the multiplicities of Metis history and territory, especially in BC.

For instance, the courts – and indeed some Metis people – suggest that Metis harvesting rights should flow from traditional continuing practices exercised in still-extant historical communities, with still-recognizable traditional territories. Those who can merely demonstrate Metis ancestry, or who participate only in more recently-constituted “communities”, with few or no ties to traditional lands, should not have constitutionally protected Aboriginal harvesting rights. A goal of those Metis who ascribe to this viewpoint is connected to the desire to preserve traditional culture and livelihood and its political meanings.

Opponents of this view suggest that the attachment to historical continuity runs counter to the directive in many Aboriginal rights cases that rights should not be interpreted as being frozen in time. Culture is complex and dynamic, and attempts by heretofore assimilated Metis to re-constitute their culture should be met with support rather than discouragement, especially when assimilation has in large part been a response to systemic racism. Cultural fluidity and “boundary bashing” is itself seen by many as an historical component of Metis individual and community identities. Metis people have often viewed themselves as mutable, as living with multiple cultures and having multiple and overlapping identities (see below for more on this point). Supporters of this viewpoint question whether complexity and change should be a reason to deny rights when, for example, a plaintiff in a tort case can recover damages even when calculating them is difficult and often based on extrapolation. The dilemma is – how much complexity is too much from the point of view of the law?

This debate has become increasingly heated since *Powley*<sup>2</sup> has created a reason to concretize conceptions of Metis history and culture, and to essentialize Metis community identities.<sup>3</sup> The community construction debate is very much alive.

In this next section, I would like to illustrate the complexity of Metis history and territories and the debates surrounding their influence on community identities. The Metis have many and varied histories, as they have many and varied territories and community identities. The law has difficulty with this, as we shall see.

### **The Metis: Many Histories, Territories, Community Identities**

Like most history, Metis history is messy. It has been characterized by high degrees and rapid rates of change, by adaptation and mobility, and also by the proliferation of many political, religious, linguistic and cultural differences.<sup>4</sup> Scholarly and everyday debate surrounds questions of the formation of Metis peoplehood. Traditionally, historians have situated the crystallization of Metis political identity in the early 1800s in the Red River area,<sup>5</sup> and Metis

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<sup>2</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff'd [2000] OJ No. 99 (Ont SC); aff'd [2001] OJ No. 607 (Ont CA); aff'd 2003 SCC 43, [2003] SCR 207 [*Powley*].

<sup>3</sup> The Royal Commission on Aboriginal Peoples ("RCAP"), perhaps trying to avoid concretizing, acknowledges the possibility that some people who identify as Metis, and who are communally accepted as such, may not have constitutionally protected Aboriginal rights, "... Being Metis ... can mean different things in different contexts: one context may speak to an individual's inner sense of personal identity, another may refer to membership in a particular Metis community, a third may signal entitlement to Metis rights as recognized by section 35 of the Constitution Act, 1982." From vol 4, "Metis Perspectives" (Ottawa: Ministry of Supply and Services, 1996).

<sup>4</sup> For example, see Gerhard J Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996).

<sup>5</sup> For a thorough discussion of the formation of Metis political and cultural identities generally, see Jacqueline Peterson & Jennifer SH Brown, eds, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985); Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, eds, *Contours of a People: Metis Family, Mobility, and History* (Norman: University of Oklahoma Press, 2012).

ethnic and cultural identity at least as early as the mid-1700s in the Great Lakes region.<sup>6</sup> Of course, Indigenous mixed ancestry families existed in what is now Canada as early as the 1500s, when European newcomers began to arrive and settle.<sup>7</sup>

More recently, Metis peoplehood debates have been renewed but not resolved. For instance, some scholars now question the Red River national crystallization theory,<sup>8</sup> and still others suggest researching family connections between Great Lakes mixed ancestry people and Red River Metis to investigate whether there might be political ties and thus elements of pre-Red River Metis nationhood in the Great Lakes area.<sup>9</sup> Still others suggest that there may be other Metis collectivities that did not arise in either the Great Lakes or in Red River, and critique the “Red River myopia”<sup>10</sup> of recent scholarship. Central to debates is when the Metis came to

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<sup>6</sup> For example, see Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991); Gloria Jane Bell, “Oscillating Identities: Re-presentations of Métis in the Great Lakes Area in the Nineteenth Century” in Christopher Adams, Gregg Dahl & Ian Peach, eds, *Métis in Canada: History, Identity, Law & Politics* (Edmonton: University of Alberta Press, 2013) 1. The court in *Powley* accepts an earlier date.

Jacqueline Peterson argues that while ethnogenesis of Indigenous mixed ancestry people took place in the Great Lakes region, these people did not develop a national consciousness, and are therefore not Metis. She suggests that her essay “Many Roads to Red River: Métis Genesis in the Great Lakes Region” in Peterson & Brown, *supra* note 5, 37, was misinterpreted in the *Powley* case. See Peterson, “Red River Redux: Métis Ethnogenesis and the Great Lakes Region” in St-Onge, Podruchny & Macdougall, *supra* note 5, 22. For an earlier perspective, see Jacqueline Peterson, “Ethnogenesis: The Settlement and Growth of a ‘New People’ in the Great Lakes Region, 1702-1815” (1982) 6:2 *American Indian Culture and Research Journal* 23.

<sup>7</sup> Historians have theorized that, prior to 1500, Irish, Norse and Basque fishermen all seasonally fished the waters of the Canadian Atlantic, and that Chinese, Polynesian and other seafarers visited the Pacific shores of North America. While these forays to the future Canada may have resulted in creation of Aboriginal/non-Aboriginal unions, I assume that children of these unions were absorbed into their respective Aboriginal communities and did not go on to form separate mixed ancestry communities.

<sup>8</sup> For example, see Gerhard J Ens, “The Battle of Seven Oaks and the Articulation of a Metis National Tradition, 1811-1849” in St-Onge, Podruchny & Macdougall, *supra* note 5, 93.

<sup>9</sup> For example, see Darren O’Toole, “The Ethnogenesis of *Wiisakodeweniniwag* (Bois-Brûlé) Reconsidered” in Adams, Dahl & Peach, eds, *supra* note 6, 143.

<sup>10</sup> This term has been used by many scholars of Metis issues, including Brenda Macdougall, and is itself contested.

politically self-identify *as* Metis, what constitutes political identification, and what degree of political identification, if any, is needed.

Implicit in the question of whether ethnic and cultural affiliation are enough to constitute nationhood is the question of whether the Metis are a nation. This, in turn, raises the question of what constitutes a nation.<sup>11</sup> Certainly, what we call the Metis Nation is not a nation state, and Indigenous scholars have been careful to distinguish Indigenous nationalism from nation-state-based nationalism, with the xenophobia and imperialist tendencies that such nationalism has frequently implied.<sup>12</sup> For instance, Cherokee literary historian Daniel Heath Justice praises “the ability of Indigenous nationalism to extend recognition to other sovereignties without that recognition implying a necessary need to consume, displace or become absorbed by those nations.”<sup>13</sup> Justice equates nationhood with community:

Indigenous nationhood is a concept rooted in community values, histories and traditions ... it is more than simple political independence or the exercise of distinctive cultural identity; it is also an understanding of a common social interdependence within the community, the tribal web of kinship rights *and* responsibilities that link the People, the

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<sup>11</sup> A thorough discussion of ideas of “nation”, or the distinctions between “nation”, “people” and “community” is not possible here, but some of these ideas will be referred to by the research participants in Chapter 5.

<sup>12</sup> Of course, Indigenous political philosophers are not so naive as to ignore the possible negatives of Indigenous nationalism, which has been described as a double-edged sword. See Keavy Martin in Kristina Fagan, *et al*, “Canadian Indian Literary Nationalism? Critical Approaches in Canadian Indigenous Contexts – A Collaborative Interlogue” in Christine Kim, Sophie McCall & Melina Baum Singer, eds, *Cultural Grammars of Nation, Diaspora, and Indigeneity in Canada* (Waterloo, ON: Wilfrid Laurier University Press, 2012) 43 at 46.

<sup>13</sup> Daniel Heath Justice, *Our Fire Survives the Storm: A Cherokee Literary History* (Minneapolis: University of Minnesota Press, 2005), cited by Keavy Martin in Fagan, *et al*, *ibid*, at 24. For an investigation of the idea that nations can be conceived of as communities, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991). Anderson’s theory has been applied to the Metis by Randa Stringer, “The Métis Nation through Anderson’s Lens” (2012) 20:1 Totem: University of Western Ontario Journal of Anthropology, online: <<http://ir.lib.uwo.ca/totem/vol20/iss1/II>>.

land, and the cosmos together in an ongoing dynamic system of mutually affecting relationships.<sup>14</sup>

The idea of social interdependence creating webs of relationship and responsibility has been expressed in Cree philosophy as *wahkootowin*;<sup>15</sup> according to Metis thinkers, *wahkootowin* also describes Metis relationships among families, extended kin groups, economic and political actors, and with non-humans.<sup>16</sup> According to Macdougall, *wahkootowin* is an expression of Metis values that are

... critical to family relationships – such as reciprocity, mutual support, decency and order – [these] in turn influenced the behaviours, actions, and decision-making processes that shaped all a community’s economic and political actions. *Wahkootowin* contextualizes how relationships were intended to work within Metis society by defining and classifying relationships, prescribing patterns of behaviour between relatives and non-relatives, and linking people and communities in a large and complex web of relationships.<sup>17</sup>

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<sup>14</sup> Justice, *ibid*, 24, cited by Niigaanwewidam James Sinclair in Fagan, *et al*, *ibid* at 44 [emphasis in original].

<sup>15</sup> See Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich, 2015); Leona Makokis, *Leadership Teachings from Cree Elders: A Grounded Theory Study* (Saarbrücken: Lambert, 2009); Danika Billie Littlechild, *Transformation and Re-Formation: First Nations and Water in Canada* (LLM Thesis, University of Victoria, 2014) [unpublished].

<sup>16</sup> See Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: University of British Columbia Press, 2010), including Maria Campbell’s “Foreword: Charting the Way” at xiii; Adam James Patrick Gaudry, *Kaa-tipeyimishoyaahk – “We are those who own ourselves”: A Political History of Métis Self-Determination in the North-West, 1830-1870* (PhD Dissertation, University of Victoria, 2014) [unpublished].

<sup>17</sup> Macdougall, *ibid* at 8.

Among the research participants, communities were described as being web-like, with overlapping local, regional, provincial and national collectivities made up of local groups interlinked by family, work and social connections. Territories were also seen as overlapping, fanning out from various hubs. The terms “community” and “nation” were used interchangeably to describe these interconnected groups, who all need each other for proper functioning.<sup>18</sup> Many participants told me they viewed communities as local expressions of the Metis nation; obversely, they stated that the Metis nation is comprised of local communities that are linked by family, social and economic ties.

Labrador Metis scholar Kristina Fagan argues “that our understandings of Indigenous nations must be based in Indigenous experiences of community rather than in institutionalized definitions.”<sup>19</sup> Other Metis thinkers are skeptical about accepting “community” as a valid descriptor, as it seems to be of a lesser order than “nation,” minimizing claims to self-determination and sovereignty.<sup>20</sup> For instance, Metis scholar Chris Andersen does not find the term “community” really applicable to Metis polities, and objects to the conflation of

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<sup>18</sup> Interview, for example, with Brenda Boyer Percell, Kamloops, BC, June 18, 2012. Ms Percell, who has family ties to Batoche and Fort Langley, is a member of MNBC, and participates in the Kamloops and Salmon Arm locals.

<sup>19</sup> Fagan, *et al*, *supra* note 12 at 60.

<sup>20</sup> An exploration of the meanings of sovereignty is beyond the scope of this paper, as the literature on this topic is vast. A recent trend in scholarship on this topic questions monolithic, state-based notions of sovereignty, and the tendency to assume sovereignty must be based on historical and territorial continuity. Many Indigenous groups, including the Metis, assert sovereignty in the absence of statehood and recognized territories. Nomadic and diasporic groups may also assert sovereignty. There are many scholars who write about sovereignty and indigeneity, including Taiiike Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2009); Karena Shaw, *Sovereignty and Political Theory: Indigeneity and the Limits of the Political* (Abingdon, UK: Routledge, 2008); and Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, 2007) [unpublished].

community with nation.<sup>21</sup> Andersen prefers the term “nation” but most often uses the term “people”. In his view, a people is a group that produces both internal and intersocietal norms, whereas a community might only have internal norms.<sup>22</sup> Other scholars of Metis studies similarly use the term “people” (or sometimes “peoples”). Metis Nation of British Columbia (MNBC) consultation manager Chris Gall, who is also a law student, suggests that a middle ground between community and nation might be appropriate in describing Metis political organization.<sup>23</sup> This drive to find a middle way, along with degrees of discomfort expressed by various people, I think reflects the inadequacy of the terms “community” and “nation” in trying to describe how Metis people organize themselves.

Some writers have commented more generally that conflation of community and nation creates a blind spot for Euro-oriented thinkers, who dismiss nationality without nation-state.<sup>24</sup> For others, a nation-state is not required, but “nation” implies the exercise of sovereignty over a discrete territory. Thus, some assert that either the Battle of Seven Oaks in 1816 or the Metis uprising at Red River in 1821 created the Metis as a nation, because these were the first known instances of Metis defending territory. (Of course, even this construction embeds the Metis as pre-existing in some form.) Others downplay the significance of territorialism, and interpret the events at Red River as an assertion of Metis economic sovereignty, as the actions taken by the

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<sup>21</sup> Chris Andersen, in response to a question I asked following a panel he participated in at the Reconciliation and the Metis conference in Ottawa, October 25, 2015.

<sup>22</sup> Andersen, “*Moya ‘Tipimsook* (‘The People Who Aren’t Their Own Bosses’): Racialization and the Misrecognition of ‘Métis’ in Upper Great Lakes Ethnohistory” (2011) 58:1 *Ethnohistory* 37 at 52-53.

<sup>23</sup> Chris Gall, “Otipecymisowak ‘The People Who Command Themselves’: The Definition of Métis Community, and What It Should Be”, (nd), paper written for Professor Janna Promislow at Thompson Rivers University Faculty of Law, at 5 [unpublished].

<sup>24</sup> Philip D Wolfart, “Against Specialized Ethnicity”, in St-Onge, Podruchny & Macdougall, *supra* note 5, 120.

Metis at Seven Oaks and Red River were designed to protect their position in the fur trade wars between the Northwest Company, and against the encroaching Hudson's Bay Company, who had brought settlers with them to the territory.<sup>25</sup>

Metis economic identities, while commonly associated with the fur trade, were many and varied. Metis were carters, farmers, fishers, merchants, and some may have been all of these over the course of their lifetimes. There were also many class divisions among Metis, although Metis tended to be socially mobile. Historians such as Gerhard Ens and Nicole St-Onge have concluded that Metis economic life was more diverse and Metis social identification more nebulous than has previously been acknowledged.<sup>26</sup> Thomas Flanagan goes so far as to assert that Metis political identity is revisionist and that being Metis was more of a "profession" or economic designation than a political or cultural identity.<sup>27</sup> As we will see in Chapter 3, this view is reflected in the *Willison*<sup>28</sup> appeal reasoning.

The objection to the claim that a lack of political or economic cohesion in Metis society leads to the conclusion that Metis society was too diverse to be labelled as such is occasioned by the

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<sup>25</sup> Sandy Campbell says some Metis referred to each other as "countrymen" at this time, but there were still divisions between French Métis and halfbreeds. Also, non-Metis viewed the (proto) Metis as being affiliated with fur trading companies rather than being attached to territory in the Red River area. In fact, many Metis were along the fur trade routes or at other posts, such as Fort William (Thunder Bay), at the time of the Red River uprising. See Campbell, "I Shall Settle, Marry, and Trade Here': British Military Personnel and Their Mixed-Blood Descendants" in Ute Lischke & David T McNab, eds, *The Long Journey of a Forgotten People: Métis Identities and Family Histories* (Waterloo, ON: Wilfrid Laurier University Press, 2007) 81 at 89-91.

<sup>26</sup> Ens, *supra* note 4; Nicole St-Onge, "Variations in Red River: The Traders and Freeman Métis of St-Laurent, Manitoba" (1992) 24:2 *Canadian Ethnic Studies* 2.

<sup>27</sup> See, for example, Thomas Flanagan, *Riel and the Rebellion: 1885 Reconsidered* (Saskatoon: Western Prairie Producer, 1983). Flanagan makes this claim without sufficiently acknowledging that economic factors are often important in forming political and cultural identity. Metis people have formed communities for many interconnecting reasons – cultural, social, religious, linguistic, as well as economic – and none of these should be reasons to deny Metis rights.

<sup>28</sup> *R v Willison*, [2005] BCI No. 924; rev'd (2006) BCSC 985 [*Willison* or *Willison BCSC*].

ethnic and cultural diversity that is characteristic of the Metis. Those authors, such as Flanagan, who claim that there is not enough social or cultural unity to comprise a community, let alone a nation, point out that Metis may not have consistently identified as being Metis, either on a personal or on a community level.<sup>29</sup> On the other hand, writers such as Brenda Macdougall and Martha Harroun assert that Metis cultural ambivalence is a myth, that “we know who we are”.<sup>30</sup>

Who, then, are the Metis? “Métis” is simply a French term meaning “mixed” and has come to be used to describe many Indigenous/non-Indigenous “mixed blood” people of differing backgrounds and circumstances in North America (and throughout francophonie). Over time, the term became predominantly associated with the French/Aboriginal families of the fur trade and their offspring. “Métis” was used of those of Six Nations ancestry as well as those descended from Anishinabe, Cree, Siouxan and other Aboriginal peoples. For instance, Louis Riel had Irish, Scandinavian, Chipewyan and French ancestry; Gabriel Dumont had French, Cree and Sioux ancestry.

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<sup>29</sup> See, for example, Doris Jeanne MacKinnon, *The Identities of Rose Marie Delorme: Portrait of a Métis Woman, 1861-1960* (Regina: University of Regina, 2012); Sylvia Van Kirk, “What if Mama is an Indian? The Cultural Ambivalence of the Alexander Ross Family”, in Peterson & Brown, *supra* note 5 at 208-17. If these were examples of ambivalence, this “ambivalence” was a response to colonialism and racism.

<sup>30</sup> Many of the research participants described how they may have identified differently at different times, often as a way of avoiding racism. This did not negate their own internal identity as Metis. For instance, Janet Gagné explained that as a child she experienced racism from both First Nations people and settlers, “My dad would go out to the [Okanagan Indian Band] reserve sometimes. I went out there. I could be Cree, and that’s what I’d tell them I was, so I didn’t get beat up. But once I went back to Coldstream [near Vernon, BC], I was French.” Gagné described how some people would comment, ““Oh, you’re pretty dark””, and she would respond, ““Yeah, that’s just the French’.” However, Gagné says, “I’m happy to say I’m Metis. I’m proud to be Metis.” Interview with Janet Gagné, Vernon, BC, August 1, 2012.

A robust account of the debates concerning Metis individual identities is beyond the scope of this dissertation. However, because I think individual identity is inextricably linked to community identity, I provide a short introduction to this topic at the end of this part.

The term “Métis” was used from Québec to BC, among the francophones of the Maritimes, and in the far north, and referred to many people who may have had vastly different political and cultural conceptions of themselves and their communities. At the same time, many of these communities may have been interlinked by family, trade, work or other connections. Other terms for Metis people included *bois-brûlés* (burnt wood people) or *otipemisiwak* (the people who own themselves).

Until recently, the term “Métis” was not commonly used for the descendants of unions of Aboriginal women with men of English, Scottish, Irish (or other non-French) ancestry; for many years the term “halfblood”, “halfbreed” or simply “breed” was used. However, to make matters more complex, many Métis and halfbreeds intermarried, especially if the parties shared other common ancestry or the Catholic religion. Métis and halfbreeds also shared cultural and political ties, and arguably there were more similarities than differences between them.<sup>31</sup> However, some people today still identify as halfbreed, especially if they have no French ancestry.<sup>32</sup>

To complicate matters further, not all Indigenous mixed ancestry people necessarily fit into the traditional sub-categories of Catholic francophone and Michif-speaking Métis and (usually) Protestant anglophone (or sometimes Gaelic- or Bungee-speaking) halfbreeds. There were sexual relationships and marriages between Aboriginal people and settlers of all backgrounds,

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<sup>31</sup> Irene M Spry, “The Métis and Mixed-bloods of Rupert’s Land Before 1870” in Peterson & Brown, *supra* note 5, 95.

<sup>32</sup> See Gregg Dahl, “A Half-breed’s Perspective on Being Métis” in Adams, Dahl & Peach, *supra* note 6, 93. Some people view this term as derogatory, others have tried to reclaim it.

ethnicities and religions.<sup>33</sup> Some of the children married into the wider Métis/halfbreed communities; some, like the Finnish/Aboriginal “Finndians”, created their own identities;<sup>34</sup> and others became absorbed into settler or Aboriginal societies.

Recent Canadian debates surrounding the use of the term “Metis” (or “Métis”) revolve around whether the term should be used to refer only to the “Metis Nation” that supposedly formed around the Red River settlement in Manitoba in the early 1800s, or whether it should refer to all (or additional) Aboriginal mixed ancestry communities and people. Often modern Metis political organizations follow one usage or other and are divided by this debate.

For instance, the Métis National Council (MNC), formed in 1983, a year after the Metis were specifically recognized in the Canadian constitution, in a 2002 motion unanimously adopted the following definition of the Metis nation:

‘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

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<sup>33</sup> For example, see Peterson & Brown, *supra* note 5; White, *supra* note 6; Jean Barman, “At the Edge of Law’s Empire: Interraciality, Citizenship and the Law in British Columbia” (2006) 24 Windsor Yearbook of Access to Justice 1 [Barman, “Edge of Law’s Empire”]; Jean Barman, *The West Beyond the West: A History of British Columbia*, 2nd ed (Toronto: University of Toronto Press, 1996) [Barman, *West beyond the West*]. For instance, there were some Red River families that had German, Swiss and Polish forebears, owing in part to the importation of European mercenaries who fought for Britain. The patriarch of Greg Willison’s Klyne ancestors was a Hessian soldier. After the late 1800s, mixed Ukrainian and Metis families were common in Manitoba, especially in and around Dauphin and Lockport.

<sup>34</sup> Personal communication with John Borrows, March 15, 2006. For a short piece on the “Finndians” of Minnesota, see “Finnish Pioneers, Ojibwe, Find Common Ground”, *Native Village Youth and Education News*, November 1, 2008, issue 191, vol 1, online: <[www.nativevillage.org/Archives/2008/Nov%202008%20News/11-1-08%20V1.htm](http://www.nativevillage.org/Archives/2008/Nov%202008%20News/11-1-08%20V1.htm)>.

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.<sup>35</sup>

The MNC is the parent organization of various provincial Metis organizations, including the Metis Nation of British Columbia (MNBC).

While the MNC does not necessarily restrict its eligibility for citizenship to those who are descended from Red River families (their notion of the “Historic Métis Nation” is likely broader than that, being based on a large territory), the Red River people and culture are its main focus, and the easiest way to obtain membership is by proving a genealogical connection to the families of the Red River settlement.<sup>36</sup>

The other prominent national organization that represents Metis people, the Congress of Aboriginal Peoples (CAP), formerly the Native Council of Canada, says that it represents all “forgotten” Aboriginal peoples, including “off-reserve and non-status Indians, as well as Métis people”.<sup>37</sup> CAP does not define “Métis”, but in practice, they represent Metis people who would likely not be eligible for membership in the MNC, or its provincial organizations.

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<sup>35</sup> Métis National Council resolution, adopted September 27, 2002. See “Who Are the Métis?”, online: <[www.metisnation.ca/who/index.html](http://www.metisnation.ca/who/index.html)>. See under the heading “Metis Territories” below for a description of the territory described by the “Historic Métis Nation Homeland”.

<sup>36</sup> See Jean Barman & Mike Evans, “Reflections on Being, and Becoming, Métis in British Columbia” (Spring 2009) 161 BC Studies 59. Although I do not have any direct ties with the MNC, my understanding is based on discussions with MNBC members, other Metis people, and with Cathy Bell, a scholar of Metis legal issues. Personal communication with Cathy Bell, February 4, 2016.

<sup>37</sup> Congress of Aboriginal Peoples, “The Congress of Aboriginal Peoples” (2008), online: <[www.Abo-peoples.org/about/overview.html](http://www.Abo-peoples.org/about/overview.html)>. At the “Reconciliation and the Metis” conference in Ottawa October 23-25, 2015 – part of the Metis Treaties research project – Elder Tony Belcourt, who testified at trial in *Powley*, suggested

MNBC tends to follow the definition of the MNC, although many of its local chartered communities admit into membership people who may not be directly linked to what the MNC would define as the “Historic Métis Nation”.<sup>38</sup> MNBC chartered communities are currently in dialogue with MNBC about the degree to which their governing structures are independent from MNBC, which seeks to create more uniformity across its community constitutions, or “charters”.

These issues, at the national, community and personal levels, can be incredibly divisive, with both sides accusing each other of discrimination, and even racism.

Some scholars have suggested the use of “Métis” (or “Metis”) to describe the Red River Metis people and descendants, and the term “métis” (or “metis”) to describe all others of mixed Aboriginal and non-Aboriginal heritage in Canada.<sup>39</sup> This usage has been debated, and has been

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that post-*Powley* debates about who should be considered part of the Metis nation are eroding earlier political alliances between Metis and other non-status Aboriginal people.

<sup>38</sup> For instance, one of the research participants, a descendant of fur trader Peter Skene Ogden and his Flathead (or possibly Nez Percé) wife Julia Rivet, was admitted as a member of the Salmon Arm Metis Association, along with her daughters and grandchildren. She says her family does have connections to Red River, as one of her great-uncles settled there and had children, but she thinks that her membership was accepted because her family was a well-known and well-documented family that went back five generations and intermarried with Red River and other Indigenous mixed ancestry people. Interview with Pat Normand, Eagle Bay, BC, June 21, 2012.

Research participant Margaret Penner, an MNBC senator, sits on citizenship appeals for MNBC and, and told me that a few appeals have resulted in admitting non-Red River descendants. Interview with Margaret Penner, Oliver, BC, August 4, 2012.

Some research participants viewed this kind of “leniency” as a problem, as they feel that people who are “not really Metis” are gaining positions of power within MNBC or local communities and, because they may not have the same political interests as Red River Metis, may not be representing the interests of the Metis nation. Interview with interview with Wayne Bousquet, June 19, 2012, Salmon Arm, BC; interview with Greg Willison, May 6, 2013, Salmon River, BC.

<sup>39</sup> See Peterson & Brown, *supra* note 5; Catherine Bell, “Métis Aboriginal Title” (LLM Thesis, University of British Columbia, 1989) [unpublished]. Later, Bell grapples further with the non-homogeneity of the Metis, concluding that “Metis” must be defined according to a complex of political, racial, historical and cultural criteria. See, for example, “Who Are the Métis in Section 35(2)?” (1991) 29 Alberta Law Review 351. Compare the position of the Métis National Council, or of Paul LAH Chartrand & John Giokas, “Defining ‘The Métis People’: The Hard Case of

abandoned by many. Groups of people who identify as Metis, but are either without Red River heritage, or are unable to prove it, have sometimes referred to themselves as “the other Metis”.

Members of historical Aboriginal mixed ancestry communities not directly connected to Red River include the Mi’kmaq, Wolostoqiyik (Maliseet) and other Metis of maritime Canada,<sup>40</sup> and the Metis communities of the northern prairies and of the far north, although many northern Metis are related to Red River families.<sup>41</sup> The Inuit/European people of Labrador, who referred to themselves as Metis for many decades, have since decided not to identify as Metis, but as Inuit. This decision by the leadership followed the Labrador Inuit case<sup>42</sup> and is contentious – some nation members still identify as “Labrador Metis” (see below for further discussion).

While there are many communities and individuals who identify as Metis,<sup>43</sup> even though they may not be of Red River ancestry, there may also be Aboriginal mixed ancestry individuals and communities that would not want to be identified as Metis. As Chris Andersen and others have

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Canadian Aboriginal Law” in Paul LAH Chartrand, ed, *Who Are Canada’s Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich, 2002). Bell informs me she no longer makes this distinction. She says, “I got a lot of push-back by Metis who did not like that kind of distinction. Also since that time the MNC definition has evolved to include distinctive Metis communities that do not originate from Red River. So I think I would use Red River and other distinctive Metis communities but not large and small.” Personal communication with Cathy Bell, 4 February 2016.

<sup>40</sup> In 2006, some maritime Metis and Manitoba Metis communities formalized their ties in the East-West Métis Union.

<sup>41</sup> For example, see Nicole St-Onge & Carolyn Podruchny, “Scuttling along a Spider’s Web: Mobility and Kinship in Metis Ethnogenesis” in St-Onge, Podruchny & Macdougall, *supra* note 5, 59. On the northern Metis, see Richard Slobodin, *Métis of the Mackenzie District* (Ottawa: Canadian Research Centre for Anthropology, St Paul University, 1966); Nicole St-Onge, “Early Forefathers of the Athabasca Métis: Long-Term North West Company Employees” in Lischke & McNab, *supra* note 25, 109.

<sup>42</sup> *Newfoundland and Labrador v Labrador Métis Nation*, 2007 NLCA 75; leave to appeal to SCC denied.

<sup>43</sup> I am particularly interested in questions of who has the political authority to determine membership in local and wider Métis communities. I am also interested in the intersection of individual and community identity.

stated, the Metis are not simply mixed – we have created a “new nation” from the cultures of our forebears.

### **BC Complexities**

In many ways, the Metis history of BC highlights and even magnifies all that is complex and multifaceted in Canadian Metis history generally, and thus leads to complexities of community construction. These complexities have generated contention about how the Metis of BC are connected to other Metis communities, and whether they are even legitimately Metis.

One of the reasons for this debate is that Red River (or proto-Red River) Metis have been migrating to BC for over 200 years, and during that same period many migrant Metis have had families – and work and social connections –with local Indigenous people, including local Indigenous mixed ancestry people. The connections between these various groups have confounded simplistic notions of who Metis are, and how they are connected, much in the same way that Metis people generally have confounded simplistic notions of heritage and culture.

Historians Jean Barman and Mike Evans have traced patterns of connection between Metis and local Indigenous mixed ancestry families in BC, and have concluded that such families were linked by family and economic ties over generations, leading to the possibility that people have been both “being and becoming” Metis in BC. The possibility that the law might treat differently people from the same extended family was raised by Barman and Evans, although

they also suggest that some communities created by local ethnogenesis might fit within the *Powley* definition of community.

Historians of the Metis in BC acknowledge that Metis (or proto-Metis) co-explorers accompanied Alexander Mackenzie (late 1700s), Simon Fraser and David Thompson (early 1800s) on their trips into what became British Columbia.<sup>44</sup> The earliest example known to written literature was François Beaulieu, born at Salt Lake, Northwest Territories in 1771 of French Canadian, Cree and Chipewyan descent, who was a guide and interpreter with Mackenzie's expeditions to the Arctic Ocean in 1789 and the Pacific Ocean in 1793.<sup>45</sup> Other notable early Metis explorers include Jean-Baptiste ("Waccan") Boucher, an interpreter and guide for Simon Fraser, and Charlotte Small, the wife of David Thompson.<sup>46</sup> Mackenzie, Fraser and Thompson worked for the Northwest Company (NWC), with Mackenzie and Fraser setting up forts and supply depots in the Peace country and central BC, including the Quesnel and Prince George areas, and with Thompson navigating the entire course of the Columbia River, through the Kootenays.

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<sup>44</sup> Barman & Evans, *supra* note 36; Bruce McIntyre Watson, *Lives Lived West of the Divide: A Biographical Dictionary of Fur Traders Working West of the Rockies, 1793-1853*, vol 1 (Kelowna: Centre for Social, Spatial and Economic Justice, University of British Columbia, 2010); George Goulet & Terry Goulet, *The Métis in British Columbia: From Fur Trade Outposts to Colony* (Vancouver: FabJob, 2008). Co-explorers also included those of Anishinabe, Cree, Six Nations, Chipewyan, Indigenous Hawaiian, French Canadian, English and Scottish descent.

<sup>45</sup> For a partial list of Beaulieu's many descendants in the NWT, and a history of the Metis in the NWT prior to the arrival of European explorers, see North Slave Métis Alliance, "Scope of Concerns for the Environmental Assessment of the Giant Mine Remediation Project", (nd), online: <[http://www.reviewboard.ca/upload/project\\_document/EA0809-001\\_Presentation\\_from\\_NSMA.pdf](http://www.reviewboard.ca/upload/project_document/EA0809-001_Presentation_from_NSMA.pdf)>. Beaulieu's father was a trader for the Compagnie des Sioux, which made various forays into what is now western Canada. Goulet and Goulet suggest Mackenzie chose other Metis from Fort Chipewyan as part of his party travelling to the Pacific Ocean. Goulet & Goulet, *ibid* at 24.

<sup>46</sup> Thompson and Small were connected to the Metis communities of Montréal and Île à la Crosse, Saskatchewan.

One of Thompson's colleagues was Metis Jacques Raphaël ("Jaco") Finlay, who in 1805-06 blazed a trail through the Columbia for Thompson, and helped set up trading posts at Kootenae House (near present-day Invermere, BC) and Spokane House (near present-day Spokane, Washington).<sup>47</sup> Finlay traded in the Kootenays, and eventually settled in Spokane. His descendants became part of the fur trade in the Flathead region, which is on the border between BC, Alberta and Montana, and is a well-known hunting area for Metis even today.<sup>48</sup>

It is not clear whether Metis were at the BC coast with the maritime fur trade as early as the late 1700s,<sup>49</sup> but this could be a topic for further research. It would also be interesting to investigate oral history on Metis-First Nations fur trade connections prior to the arrival of Europeans to the Pacific slopes.<sup>50</sup>

The dominant Pacific Fur Company was purchased by the NWC in 1813, which flourished in the northwest prior to its merger with the Hudson's Bay Company (HBC) in 1821. This merger

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<sup>47</sup> At trial in *Willison*, Ron Nunn gave evidence about Jaco Finlay blazing a trail for Thompson, but for some reason Finlay's name was reproduced in the trial decision as "John Coffinley". This was likely a transcription error. See *Willison* trial judgment, para 62; examination in chief of Ron Nunn, trial transcript, June 21, 2006 at 113. Note Ron Nunn is also a descendant of the Duchoquette family, who were involved in the fur trade in the south Okanagan.

<sup>48</sup> Watson, *supra* note 44 at 53. This history was also related to me in my interview with Mark Carlson, Trail, BC, July 26, 2012.

<sup>49</sup> JR Miller, in *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989) at 142-43, suggests there were Indigenous/non-Indigenous families that arose as a result of the maritime trade.

<sup>50</sup> Many of the trade routes used by fur trade companies used already-existing Aboriginal trade networks. I think the Metis would have been aware of and used these networks, especially as some of them were likely in the far northwest before European explorers and traders. Ron Nunn expressed a similar idea to me: Interview with Ron Nunn, Oliver, BC, August 5, 2012. Watson cites Geoffrey J Matthews, *et al*, *Historical Atlas of Canada*, vol 1 (Toronto: University of Toronto Press, 1987) as a source for information about Indigenous trade between the northern prairies through what is now northern and central BC and the Columbia into present-day Washington and Oregon. See Watson, *supra* note 44 at 122. According to Matthews, *et al*, archaeological evidence suggests trade had been carried out on this route through Edziza (upper Stikine) for at least 10,000 years, and through Anahim (Chilcotin) for at least 5,000 years.

resulted in part from the Metis uprising in Red River over HBC attempts to control Metis traders from the NWC – this is the uprising characterized by some as the crystallizing moment of the Metis nation. However, some Metis (or proto-Metis) from the NWC arrived in BC even before 1821, and are related to Red River families. For instance, in Kamloops there was a Joseph LaRocque who was the head of Fort Shuswap, a NWC post, and another Joseph LaRocque who worked at the HBC’s Fort Cumcloops.<sup>51</sup> After the merger, these two posts were combined and became Fort Kamloops. The number of Metis families living at or near this fort became a point of contention in the *Willison* case.

Over the next 50 years, a network of trading routes became established across the Rocky Mountains, across northern BC to the coast and down through the interior following various routes to the south coast, and through the Okanagan into Washington and Oregon. Trading posts were also established in the Kootenays and on Vancouver Island. Metis communities became centred, for example, around many of the fur trading posts at Fort Langley, Kamloops, Prince George, Quesnel, and Fort St John, among many others. Metis also settled in the Nanaimo and Victoria areas, as early as non-Indigenous settlement occurred in these areas.

Northern trading routes included those through northeastern and central BC, across the Rocky

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<sup>51</sup> It is difficult to trace the exact genealogies of the LaRocque family, as they may be descended from four different French progenitors, two of whom were likely related. A group of Metis LaRocques were associated with the trading post at Rocky Mountain House, and knew the Klyne family. See Joachim Fromhold, *Alberta History – Jasper National Park: 10,000 Years of Indian History, Part 2, 1750-1850* (Appendix) (London: Lulu, 2011). According to Fromhold, the LaRocques traded into Kamloops and married into the Kamloops First Nation. See also Ian S MacLaren, *Culturing Wilderness in Jasper National Park: Studies in Two Centuries of Human History in the Upper Athabasca River Watershed* (Edmonton: University of Alberta Press, 2007). Kamloops Nation Elder Christine Tronson says the LaRocques were “the foundations of the reserve”: “Interview with Christine Tronson”, *Kamloops This Week*, August 23, 2012.

The LaRocques and Klynes later travelled together on the first Sinclair Expedition in 1841: “List of Emigrants for the Columbia”, PAM (HBC), SF Oregon File No 1, F 26/1, fond 2; Geneva Lent, *West of the Mountains: A Biography of James Sinclair*, PAM MG 9, A 65-1, 65-2.

Mountains and eventually across Canada eastward and northward. These routes comprised the Columbia trading department (present-day BC, Washington, Oregon) and the Athabasca department (present-day BC, Alberta and NWT).

In the BC southern interior, which is the main focus of this dissertation, the so-called “Fur Brigade Trail” traversed the land from the northern and central posts<sup>52</sup> to Fort Kamloops/Shuswap, and on through Monte Creek, following the Salmon River through Grande Prairie (Westwold) and Falkland, and down through the Okanagan valley to posts at Similkameen/Keremeos and Osoyoos.<sup>53</sup> This trail followed the Columbia River through Fort Okanagan in what is now Washington to the river’s mouth at Fort Vancouver.<sup>54</sup> Another trail following the Willamette River led down into Oregon, creating an eventual Metis settlement in the Willamette valley, where some of my own family travelled, and others eventually settled.<sup>55</sup> This was the route taken by my relatives, Pierre and Louis LaRocque; Greg Willison’s relatives, the Klynes; and Ron Nunn’s relatives, the Fletts, as part of the first Sinclair expedition to settle

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<sup>52</sup> Northern posts such as Fort St James and Fort St John were linked to the wider trading networks of the NWC and HBC; central posts such as Quesnel, Fort Alexandria and Fort George (Prince George) were often the starting point of the “Brigade Trail”. There were also posts at Jasper, Rocky Mountain House and Edmonton that were linked to the BC routes. For a thorough description of these routes, see James R Gibson, *The Lifeline of the Oregon Country: The Fraser-Columbia Fur Brigade System, 1811-47* (Vancouver: University of British Columbia, 1997).

<sup>53</sup> Other posts in the Okanagan valley included Lac Ronde (Vernon), L’Anse au Sable (Westbank), Prairie de Nicholas (Summerland) and Lac du Chien (Skaha Lake).

<sup>54</sup> Alexander Ross, a Scot who later married an Okanagan woman and settled in Red River, along with his colleague David Stuart, in 1811 found an Indigenous trail from the mouth of the Columbia River to villages along the upper Fraser River to Fort Alexandria. This trail became part of the coastal trade route, and linked to the interior trade routes.

<sup>55</sup> For a history of the Indigenous/non-Indigenous migration and interaction in this region, see Melinda Marie Jetté, *At the Hearth of the Crossed Races: A French-Indian Community in Nineteenth-Century Oregon, 1812-1859* (Corvallis: Oregon State University Press, 2015).

Oregon territory for the British.<sup>56</sup> Despite these settlements of Metis and French Canadians, and other efforts, the Oregon Boundary treaty was signed in 1846, and the Columbia district south of the 49th parallel (except for on Vancouver Island and some of the Gulf Islands) became part of the United States. In anticipation that this might happen, Fort Langley was established in 1827 and developed on the lower Fraser River, 50 kilometres east of what is now Vancouver, BC, at the mouth of the Fraser, and Fort Victoria was established on Vancouver Island in 1843. Trade to Fort Langley also came through the Kootenays and the Cascades in the southern part of what is now BC (compare the modern Highway 3), and through an alternate route from Kamloops through the Fraser Canyon (modern Highway 1) and through Merritt and the Nicola Valley (modern Highways 5 and 97C).

Some people stayed, some didn't, although a common pattern was for people to consider Metis settlements as part of a web of Metis territories across North America. These were places that people might inhabit for a time, leave, and then return to, especially because of work opportunities that required high degrees of mobility. This pattern often continued over many generations – it existed in my own family, and among my research participants. Bruce Watson notes the many descendants of explorers Mackenzie, Fraser and Thompson living in BC (and Alberta), and in fact many of these descendants have formed their own associations, such as the Fraser-Brazeau group. However, Metis communities comprised more than mere settlements, and often encompassed large, overlapping territories.

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<sup>56</sup> Interview with Greg Willison, Salmon River, BC, May 6, 2013; interview with Ron Nunn, Oliver, BC, August 5, 2012.

Current oral and documentary history research suggests some of these historic communities have persisted to the present day, although Metis identities may have gone underground to some extent and Metis people have been and continue to be highly mobile. Metis people continue to migrate to centres like Prince George, Quesnel and Kamloops, which have had Metis populations over many generations.

While Metis settlement and/or territorial use was fanning out across what would later be referred to as BC,<sup>57</sup> new local alliances between traders of European (and other) descent and women from BC's many Indigenous nations were important and exceedingly common. More Metis migrants came to BC with the gold rushes, and non-Aboriginal men pursuing dreams of gold often had children with local Aboriginal women.<sup>58</sup> Later, political and economic upheavals affecting the Metis on the prairies resulted in yet more migration to BC. Both migrant Metis from other parts of North America and local Indigenous mixed ancestry people partnered with immigrants and migrants of mixed or non-European descent: Indigenous Hawaiians, Mexicans, Chinese, Caribbean islanders, black Americans, Japanese and south Asians became part of the early fabric of BC.<sup>59</sup> And of course, further Metis mixing and migration have continued to the

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<sup>57</sup> What is now referred to as British Columbia was once four colonies. BC was created in 1858 and it was united with Vancouver Island in 1866. Pre-provincial terms for the area included "New Caldedonia"; and "the Columbia" (as part of the larger Northwest region that included what is now Washington and Oregon states).

<sup>58</sup> Deduced from censuses. See Barman & Evans, *supra* note 36.

<sup>59</sup> See Barman, "Edge of Law's Empire", *supra* note 33; Barman, *West beyond the West*, *supra* note 33; Jean Barman, *Stanley Park's Secret: The Forgotten Families of Whoi Whoi, Kanaka Ranch and Brockton Point* (Madeira Park, BC: Harbour, 2005) [Barman, *Stanley Park's Secret*]; John Sutton Lutz, "Stó:lō Relations with Asian Immigrants in the Late 19th and Early 20th Century: The Licit and the Illicit", presentation to *The Stó:lō People of the River Conference*, May 1997; Darren Friesen, *Canada's Other Newcomers: Aboriginal Interactions with Peoples from the Pacific* (MA Thesis, University of Saskatchewan, 2006) [unpublished]; Kamala Todd is a BC Metis artist and online curator of a collection of stories about the Aboriginal/Chinese community of Vancouver's Chinatown. For her short autobiography of Larry Grant, an elder of Musqueam/Chinese heritage, see online: <[www.city.vancouver.bc.ca/COMMSVCS/SOCIALPLANNING/initiatives/aboriginal/storyscapes/story11.htm](http://www.city.vancouver.bc.ca/COMMSVCS/SOCIALPLANNING/initiatives/aboriginal/storyscapes/story11.htm)>.

present day. Metis communities now abound in BC, with the most recent census giving the Metis population of BC as approximately 59,000.<sup>60</sup>

Jean Barman and Mike Evans illustrate the complexities of BC Metis history in various works, citing intermarriage across generations between migrant Metis and Aboriginal mixed ancestry people indigenous to BC.<sup>61</sup> These were the children of Aboriginal/non-Aboriginal unions created as a result of the fur trade, gold rushes, and subsequent migrations.<sup>62</sup> The genealogies of a number of my interviewees reflect that Red River Metis and local Indigenous mixed ancestry fur trade families partnered and created families. In the Thompson-Okanagan region,

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The Musqueam-Chinese and the Coast Salish-Hawai'ians of Vancouver are historic Indigenous mixed ancestry groups that do not identify as Metis.

<sup>60</sup> Statistics Canada, Census of Canada, 2006. These people are obviously only those who were willing to publicly identify as Metis. MNBC gives the number of their citizens as approximately 11,000, and the Metis population of BC as approximately 70,000. MNBC has 34 chartered communities. The more recently formed BC Metis Federation has approximately 6,300 members.

<sup>61</sup> Barman & Evans, *supra* note 44;. Such intermarriages were also discussed in Jean Barman, "Still a Legal Quagmire: Two Centuries of Being Métis in British Columbia," the McLean Lecture in Legal History, University of Victoria, October 15, 2007; Mike Evans, Jean Barman and Gabrielle Legault elaborate on this topic in "Métis Networks in British Columbia: Examples from the Central Interior" in St-Onge, Podruchny & Macdougall, *supra* note 5, 331; also see Barman, *West beyond the West*, *supra* note 33. Note also Alan Twigg, *Aboriginality: The Literary Origins of British Columbia*, vol 2 (Vancouver: Ronsdale, 2005); and Alan Twigg, *Thompson's Highway: British Columbia's Fur Trade, 1800-1850* (Vancouver: Ronsdale, 2006). Although these are not scholarly works, these biography-based books illustrate the long history of intermarriage between Aboriginal and non-Aboriginal people in BC – often across many generations, as well as common patterns of Metis migration from other parts of Canada and the United States.

<sup>62</sup> Jean Barman's scholarship highlights the persistence and dispersion of Indigenous mixed ancestry families in BC, particularly those who lived in and around the principal fur-trading posts of Fort Victoria, Fort Rupert, Fort Langley, Fort Okanagan, Thompson's River/Fort Kamloops, Stuart's Lake/Fort St James, and Fort Alexandria, and suggests that descendants continue to live in the areas surrounding these former posts. Barman's work about Metis and Indigenous mixed ancestry people in BC includes: *French Canadians, Furs and Indigenous Women in the Making of the Pacific Northwest* (Vancouver: University of British Columbia Press, 2014) [Barman, *French Canadians, Furs and Indigenous Women*]; *Stanley Park's Secret*, *supra* note 59; "Island Sanctuaries: Early Mixed Race Settlement on Gabriola and Nearby Coastal Islands" (March 2001) 2 *Shale* (Gabriola) 1; *West beyond the West*, *supra* note 33; "Invisible Women: Aboriginal Mothers and Mixed-Race Daughters in Rural British Columbia", in RW Sandwell, ed, *Beyond the City Limits: Rural History in British Columbia* (Vancouver: University of British Columbia Press, 1999) 159; "What a Difference a Border Makes: Aboriginal Racial Intermixture in the Pacific Northwest" (July 1999) 38:3 *Journal of the West* 14; "Family Life at Fort Langley" (Fall 1999) 32:4 *British Columbia Historical News* 16; and "Lost Okanagan: In Search of the First Settler Families" (1996) 60 *Okanagan History* 8.

for example, many Metis families, including my own family, married into the Shuswap (Secwepemc) and Okanagan (Syilx) nations. While some of these people became absorbed into the families and nations of their local Aboriginal ancestors, others – such as Lottie McDougall Kozak’s extended family – continued to identify as Metis. Research participant Pat Normand of Eagle Bay, a descendant of a local mixed Aboriginal fur trade family, identifies as Metis and associates with the local Metis community. Research participant Warren Ogden of Salmon Arm, a descendant of local mixed Aboriginal ranching families who settled along the historic Fur Brigade Trail in Westwold, about 15 kilometres from Falkland, also identifies as Metis, and associates with the local Metis community.<sup>63</sup>

While it may seem that I am racializing people by pointing out their ancestry, my point is that citizenship in the Metis nation/membership in local communities is not always dependent on ancestry, even now in the days of internalized colonialist divisions between Aboriginal peoples, and it certainly wasn’t in the past. As was suggested in the previous section, even Red River Metis had various ancestries, which did not prevent them from continuing to create the new nation.

I acknowledge that some of the research participants might not view those without Red River ancestry as being truly Metis, but in practice, such people participate in the community, although they may or may not be formal members (whether by choice or because community membership rules do not permit it).

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<sup>63</sup> Membership rules in Metis local associations are less likely to be based strictly on ancestry than the membership rules of provincial Metis organizations, although in the case of MNBC, membership has been occasionally granted to people without Red River ancestry. Interview with Margaret Penner (MNBC senator who reviews membership appeals), Oliver, BC, August 4, 2012.

The crystallization of the Metis nation has important political and legal ramifications, so it is not surprising that it is of interest to historians of the Canadas and the prairie west, since the Metis peoples of these areas have become increasingly active in promoting their rights and concerns. What is surprising is that there seems to be comparatively little interest in the same questions in British Columbia, especially given the political activism that has been awakening amongst the self-identifying Metis of BC. It seems to be taken for granted that many Aboriginal/non-Aboriginal families in what is now BC did not cohere into a recognizable political or cultural entity (or entities) and thus discussion of this fact is brief.

Jean Barman asserts that racism, along with the concomitant absence of legal categories to contain “interraciality” – this absence being a phenomenon unique to BC – led to children of mixed ancestry more often associating with either their mother or their father’s background; a separate identity as a Metis or mixed-blood person was less common.<sup>64</sup> Similarly, Barman notes, “Unlike their counterparts east of the Rocky Mountains, interracial families descending from fur trade unions did not become legally constituted as Métis.”<sup>65</sup> Barman, along with Renisa Mawani, describes that, owing to the colonial situation in BC, there were no legal categories for Metis. People were expected to define themselves as either “white” or “Indian”.<sup>66</sup>

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<sup>64</sup> See, for example, Barman, “Edge of Law’s Empire”, *supra* note 5.

<sup>65</sup> *Ibid* at 4-5.

<sup>66</sup> Barman, *ibid*; Renisa Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921* (Vancouver: University of British Columbia Press, 2009).

While Barman reinforces these ideas in her most recent book *French Canadians, Furs and Indigenous Women*,<sup>67</sup> she and Mike Evans suggest that, despite these legal limitations, some Metis-Aboriginal mixed ancestry networks did arise in BC.<sup>68</sup>

Metis scholar Olive Dickason takes “a look at the emergence of the métis”,<sup>69</sup> at the phenomenon of Metis communities ignored by historians, and tries to answer her own question, “... why do we rarely hear of the métis on the West Coast?” She has a number of theories. One is that the climate was not as harsh on the coast as on the prairies or in the east. This reduced reliance on Aboriginal winter survival skills. Secondly, she posits that the fur trade was not operating long enough to create the ongoing symbiotic relationships that characterized the inland trade. Further, interraciality was not generally encouraged as it had been further east. Thirdly, there were no colonial rivalries creating military alliances between Aboriginal nations and European descendants.<sup>70</sup>

Ironically, this essay appears in a collection of “expansionist” scholarship, which includes works by the writers of the “New Peoples Forum”, derived from the first International Conference on the Métis, held in Chicago in 1981. Out of that conference came the book *The New Peoples: Being and Becoming Métis in North America*,<sup>71</sup> with essays discussing the origins, migrations and boundaries of the Metis. In the “Afterword” to *The New Peoples*, Robert K Thomas asks a

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<sup>67</sup> Barman, *supra* note 62.

<sup>68</sup> Barman & Evans, *supra* note 44; Evans, Barman & Legault, *supra* note 61.

<sup>69</sup> Olive Patricia Dickason, “From ‘One Nation’ in the Northeast to ‘New Nation’ in the Northwest: A Look at the Emergence of the Métis” in Peterson & Brown, *supra* note 5, 19.

<sup>70</sup> *Ibid* at 31.

<sup>71</sup> Peterson & Brown, *supra* note 5.

question which is highly relevant to the BC Metis: "... are métis groups with a problematic identity simply incomplete peoples who did not have the time to develop a strong sense of themselves as métis, or have they been eroded by external definitions imposed by official and lay sections of the general society?"<sup>72</sup> In order to deal with this question, Thomas devises a sociogeographic outline of "... what would seem to be an extremely complex tangle of relatively discrete métis communities stretching across northern North America."<sup>73</sup> Thomas divides the Metis as follows:

1. Descendants of Red River people living in "traditional" Métis territories, but not on Indian reserves;
2. Descendants of Red River people who migrated outside "traditional" Métis territories. This would include e.g. people who moved to Saskatchewan after the first Resistance in 1869, and people who migrated further after the 1885 Resistance. The movement "... must have initiated a whole new social and cultural dynamic within these métis groups". Thomas notes, **"There are, moreover, clusters of métis families throughout British Columbia which likely represent the westernmost edge of the Red River métis diaspora."**
3. Descendants of Red River people living on Indian reserves in Canada or reservations in the United States;
4. Local and fairly autonomous groups of mixed-bloods with no connection to the Red River Métis;
5. Descendants of Great Lakes Métis;
6. Mixed-blood groups not descended from Red River Métis who are associated with Indian Bands;
7. New Métis migrants to the cities.<sup>74</sup>

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<sup>72</sup> Robert K Thomas, "Afterword", in Peterson & Brown, *ibid*, 243 at 274.

<sup>73</sup> *Ibid* at 248.

<sup>74</sup> *Ibid* at 248-50 [emphasis added].

At the same time, Thomas acknowledges that Metis people may not relate to these or other “artificial” definitions of Metisness. I note that BC Metis could easily fit within Categories 3 through 7 as well as within Category 2, which explicitly mentions BC Metis. My own view follows that of Thomas’ second suggestion that recognition of Metis communities in BC has “been eroded by external definitions imposed by official and lay sections of the general society”. I will address this contention at the end of this chapter.

A Metis view on the work of the “New Peoples” project comes from Leah Dorion and Darren R Préfontaine’s article “Deconstructing Métis Historiography: Giving Voice to the Métis People”, in the monumental work *Métis Legacy*:<sup>75</sup> “The New Peoples Forum has had a definite impact upon the academics writing on the ‘other’ Métis. The recently expanding literature based on this topic is not only exciting, it is long overdue.”<sup>76</sup>

Dorion and Préfontaine cite Sylvia Van Kirk’s “Colonized Lives” on Victoria Metis women,<sup>77</sup> and Jackson’s *Children of the Fur Trade*<sup>78</sup> as having delineated Metis identity in the Pacific Northwest, and note that historic mixed ancestry groups in the Pacific Northwest have “readily

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<sup>75</sup> Lawrence J Barkwell, Leah Dorion & Darren R Préfontaine, eds, *Métis Legacy: A Métis Historiography and Annotated Bibliography* (Winnipeg: Pemmican, 2001).

<sup>76</sup> Leah Dorion & Darren R Préfontaine, “Deconstructing Métis Historiography” in *Métis Legacy, ibid*, at 19.

<sup>77</sup> Sylvia Van Kirk, “Colonized Lives: The Native Wives and Daughters of Five Founding Families of Victoria”, in Mary-Ellen Kelm & Lorna Townsend, eds, *In the Days of Our Grandmothers: A Reader in Aboriginal Women’s History in Canada* (Toronto: University of Toronto Press, 2006) 170. This is an account of the women of the Douglas, McNeill, Work, Tod and Ross families, who lived most of their lives at various fur trade posts in the Columbia Department and were the matriarchs of some of the founding Metis families of Victoria

<sup>78</sup> John C Jackson, *Children of the Fur Trade: Forgotten Métis of the Pacific Northwest* (Missoula, MT: Mountain Press, 1995).

identified as being Métis” although they were localized in small communities with small territories.<sup>79</sup>

Robin Fisher, noted historian of Aboriginal-settler relations, states,

When fur traders became more permanent residents [of the Pacific slopes], as happened elsewhere in western Canada, Native women sought marriage alliances with them ... It made economic sense for a Native woman to establish a kinship relationship with a Company trader and they often assumed important roles as mediators between the two races ... Such marriages were clearly good business, but often they were also based on strong affection and many were lasting relationships rather than temporary liaisons. **The children of such marriages formed a mixed-blood society that was smaller but no less significant than the Metis society of Red River in what is now Manitoba.** Thus fur trade marriages and the families that resulted were another measure of the reciprocity of race relations.<sup>80</sup>

While the significance of the Metis fur trade society in BC is acknowledged, nothing is said about the culture and conduct of this “Metis society” or of its history.

Of course, the existence of Metis communities in BC in any form is contentious, and the composition of such communities is also contentious, owing to the interlinking of migrant Metis and Aboriginal mixed ancestry families in BC over time, and owing to the likely persistence of

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<sup>79</sup> *Ibid.*

<sup>80</sup> Robin Fisher, “Contact and Trade, 1774-1849”, in Hugh JM Johnston, ed, *The Pacific Province: A History of British Columbia* (Vancouver: Simon Fraser University History Department; Montréal: Douglas & McIntyre, 1996) 48 at 56-57 [emphasis added]. Of this book’s 398 pages, only two are dedicated to the Metis.

Aboriginal mixed ancestry families not connected with Metis families. This reflects the question posed by Barman and Evans: is it possible to be and to become Metis in BC? While this is a difficult question, it is perhaps more straightforward than the question about whether Metis communities are really communities. These contentions will be addressed in Part 3.

### **Metis Territories**

Like Metis history, Metis territory is complex and contested. Metis territory may be of many kinds. For instance, during the period of the Great Lakes fur trade, Metis (or proto-Metis) obtained use and passage rights through First Nations territories through diplomacy, blended legal systems, marriage, adoption and, occasionally, warfare.<sup>81</sup> Metis gained family territories through relationships with their First Nations relatives, and also enjoyed communal property holding with them. After the reduction of the Great Lakes fur trade following the American War of Independence, and yet further after the War of 1812, many (proto)Metis migrated westward. As with their French Canadian ancestors, Metis held private property distributed along the Red and other rivers in the manner of the Québec seigneurial system, in which each landholder had a small piece of river frontage, the plots trailing out from the riverbank in long strips. This practice was also carried on in the Pacific Northwest.<sup>82</sup> At the same time, many Metis, even those with private landholdings, used these more permanent settlements as “hubs”, as places to return to, as many of the occupations of the Metis involved long months of travel. For instance, the journey from Montreal to Red River was approximately 2,400 kms, and took many months. Metis people kept their family connections over these long distances and

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<sup>81</sup> See, for example, White, *supra* note 6.

<sup>82</sup> Watson, *supra* note 44.

long absences. So, even one family might have had more than one type of territorial connection.<sup>83</sup>

On the prairies, Metis negotiated shared harvesting rights with First Nations, as in the Metis treaties with the Dakota in 1859 and 1861. Metis skirmishes with the Dakota and other nations over use rights have been recorded. In other instances, Metis were allowed to set up more permanent settlements in First Nations territories. Over time, such settlements came to be seen as distinctively Metis. Examples include Île à la Crosse, Duck Lake, and Lac Ste Anne. Some of the settlements in the far north existed before the Red River period, and there were many later migrations from Red River to the north and back in the 1800s and 1900s.

The Metis protection of their territory along the Red River against encroaching Canadian settlement led to the first Riel Resistance in 1869. Despite the efforts of the Metis in negotiating with Canada for their land rights in what became the province of Manitoba in 1870,<sup>84</sup> Metis were dispossessed of their lands there through the “land scrip” process, in which Metis were guaranteed a certain portion of their traditional lands, or were able to trade in their lands for money.<sup>85</sup> While this was supposed to ensure Metis people retained access to their own lands, in part in exchange for the entry of Manitoba into Canadian confederation, in

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<sup>83</sup> For an example of a complex Metis view of connection to territory, see Emma LaRocque, *When the Other Is Me: Native Resistance Discourse, 1850-1990* (Winnipeg: University of Manitoba Press, 2010) at 136-37.

<sup>84</sup> Darren O’Toole, “Métis Claims to ‘Indian’ Title in Manitoba” (2008) 28:2 *Canadian Journal of Native Studies* 241.

<sup>85</sup> For a description of how scrip worked, see Frank Tough & Erin McGregor, “‘The Rights to the Land May Be Transferred’: Archival Records as Colonial Text – A Narrative of Métis Scrip” in Paul W dePasquale, ed, *Natives & Settlers, Now & Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta, 2007) 33.

practice, land speculation and fraud was rife, and many people lost their lands.<sup>86</sup> The implications of this for the relationship between the Metis and the federal crown went unaddressed until the *Manitoba Métis Federation* case.<sup>87</sup> Because of the scrip fiasco, many Metis went west, creating settlements in Saskatchewan, Alberta, BC and the north. Some of these, which were more or less continually occupied, came to be seen as “traditional”.

In a few years, the integrity of the Metis territories in Saskatchewan was violated by west-reaching Canadian settlement, and this led to the second Riel Resistance in 1885. Following this, many Metis continued west, but many more (including my own family) settled, at least temporarily, in the United States, fearing Canadian reprisals. While there had arguably been Metis in what became the US since before the American War of Independence, these communities became flooded with new members in the late 1800s. Some stayed, especially in Montana and North Dakota, marrying into Indigenous nations there, and some eventually made their way back to Canada (various branches of my family did both – and so did the families of research participants Wayne Bousquet, and of Lenore and Greg Willison). Some Metis who journeyed with the Sinclair Expeditions to Oregon Territory remained there, along with other Metis who had settled there in connection with the northwest fur trade.<sup>88</sup>

During this period of loss of Metis lands, migration for economic and political reasons was common. Smaller settlements remained in Manitoba, with some Metis going east to Ontario

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<sup>86</sup> See, for example, Chapter 6 of Frank Tough, *“As Their Natural Resources Fail”: Native Peoples and the Economic History of Northern Manitoba, 1870-1930* (Vancouver: University of British Columbia Press, 1996).

<sup>87</sup> *Manitoba Métis Federation v Canada*, [2013] 1 SCR 623.

<sup>88</sup> Jetté, *supra* note 55.

and Québec, sometimes to join relatives who might have worked there (as in the fur trade communities of Fort William (Thunder Bay), Sault Ste Marie and Montréal) or who might have retired there from the fur trade, a common practice (e.g. the Ross family). Meanwhile, Metis settlements in Saskatchewan and Alberta became larger, with eight of the traditional Alberta settlements being regulated, since 1930, under provincial legislation, as a result of the efforts of Metis activists, including Jim Brady and Malcolm Norris.<sup>89</sup> Today, these settlements are governed under the *Metis Settlements Act*,<sup>90</sup> and have their own tribunal, the Metis Settlements Appeal Tribunal. Alberta is the only province with such legislation.<sup>91</sup>

While many Metis today may live in areas where there are traditional settlements, many others do not. Some Metis may be urban, some may be rural. The modern Metis Nation thus comprises many communities, some of which are physically disparate, some of which are separated from their traditional land bases, and some of which are arguably not attached to particular lands.

In British Columbia, as discussed in the previous section, traditional Metis settlement areas in BC include Victoria, Fort Langley, Kamloops, and elsewhere in the Thompson/Okanagan along the Brigade Trail, in the Kootenays, in Prince George, in Quesnel, and in the Peace country.

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<sup>89</sup> Nicole C O'Byrne, "'No Other Weapon Except Organization': The Métis Association of Alberta and the 1938 Metis Population Betterment Act" (2013) 24:2 *Journal of the Canadian Historical Association/Revue de la Société historique du Canada* 311.

<sup>90</sup> SA 1990, c M-14.3.

<sup>91</sup> See Catherine Bell, *Alberta's Métis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Centre, 1994).

There are many disputes about Metis territory in BC. MNBC itself has taken issue with what it has seen as the exclusion of much of the territory of BC from the Metis nation homeland in the description offered by its parent organization, the Métis National Council.

According to the MNC, the territory of the “Historic Métis Nation Homeland” roughly corresponds to the current Manitoba, Saskatchewan and Alberta, and parts of Ontario, British Columbia, and the US prairies (e.g. North Dakota and Montana). The idea of “homeland” does not imply exclusive use or title throughout that area, although it may include areas of exclusive use or title.

While there have been many histories of the Metis that touch upon territorial concerns, there have not been many scholars who specifically focus on the complexity of Metis ways of relating to territory. One exception is Étienne Rivard. Rivard states, “Territoriality is both the process by which a people appropriate space and create territory through their identity markers and the process by which they redefine, at least partially, their identity and sense of belonging in relation to that history.”<sup>92</sup> Rivard argues that territory is inseparable from history, and from community identity. Rivard says of Metis territoriality, “Metis spatial mobility underlined a persistent and paradoxical feeling – the excitement of departing for the ‘free life’ of the plains, yet the heartbreak of leaving the settlements.”<sup>93</sup> In his view, this paradox describes the tensions between mobility and rootedness typical of Metis territoriality.

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<sup>92</sup> Étienne Rivard, “‘Le Fond de l’Ouest’: Territory, Oral Geographies, and the Métis in the Nineteenth-Century Northwest” in St-Onge, Podruchny & Macdougall, *supra* note 5, 143 at 144.

<sup>93</sup> *Ibid* at 154.

In the Introduction to *Contours of a People*, the editors connect this “expansive geographic familiarity” with “tremendous physical and social mobility, and maintenance of strong family ties across time and space”.<sup>94</sup> These ties have been described in the work of Metis philosophers as an example of wahtookowin, as the web-like structures of family and social connections persist across territories, and persist despite cultural, economic, political or other differences.<sup>95</sup>

Nicole St-Onge echoes these views in her video on the BC Metis Mapping Research Website,

... the Metis had a mental map that was immense. They had no fear, if you track individuals, or going from Red River to Fort Chipewyan and beyond, Kelly Lake, if you want, down to St Louis, down the Columbia. If you follow life histories, they went where the work was. And it’s not ... I don’t think in their minds they were leaving their home space. This was part of their world, their territory. I’m sure there were boundaries to it ... you didn’t go beyond, maybe, south of St Louis, you didn’t go north of Mackenzie, or whatever, but they travelled within their world and were comfortable.<sup>96</sup>

As we will see when looking more closely at *Powley* and the cases that consider it, this expansive, loosely bounded view of territory is at odds with the vision of community espoused by the courts.

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<sup>94</sup> Brenda Macdougall, Carolyn Podruchny & Nicole St-Onge, “Introduction: Cultural Mobility and the Contours of Difference” in St-Onge, Podruchny & Macdougall, *supra* note 5, 3 at 8.

<sup>95</sup> Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: University of British Columbia Press, 2010).

<sup>96</sup> Online: <<http://document.bcmetiscitizen.ca>>.

These themes will be developed throughout this dissertation, and in Chapter 7 I will expand on their implications for Metis theory.

## **PART 2           INTERNAL AND EXTERNAL FACTORS AFFECTING PERCEPTIONS OF METIS COMMUNITIES**

### **Spectra of Metis Identities and Constructed Splits**

“To use the example of mixed Native and European heritage people, some of us are raised on reserve, in the bush, in small towns, on farms, in cities, and/or and combination of these places; as Indians, as Metis, as ‘breeds’, as whites ...; with great pride, with great shame, with full knowledge, in complete ignorance, with double and triple messages about who we are and are and about our place in the world.

...

As an ally you must never expect me to choose sides, because I am all sides. You must never silence the parts of me that need to be given voice, especially when the parts of me do not agree.”

Joanne Arnott, in *Miscegenation Blues*

I have tried to show in the previous sections that Metis histories and territories are complex. Thus, Metis individual and community identities, which encompass these complexities, can be seen as problematic for the state, and for state law. In this section, I discuss how Metis identity issues are relevant to community construction, by Metis, settlers, and the state.

There have been many perceptions, among Metis and others, about Metis identity. On one end of the spectrum, Metis identity has been seen as multiplicitous and overlapping; on the other end, Metis identity has been seen as concrete and distinct. Whether concrete or permeable (although concrete itself is permeable), Metis identities have been perceived as both threatening and liberating.

In some constructions, Metis multiplicity is seen as positive and inclusive, with complex identities bringing Metis people “the best of both (i.e. Aboriginal and European) worlds”. In other constructions, multiplicity means “nebulous”, “shifting” – perhaps even “shifty”, as sometimes both European-descended settlers and First Nations people have mistrusted Metis people, as their mixed-ness (and thus other-ness) was seen as making their loyalties suspect. Such negative constructions include stereotypes of Metis as “bastards”, untrustworthy, “polluting” the “white race”, ignorant, un-governable, and exhibiting the “worst of both worlds”.<sup>97</sup> According to Nikos Papastergiadis, “In early records of colonial encounters, the ambiguity surrounding hybrids was wrapped in ambivalence. On the one hand, hybridity was blamed for causing bad health. The symptoms included fatigue and indolence. Economic inertia, moral decadence and even syphilis were also effects that hybrids supposedly brought to the New World”.<sup>98</sup> On the other hand, the hybrid could serve to enlighten society by being “... lubricants in the clashes of culture; they were the negotiators who would secure a future free of xenophobia”.<sup>99</sup>

As this dichotomy illustrates, even “positive” constructions of Metis people could be colonialist and condescending. For instance, one of my ancestors, Marie-Rosalie Marion, was described

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<sup>97</sup> See Mawani, *supra* note 66; Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001); John Lutz, “Making ‘Indians’ in British Columbia: Power, Race, and the Importance of Place” in Richard White & John M Findlay, eds, *Power and Place in the North American West* (Seattle: University of Washington Press, 1999) .

<sup>98</sup> Nikos Papastergiadis, “Tracing Hybridity in Theory” in Pnina Werbner & Tariq Modood, eds, *Debating Cultural Hybridity: Multi-Cultural Identities and the Politics of Anti-Racism* (London: Zed, 1997) 257 at 260.

<sup>99</sup> *Ibid* at 261.

with surprise by a dinner guest as being clean, neatly dressed and genteel;<sup>100</sup> other Metis, especially women, were said to have become remarkably adapted to Euro-Canadian culture.<sup>101</sup> One of these women was Jane Klyne, a great-aunt of Greg Willison; as we shall see, the court's construction of Mrs Klyne as a "Victorian matron", based on an historical account, prevented her from being seen as authentically Metis.

More ambivalently, Metis have been construed (including by hybridity theorists) as interpreters, mediators, and ambassadors, but as not fully inhabiting particular worlds. This view is connected to understandings of Metis people as encompassing numerous, but static identities, a kind of cultural multiple personality phenomenon presumed to be some kind of disorder, equating mixedness with madness; while this is a colonialist view, integration of seemingly disparate selves is also a topic discussed by some Metis autobiographers. An example of a multiplicitous identity used by non-Metis and often acknowledged by Metis people is that of a "go-between," someone who can navigate both the Aboriginal and the non-Aboriginal worlds.<sup>102</sup> Although not merely "go-betweens," the Metis negotiated political and trade relationships with all their "cousins," including treaties with other Indigenous nations.

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<sup>100</sup> This account by JW Radiger, Head Clerk of the HBC, was recorded in Lillian Beynon Thomas, "Some Manitoba Women Who Did First Things" (1947-48) 3:4 Manitoba Historical Society Transactions, online: <[www.mhs.mb.ca/docs/transactions/3/firstwomen.shtml](http://www.mhs.mb.ca/docs/transactions/3/firstwomen.shtml)>.

<sup>101</sup> Sylvia Van Kirk, *Many Tender Ties: Women in Fur Trade Society, 1670-1870* (Winnipeg: Watson & Dwyer, 1980).

<sup>102</sup> This is a common metaphor used to describe Metis people, including Louis Riel, who occasionally used it to describe himself. See, for example, Albert's Braz's chapter on this topic in *False Traitor: Louis Riel in Canadian Culture* (Toronto: University of Toronto Press, 2003) at 9 entitled "The Go-Between: Riel as Cultural Mediator". Metis poet Gregory Scofield illustrates the cultural divide Riel must negotiate in "Le Porte-parole/The Spokesman," in *Louis: The Heretic Poems* (Gibsons, BC: Nightwood, 2011) at 45. Minelle Mahtani points out that the metaphors of "interpreter" and "translator" are often used by people of mixed ancestry to describe themselves: Mahtani, "Mixed Metaphors: Positioning 'Mixed Race' Identity" in Jo-Anne Lee & John Sutton Lutz, eds, *Situating "Race" and*

Many Metis thinkers have objected to splitting elements of Metis identity. While non-Metis people often think of being Metis as being “part Native” and “part European”, Metis people view themselves as being more than simply mixed. Similarly, mestiza scholar Paula Gunn Allen says that mestiza/os are not “half and half” but “all in all”.<sup>103</sup>

At the same time, there are movements among some Metis people to deliberately concretize Metis individual and community identities, thus eroding complexity. This may be for reasons independent of external actors, but I contend that, many times, Metis identity formation has been influenced by state law.

Canadian legal history is a history of attempting to classify and divide Aboriginal groups, internally, and from each other. These attempts live on today. For instance, through the *Indian Act*, the Canadian government tried to limit who could be defined as an “Indian”. While this definition has expanded over time to reinstate First Nations (and some Metis) women who lost their status when they married non-“Indian” men, and to reinstate the children of these women, inappropriate restrictions still exist.<sup>104</sup>

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*Racisms in Space, Time, and Theory: Critical Essays for Activists and Scholars* (Montréal & Kingston: McGill-Queen's University Press, 2005) 77.

<sup>103</sup> Paula Gunn Allen, “She Is Us: Thought Woman and the Sustainability of Worship” in Melissa K Nelson, ed, *Original Instructions: Indigenous Teachings for a Sustainable Future* (Rochester, VT: Bear, 2008) 138.

<sup>104</sup> Discrimination against women who married non-status men was challenged unsuccessfully by Jeannette Lavelle and Yvonne Bédard in *Canada (AG) v Lavell*, [1974] SCR 1349 then successfully by Sandra Lovelace at the UN in *Lovelace v Canada*, UN Human Rights Committee, Communication No. R6/24 (December 29, 1977), UN Doc. Supp. No. 40 (A/36/40) at 166 (1981). The UN's decision that the *Indian Act* discriminated on the basis of gender was embarrassing to Canada, and in 1985 the federal government enacted *An Act to Amend the Indian Act* (SC 1985, c 27) (“Bill C-31”) allowing non-status women and their children to regain (or gain) their status. However, Bill C-31 still did not address the problem that women with only one status parent who were reinstated could not pass status on to their grandchildren, while the brothers of such women were entitled to do so. This issue was litigated in *Mclvor v Canada (Registrar, Indian and Northern Affairs)* [2007] BCJ No. 1259; aff'd in part [2009] 2 CNLR 236 (BCCA); leave to appeal to SCC denied. Following the BCCA decision, parliament enacted the *Gender*

In 1930, Canadian bureaucrats and jurists questioned whether Inuit are “Indians” for the purposes of s. 91(24) of the constitution (i.e. whether they are considered to be under federal jurisdiction).<sup>105</sup> The same question involving the Metis languished in the courts for 18 years, until the Supreme Court of Canada in *R v Daniels* affirmed that Metis (and non-status Indians) are also “Indians” under s. 91(24).<sup>106</sup> Similar legal conundrums regarding categorizing Aboriginal people include forcing Metis people living on Metis settlements in Alberta to decide whether they are Metis or Indian (some people may identify as both, and may fit within both legal definitions<sup>107</sup>) for the purposes of accessing benefits.<sup>108</sup> In the Labrador Metis case, people who had for many years identified as Labrador Metis, and who were descendants of Inuit and Europeans, were reassured by the court that they would not have to decide whether they were Metis or Inuit (or both) to be able to claim an Aboriginal right to consultation.<sup>109</sup> However, the fallout from this case split the nation, with some Labrador Metis deciding to identify as Inuit, renaming their people NunatuKavummiut (“people of our ancient land”). While some Metis commentators commend this move, contending that the Labrador Metis

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*Equity in Indian Registration Act*, SC 2010, c 18 (“Bill C-3”). Bill C-3 allows grandchildren of women who lost status by marrying non-status men to register as status Indians. Critics say Bill C-3 is still under-inclusive because it excludes 1) grandchildren of women who “married out” before 1951; 2) descendants of status women who co-parented in common-law unions with non-status men; and 3) female children of male Indians, if such fathers were not legally married at the time their daughters were born. A federally funded process is now exploring these issues.

<sup>105</sup> *Reference re Term “Indians”* [1939] SCR 104 (*sub nom Re Eskimos*).

<sup>106</sup> *Daniels v Canada*, 2016 SCC 12. Note that in *R v Blais*, [2003] 2 SCR 236, the court held that Metis were not “Indians” for the purposes of the *Manitoba Natural Resources Agreement (NRTA)*, SC 1930, c 29.

<sup>107</sup> On the many links between Metis and other Indigenous communities, see Rob Innes, JR Miller, Patricia Sawchuk.

<sup>108</sup> *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, [2011] 2 SCR 670.

<sup>109</sup> *Newfoundland and Labrador v Labrador Métis Nation*, 2007 NLCA 75, leave to appeal to SCC denied.

weren't really Metis in any event,<sup>110</sup> Fagan asserts that the decision to identify as Inuit has created a rift that weakens possibilities of joint community action.<sup>111</sup>

Many other examples may be cited as to how the Canadian law has created or emphasized divisions between Aboriginal people: between on- and off-reserve people, between urbanized and "traditional" people, and between men and women.<sup>112</sup> Examples in the BC context have been noted above.

Forcing people to choose identities has had lasting impacts. *Powley* is a manifestation of this and increases the tendency among some Metis people to concretize their own identities, to bring themselves and their communities within the confines of the community conundrum. This is not to say that Metis people should never attempt to create definitions for their own communities, including citizenship requirements, but I would suggest these definitions should be considered and debated within communities, and any adoption of legal or other state-based definitions should be deliberate and done with full knowledge and awareness.

As John Borrows points out in *Physical Philosophy*, traditionally, in most Indigenous nations, citizenship was not based on blood quantum. Such political features stem from colonialist practices that we have internalized, and through which we are now "patrolling our own

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<sup>110</sup> See Chris Andersen, "*Métis*": *Race, Recognition and the Struggle for Indigenous Peoplehood* (Vancouver: University of British Columbia Press, 2014).

<sup>111</sup> Fagan also points out that Labrador Metis people started identifying as "Metis" in the 1970s at the suggestion of Harry Daniels in order to ally with other Metis groups. See Kristina Fagan Bidwell, "Metis Identity and Literature" in James H Cox & Daniel Heath Justice, *The Oxford Handbook of Indigenous American Literature* (Oxford: Oxford University Press, 2014) 118. While acknowledging the political expediency of this move, Andersen critiques it as a case of "mis-recognition".

<sup>112</sup> On the latter point, see *Sawridge Band v Canada*, 2004 FCA 16, [2004] 3 FCR 274, leave to appeal to SCC denied.

subordination”.<sup>113</sup> While membership in Metis political organizations does not require a blood quantum limit, in many cases it does require descent from or relation to Red River families. Traditionally, citizenship was not granted based on blood,<sup>114</sup> just as the “life giver” role ascribed to women in many Indigenous cultures is not necessarily based on biological motherhood.<sup>115</sup> Many debates surround the question of whether basing individual or community membership on biological descent is valid, or even racist. Such (il)logics were rejected in *Powley*, although proof of Aboriginal ancestry is still required. This is likely because to have a strictly biological definition imposed by the court would be in violation of both the Canadian Charter and international human rights law. It may also be because of evidence that was led at trial in *Powley* about the importance among Metis (as among other Indigenous) people of non-biological relations as part of extended family or community networks.<sup>116</sup> Thus, ancestry may be established, according to *Powley*, “by birth, adoption or other means”. While it is not clear what “other means” might have been intended to include, it could include marriage, and

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<sup>113</sup> John Borrows, *Physical Philosophy* [forthcoming].

<sup>114</sup> Indigenous legal scholar Val Napoleon, from the Treaty 8 area in northeastern BC, home to Cree, Saulteaux, Dene, Iroquois and Metis peoples, contends “... that many pre-contact aboriginal societies practised forms of nationhood that were deliberately inclusive in order to build strong nations with extensive international ties.” Napoleon, “Extinction by Number: Colonialism Made Easy” (2001) 16 *Canadian Journal of Law & Society* 113.

<sup>115</sup> See Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Canadian Scholars’ Press, 2001).

<sup>116</sup> In her book *Indian Women and French Men: Rethinking Cultural Encounter in the Western Great Lakes* (Amherst: University of Massachusetts Press, 2001), Susan Sleeper-Smith notes that French-Indigenous families commonly adopted the tradition of god-parenting. God-parenting was also important in Metis families, and was a way of reinforcing community relationships through reciprocal responsibilities, and thus may have been overlapped with Indigenous practices of bolstering relationships through fictive kinship. Nicole St-Onge and Carolyn Podruchny have also suggested Scottish-descended Metis used their clan affiliations in order to create community relations and build economic ties. See their essay “Mobility and Kinship in Metis Ethnogenesis” in St-Onge, Podruchny & Macdougall, *supra* note 5, 59 at 65, citing Colin Calloway.

extended family relationships via marriage and adoption, and it leaves room for the possibility of naturalization.<sup>117</sup>

### **Racism, Conflict and Community Construction**

Indigenous peoples the world over have experienced colonialism, cultural suppression, assimilation, prejudice, loss of lands, livelihoods, languages – and, of course, legal discrimination. This is as true in what is now Canada as anywhere else. Metis, First Nations and Inuit people have suffered the ravages of foreign diseases, philosophies, religions, political and military institutions – the list goes on. Many of us are exiles in our own land. Of course, this is not to say that Indigenous people are defined only by oppression and victimhood. Despite these ravages, Aboriginal people in Canada and Indigenous people around the world are in a phase of strengthening and resurgence.

While Metis people certainly experienced discrimination at the hands of Euro-Canadians and Americans, they also experienced discrimination from other Aboriginal people. For instance, some First Nations people call Metis people “Me too” people, implying that we are Indian “wannabes”, or that we are somehow less Aboriginal. This form of lateral violence is also practised among First Nations people, who hierarchize aboriginality, with the (supposedly) full-blood status Indians on the top. This is known as the “More Indian Than Thou” (MITT) phenomenon.

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<sup>117</sup> Naturalization is one of the methods suggested by Larry Chartrand as a solution to the question of who should be considered part of the Metis nation. See his article “Métis Identity and Citizenship” (2001) 12:5 Windsor Review of Legal & Social Issues 5. Within MNBC the idea of “associate membership” for spouses and other non-biological family members is currently being debated, with some arguing that such a category creates two classes of citizens. Some members of MNBC charter communities who are not also MNBC members object on the grounds that MNBC would expect charter communities to enforce this citizenship category even if they do not wish to.

On the one hand, many Metis who had relatively fair skin tried to “pass for white” and assimilate into colonial culture. Some did this so successfully that their children were not raised with any sense of Metis identity. In other cases, Metis community identity and self-identity went underground. This was particularly true in British Columbia, as will be seen below.

Many assimilated or partly assimilated Metis are thought to struggle with a sense of self-hatred. Laura Smyth Groening talks of “[...] wrestling with a complex self-hatred: hatred of one’s white identity because whites are the oppressors, and hatred of one’s Native identity because of the way that identity has been constructed as ‘other’ by society at large”.<sup>118</sup>

In addition to the double bind of internalized racism that may resonate with some, Metis must also contend with external political conflicts with First Nations people and communities. For instance, Metis have been blamed for allowing Europeans to exploit First Nations lands as part of the fur trade, as having “sold out” Manitoba First Nations by having the presumption to negotiate Manitoba’s entry into confederation without fully considering First Nations’ rights and title in areas claimed by the Metis.<sup>119</sup> Other conflicts were caused by Indian agents hiring Metis people as farm instructors, in a bid to persuade Aboriginal people to adapt to a more

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<sup>118</sup> Laura Smyth Groening, *Listening to Old Woman Speak: Natives and AlterNatives in Canadian Literature* (Montréal & Kingston: McGill-Queen’s University Press, 2004) at 131. For more on the psychological aspects of dealing with Indigenous/non-Indigenous identities, see Cathy Richardson, “Cultural Stories and Metis Self-creation” (2005) 18:1 *Relational Child & Youth Care* 55; Cathy Richardson, “Embodying the Oppressor and Oppressed: My Perspective as a Metis Woman” (2001) 1 *International Journal of Narrative Therapy & Community Work* 84; Sylvie Cottell, *My People Will Sleep for One Hundred Years: Story of a Metis Self* (MA Thesis, University of Victoria, 2004) [unpublished]; Teresa LaFramboise, Hardin LK Coleman & Jennifer Gerton, “Psychological Impact of Biculturalism: Evidence and Theory” (1993) 114:3 *Psychological Bulletin* 395.

<sup>119</sup> See Kerry Sloan, “‘A New German-Indian World in the North-West’: A Métis Deconstruction of the Rhetoric of Immigration in Louis Riel’s Trial Speeches” in Hans V Hansen, ed, *Riel’s Defence: Perspectives on His Speeches* (Montréal; Kingston: McGill-Queen’s University Press, 2014) 166.

sedentary, agrarian lifestyle. Some First Nations thinkers have commented that Louis Riel exploited First Nations people for his own political aims.<sup>120</sup>

In the BC context, some research participants commented to me that the Metis are caught in the middle of a political/land dispute between the Okanagan and Shuswap nations, particularly as the area “in the environs of Falkland” falls in a disputed region. According to many research participants, the Metis of the Thompson/Okanagan region have been improving their relations with Shuswap people (John, Wayne, Eldon, Dean), but there are still tensions with the Okanagan (Lottie, Ron, Janet).

Despite the reality of conflicts (and perceived conflicts) between Metis and First Nations, the most difficult to contend with have been Metis people’s conflicts with the state, and with settlers. These conflicts have only been discussed widely in the last 30 or so years. Metis activists have often referred to the Metis as “Canada’s forgotten people”. While many non-Aboriginal Canadians may have been aware of racism and state marginalization directed against First Nations or Inuit people, most were not aware of discrimination against Metis and its results. While those who advocated for Metis settlements in Alberta successfully fought against the displacement of Metis people from their lands, and while various Metis political organizations increased in membership throughout the latter half of the 20th century, the experiences of Metis people were not uppermost in the minds of most Canadians. Maria Campbell’s autobiographical novel *Halfbreed*, published in 1974, was one of the first works to bring to the attention of non-Metis the life of many Metis people who were forced to live on

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<sup>120</sup> For example, see Blair Stonechild & Bill Waiser, *Loyal till Death: Indians and the Northwest Rebellion* (Calgary: Fifth House, 1997).

road allowances and railway rights-of-way, as they had been displaced from their own lands.<sup>121</sup>

This literal marginalization left Metis people vulnerable, often forcing them to leave their homes without any compensation. Metis people often found it difficult to find work, as many employers were leery of employing “shifty halfbreeds”. While Metis people suffered many of the same forms of discrimination as other Aboriginal people – discrimination in housing,<sup>122</sup> employment, having their children forcibly removed and sent to residential schools – Metis people did not have any formal status or protection as Metis because Metis land rights were seen by the Canadian law as having been relinquished via the *Manitoba Act* of 1870, and the entry of Manitoba into confederation. Once the possibility of Canadian expansion had been secured, and more and more settlers were heading west, the Metis were seen as dispensable, and lacked any kind of recognition from the state. This was in contrast to First Nations people, who had the possibilities of Indian status, Indian band recognition and treaty-based benefits.

The idea of the Metis being a “lost” people, particularly in BC, was a common theme in many of the interviews with research participants. Many participants stressed the diasporic nature of Metis people and communities – whether voluntary or involuntary. At the same time, they also asserted that Metis people had attachments to particular territories, and that they were in a process of finding themselves, politically and culturally. Part of community for them was about this rebuilding. This will be discussed further in Chapter 5.

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<sup>121</sup> Maria Campbell, *Halfbreed* (Toronto: McClelland & Stewart, 1973).

<sup>122</sup> See Nathalie Kermaal’s work on the Metis “Canative” cooperative housing initiative in Winnipeg.

## **Academic Conversations and Community Construction**

There have been many academic discussions over the last 50 years that bear on constructions of Metis identities and thus on Metis communities. These include studies of hybridity (creolization, bricolage, metissage, etc.), queerness, diaspora, nomadism, multiculturalism, trans-nationalism, and so-called “post-colonialism”. These discussions are relevant to Metis studies because they are concerned with the nature of peoples and cultures that move between and beyond simplistic (or dualistic) constructions of “ethnicity”, “race”, “gender”, “culture”, “nation,” and “community”. While this literature is vast and discussed in some detail in Chapter 7 in the context of Metis theory, I would like to briefly introduce it here only to the extent that it relates to debates about community construction by the state.

Proponents of hybridity and other “border-crossing” studies, and their various permutations, claim that their work – and the “work” of people that embody their claims – challenges entrenched essentialist notions about how people construct individual and community identities, and how they act on them. In other words, they claim to be making space for the pluralities and complications of human experience that have often been ignored, stereotyped or co-opted by forces such as nationalist movements, state bureaucracies, capitalism and, of course, law. On the other hand, some argue that theories of hybridity, border crossing, and other “transgressive” theories are themselves simply creating new, more finely-divided essentialisms. While some claim that mixing of all kinds is liberating and invigorating (as in “hybrid vigour”), as well as being more accurately descriptive of reality, others find such claims naïve. For instance, Kalra, Kaur and Hutnyk suggest that much of the culture touted as hybrid is

co-opted and commodified, perhaps providing a frisson of excitement for the international cultural elite, but not promoting any real change.<sup>123</sup>

These debates are reflected in arguments about whether so-called “ethnic” or “minority” communities arise organically or whether they are imposed by the state, the law, or other external actors. (Of course, these possibilities are not mutually exclusive.) Kenan Malik contends that many externally recognized communities are actually fabrications of the state that seek to contain and constrain groups: “Multicultural policies ... have not responded to the needs of communities but, to a large degree, have helped *create* those communities by imposing identities on people ...”<sup>124</sup> He continues, “Once political power and financial resources become allocated by ethnicity, then people began to identify in terms of those ethnicities, and only in terms of those ethnicities.”<sup>125</sup> In terms of *Powley*, for instance, as many of the research participants point out, people are “jumping on the *Powley* bandwagon”<sup>126</sup> because they think they can access some form of Metis benefits from the state.

In addition to being artificial, community definitions also become impossibly essentialized.<sup>127</sup>

This gets stretched to ridiculous extremes in journalism-speak, e.g. the “rollerskating community”, the “blogging community”, the “small business community”. Here, “community”

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<sup>123</sup> Virinder S Kalra, Raminder Kaur & John Hutnyk, *Diaspora & Hybridity* (London: Sage, 2005).

<sup>124</sup> Kenan Malik, *Multiculturalism and Its Discontents: Rethinking Diversity after 9/11* (London: Seagull, 2013) at 61 [emphasis in original].

<sup>125</sup> *Ibid* at 62.

<sup>126</sup> A number of research participants used this phrase.

<sup>127</sup> Renuka Sooknanan in “The Politics of Essentialism: Rethinking the ‘Black Community’”, says “I would venture so far as to say that there is no such thing as *the* Black community. I would further argue that “*the* Black community” is a nebulous sign, that doesn’t allow for complexity. It encompasses a stasis appeal and closures which, as a stable sign, makes thinking Black community an impossibility.” In Rinaldo Walcott, ed, *Rude: Contemporary Black Canadian Cultural Criticism* (Toronto: Insomniac Press, 2000) 137 at 141.

is reduced to meaning a group of people, however otherwise disconnected, that have one common interest. Perhaps this is not too surprising, given the proliferation of notional or virtual communities, such as online communities.

### **PART 3      REFLECTIONS ON COMMUNITY CONSTRUCTION**

Before leaving this brief introduction to the complexities of Metis history and territory, and how these inform community identities, I wish to assert that I am not trying to argue here for any one definition of “Metis”; the research participants and other Metis people have varied views, and this topic can be very divisive. What is interesting for the purposes of this study is the variation in views, including among the research participants, and I ponder the significance of this for Metis thinking and legal critique in particular. At the same time, my own view tends to be that, while the Red River Metis are distinctive, as other Metis collectivities may also be, the Metis nation is constantly evolving and expanding, and I would have no objection to recognition of a larger, more expansive Metis nation, just as when the Metis and halfbreeds of Red River joined together in the Resistance of 1869 to achieve common objectives. This topic has occupied many people for many years,<sup>128</sup> and its resolution will likely be elusive for many years to come.

Similarly, questions of what constitutes a nation, and whether the Metis are a nation, are also contentious and not likely to be resolved soon. My own view is that the Metis are at least one “nation” made up of a number of “communities” that are linked in various ways. This is based

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<sup>128</sup> See, for instance, Louis Riel’s second trial speech, in which he explains his plan for a wider Metis Nation that will encompass local and ethnically diverse Metis. He also explains a suggested Metis response to increasing immigration, and speaks of an expanded Metis nation as a confederacy. See Sloan, *supra* note 119.

on my view that Metis ideas of nationhood are akin to notions of expansive, interconnected polities that create cultural and legal norms. Based on my experience as a community member, and as a member of the Metis Nation of Greater Victoria governing council, both local Metis communities and regional/provincial expressions actually create inter-societal norms. I am not sure either “nation” or “community” fully captures how Metis people conceptualize themselves.

All of the research participants said they thought of the Metis as a nation or people, and of Metis communities and Metis political organizations as subsets of the Metis nation/people. This echoes much of the evidence led in the BC and other Metis rights cases, including by the claimants’ expert witnesses in *Laviolette*, *Belhumeur* and *Goodon*. This will be discussed further in Chapters 5 and 9. Ultimately, decisions about identity are both private and communal and, in the context of Metis communities, will be made as an incident of self-determination and collective consensus building. The tensions between nationalist and diasporic expressions of Metisness will be explored in Chapter 7.

The view espoused in *Powley* and by the courts that follow it is that there should be reasonably identifiable *cultural* criteria for Metis community membership, criteria that purport to be more relevant than political criteria. Cultural criteria are distinguishable from indicators of citizenship or nationality/sovereignty, or from membership in Metis political organizations. This undercuts the assertion and practice of political power by Metis, and reduces their status to that of a mere cultural group.

### **BC Context: The Missing Metis?**

While, as addressed in Part 1, one of the main debates about the existence of Metis people in BC revolves around questions of authenticity (are they “real”, i.e. Red River, Metis – e.g. recent migrants only?), other debates are arguably as vigorous, but perhaps more subtle. For instance, various people suggest there can be no true historic Metis communities in BC because Metis collectivities in the province lack political cohesion, historicity and continuity. While some Metis people may agree with this, I would like to suggest a reconsideration of the appropriateness of these questions, as they assume the isolation of Metis people in BC. For instance, why does separate political cohesion for Metis in BC have to be established if, for instance, the larger Metis nation has already crystallized? (Jean Teillet addresses this in the appeal factum in *Willison*.) Why can it not be seen that Metis in BC – as with Metis in Alberta or Saskatchewan – are simply members of this larger nation that has already politically cohered? (This is the view taken by MNBC.) Of course, there may be localized instances of “ethnogenesis”, such as that described by Brenda Macdougall among the Metis of northern Saskatchewan,<sup>129</sup> but this does not require such local communities to be disassociated from the larger Metis nation.

Based on both documentary research and interviews with the research participants, I have concluded that Metis people maintained ties over great distances, travelled over great distances, and may or may not have settled permanently anywhere. This does not necessarily imply they lacked political will or agency. Questions about whether Metis people have been in

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<sup>129</sup> Maccdougall, *supra* note 95.

BC long enough are based on the idea that today's boundaries of BC were relevant to people who lived and worked without much regard for colonial boundaries, even if we ignore the fact that the present boundaries of BC did not exist during the "post-contact, pre-control" period of 1858-64 established for BC in *Willison*. Such questions also ignore the fact that Metis people often congregated around hubs, but didn't necessarily settle there. This does not mean they lacked cohesion.

Did Metis people actually identify as Metis in BC? This is another question that is hotly debated, but I think this question could be put to other Metis over time on the prairies and it would be seen that people may or may not have identified specifically as Metis, or may not have always identified as Metis. Even the term "Metis" only began to be uniformly used around the middle of the last century. To say that people constantly ran around waving infinity flags and proclaiming their Metisness is simply historical revisionism. People also expressed other alliances, or might have been members of other communities, but this did not detract from their identity as Metis.<sup>130</sup> On a nationalist citizenship model, this would not be problematic, given the possibility of dual citizenship.

One of the claims against Metis persistence in BC is that BC Metis political organizations are relatively recent creations.<sup>131</sup> There are currently two BC Metis political organizations with large memberships: the Metis Nation of British Columbia (MNBC) and the BC Metis Federation,

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<sup>130</sup> See John Borrows, *Physical Philosophy* [forthcoming]; Ghislain Otis, "Territoriality, Personality, and the Promotion of Aboriginal Legal Traditions in Canada" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: University of British Columbia Press, 2007) 136.

<sup>131</sup> The claim that recent organizations are inauthentic is one way the state "dams/damns" Indigenous peoples. See Borrows, *ibid*.

a group that recently split off from MNBC. Both MNBC and the BCMF have “charter communities”, communities that are politically linked to their parent organizations, but that may have local members who are not provincial-level members. There are also independent Metis communities in BC, such as the Kelly Lake Metis Association (although smaller communities may have affiliation arrangements with MNBC or BCMF). The provincial government only has official relationships with the MNBC and BCMF, although KLMA has participated in various government consultation processes. While the government finds it more comprehensible and more convenient to deal with larger “umbrella” groups, the *Powley* test says that it is “communities” that are rights-holding entities, and that membership in a modern political community is not sufficient to ground Metis rights. This creates a double bind, because provincial-level Metis political organizations were created to both help facilitate relationships with provincial governments and to govern other (internal) Metis interests.

Can Canadian law take account of the complexities of BC Metis history, and of current Metis political developments, given that the law’s concern is not simply the existence or political construction of Metis communities, but their persistence and continuity from the time of “European control” to the present? The lack of research done about the continuity of some communities leads to debates about whether “distinct” Metis communities have persisted in BC. Further research is therefore required. Based on the sources referred to in this chapter, on the interviews for this study, and on my acquaintanceship with Metis people in BC of varied origins,<sup>132</sup> I suspect that in many cases, local Aboriginal mixed ancestry people and migrant

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<sup>132</sup> My mother, whose parents came to BC in 1948 from Saskatchewan, had French, Cree, Saulteaux, Irish, Scottish, Six Nations, Dene and Welsh ancestry, as well as likely Melungeon ancestry. The Melungeons are thought to be a

Metis came together to create new Metis communities which became distinctive and truly indigenous to BC,<sup>133</sup> and continue to be affiliated with Metis communities across North America. There are also likely communities of Aboriginal mixed ancestry people in BC who do not identify as Metis.<sup>134</sup> Of course, because of racism and self-silencing (see Chapter 6) there may be many families in which information about Metis ancestry has historically been suppressed.<sup>135</sup>

While I suspect that the courts view Metis history in BC as fractured, and unconvincing as “real” history, it follows many patterns common to Metis – and Canadian – history generally (see Chapter 8). The challenge is to admit multiplicity as a part of Metis history without negating the existence of real (and rights-bearing) Metis communities.

## CONCLUDING THOUGHTS

In this chapter, I sought to illustrate the complexities of Metis histories and territories, and how these complexities have contributed to constructions of community.

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people of US Native American, Black and European ancestry who, like the Metis, intermarried over many generations, creating their own communities. Historically, they lived mostly in Kentucky and West Virginia. My current genealogical research, as well as some family stories, suggests this is the ancestry of my grandfather’s paternal line. For an interesting article on the Melungeons as Metis, see Jason Adams, “The Metis Heritage of the Sizemore Family” (2001) *Multiracial Activist*, online: <<http://multiracial.com/site/index.php/2001/10/01/the-metis-heritage-of-the-sizemore-family/>>.

<sup>133</sup> These communities are not bounded by the borders of BC, but spill over into neighbouring provinces, territories and US states.

<sup>134</sup> The political aspects of identification as Metis in BC are beyond the scope of this dissertation. So are the political implications of accepting court-based definitions of Metis identity.

<sup>135</sup> This happened in the families of a number of the research participants (Lois McNary, Wayne Bousquet, Sandy Milner), and happened in one branch of my own family that lived for three generations in BC. Prairie branches of my family openly identify as Metis.

It may be that these complexities and contentions are not fully explicable or resolvable.

Nevertheless, Metis people exist – have had and still have governments, law, culture, religion, art, history – and language.<sup>136</sup>

In his book on Michif – the Metis language(s) that have French nouns and Cree verbs, Peter Bakker states “Metis is an impossible language”.<sup>137</sup> While this may sound hyperbolic, Bakker says that some linguists literally doubt the existence of Michif, because it doesn’t fit into the model of how a mixed language should look. First, Michif is a problem for the “family tree” language model, which states that every language has one parent language. As Michif is neither Algonquin in its entirety or Indo-European (Romance) in its entirety, it presents a classification problem. Second, Michif appears to invalidate theories of language contact, which purport to describe processes of contact-induced change. Third, Michif is a language with “separate sound systems, morphological endings, and syntactic rules”; thus it “challenges all theoretical models of language”.<sup>138</sup>

Despite the claims of linguists and language theoreticians, Michif exists, though “impossible”. I would like to claim that Metis identities, communities, territories and histories, though equally “impossible”, exist as well.

In the next chapter, I will illustrate how colonialist dualisms underlie the development of Metis rights law, and the hunting cases in BC in particular.

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<sup>136</sup> See Zalfa Feghali, “Conversations That Never Happened: The Writing and Activism of Gloria Anzaldúa, Maria Campbell and Howard Adams” in Gillian Roberts & David Stirrup, eds, *Parallel Encounters: Culture at the Canada-US Border* (Waterloo, ON: Wilfrid Laurier University Press, 2013) 207.

<sup>137</sup> Peter Bakker, “A Language of Our Own” in Rita Flamand, *Michif Conversational Lessons for Beginners* (Winnipeg: Metis Resource Centre, 2002) i at ii.

<sup>138</sup> *Ibid* at i-ii.

## **A COMMUNITY DIALOGUE**

*A Metis legal colleague told me lately he agreed with me that there were many ways of being Metis. But he argued that there needed to be some definition of “community” in the law, otherwise “all sorts of people” could start illegitimately claiming Metis rights. When I asked him what he meant, he said that he didn’t think urban, assimilated Metis should have constitutionally protected harvesting rights.*

*Rather taken aback, I asked him whether he didn’t think that the modern reconstitution of Metis communities was valid. He replied “Yes, but only in the political sense. Not in the cultural sense.” Efforts to preserve “living” traditional culture were valid, he asserted, but “true community” could not be re-created by urban people who merely got together once a month and dressed up in sashes and beaded jackets.*

*As an (arguably) assimilated and (mostly) urban Metis, I asked my colleague if he meant the inherent complexity of Metis (my) history should mean that some Metis (me) would not have constitutionally protected Aboriginal harvesting rights? Perhaps this is as it should be – aren’t such rights connected to territory? What is Metis territory? That was another tricky question. But I left that for a moment.*

*I asked another question, more to myself than to him, “Do First Nations or Inuit lose their Aboriginal harvesting rights if they live in cities? Or in other communities?” Then I looked at him directly. “Are you a hunter?” “Yes.” “Well,” I said, “Don’t you live in a city?” He thought for a moment. Musing, he said, “Well, I didn’t always, and I still go back to my home*

*community in Saskatchewan to hunt.” I said, “What is your real home? Here or there?” He thought again, “Both, I guess. What about you? Where’s your home community?” “Well,” I said. “I grew up in Coquitlam, BC; I’ve lived in Nova Scotia, Ontario, Alberta, overseas, and most recently in Victoria. But I’ve spent a month or two almost every year in the country in the southern interior of BC, where most of my relatives live. I guess I feel at home there and on the coast, but my parents and grandparents are from the prairies and I lived there too ... all of those places are home in a way.” “Are you a hunter?” he asked. “No, although my grandpa taught me how to shoot. But my grandpa and uncles hunted, and my grandpa trapped. Mostly, I harvest plants and mushrooms for food and medicine, and I’ve occasionally gone fishing. Once, when I lived in Vancouver, and went fishing at the mouth of the Capilano River without a licence, I almost got nicked. Actually, the fisheries guys tried to get close to our boat to see our licences, but every time they approached, a big wave came, and they gave up.” I smiled at the memory. “Of course, this was before Powley, even before I became a lawyer. I wouldn’t want you to think, as an urban Metis with no rights, that I would deliberately do anything an officer of the court wouldn’t do.” I winked, and he laughed. “Well, it’s your paper,” he said, “So I’ll give you the last word.”*

## Chapter 3

### THE LEGAL GENEALOGY OF THE COMMUNITY CONUNDRUM

#### INTRODUCTION

“The Supreme Court’s definition of a local, stable and continuous community as the applicable rights-bearing entity seems to be at odds with the historic reality of almost all aboriginal peoples in Canada.”

Jean Teillet, *Métis Law Summary* (2013)

“Our legal histories have been built on a foundation of fiction and magic.”

Jacinta Ruru, keynote address at conference entitled “Treaty Right(s): Re-Imagining Indigenous Treaties”, Victoria, BC, January 16, 2015

Most of the literature that deals with the law and Metis peoples deals with the definition of “Metis”,<sup>1</sup> which is not defined in either the *Constitution Act, 1982*,<sup>2</sup> or in the *Powley* case.<sup>3</sup> The definition of who is a Metis person, or which Metis persons can constitute a Metis community is left up to the communities to determine. This has led to a great deal of research (and other kinds of searching) on the part of Metis people, governments, lawyers and academics.

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<sup>1</sup> For example, see Cathy Bell, “Who Are the Metis in s. 35?” (1991) 29 *Alberta Law Review* 351; Paul LAH Chartrand, “The Hard Case of Defining ‘The Metis People’ and Their Rights: A Comment on *R. v. Powley* (2003) 12:3 *Constitutional Forum* 84. In this article, Chartrand says *Powley* was misguided, as it potentially infringes Indian rights; in any event, “Metis” should mean the Red River Metis, as the Metis are not a racial group. This article was written before the SCC decision. See also Paul LAH Chartrand, “Defining the ‘Métis’ of Canada: A Principled Approach to Crown-Aboriginal Relations” in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction and Governance* (Toronto: Irwin Law, 2008) 27. Chartrand has also discussed the idea of “community” in *Powley* in his work.

<sup>2</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>3</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff’d [2000] OJ No. 99 (Ont SC); aff’d [2001] OJ No. 607 (Ont CA); aff’d 2003 SCC 43, [2003] 2 SCR 207 [*Powley*, or *Powley* SCC].

However, the question of the meaning of “community” in *Powley* and the cases that follow it is less frequently discussed.<sup>4</sup>

Given the importance of the *Powley* case, it is not surprising that it is the subject of many critiques.<sup>5</sup> In a search on QuickLaw, which tends to exclude social science and even socio-legal works, I found 63 articles discussing *Powley*, and many others discussing cases that follow it.<sup>6</sup> In contrast, on QuickLaw I found only two published articles that discuss *Willison*,<sup>7</sup> two that discuss *Howse*,<sup>8</sup> and one that discusses *Nunn*.<sup>9</sup> The article that discusses *Nunn* also discusses

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<sup>4</sup> Works that do discuss it include Jean Teillet, *Métis Law in Canada* (Toronto: Pape Salter Teillet, 2013), online: <[www.pstlaw.ca/resources](http://www.pstlaw.ca/resources)> [Teillet, *Métis Law in Canada*]; Brent Brian Olthuis, *The Constitution's Peoples: A Robust and Group-Centred Interpretation of the Constitution Act, 1982, in Light of R. v. Powley* (LLM Thesis, University of Victoria, 2005) [unpublished] [Olthuis, *The Constitution's Peoples*]; Brent Olthuis, “The Constitution’s Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act, 1982*” (2009) 54 McGill Law Journal 1 [Olthuis, “Constitution’s Peoples”]; Andrea Horton & Christine Mohr, “*R. v. Powley*: Dodging *Van der Peet* to Recognize Métis Rights” (2005)30 Queen’s Law Journal 72; and Chris Andersen, “Settling for Community? Juridical Visions of Historical Metis Collectivity in and after *R. v. Powley*” in Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, eds, *Contours of a People: Metis Family, Mobility, and History* (Norman: University of Oklahoma Press, 2012) 392. Arthur J Ray, the Powleys’ expert witness, talks about “Defining Métis Communities and Customs” in the aftermath of *Powley* in Chapter 6 of his book *Telling it to the Judge: Taking Native History to Court* (Montréal & Kingston: McGill-Queen’s University Press, 2011).

<sup>5</sup> Most criticism is negative. See, for example, Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2011) ; Jeremy Patzer, “Even When We’re Winning, Are We Still Losing?” in Christopher Adams, Gregg Dahl & Ian Peach, eds, *Métis in Canada: History, Identity, Law & Politics* (Edmonton: University of Alberta Press, 2013) 307. However, there are some authors who write with approval, at least to some extent, about *Powley*. For instance, Ian Peach describes the court in *Powley* as attempting to move away from First Nations-based models of Aboriginal rights, which had been used in pre-*Powley* cases: Ian Peach, “The Long, Slow Road to Recognizing Métis Rights” in Christopher Adams, Gregg Dahl & Ian Peach, eds, *Métis in Canada: History, Identity, Law & Politics* (Edmonton: University of Alberta Press, 2013) 279. Lori Sterling and Peter Lemmond approve of *Powley* as a positive “first step” in elucidating Métis rights. Their perspective is interesting, given that both authors were counsel for the crown in *Powley* at the Ontario Court of Appeal. See Sterling & Lemmond, “*R. v. Powley*: Building a Foundation for the Constitutional Recognition of Métis Aboriginal Rights” (2004) 24 Supreme Court Law Review (2d) 243. Jean Teillet, in her *Métis Law Summary*, *ibid*, points out that *Powley* was the first case in which the Métis were identified as a rights-bearing entity.

<sup>6</sup> For a critique of the crown’s mostly successful strategies in expanding the type of evidence required from claimants in Métis rights cases after *Powley*, see Jean Teillet, “Old and Difficult Grievances” (2004) 24 Supreme Court Law Review (2d) 291.

<sup>7</sup> *R v Willison*, [2005] BCJ No. 924; rev’d (2006) BCSC 985 [*Willison* or *Willison BCSC*].

<sup>8</sup> *R v Howse, et al*, [2000] BCJ No. 905 (BC Prov Ct); rev’d [2002] BCJ No. 379 (BCSC); leave to appeal to BCCA granted [2003] BCJ No. 508 (BCCA) [*Howse; Howse BCSC*].

*Willison*. I did find a few other articles elsewhere (for example, on the Gabriel Dumont Institute website<sup>10</sup>) that mention the BC cases, other than in passing. Jean Teillet, Chris Andersen, and Jean Barman and Mike Evans discuss *Willison* (and *Howse* and *Nunn* to some extent) and Sébastien Grammond and Lynne Groulx provide an interesting analysis of *Howse*.<sup>11</sup> In addition, I discovered some analysis of *Willison* and the other BC cases in an unpublished Masters thesis by Bradley Shaun Bellemare,<sup>12</sup> and an unpublished law school term paper by Chris Gall.<sup>13</sup> Both these papers were written by Metis students.

In this chapter, I hope to help fill in the gaps in the literature by addressing the meaning of “community” as used in *Powley*, and by discussing the BC Metis rights jurisprudence.

In Part 1, I provide a brief introduction to how *Powley* has been applied in other Metis rights cases.

In Part 2, I review the background to the creation in *Powley* of the tests for the existence of an historic Metis rights-bearing community, a contemporary Metis rights bearing community, and continuity between the historic practice and the contemporary right. This review suggests that,

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<sup>9</sup> *R v Nunn*, [2003] BC No. 3229 [*Nunn*].

<sup>10</sup> Online: <[www.gdins.org](http://www.gdins.org)>.

<sup>11</sup> Sébastien Grammond & Lynne Groulx, “‘Finding’ Metis Communities” (2012) 32:1 *Canadian Journal of Native Studies* 33.

<sup>12</sup> Bradley Shaun Bellemare, *La Chaas: The Métis Constitutional Right to Hunt in the Canadian Legal Consciousness* (LLM Thesis, University of Saskatchewan, 2006) [unpublished].

<sup>13</sup> Chris Gall, “Otipemisiwak ‘The People Who Command Themselves’: The Definition of Métis Community, and What It Should Be”, (nd), paper written for Professor Janna Promislow at Thompson Rivers University Faculty of Law [unpublished]. Another (former) Metis student who discusses *Willison* briefly is Bruce Leslie Poitras, “By Birth, Adoption or Other Means: Being, Becoming, and Belonging as Métis in British Columbia”, (nd), paper written for Political Science 633, University of Victoria [unpublished]. Poitras suggests an expansive definition of Metis in the BC context, but one that is rooted in Metis political agency and community.

although elements of the *Powley* test derive from *Van der Peet*<sup>14</sup> and other Aboriginal rights cases, the tests for finding Metis communities have no clear derivation, but reflect European-influenced notions of community.

In the third part, I briefly review the *Powley* case, and the parts of the test that help to create the community conundrum. I also discuss the BC Metis rights cases in light of *Powley*, showing why the *Powley* tests for community resulted in losses for the Metis claimants in *Willison*, *Nunn* and *Howse*.

## **PART 1      POWLEY AND ITS APPLICATION TO OTHER METIS RIGHTS CASES**

On October 22, 1993, Steve and Roddy Powley shot a bull moose near Sault Ste Marie, Ontario. They did not have a provincial licence. The Metis father and son tagged their catch with a Metis association membership card and a note that read “Shot to feed my family for the winter”. The Powleys were subsequently charged by Ontario Natural Resources for hunting moose without a licence, and for unlawful possession of moose.<sup>15</sup> Thus began the case of *R v Powley*, undoubtedly the most important Metis rights case in the history of Canadian jurisprudence.

In 1998, the trial judge dismissed the charges against the Powleys, ruling that they were exempt from Ontario hunting enactments by virtue of a Metis right to hunt that was protected by s. 35(1) of the constitution.<sup>16</sup> The crown appealed this decision and, despite losing at the Ontario

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<sup>14</sup> *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*].

<sup>15</sup> The Powleys were charged under sections 46 and 47(1) of the Ontario *Game and Fish Act*, RSO 1990, c G-1.

<sup>16</sup> *Supra* note 2. *R v Powley* (1998), [1999] 1 CNLR 153 (Ont Ct (Prov Div)) [*Powley* trial, or *Powley OPC*].

Superior Court of Justice<sup>17</sup> and the Ontario Court of Appeal,<sup>18</sup> applied for leave to appeal to the Supreme Court of Canada. On September 19, 2003, the Supreme Court unanimously upheld the trial decision, finding that the Powleys could exercise an Aboriginal right to hunt for food as incident to their membership in the “rights-bearing” historic Metis community of Sault Ste Marie.

When *Powley* came out, it was hailed as a remarkable win. The Supreme Court of Canada was praised for attempting to be sensitive to Metis self-government and identity issues. Of course, it was a key development in Metis jurisprudence, and a victory for the Powley family. It was also a win for Metis from Sault Ste Marie, Ontario, and for other Metis people whose families were connected over time to fairly static, bounded communities seen to be “historic”. For those outside such charmed realms, however, there was not much hope of achieving recognition for Metis rights in the Canadian courts. The most successful Metis rights cases that follow *Powley* originated in the so-called “Metis heartland” of the prairies: *Belhumeur*,<sup>19</sup> *Lavolette*<sup>20</sup> and *Goodon*.<sup>21</sup> In these cases, Metis communities in Manitoba and Saskatchewan were recognized as having fairly large traditional territories. While this is a positive development, Metis rights claimants from communities outside this pale have never been successful. For instance, the Québec Superior Court recently denied constitutional protection to the land occupation and harvesting rights of Metis in the Domaine-du-Roy and Seigneurie de

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<sup>17</sup> (2000), 47 OR (3d) 30 (SCJ) [*Powley OSC*].

<sup>18</sup> (2001), 53 OR (3d) 3 (CA) [*Powley OCA*].

<sup>19</sup> *R v Belhumeur*, 2007 SKPC 114 [*Belhumeur*].

<sup>20</sup> *R v Lavolette*, 2005 SKPC, [2005] 3 CNLR 202 [*Lavolette*].

<sup>21</sup> *R v Goodon*, 2008 MBPC 59 [*Goodon*].

Mignan, a large area of central Québec. The court concluded that while a Metis community in this area may have existed as a result of “significant interbreeding”, the evidence did not establish the existence of “an identifiable, distinct and homogeneous” Metis community, and therefore did not meet the *Powley* test.<sup>22</sup> Similarly, Ontario Metis have failed (e.g. *Beaudry*,<sup>23</sup> *Fortin*,<sup>24</sup> *Gagnon*,<sup>25</sup> *Guay*<sup>26</sup> – although there was one successful pre-*Powley* case, *Buckner*<sup>27</sup>), as have Metis in the Maritimes (e.g. *Caissie*,<sup>28</sup> *Chiasson*,<sup>29</sup> *Daigle*,<sup>30</sup> *Hopper*,<sup>31</sup> *Vautour*<sup>32</sup>). One judge goes so far as to opine that there are no Metis in the Maritimes (*Castonguay*<sup>33</sup>). Even in Alberta, Metis claimants have failed to meet the *Powley* test, based on the supposed lack of evidence going to community existence and continuity (*Hirse Korn*<sup>34</sup>). It is not clear whether even the Alberta Metis settlements, created in the 1930s, are considered historic

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<sup>22</sup> *Québec v Corneau*, 2015 QCCS 482.

<sup>23</sup> *R v Beaudry*, [2006] OJ No. 790.

<sup>24</sup> *R v Fortin*, [2006] OJ No. 1166.

<sup>25</sup> *R v Gagnon*, [2006] OJ No. 4738.

<sup>26</sup> *R v Guay*, [2006] OJ No. 1165.

<sup>27</sup> *R v Buckner* [1997] OJ No. 1165 is an interesting case because it says that Mr Buckner, who identifies as Metis and is from the Maritimes, but was hunting in Treaty 3 territory in Ontario, has Metis rights in Ontario, as he was accepted as a member of the Metis Nation of Ontario. This decision, in effect, affirms Metis law, because it recognizes the right of the MNO to determine its own citizenship and, potentially, to share the use of their hunting territories with non-citizens.

<sup>28</sup> *R v Caissie*, 2012 NBPC 1.

<sup>29</sup> *R v Chiasson*, [2004] NBJ No. 62 (NBQB); leave to appeal denied 2005 NBCA 82.

<sup>30</sup> *R v Daigle*, 2003 NBPC 4.

<sup>31</sup> *R v Hopper*, [2004] NBJ No. 107 (NBPC); [2005] NBJ No. 477 (NBQB); [2008] 3 CNLR 337 (NBCA).

<sup>32</sup> *R v Vautour*, 2010 NBPC 39.

<sup>33</sup> *R v Castonguay, et al*, [2003] NB No. 496.

<sup>34</sup> *R v Hirsekorn*, [2010] AJ No. 1389; aff'd in part 2011 ABQB 682; aff'd 2013 ABCA 242; leave to appeal to SCC denied.

(*L'Hirondelle*<sup>35</sup>). In the north, despite the inclusion of Metis in the Sahtu Dene and Metis land claim negotiations, the existence of Metis communities is contested by the Crown (*Paul*<sup>36</sup>).

In the north, including northern Alberta and Saskatchewan, many Metis have Dene ancestry, as Metis migrated north in many waves, sometimes even before the Red River community was thought to have crystallized politically. Of course, this claim is contentious, as is the characterization of pre-Red River people of mixed ancestry from the Great Lakes as Metis. While Metis in the north tend to be more likely to be recognized as Metis,<sup>37</sup> even for the purpose of negotiating land claims,<sup>38</sup> the Metis from BC are rarely recognized as being legitimately Metis, even though many of them are the descendants of Red River Metis, or proto-Red River people, who sometimes intermingled with local Metis and other local Indigenous people, arguably creating their own community(ies).<sup>39</sup> BC is an interesting case for that reason, and it is telling that one of the most northerly Metis communities in BC, which overlaps with Metis territory in Alberta and the NWT, has been considered worthy of being consulted by the BC provincial government in the Site C Dam consultations.

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<sup>35</sup> *L'Hirondelle v Alberta (Minister of Sustainable Resource Development)*, [2011] AJ No. 1108 (ABQB); rev'd [2013] AJ No. 11 (ABCA). This case overturned *R v Lizotte*, 2009 ABPC 287, in which the court held that a Metis settlement identification card could be proof of membership in a s. 35 rights-bearing Metis community. The crown in *Lizotte* argued the claimant should have to prove an ancestral connection to the territory surrounding Paddle Prairie Metis Settlement back to the late 1800s, although Paddle Prairie was not established by statute until the late 1930s.

<sup>36</sup> *Paul and North Slave Métis Alliance v Canada, NWT and Dogrib Treaty 11 Tribal Council*, 2002 FCT 615.

<sup>37</sup> See, for example, Richard Slobodin, *Metis of the Mackenzie District* (Ottawa: Canadian Research Centre for Anthropology, St Paul University, 1966).

<sup>38</sup> For an insightful description of the inter-Indigenous divisions caused by the Sahtu Dene/Metis Comprehensive Claim process, see Carly A Dokis, *Where the Rivers Meet: Pipelines, Participatory Resource Management, and Aboriginal-State Relations in the Northwest Territories* (Vancouver: University of British Columbia Press, 2015).

<sup>39</sup> See, for instance, Jean Barman & Mike Evans, "Reflections on Being, and Becoming, Metis in British Columbia" (Spring 2009) 161 BC Studies 59; Mike Evans, Jean Barman & Gabrielle Legault, "Metis Networks in British Columbia: Examples from the Central Interior" in St-Onge, Podruchny & Macdougall, *supra* note 4, 331.

To discover why Metis in other parts of BC have not been seen as part of legitimate communities by the courts, in the next part I briefly trace the genealogy of the courts' understandings of Metis communities. A close reading of key cases, along with an analysis of *Powley* itself will reveal that the current case law derives from invented concepts that have more in common with magic than with realism.

## **PART 2        THE *POWLEY* CASE AND TESTS FOR “COMMUNITY”**

*Powley* adapts for Metis claimants the *Sparrow*<sup>40</sup> and *Van der Peet*<sup>41</sup> tests for establishing Aboriginal rights. According to the Supreme Court of Canada in *Van der Peet*, First Nations people claiming an Aboriginal right must show that the impugned practice, tradition or custom was integral to their community's “distinctive culture” prior to “contact” with Europeans.<sup>42</sup> *Sparrow* and *Van der Peet* were cases about First Nations fishing rights. The test was modified in *Adams*, another First Nations fishing case.<sup>43</sup> In this case, the court held that “contact” meant “effective control” by European (French and British) colonial governments, further defined as being when European laws were recognized and adopted. For Metis people proving an Aboriginal right, the court in *Powley* modified the time period to be “post-contact but pre-control”, taking into account that Metis societies necessarily arose after contact.<sup>44</sup> Metis

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<sup>40</sup> *R v Sparrow*, [1990] 1 SCR 1075 (SCC) [*Sparrow*].

<sup>41</sup> *Van der Peet*, *supra* note 14.

<sup>42</sup> This test is taken from a phrase in *Sparrow*, *supra* note 40 at 1099 that talks about the salmon fishery as being “integral to the distinctive culture” of the Musqueam. See *Van der Peet*, *ibid*, para 46.

<sup>43</sup> *R v Adams* [1996] 4 CNLR 1 (SCC) [*Adams*].

<sup>44</sup> *Powley*, *supra* note 3 at para 37. *Delgamuukw v BC*, [1997] 3 SCR 1010 at para 115.

communities, not individuals, needed to have been exercising their rights post-contact but pre-control, in order for Metis individuals to prove the existence of their rights.

This strange requirement stems from the judicial construction of Aboriginal rights as collective, as being held by Aboriginal “communities” or distinctive collectivities.<sup>45</sup>

While the identification of First Nations or Inuit communities was thought to be relatively unproblematic, the court in *Powley* recognized that identifying a Metis community might be more difficult. It stated, “While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers.”<sup>46</sup> Nevertheless, the court adopted the *Van der Peet* test for Aboriginal rights – that the Aboriginal community to whom the rights belong must be “historic” (before European control), and the “practices, customs and traditions” for which protections are sought must also have been practised “historically” (before European control).<sup>47</sup> Further, there must be continuity between historic and modern community practices.

In *Van der Peet*, the court reasoned that a “significant corollary” of community-based hunting rights is that they are site-specific.<sup>48</sup> The court uses “group” or “community” or “society” fairly

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<sup>45</sup> *Sparrow*, *supra* note 40 at para 68. I have problematized the notion of “community” as opposed to “society” or “nation” in Chapter 2. The nomenclature describing such collectivities often varies across Aboriginal rights cases, even within one case.

<sup>46</sup> *Powley SCC*, *supra* note 3 at para 29.

<sup>47</sup> *Van der Peet*, *supra* note 14 at paras 45-47, 55-74.

<sup>48</sup> *Ibid* at 559, cited in *Powley OCA*, *supra* note 18 at para 19.

interchangeably, and sometimes conflates these with “culture”.<sup>49</sup> While all of these ideas percolated into what became the *Powley SCC* decision, and were discussed at the previous levels of court, the necessity of determining whether there was a historic community in a discrete geographical area, with continuity to a modern community, was not stressed until the *Powley OCA* decision.

When the Ontario Court of Appeal in *Powley* cites *Van der Peet* at page 559 on the “significant corollary of the communal nature of aboriginal rights,” it changes the passage slightly: “... the rights specific to the site and the history of each particular community are ‘not general and universal; the scope and content must be determined on a case-by-case basis. The existence of the right will be specific to each aboriginal community.’”<sup>50</sup> That is, the phrase “the rights specific to the site and the history of each particular community” does not actually appear at 559 in *Van der Peet*. In fact, the passage does not use the word “site” at all; “history” is linked to “practices, customs and traditions” rather than to “site”. Although the court in *Van der Peet* does mention the “specific history of the group claiming the right”, the concern is really with “the practices, customs and traditions of the particular aboriginal community claiming the right”. Arguably, *Powley* has it the other way around – Metis claimants are expected to provide evidence of “practices, customs and traditions” in order to show they have history at a particular site.<sup>51</sup> The origin of the phrase “the rights specific to the site and the history of each particular community” is not clear, although it would be interesting to look at the crown’s factum on this point.

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<sup>49</sup> Chris Andersen also makes this point in “Settling for Community?”, *supra* note 4.

<sup>50</sup> *Powley OCA*, *supra* note 18 at para 90.

<sup>51</sup> Jean Teillet also makes this point in *Métis Law Summary*, *supra* note 4 at 1-38.

### **Application of Pre-SCC *Powley* Cases to Pre-*Willison* Cases in BC**

The interest of the Ontario Court of Appeal in determining whether there was a historic community in a discrete geographical area, with continuity to a modern community, is why in both *Howse BCSC* and in *Nunn*, even though those cases were based on *Powley OCA*, not on the SCC decision, there was still a community connection test of sorts. This explains the difference in the outcome between the trial in *Howse* in 2000, which was based on O'Neill J's decision in *Powley* at the Ontario Superior Court, and the appeal in *Howse* in 2001, based on the more recently-decided *Powley OCA*. The focus on the community connection test, although not as pithily defined as in *Powley SCC*, was the reason the original *Howse* decision was overturned, and was also the reason the court found against the Metis claimant in *Nunn*.

In *Howse*, members of a Metis community in Cranbrook, BC took part in an organized subsistence hunt. Six Metis were charged with, among other things, hunting moose and deer without proper licences. Although the defendants were acquitted at trial, the crown was successful on appeal, and the appeal judge found that there was not enough evidence to support a claim that there was a Metis rights-bearing community in the Kootenays. No expert evidence was adduced at trial; most of the evidence was given by the defendants themselves. In 2003, leave to appeal to the British Columbia Court of Appeal was granted (as the Supreme Court decision in *Powley* was then still pending), but the appeal was not pursued.

In *Nunn*, the BC Provincial Court found that there was insufficient evidence to prove there was a contemporary or historic Metis community in the Okanagan Valley capable of sustaining Metis Aboriginal rights. Mr Nunn (who was also certified as an expert witness in *Willison*) was

granted leave to appeal to the Supreme Court of BC, but subsequently abandoned his appeal.<sup>52</sup> He was self-represented.

The trial judge in *Howse*, Waurynchuk PCJ, relied on the Ontario Superior Court decision of O’Neill J in *Powley*, which is arguably the most progressive of all the *Powley* decisions.

Waurynchuk PCJ agreed with O’Neill J that “objectively determinable ties of a claimant to a local Métis community were unacceptable and not required.”<sup>53</sup> As well, he agreed with O’Neill J in rejecting “... the argument that the requirement of acceptance ‘by the Métis’ could be satisfied only if given by a local Métis community in continuity with an historic Métis community”,<sup>54</sup> holding that organizations such as the Metis Nation of Ontario could provide community acceptance. This is interesting, because later the SCC in *Powley* rejects the idea that “modern” Metis political organizations can attach Metis rights. As well, while O’Neill J follows Aboriginal rights jurisprudence in holding that Aboriginal harvesting rights are collective, he allows that “each individual in the community does not have to meet an individual cultural means test”.<sup>55</sup> This is supported by Waurynchuk PCJ as well.

*Howse* follows the two-stage test from *Powley OSC*, the first stage being to identify the nature of the right; the second stage being to determine whether the “practice, custom or tradition” claimed as a right was “an integral part of the distinctive culture of the local aboriginal

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<sup>52</sup> Mr Nunn is also a Captain of the Hunt, a designation pertaining to the traditional Metis law of the hunt, which has been formally enshrined in the resource management policies of the Metis Nation of BC. See the *BCMANR Policy* Version 1.0, ratified November 15, 2006, amended December 6, 2006. Available online: <[www.bcmnr.ca/files/BCMANR%20Policy.pdf](http://www.bcmnr.ca/files/BCMANR%20Policy.pdf)>.

<sup>53</sup> *Howse*, *supra* note 8 at para 12(5).

<sup>54</sup> *Ibid* at para 12(7).

<sup>55</sup> *Ibid* at para 12(6).

community ... in the past ... and has remained an integral part of the culture of the community ...”<sup>56</sup> On analysis, Waurynchuk PCJ finds the answers to these questions straightforward: “I find that from the earliest of times when the fur trade penetrated west of the Rocky Mountains people of Métis origin lived off the land by hunting wildlife, fishing and food gathering in the Rocky Mountain Trench where the organized October 1997 hunt took place.”<sup>57</sup> On the second point, he holds that, “The evidence presented at trial would support the conclusion that hunting was an integral part of the Métis culture prior to the assertion of effective control by the European authorities. The evidence indicates that the Métis lived off the land for subsistence purposes. Hunting was of central significance to the Métis, and integral to their distinctive society.”<sup>58</sup> The issue of whether there was a Metis community, and whether it was historic, did not enter into the analysis. The focus was on the continuity of the practice, although the judge did note the claimants were members of a “contemporary Métis society”,<sup>59</sup> and implied that they had a society (although where it was located was not discussed) at the time of European control. It was the site of the hunting that was at issue, not the site of the community.<sup>60</sup>

Unfortunately for the *Howse* claimants, the trial judge’s decision was overturned on appeal. The main reason for this was that the appeal judge in *Howse* relied on the *Powley OCA* decision, which had just come down. In this version of *Powley*, the court stressed that Metis rights were

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<sup>56</sup> *Powley OSC*, *supra* note 17 cited to para 13 in *Howse*, *ibid*.

<sup>57</sup> *Howse*, *ibid*, at para 31.

<sup>58</sup> *Ibid* at para 32.

<sup>59</sup> *Ibid* at para 33.

<sup>60</sup> Strangely, the idea that the site of the community and the site of the practice might be different is rarely raised. One of the few cases that raises it is *Goodon*, *supra* note 21.

community-based, site-specific and required continuity. This shifted focus was in part the result of successful arguments by the crown. One of the issues on appeal in *Howse* was whether the trial judge erred in concluding there was sufficient evidence of continuity with a historic Metis community. This was a result of the requirement in *Powley OCA* that, “The claimant must show continuity of the contemporary community and its practices with the historic community and its practices.”<sup>61</sup> According to the *Howse* appeal judge, Metzger J, the claimants did not meet any aspect of this test (on the issue of evidence in this case, see Chapter 6). While Metzger J acknowledges that the Court of Appeal decision in *Powley* was not before the trial judge in *Howse*, the decision does not indicate this was addressed by counsel. However, in my research interviews, both claimant Dan LaFrance and current Kootenays Hunt Captain Mark Carlson pointed out the unfairness of having to meet a test that was not developed until after the trial. While the claimants did get leave to appeal, this was not pursued, in part because of the cost of having to research the history of the Metis community in the Kootenays.

The *Nunn* case was decided based on the *Powley OCA* decision and the *Howse* appeal decision. The judge in *Nunn*, Grannary PCJ, cites at paragraph 25 the same passage from *Van der Peet* that I refer to above about the “significant corollary” of community rights as being site-specific. While I do not dispute that there is authority for the proposition that Aboriginal harvesting rights are site-specific, one of the authorities cited by the trial judge in *Nunn* is *Côté (Adams)*: “[a]n aboriginal practice, custom or tradition entitled to protection as an aboriginal rights will frequently be limited to a specific territory or location, depending on the actual pattern of

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<sup>61</sup> *Powley OCA*, *supra* note 18 at para 90, cited in *Howse BCSC*, *supra* note 8 at para 24.

exercise of such an activity prior to contact.”<sup>62</sup> This is not exactly an unequivocal statement, and seems to highlight the importance of rights being decided on a case-by-case basis.

However, Grannary PCJ acknowledges that there may be a spectrum of connection to the land, although in the case of hunting, he thinks it is inherently tied to the land. He does not mention the mobility of Metis rights, which was brought up by many of the witnesses in the case.

Ultimately, the judge in *Nunn* held that there wasn’t sufficient evidence of either a historical or a modern Metis community in the Okanagan Valley. Modern Metis people in the area were seen as not actively pursuing a “Metis way of life”, and it seemed doubtful to the judge that hunting in the “non-fur bearing Okanagan” carried on historically after the end of the fur trade.

## **PART 2: ORIGINS OF POWLEY DEFINITION OF “METIS COMMUNITY”**

In applying the *Van der Peet* test to Metis claimants, the court in *Powley* had to explain what they meant by a Metis “community”. Given that this question has bedeviled many scholars, lawyers, judges – and many Metis trying to understand their own identities – this was no small task. Metis identity is contentious and, as discussed in Chapter 2, there are likely many communities and individuals who could legitimately identify as Metis. There may also be communities of people of Aboriginal mixed ancestry who are not Metis.

However, the Supreme Court in *Powley* recognized that the “... diversity among different groups of Métis may enable us to speak of Métis ‘peoples’, a possibility left open by the language of s. 35(2), which speaks of the ‘Indian, Inuit and Métis peoples of Canada’.”<sup>63</sup>

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<sup>62</sup> *R v Côté (Adams)*, *supra* note 43, cited to *Nunn*, *supra* note 9 at para 39.

<sup>63</sup> *Powley*, *supra* note 3 at para 11.

Further, the court stated,

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimant belongs to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. **A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.**<sup>64</sup>

The descriptors “continuity and stability”, “site-specific”, “distinctive collective identity”, “same geographic area” and “common way of life” all signal “bounded”, “static” and thus “recognizable by the Canadian law”. Other than the statement that Aboriginal rights are site-specific, these descriptors do not derive from *Van der Peet*, as defining the Stó:lō people as a right-possessing entity was not seen as problematic. The definition of community is introduced in *Powley OCA* as a modification of the *Van der Peet* test.

As F Matthew Kirchner points out, the “integral to a distinctive culture test” in *Van der Peet* test “was developed largely from a blank slate.”<sup>65</sup> In *Powley*, the phrase “a group of Metis with a distinctive collective identity, living together in the same geographic area, and sharing a

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<sup>64</sup> *Ibid* at para 12 [emphasis added].

<sup>65</sup> “Achieving Cultural Security and Continuity: *R. v. Sappier* and the refined *Van der Peet* Test” paper prepared for a conference in Vancouver, BC, of the Pacific Business and Law Institute (26-27 February 2007). For other critiques of *Van der Peet*, see, for instance, Russell Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42 McGill Law Review 993; Douglas Lambert, “*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues” (1998) 32:2 UBC Law Review 249; Lorraine Weir, “‘Time Immemorial’ and Indigenous Rights: A Genealogy and Three Case Studies (*Calder*, *Van der Peet*, *Tsilhqot’in*) from British Columbia” (2013) 26:3 Journal of Historical Sociology 383; Olthius, “Constitution’s Peoples, *supra* note 4; Woo, *supra* note 5.

common way of life” also seems to be magically pulled out of a hat. This definition was not referred to at any of the previous levels of court; indeed, although the trial judge Vaillancourt J does refer to Metis communities generally, when discussing the test for finding Metis collectivities, he uses the term “societies”, and his analysis is confined to whether Metis people in the Sault Ste Marie area were distinct from Ojibway people in the historic period. This follows from the test in *Van der Peet*, which speaks of “Aboriginal peoples” living in “communities” and having “distinctive societies”.<sup>66</sup> For the purpose of ascertaining rights, the *Powley* trial judge decided that the correct interpretation of *Van der Peet* was that while Aboriginal rights are held to be communal, those rights inhere in Aboriginal societies, not necessarily in smaller community units.<sup>67</sup> The trial judge also discussed whether there was a “contemporary Metis society” in the area of Sault Ste Marie.<sup>68</sup> While the crown argued the boundaries of this society should be those of Sault Ste Marie itself, the judge held that a wider geographical area should apply that would encompass a number of Metis communities in the areas surrounding Sault Ste Marie.<sup>69</sup> In this way, while the judge had to work within the jurisprudence that told him that Aboriginal rights were “site-specific”, he tried to accommodate the reality that Metis society was made up of a number of different communities. On the question of continuity of Metis hunting practice in the area, Vaillancourt J merely enquired into

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<sup>66</sup> Lamer CJ in *Van der Peet*, *supra* note 4 at 93.

<sup>67</sup> *Powley OPC*, *supra* note 16 at paras 72-78.

<sup>68</sup> *Ibid* at para 79.

<sup>69</sup> *Ibid* at paras 68-71.

whether hunting had been practised post-contact and pre-control, and whether it was still being practised.<sup>70</sup>

At the Ontario Superior Court, the crown phrased one of the issues on appeal as “the issue of whether there is today a local Métis community, in continuity with the historic Métis community of Sault Ste. Marie, with a distinctive culture in which hunting for food is integral”.<sup>71</sup> O’Neill J, while being sensitive to the fact that “[i]t is not so easy to package up and describe a Métis community”,<sup>72</sup> and while also being sensitive to the issues of reconstituting Metis communities in the face of colonialism, I think took up unreflectively the crown’s recharacterization of the issues. Thus, instead of deciding on whether a distinctive Metis society existed post-contact pre-control, and whether a distinctive Metis society still existed, among whose members hunting was still an integral practice, the focus on appeal became the existence of communities and their continuity, which would demonstrate the continuity of practices. While I acknowledge that some of the witnesses at trial used the term “community”, I think the re-framing of the issue by the crown moved the Metis rights analysis away from the *Van der Peet* test, and made the *Powley* analysis more focused on local, bounded communities and their continuity.

In framing its issues on appeal, the crown also changed the focus from the continuity of the right claimed, to the continuity of the community itself. The fourth issue on appeal was phrased as whether the trial judge “made an error in finding that the respondents are members

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<sup>70</sup> On the latter point, see *Powley OPC, ibid*, paras 105-07.

<sup>71</sup> *Powley OSC, supra* note 17 at para 10(3).

<sup>72</sup> *Ibid* at para 29.

of an existing local Metis community in continuity with the historic Metis community of the City of Sault Ste. Marie".<sup>73</sup> As Jean Teillet notes in her critique of the SCC judgment in *Powley*, this is not the test as envisioned in *Van der Peet*.<sup>74</sup> Of course, showing community continuity to some extent is necessary for proving continuity of the right, but shifting the focus of the evidence to be adduced to proving continuity of the community rather than of the practice makes the test broader and more difficult to meet.<sup>75</sup>

O'Neill J in *Powley OSC* refers to the evidence of expert witness Arthur Ray that Metis communities are not necessarily always located in one place:

You look at maps and you look for little clusters of settlements and say, ah, there's a community, now who's living in it? But the reality is also there's a larger community, it's a community of related families and individuals who are moving around a lot ... you have some coalescing of people together into small communities taking place but it would be wrong to suppose that it is the only place that Metis live because, for example ... as we'll see here in the case of Sault Ste Marie, Sault Ste Marie was regarded, was the home base for some of these families, but members of the family could be spread across the country for years and years before they came back ...<sup>76</sup>

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<sup>73</sup> *Ibid* at para 10(4).

<sup>74</sup> Teillet, *Métis Law Summary*, *supra* note 4.

<sup>75</sup> Note, however, that Horton and Mohr, *supra* note 4, critique *Powley* for not focusing more on community, as *Powley* interprets one of the purposes of s. 35 as recognizing and preserving Metis communities. They also argue that over-focus on the continuity of practices freezes Metis rights in the past.

<sup>76</sup> Cited to *Powley OPC*, *supra* note 16 at para 32.

This was referred to by O’Neill J in the context of the trial judge’s expansion of the area under consideration to be broader than merely the city of Sault Ste Marie. The only other specific attempt to define “community” was in O’Neill J’s reference to the *Black’s Law Dictionary* definition:

Community: Neighbourhood; vicinity; synonymous with locality ... People who reside in a locality in more or less proximity. A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges or interests ... It connotes a congeries of common interests arising from associations – social, business, governmental, scholastic, recreational.<sup>77</sup>

This definition was placed in the middle of an analysis about whether the Powleys had been accepted by the Metis community as Metis and, while it is not clear how this definition was intended to elucidate this point, I think it was meant to refer to the idea that the modern Metis community could be a community with “a congeries of common interests”, rather than to the idea that Metis communities should be strictly tied to particular locales, especially given O’Neill J’s earlier reference to Arthur Ray’s testimony on this point. In any case, the *Black’s Law Dictionary* definition was neither adopted nor discussed.

In the *Powley* decision at the Ontario Court of Appeal, the justices replaced the trial court’s word “society” with “community” in reference to the finding that there was a distinctive historic Metis society in the environs of Sault Ste Marie, but used both “society” and “community” in terms of describing the contemporary collectivity. Nevertheless, all the issues

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<sup>77</sup> *Black’s Law Dictionary*, 6th ed (St Paul, MN: West, 1990), as cited in *Powley OSC*, *supra* note 17 at para 53.

as framed by the court that deal with identifying Metis collectivities are phrased using “community”.<sup>78</sup> Despite this, though, the court did not seem too concerned with whether there was a historic Metis community. The court’s analysis on the issue of whether “the right claimed was a practice exercised by the historic Métis community at Sault Ste Marie and was integral to the distinct culture of that community”<sup>79</sup> focused on whether the historic community had hunted, and whether that hunting was integral to their culture. On the issue of whether “there exists today a Métis community in continuity with the historic Metis community that continues to exercise the practice grounding the right” the focus was on whether the later community had become invisible or had simply disappeared. Of concern was whether the Metis who had moved onto nearby reserves (including the Powleys’ Metis ancestor) had become culturally indistinguishable from their First Nations neighbours, leading to the conclusion that there was no cultural difference between hunting by Metis people and by First Nations people.

There were no attempts in the Ontario Court of Appeal decision to define or discuss the word “community”.

Of course, the trial and first two appeals in *Powley* conform more closely to the *Van der Peet* test than does *Powley SCC*, although *Powley SCC* accepts the template of *Van der Peet*.

Nevertheless, the test in *Powley* is not exactly the test in *Van der Peet* (leaving aside that *Powley* says the appropriate time frame for characterizing the right is post-contact, pre-

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<sup>78</sup> *Powley OCA*, *supra* note 18 at paras 30-49.

<sup>79</sup> *Ibid* at para 69. Note this word should be “distinctive”. On the difference between “distinct” and “distinctive”, see *Van der Peet*, *supra* note 14.

control). For instance, *Van der Peet* is interested in whether a practice is integral to the distinctive culture of the Aboriginal “group”, and this word is interpreted in *Powley* as relating to a local community rather than to a “society” more broadly.<sup>80</sup> In *Van der Peet*, the issue was whether Stó:lō people generally and communally had particular rights, not whether particular Stó:lō local communities had such rights.<sup>81</sup>

Although the definition that *Powley* adopts for “Métis community” – “a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life” – does not appear in any of decisions of the previous levels of court, it does bear some resemblance to the phrase from *Black’s Law Dictionary* referred to in O’Neill J’s judgment: “A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges or interests”. Whether this similarity is accidental is not clear, but it is not great in any case.

Closer to the *Powley* definition of “Métis community” is the US Supreme Court definition in *Montoya v United States*<sup>82</sup> of the term “tribe”. None of the four courts that heard the *Powley* case cite *Montoya*; it is not clear whether the SCC had *Montoya* in mind, but the parallel is startling. The court in *Montoya* held, “By a ‘tribe’ we understand a body of Indians of the same race, united in a community under one leadership or government, and inhabiting a particular

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<sup>80</sup> *Powley OCA*, *supra* note 18 at para 89.

<sup>81</sup> Jean Teillet also makes this point at 1-35 in *Métis Law Summary*, *supra* note 4, stating that *Tsilhqot’in (BCCA)* establishes that the proper rights holder of communal Aboriginal rights is a people, not (for instance) an Indian Band. *Tsilhqot’in Nation v British Columbia*, 2012 BCCA 285. This holding was affirmed in 2014 SCC 44, [2014] 2 SCR 257.

<sup>82</sup> 180 US 261, 266 (1901).

though sometimes ill-defined territory.”<sup>83</sup> In critiquing the application of this definition of “tribe” in the more recent *Mashpee Tribe v Town of Mashpee*,<sup>84</sup> LatCrit scholars Gerald Torres and Kathryn Milun state, “Beyond reflecting archaic notions of tribal existence in general, the *Montoya* requirements incorporated specific perceptions regarding race, leadership, community, and territory that were entirely alien to Mashpee culture.”<sup>85</sup> The Mashpee, an Indigenous nation from Massachusetts, over time had married Wampanoag, European and black partners, but had retained their citizenship laws and considered all their descendants to be Mashpee. As well, the Mashpee had been displaced from, and then had returned to their traditional lands, and their forms of land ownership had changed, owing to adaptations to colonial laws. The Mashpee had adopted many cultural forms of their neighbours, including the Christian religion. Their form of governance was not authoritarian, and thus not cognizable to the court. As a result of all these vag(ue)aries (in the minds of the trial judge and jury), these people could not be seen as members of a “tribe”, although that is how they saw themselves.

While the origin of the *Montoya* definition of “tribe” is unclear,<sup>86</sup> it may also be out of a hat – although perhaps not so much *ex nihilo* as *ex machina*: a definition created to exclude from the power machine those people whose existence and claims to sovereignty challenge the existence and sovereignty of the state. With a wave of the magic wand, the realities of Mashpee lived experience were erased.

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<sup>83</sup> *Ibid* at 266.

<sup>84</sup> 447 F Supp 940, 950 (D Mass 1978); *aff'd sub nom Mashpee Tribe v New Seabury Corporation*, 427 F Supp 899 (D Mass 1978); 592 F2d 575 (1<sup>st</sup> Cir), *certiorari* denied 444 US 86 (1979).

<sup>85</sup> “Translating *Yonnonديو* by Precedent and Evidence: The Mashpee Indian Case” (1990) 4 Duke Law Journal (Frontiers of Legal Thought III) 625.

<sup>86</sup> Perhaps the court in *Montoya* was influenced by the *Black’s Law Dictionary* definition of “community”.

A similar wand was at work in *Powley*, although its workings were more subtle, and the hands that held it more ostensibly benign. Arguably the court in *Powley* was less blind to Metis realities than the courts in either *Montoya* or *Mashpee* were to the realities of their subjects; the *Powley* court was in fact trying to avoid concretizing Metis community identities.

Nevertheless, legal unrealism was at work. While *Powley* tried to aboriginalize Metis rights, it also held them hostage to common law presumptions. Communities, territories and histories became static and bounded; Metisness, it seemed, was too “ill-defined” to attract law’s recognition.

This is not surprising, as, historically, Canadian courts, historians, politicians and others have had difficulty with the concept of Metis communities, which confounded colonial notions of racial and cultural purity. This is evident in the laws of BC, which required Metis people to define themselves as either “Indian” or white”.<sup>87</sup> While the colonial system could contend with Metis individuals, as being occasional exceptions to established notions of racial stereotyping, whole collectivities of mixed ancestry people were more daunting.<sup>88</sup> Thus, the multiplicity of Metis communities in Canada was not easily accepted.

According to Brian Slattery,

The criterion [...] disqualifies collections of people that lack sufficient coherence, permanence or self-identity to qualify as an organized group. But these requirements

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<sup>87</sup> See Jean Barman, “At the Edge of Law’s Empire: Interraciality, Citizenship and the Law in British Columbia” (2006) 24 Windsor Yearbook of Access to Justice 1; Renisa Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921* (Vancouver: University of British Columbia Press, 2009); John Lutz, “Making ‘Indians’ in British Columbia: Power, Race, and the Importance of Place” in Richard White & John M Findlay, eds, *Power and Place in the North American West* (Seattle; University of Washington Press, 1999) 61.

<sup>88</sup> See Teillet, *Métis Law Summary*, *supra* note 4 at 1-5.

must be applied flexibly, in light of varying levels of organization found in aboriginal societies.<sup>89</sup>

Flexible application could be achieved by taking Metis perspectives into account, which is the aim of this dissertation. Indeed, according to *Van der Peet*, in assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal people claiming the right.<sup>90</sup> In *Sparrow*, Dickson CJ and La Forest J held that it is “crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake”.<sup>91</sup>

### **PART 3 THE SIGNIFICANCE OF THE *POWLEY* CASE AND TESTS FOR “COMMUNITY”**

The court in *Powley* outlined three factors as a means to identify Metis persons who hold existing rights. These are self-identification, an ancestral connection to an historic Metis community, and community acceptance.<sup>92</sup>

A paraphrase of the adapted 10-point *Powley* test, along with sub-tests, is set out below:

1. Characterization of the right:
  - a. characterization of the impugned action;
  - b. characterization of the government regulation;
  - c. characterization of practice, custom or tradition relied upon to claim the right;
  - d. sensitivity to Metis perspective;

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<sup>89</sup> Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Canadian Bar Review 727 at 756.

<sup>90</sup> *Van der Peet*, *supra* note 14 at para 49.

<sup>91</sup> *Sparrow*, *supra* note 40 at 1112.

<sup>92</sup> *Powley*, *supra* note 3 at para 30.

2. Verification of the claimant's membership in the relevant contemporary community:
  - a. self-identification;
  - b. ancestral connection (by birth, adoption or other means);
  - c. community acceptance;
3. Identification of the historic rights-bearing community:
  - a. distinctive collective identity;
  - b. lived together in the same geographic location (permanent settlement not required, just presence on the land – *Willison*; area can be large and can encompass more than one settlement – *Laviolette, Belhumeur, Goodon*);
  - c. common way of life;
4. Identification of the contemporary rights-bearing community (community must identify as Metis; need proof that modern community is a continuation of the historic community);
5. Identification of the relevant time frame (post-contact, pre-control);
6. Determination of whether the practice is integral to the claimant's distinctive culture (including whether harvesting took place in historic community territory);
7. Establishment of continuity between the historic practice and the contemporary right asserted;
8. Determination of whether the right has been extinguished;
9. If there is a right, determination of whether there has been an infringement;
10. Determination of whether the infringement is justified.

For the purposes determining the effects of the *Powley* test in practice, I have been looking only at parts 3, 4 and 7 of the test – essentially, those aspects of *Powley* which deal with Metis community. The location of Metis lands is dealt with as part of the definition of “community”.

While self-identification is important, it alone is not enough for the purposes of s. 35. A rights claimant must also prove he or she is a member of a Metis collective with a “recognizable group identity”. This was affirmed in *Powley*:

The term “Métis” in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.<sup>93</sup>

“Ancestral connection” requires descent from, or connection to (e.g. by adoption), members of an historic Metis community. “Community acceptance” refers to the community supporting the view that the person in question is in fact a Metis. Membership (or not) in a particular Metis political organization is not determinative. According to *Powley*, the question is really whether a claimant has an ongoing connection to a historic “rights-bearing community”, not to a political organization.<sup>94</sup> The membership requirements of a Metis organization to which a claimant belongs must be put into evidence. There must be an “objectively verifiable” and fair method of determining acceptance by the group.<sup>95</sup>

The court held in *Powley* that community acceptance is about past and ongoing participation in the community and its shared culture. Other relevant considerations are whether the claimant participates in community activities and cultural events. Testimony from community members

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<sup>93</sup> *Ibid* at para 10.

<sup>94</sup> *Ibid* at paras 32-33.

<sup>95</sup> *Ibid* at para 29.

may be heard. There needs to be a “solid bond of past and present mutual identification” between the claimant and the community.<sup>96</sup>

It was not necessary for the court in *Powley* to determine whether the Sault Ste Marie Metis community formed part of a larger “people” or “nation”.<sup>97</sup> Additionally, a Metis community does not need to be equated with an actual town or village. In *Powley*, although the community was centred in the town of Sault Ste Marie, the community was found on the evidence to have collectively-held Aboriginal rights in “the environs” of Sault Ste Marie.<sup>98</sup> In other words, it was not found necessary to define the exact limits of the Sault Ste Marie Metis community’s traditional territory; it was sufficient to show that the harvesting had taken place within the traditional territory.

Continuity of the “historical” community must also be shown, although the court allows that continuity may be possible where the community dwindles and public expressions of culture “go underground” because of racism and colonialism.<sup>99</sup>

It is interesting to note that Steve Powley for most of his life identified as a “white” man, partly because the family histories had been kept quiet. In fact, his Metis family connection is quite remote – six generations back.<sup>100</sup> It is ironic that he evidently lived among the historic rights-

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<sup>96</sup> *Ibid* at para 30.

<sup>97</sup> *Ibid* at para 12.

<sup>98</sup> *Ibid* at para 23.

<sup>99</sup> *Ibid* at para 27. Jean Teillet asserts that a more correct interpretation is that the test for continuity refers to the continuity of the practices of the community, rather than to the continuity of the community itself. Teillet, *Métis Law Summary*, *supra* note 4 at 1-38. Horton and Mohr also make this point in “*R. v. Powley: Dodging Van der Peet to Recognize Métis Rights*”, *supra* note 4.

<sup>100</sup> On this point, see also Olthuis, *The Constitution’s Peoples*, *supra* note 4.

bearing Metis community of Sault Ste Marie for most of his life without realizing his family connections to them. Once he learned of his origins, he applied for and was granted membership in a provincial Metis association.<sup>101</sup> This was a mere four years before the famous bull moose was shot, despite the fact that Metis identification of recent vintage was looked on by the court in *Powley* as generally suspect. This illustrates two things. One – the community decided family ties were more important than previous self-identification and certainly more important than blood quantum, and accepted Mr Powley as a Metis. Second, the court decided Steve Powley had constitutionally protected Aboriginal rights because he was related to people in the modern Metis community of Sault Ste Marie, and that community had an unbroken connection to an historical rights-bearing community. Mr Powley’s rights as an individual Metis were dependent on the existence of a distinctive community, even though his existence in Sault Ste Marie for most of his life was not recognizably different from that of the members of the non-Aboriginal community. So, the concern was not that Steve Powley’s family had “gone underground”, but the fact that – despite some occasional lapses – the Sault Ste Marie Metis community had not.

As I hope to show in my analysis in Chapter 8, the Metis nation – like the Canadian nation – comprises many communities, some of which may be physically dispersed, even historically discontinuous. Thus, the fact patterns of most Metis harvesting rights cases will not be like those in *Powley*, which concerned a relatively static and traditional community with a recognized land-base, and thus seemed to be almost tailor-made to the adapted “Indian” *Van der Peet* test.

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<sup>101</sup> *Ibid.*

While the community continuity test in *Powley* seems ideally suited to the facts of that case, they are not suited to the realities of Metis history in BC. For instance, there existed ample written evidence of a historic Metis community in the environs of Sault Ste Marie, and of the distinctiveness of the Sault Ste Marie community from the surrounding Aboriginal and non-Aboriginal communities. In BC, however, where the historical sources that do exist (both written and oral) have been little studied, and thus are not easily presentable, court decisions in BC reflect an understanding that Metis communities in that province lack sufficient continuity and distinctiveness. Similarly, the Sault Ste Marie community was shown to have a relatively static population which harvested in a relatively small area surrounding the urban centre; whereas in BC, Metis communities generally live and harvest within larger regions, and – in common with their prairie cousins – have exhibited a far greater degree of mobility.

For instance, in BC, the facts and reasoning of the Metis hunting rights case of *Willison* encapsulate the difficulties experienced by claimants in proving the existence of Metis rights-bearing communities outside of the so-called “Metis heartland”.

### **Why *Powley* Didn’t Work for Greg Willison**

On November 26, 2000, Greg Willison shot a 3 x 2 antlered mule deer near Falkland, BC. He did not have a hunting licence. Like the Powleys, Mr Willison was hunting for food, and produced a Métis Provincial Council of BC<sup>102</sup> membership card as part of his assertion that he had an Aboriginal right to hunt for sustenance. Like the Powleys, Mr Willison was successful at trial, with the judge finding that he was exempt from licensing requirements owing to his having a

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<sup>102</sup> This was the precursor organization of MNBC.

constitutionally protected Aboriginal right to hunt. He was thus acquitted of charges of hunting antlered deer out of season, and of unlawful possession of deer.

However, unlike in *Powley*, the crown was successful on the *Willison* appeal, and a conviction against Mr Willison was entered. The reasons for Mr Willison's failure on appeal revolved around the question of whether there was a Metis rights-bearing community in the environs of Falkland. While the BC Supreme Court upheld the reasoning in *Powley*, it held that there was not enough evidence to determine that there was an historic Metis community in the Falkland region.

The trial judge in *Willison*, Stansfield PCJ (as he then was), heard the testimony of two expert witnesses, as well as the oral history evidence of Elsie ("Lottie") Kozak, a Metis Elder from Falkland. On the basis of this evidence, he found that the "environs of Falkland" was the area of the Brigade Trail of the northwest fur trade, which commenced in Fort Kamloops, continued through Falkland, the Okanagan valley, and into Fort Okanogan in Washington State. This finding was left undisturbed on appeal, as was the finding that Mr Willison had blood ties to Red River Metis people who migrated to BC in the mid-1800s.

Also undisturbed by the appeal judge was the *Powley* reasoning that it was not necessary to find a localized Metis settlement in order to find a Metis community. Williamson J allowed that, on a purposive analysis of s. 35, the historic mobility of the Metis should not be a bar to the protection of their constitutionally protected rights.<sup>103</sup>

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<sup>103</sup> *Willison BCSC, supra* note 7 at paras 24, 28, 52.

However, Mr Justice Williamson did find a number of the trial judge's conclusions to be in error. First, he held that the trial judge was wrong to conclude on the facts that there was an historic Metis community in the environs of Falkland. Although the evidence pointed to the possibility that Metis people were involved with the fur trade in BC, it did not show that the fur trade extended to the environs of Falkland,<sup>104</sup> and it did not show that in any case there was a community in the area. Additionally, Williamson J found that the trial judge unjustifiably expanded the definition of "Métis community" to include modern definitions of community:

A reading of *Powley* discloses that a "community", in the context of s. 35 rights, should demonstrate a people with a distinctive collective identity, sharing a common way of life, and living together in the same geographic area.

The learned trial judge found that there was such a contemporary rights bearing community in this case. His Honour stated at paras. 111 and 112:

Having regard to what I have said already as to what constitutes a "community", I have no hesitation in finding that there exists a Métis "community" in the Okanagan Thompson area. It is palpably clear to me that Mr. Willison, Mr. Nunn, Ms. Kozak, and others seek each other out in exactly the manner I described earlier regarding members of ethnic communities who may constitute a relatively small minority of persons within a wider community. It is just as apparent to me that their purpose in seeking each other out is to enhance their

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<sup>104</sup> *Ibid* at para 26.

survival as a distinct community and to protect practices that were historically important features of Métis communities.

I do not perceive it to be necessary to undertake an exhaustive analysis of which of the persons on the Salmon Arm local phone list continue to reside in the immediate geographic area, or indeed are persons who can meet all of the criteria of self identification, ancestral connection, and community acceptance [...]

I agree with the Crown that in effect the learned trial judge expanded the definition of community found in *Powley* to include a geographically wide, loosely affiliated group of people of mixed ancestry rather than a group with a distinctive, collective identity, living together in the same geographic area and sharing a common way of life. I respectfully find this to be an error.<sup>105</sup>

In other words, Williamson J held that the trial judge erred in importing a 21st century multicultural philosophical precept<sup>106</sup> into the determination of whether there was a Metis community near Falkland that met the test laid down in *Powley*. Williamson J found, rather, that the evidence was too sparse and equivocal to demonstrate that there was an historic Metis community with a sufficient degree of continuity and stability to support a site-specific Aboriginal right.<sup>107</sup>

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<sup>105</sup> *Ibid* at paras 46-48.

<sup>106</sup> *Ibid* at para 17.

<sup>107</sup> *Ibid* at para 32.

The appeal judge noted that expert witness Dr Michael Angel was qualified to give evidence about the Metis in the fur trade in the Pacific Northwest in general, but not about the Brigade Trail in particular, and thus his evidence should have been considered with more caution.<sup>108</sup>

Descriptions with respect to the role of the Metis in the BC fur trade were found to be descriptive of “a type of employment” rather than of a distinctive Metis culture.<sup>109</sup>

Evidence adduced about the organized hunt, and Metis clothing, dance and customs (led by various witnesses) was found by Williamson J to be insufficiently site-specific, and it was held there was no evidence as to how such customs might define a culturally distinct people in the environs of Falkland.<sup>110</sup>

In summary, the crown’s appeal succeeded because the facts in *Willison* were not enough like those in *Powley*:

It is difficult to conclude that the evidence supported the establishment of a “community”, as I understand it, envisioned by *Powley*. As noted above, Sault Ste. Marie was a hub for many generations of activity. The Métis from that area were mobile and travelled widely, but kept their connection with, and in many instances returned to, the community of Sault Ste. Marie. There was found to be an established community on the site and in the environs of that settlement.<sup>111</sup>

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<sup>108</sup> *Ibid* at para 38.

<sup>109</sup> *Ibid* at para 39.

<sup>110</sup> *Ibid* at para 42.

<sup>111</sup> *Ibid* at para 34.

The fact that Mr Willison is a Metis person and that there is a modern Metis community in the environs of Falkland was not enough to prove that a distinct historic rights-bearing Metis community existed in that area. Even if it did, the court found no proof of community continuity to the present day.<sup>112</sup>

While Dr Angel's evidence referred to a few primary sources such as the journals of Simon Fraser and David Thompson, Hudson's Bay and other fur company records, and secondary sources, including some works of Jean Barman, as well as James R Gibson's history of the Brigade Trail, there was still a gap in the historical evidence presented in court.<sup>113</sup> This gap will be explored further in Chapter 6.

As well as highlighting the difficulties for claimants of accessing primary historical records, the *Willison* appeal decision also reflects how evidentiary problems compound the issue of interpretation, notwithstanding the fact that the reasoning appears to be benign, reflecting the positive elements of *Powley*. Regarding the lack of evidence going to community continuity, for instance, Williamson J follows *Powley* in holding that allowances must be made for the fact that Metis communities went "underground" due to racism. However, he states "[...] that invisibility could be dispelled with admissible evidence, whether by way of oral history or otherwise".<sup>114</sup> Given the state of the historical record on this subject in BC, claimants will likely rely on oral history evidence. Unfortunately, the tendency of Canadian courts to dismiss Aboriginal oral

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<sup>112</sup> *Ibid* at para 51. Note, however, that the court encourages oral history submissions in this regard.

<sup>113</sup> For a discussion of some of the evidence presented in *Willison*, see Bellemare, *supra* note 12.

<sup>114</sup> *Willison*, *supra* note 7 at para 52.

history evidence without corroborating written evidence is notorious,<sup>115</sup> and will likely leave the claimants where they started.

In a similar vein, Williamson J again followed *Powley* when he opined that mobility, which is a key characteristic of Metis people, should not be a bar to them exercising their rights under s. 35.<sup>116</sup> Nevertheless, it is in great part the mobility of the Metis of the Thompson/Okanagan that led the court to conclude that community continuity did not occur. This is despite the further supportive announcement that “I am persuaded, as submitted by Mr. Willison, that the finding of a Metis community does not require evidence of a *settlement* in the given area. However, there must be evidence of a community *on the land*”.<sup>117</sup> While submission of additional evidence might have made a difference to the decision in *Willison*, the court interpreted the available evidence in light of the assumption that communities with territories and populations less static than those in Sault Ste Marie may not meet the community continuity test set out in *Powley*.

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<sup>115</sup> For examples of Aboriginal law cases reflecting caution about the use of Aboriginal oral history evidence, see, e.g. *Attorney-General for Ontario v Bear Island Foundation* (1984), 15 DLR (4th) 321 (Ont SC); the trial decision in *Delgamuukw v British Columbia*, [1991] 185 BCSC; *Benoit v Canada*, (2002) FCT 243 (FCTD), rev'd [2001] FCJ No. 518 (FCA). For commentary on this issue generally, see, for example, John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39 Osgoode Hall Law Journal 1; Val Napoleon, “*Delgamuukw*: A Legal Straightjacket for Oral Histories?” (2005) 20:2 Canadian Journal of Law and Society/Revue Canadienne Droit et Société 123; Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: University of British Columbia Press, 2011); Ray, *supra* note 4.

More recent cases, such as *Delgamuukw v British Columbia* [1997] 3 SCR 1010 and *Tsilhqot'in*, *supra* note 81 have demonstrated a more enlightened approach, as have the successful Metis cases, but there is no guarantee these cases will be more than exceptions to the historical rule. However, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) for a discussion of the possibility that courts' understandings of Indigenous oral history could be improved if oral history were seen by judges in the context of Indigenous laws and customs.

<sup>116</sup> *Willison*, *supra* note 18 at para 28.

<sup>117</sup> *Ibid* at para 24 [emphasis in original].

All of the BC Metis rights cases have in common the court's frustration with a seeming lack of evidence, and a narrow construction of the notion of Metis community. As previously stated, there is simply not a great body of written or documented oral history that may be presented as evidence. This absence from the historical canon was engendered in part by racism – in that the province's history has long been written as if it were populated only by descendants of Europeans – but also by BC governance practices prior to Confederation.<sup>118</sup> Documents that did exist were ignored or misinterpreted by historians because of colonialist assumptions about the nature of Metis history, territory and communities.

A more insidious difficulty, however, is the way in which the concept of “community” has been interpreted in light of the tests in *Powley*. For instance, it is debatable that the approach of the trial judge in *Willison* was to import modern notions of community into his analysis. It could just as easily be argued that the notions of community assumed in *Powley* themselves are modern – that the court in *Powley* attempts to impose a normative structure on notions of community which would likely not have been thought of 150 years ago. The multiplicity of identities is not necessarily a post-modern phenomenon, especially not for peoples who are used to living in more than one culture.

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<sup>118</sup> Barman, *supra* note 87; Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001).

### Kelly Lake: A “Real” Historic Metis Community in BC?

A possible exception to the legal dismissal of the existence of Metis communities in BC is *Kelly Lake Metis Settlement v. BC and EnCana*.<sup>119</sup> This is a judicial review application involving a decision to allow natural gas wells to be drilled in the environs of Kelly Lake, in northeastern BC, site of a Metis community which has subsisted since at least 1910.

The history of the Kelly Lake community is relatively well documented, particularly by former community school teacher Gerald Andrews. According to Andrews, he encountered a distinct people with distinct customs and a recognizable group identity when he lived there from 1923-25.<sup>120</sup> As detailed in Andrews’ memoir, some of Kelly Lake’s residents have genealogies tracing back nine generations to the 1750s (although not back that far in that region). Andrews’ book *Metis Outpost* includes a detailed genealogy of the community’s residents in which three of Kelly Lake’s prominent families – Calliou, L’Hirondelle and Thomas – are identified as Iroquois Metis. Most of these families arrived in the Kelly Lake region from Alberta in the early 1900s.

Perhaps the existence of this “reliable” written history is why, in reportage on this case, Kelly Lake is repeatedly referred to as “BC’s only Métis community”.<sup>121</sup> This is likely also why the BC Crown recognizes Kelly Lake as a grudging exception to its position that there are no historical

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<sup>119</sup> *Letendre and the Métis Community of Kelly Lake v BC Minister of Energy and Mines, the BC Oil & Gas Commission and EnCana Corporation*, Victoria Registry File No. 04 1790, 2004 (BCSC). Another case involving the Kelly Lake community is *Gladue & Kelly Lake Métis Settlement Society v BC*, Vancouver Registry File No. S024022 (BCSC), which claims BC is discriminating against the community contrary to s. 15 of the Charter (and its fiduciary duty) by failing to provide basic services provided to other citizens of the province. The parties have since signed an abeyance agreement. For some details about the background to these lawsuits, see David Bentley & Brenda Murphy, “Power, Praxis and the Métis of Kelly Lake, Canada” (2006) 26:2 *Canadian Journal of Native Studies* 289.

<sup>120</sup> Gerald Smedley Andrews, *Metis Outpost: The History of Kelly Lake* (Victoria: GS Andrews, 1985).

<sup>121</sup> See e.g. *The Tyee*, May 31, 2004.

Metis communities in BC – because the BC Supreme Court characterized the Kelly Lake Metis community as “historic” based on the journals of a white schoolteacher who lived there for two years in the 1920s.

### **CONCLUDING THOUGHTS**

In this chapter, I have tried to illustrate how *Powley* and the BC cases create a conundrum for the Metis of BC, and how the definitions creating this conundrum have evolved. This evolution suggests that the overfocus on the history and site of Metis communities eclipses the purposive approach in *Van der Peet* and earlier versions of *Powley* that focus on practices that ground rights, and also focus on supporting and preserving currently practiced rights rather than drawing geographical and chronological borders around them.

This chapter concludes the introductory section of this dissertation, which provides the background to, and description of, the community conundrum. In the next chapter, I will describe the research approach I took to exploring Metis perspectives on the community conundrum.

## **TELLING STORIES**

*At first, it was interesting and exciting. People cared about the issues and shared their ideas. They told their stories, articulated their laws. They gave her more than she could have imagined or asked for. She gave them gifts. Together, they shared venison, salmon, soapberries, plums. They shared visions. They drank spruce tea, Red Rose. They laughed until they cried. She was invigorated, restored.*

*Then came the paper – mounds of paper. “This is not going to come easy.” That was her first thought, then her second and third. So then it didn’t. It was a madness, this method, this continual movement and re-ordering of ideas. What should come first? Theory, methodology, philosophy? History, law, critique? Everything was part of the big picture. How could she represent the web-like interrelationship of ideas, the spirals, the recursiveness, in a linear format? Her compromise was to go around in circles, getting nowhere.*

*She paced the floor and cut her paper into a thousand pieces, moving the little strips again and again across the linoleum. She pulled the tape off one strip, and tried to adhere it to another. But nothing was sticking. Huge piles were consigned to the cutting floor. Her mind was in tatters. Who would be willing these days to read things slowly, piecing it all together, resisting the pressure to “cut to the chase”? Or maybe the chase scene really was central? She was no longer sure. She hunted for words, flighty, slippery, wily. She fished for fragments. There were strips of footnotes like mountains of litter, lottery tickets, ticker tape. Would anyone throw confetti? Would anyone stay for the credits?*

*Enough! She cut herself short. Enough with the mixed metaphors already! Even they didn't fall together.*

*She had to think – what was she doing and why? Who was she to be doing this anyway? Who would care? Who was she kidding?*

*Meanwhile, there were those who had trusted her with their knowledge, their stories. All her wordplay, all her angst didn't change the fact that she had been given these gifts and had to give something in return. These were the stories she would have to tell, to the best of her ability. The laws of respect and reciprocity demanded it. Other stories were being told, distorted stories, stories that caused real harm. This reminded her that playing with words could be a distraction, or worse – a power play. She needed to stick to the stories she had been given. She learned they were her stories as well, the stories of her relatives. She needed to trust herself and at the same time, forget herself.*

*She got it together and picked up the pieces.*

## Chapter 4

### RESEARCH PROCESS AND CONCERNS

#### INTRODUCTION

“Native peoples in real life are going about reconstructing their lives and communities, pushing paradigms long before we can write our novels and poems, or our dissertations. This process is infinitely more subtle and interesting than any caricatures, tropes, allegories, arguments, dogmas, or speculations we theorists may try to sort out.”

Emma LaRocque, in *When the Other Is Me* (2010)

“Our job was not to fake a space of our own and write it up, but rather to find words for our space-lessness.”

Dennis Lee, in “Cadence, Country, Silence: Writing in Colonial Space” (1974)

In this chapter, I set out my research goals and questions. I also describe how I conducted my research, analysis and writing and how I tried to ground these practices in Metis philosophy and values. I reflect on this process in light of the literature on Indigenous research methodologies, including Metis methodologies.

I thought it would be important to consider here how Metis philosophy might inform Metis research practice and theory. While the paucity of materials on Metis research makes this challenging, I believe the foundations already exist in Metis ideas and values. Examples of Metis values central to doing research are respect (e.g. for diversity, inclusivity, individual agency, and for others’ knowledge); reciprocity (e.g. sharing with and benefitting others); responsibility (e.g. being careful, reliable and accountable); and balance (e.g. not essentializing,

not dichotomizing).<sup>1</sup> Underpinning these values are two important and interlinked Metis philosophical concepts: interconnection – and, correspondingly – irreducibility. These concepts will be explored at length in Chapter 7 and throughout this dissertation.

I do not claim to have developed a theory of Metis research, as this would require many more community discussions and a much broader analysis than is possible given the time and space (in pages) in which I must complete my dissertation. I also doubt that there can be a singular theory of Metis research, and posit that theory itself can only go so far. In fact, as I will elaborate on in Chapter 7, I suggest that the tendency to use theory to define people and constrict thought should be investigated, and that such investigation reflects Metis thinking and practice. However, despite my caveats and hesitations, I hope that the discussion in this chapter might provide a jumping-off point for a conversation about what theories of Metis research might look like. I hope it might also provide some suggestions towards developing Metis research methodologies (research systems) and methods (actual practices) particularly with respect to community research. (I use “theories” and “methodologies” here, as Metis people are not a singularity, and Metis approaches to research reflect that reality).

Development of Metis research practice and theory would enlarge upon the foundational work already done by Metis community researchers and research theorists such as Mike Evans, Chris Andersen, Cathy Richardson and Judy Iseke, whose work is discussed below.

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<sup>1</sup> These principles, although expressed somewhat differently, are outlined in National Aboriginal Health Organization (NAHO), “Principles of Ethical Métis Research” (2011), online: <[www.naho.ca/metiscentre](http://www.naho.ca/metiscentre)> [NAHO Research Principles]. This paper will be discussed further in this chapter.

In this chapter, I will use a slightly modified McGill citation style in which authors who are referred to multiple times will be referenced in the main body of the text after the first footnote reference. I have chosen to use this method in order to highlight the names of researchers and theorists.

What was striking in my investigation of what might underlie doing research in Metis communities, and in my experience as a Metis person doing research, was how the same kinds of problems I discovered with the Canadian law of Metis rights were replicated in the academic research process. In my view, both of these sets of problems relate to a non-Metis misunderstanding of the nature of Metis communities and, in that sense, my research process illuminated some of the origins of the community conundrum.

## **CHAPTER OUTLINE**

This chapter has three parts. Each part contains reflections on research practice and theory based on my experience conducting research for this project.

In Part 1, I provide an overview of the literature on Indigenous research methodologies, with a focus on Canadian and Metis scholarship, and with a nod to useful approaches within other methodologies. I also briefly introduce Metis philosophical concerns in relation to research.

In Part 2, I outline my research goals and questions, and briefly describe my research design. I use narrative to describe the research, analysis and writing methods I have used to pursue my research goals and answer my research questions. I also situate myself in the research, describing my relationship to the research community, my relevant cultural, work and academic background, and how I think these factors have influenced my research perspective. Inherent in my description of myself relative to my research is a discussion about the limitations of the scope of this research project.

In Part 3, I reflect on 1) some of the practical difficulties I encountered in trying to conduct my research in a good way and in concert with Metis values and protocols; and on 2) the ironies of trying to reduce Metis experience and knowledge to written form. I consider the sparse literature about Metis research, especially community research, in light of my research experience, while highlighting the similarities and some differences between various Metis and other Indigenous approaches.

In this chapter's concluding section, I explain how the tensions and dilemmas in the research process – along with the gaps in the literature on Metis research – are relevant to Metis legal critique.

## **PART 1        SITUATING MY RESEARCH**

In this part, I introduce Indigenous research methodologies, set out my research goals and questions, and describe my research design. While I discuss some of the implications of Indigenous research methodologies for my study in the rest of this chapter, I thought it was important for readers to at least have an overview of some of the important ideas and goals of Indigenous research approaches to ground the narrative that follows in Part 2.

### **Indigenous Research Methodologies: An Overview**

A “methodology” can be described as a “systematic method for gaining/generating knowledge”.<sup>2</sup> Methodologies are seen by both Indigenous and non-Indigenous scholars as being culturally and philosophically situated, as reflecting particular understandings of the

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<sup>2</sup> This is my definition, after Bagele Chilisa, *Indigenous Research Methodologies* (Los Angeles: Sage, 2012) [Chilisa] and Kathleen E Absolon (Minogijzhigokwe), *Kaandossiwin: How We Come to Know* (Halifax: Fernwood, 2011) [Absolon].

nature of being and reality (ontology), ways of knowing (epistemology), and values/ethics (axiology). The researcher is also culturally and socially “situated”, for example by virtue of her class, culture, ethnicity, work and academic experience, or relationship to the research participants. Metis scholar Chris Andersen and trawwoolway (northern Tasmania) scholar Maggie Walter suggest a “recipe” for (all, not just Indigenous) methodology: the researcher’s “standpoint” – which includes her understandings of reality, ways of knowing, values and social position – forms the basis of the theories she uses for conducting research, and these theories generate methods (actual research practices).<sup>3</sup> This recipe symbolizes the recognition by many Indigenous (and other) researchers that engaging in research is not a neutral undertaking.

### **What Is Indigenous Research Theory and Practice?**

Research is not merely an academic endeavour. Indigenous research is based in and respects Indigenous knowledge and knowledge-holders; it reveals and creates links between people, and between people and other beings; it involves integrating various aspects of the self, and integrating the self with others. Research is intended to be both intellectually and socially transformative, allowing decolonization and revitalization of the researcher and the researched. Critically (pardon the pun), knowledge is seen as contextual: it is culturally mediated. These assumptions themselves are based in Indigenous philosophies and have been categorized by some theorists as the “Four Rs”: relationality, respect, reciprocity, and responsibility.<sup>4</sup>

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<sup>3</sup> Maggie Walter & Chris Andersen, *Indigenous Statistics: A Quantitative Research Methodology* (Walnut Creek, CA: Left Coast Press, 2013) at 44-56 [Walter & Andersen].

<sup>4</sup> See, for instance, Chilisa, *supra* note 2; Verna J Kirkness & Ray Barnhard use “relevance” rather than “relationality” in their article “First Nations and Higher Education: The Four Rs – Respect, Relevance, Reciprocity, Responsibility” (1991) 30:3 *Journal of American Indian Education* 1.

Research has always been necessary for human survival and flourishing, even as in some contexts researchers caused harm to other people and other beings through ignorance and exploitative practices. Research is ubiquitous in everyday life, yet within the western (European-derived) intellectual tradition, a mystique developed around academic research, particularly in the so-called “hard” sciences, reinforcing the view that all of the prescribed probing, scrutinizing, cross-checking and analysis would ensure the correctness and complete objectivity of research conclusions. While such notions have been themselves thoroughly scrutinized by various theorists – most notably Linda Tuhiwai Smith in *Decolonizing Methodologies*<sup>5</sup> – the western academy is still rife with unexamined cultural assumptions about the superiority of western academic research methods, and the resulting colonialist styles of research and delusions of objectivity.

Meanwhile, there has been an upwelling in scholarship about Indigenous research methodologies; this is a vigorous, if small field. In particular, the Indigenous interest in community research, which involves researchers working together with people in a community or communities to share knowledge, was spurred by many people’s negative experiences with academic research. Western academic researchers often came to extract knowledge from their Indigenous “subjects” without creating personal and community connections, and often without even providing their research findings to the community(ies).<sup>6</sup> They purported to control knowledge that did not belong to them, and used it for their own purposes, mainly academic advancement. This extractive research paradigm was very damaging and, in response

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<sup>5</sup> Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed (London: Zed, 2012) [Smith].

<sup>6</sup> Extractive research, along with other examples of colonialist research, is described at length in Smith, *ibid*.

(or as an alternative), Indigenous people began to do academic research in their own (or other Indigenous) communities, using their own methodologies, and to train and support others to do the same.

Some Indigenous researchers, in response to extractive and objectifying research, have chosen not to compare Indigenous research methodologies with western methodologies, as they see this as implying a need to justify the worth of Indigenous methodologies against assumed-to-be-superior western standards. Other researchers value “selective appropriation” of methodologies from other traditions, including western traditions (Chilisa). While I understand and can appreciate both positions, my own observation is that the movement towards researching and implementing Indigenous methodologies parallels the western academic movement towards focusing on research that is concerned more with process than outcome,<sup>7</sup> and values the experience and knowledge of non-academics. Similarly, the critical Indigenous movement, and the movement to support Indigenous rights, parallels the second wave feminist movement, and various critical race movements, including the US civil rights movement. These movements all questioned the centering of power in the white, middle-class, mostly male establishment, and promoted the agency of “non-establishment” people.<sup>8</sup> One way of decentring the establishment was to value and try to understand the experiences and knowledge of people considered to be historically marginalized, to respect their power and agency. Another way was to undercut the presumption of academic objectivity and to show that knowledge was culturally situated.

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<sup>7</sup> Sharan B Merriam, *Case Study Research: A Qualitative Approach* (San Francisco: Jossey-Bass, 1988).

<sup>8</sup> The significance of these movements for Metis critical legal theory will be discussed in Chapter 7.

An example of these latter trends was the increasing tendency within social science disciplines to use qualitative (soft data) research methods, and to question whether there was such a thing as “objective” knowledge, even within quantitative (hard data) inquiry.<sup>9</sup> Feminist and critical race scholars, for instance, proclaimed the value of voicing individual and community expressions of oppression, resistance and resurgence. Quantitative techniques that came into vogue in the middle of the last century and have been developed since include narrative inquiry, autoethnography, oral history research, the use of focus groups, and participatory community action research. At the same time, researchers began to question their own ethics and standpoints, as in the debates about insider/outsider researcher identities (e.g. Amal Treacher, Lila Abu-Lughod, Kiran Narayan).

While these trends may seem to stem from western academic discourse, they were arguably also cross-influenced by the work being done by Indigenous researchers and theorists, and by mixed and diasporic researchers and theorists, for instance in the Chicana/o tradition. Beginning in the 1950s and '60s, western academic thinking was also being influenced by Indian, Tibetan and other Asian philosophies, including Hinduism and Buddhism; these influences were the fruition of an interest that had begun as early as the late 19th century, as a result of cultural exchanges driven by colonialism. These eastern philosophies had their western echoes in post-structuralism and deconstructionism, which questioned the previously

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<sup>9</sup> For an insightful critique of bias in quantitative research, see Chris Andersen’s study of representations of Metis people in the Canadian census: “From Nation to Population: The Racialization of ‘Métis’ in the Canadian Census” (2008) 14:2 Nations & Nationalism 347.

accepted mantra of positivist objectivity.<sup>10</sup> These perspectives, such as the Buddhist view that all knowledge and experience is “empty”, must have resonated with many Indigenous scholars; Cree philosophy, for instance,<sup>11</sup> understands objectivity as a mental illusion.<sup>12</sup>

Many Indigenous researchers have chosen to use qualitative research methods, as they have felt these most closely matched their own perspectives and approaches; more recently, Indigenous researchers have also been using quantitative methods, particularly in the health sciences. While some Indigenous researchers may be wary of quantitative research as potentially taking Indigenous voices out of research, others advocate for the appropriateness of reclaiming quantitative research done by Indigenous researchers (Walter & Andersen).

The exploration above on the overlap of Indigenous and western approaches to research is not meant to limit the particularity of Indigenous methodologies, but is included to illustrate the importance of taking intellectual multiplicity into account, which I see as forming part of a Metis ethic of research.<sup>13</sup> This view is echoed by writers about some of the so-called “third space” methodologies that deal with, for example, culturally or ethnically mixed people, or sub-

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<sup>10</sup> In my view, Jacques Derrida, one of the foremost proponents of deconstructionism, was also influenced by Jewish mystical ideas of language which, among other things, suggest an infinite multiplicity of interconnected meanings.

<sup>11</sup> See Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Halifax: Fernwood, 2008) [Wilson]; Leona Makokis, *Leadership Teachings from Cree Elders: A Grounded Theory Study* (Saarbrücken: Lambert, 2009) [Makokis].

<sup>12</sup> See also Umeek (E Richard Atleo), *Principles of Tsawalk: An Indigenous Approach to Global Crisis* (Vancouver: University of British Columbia Press, 2011) [Umeek]; Gregory Cajete, *Native Science: Natural Laws of Interdependence* (Santa Fe, NM: Clear Light, 2000) [Cajete].

<sup>13</sup> Intellectual syncretism has a long history in Metis thought. Just to give a brief example, the politico-religious thinking of Louis Riel drew on such varied sources as Indigenous worldviews, Roman Catholicism, Protestant millennialism, Judaism and Theosophy (itself influenced by Buddhism via colonialism in the late 1800s). See Jennifer Reid, “‘Faire Place à une Race Métisse’: Colonial Crisis and the Visions of Louis Riel” in Jennifer Reid, ed, *Religion and Global Culture: New Terrain in the Study of Religion and the Work of Charles H Long* (Lanham, MD: Lexington, 2003) 51.

groups who are marginalized within larger groups which themselves are also marginalized (Chilisa).<sup>14</sup>

### **Indigenous Research Methodologies: A Sampling of Practices**

Methods used in Indigenous research seek to uphold the philosophies and values that form part of Indigenous research methodologies. For instance, the aim of achieving balance, although not necessarily synthesis or resolution, is described in many works of Indigenous philosophy, including Metis philosophy as expressed in both written and oral texts.<sup>15</sup> This aim is reflected in the interconnected “Four Rs”: relationality, respect, reciprocity, and responsibility. These describe the balance of self-interest with other-interest, while at the same time teaching that self and other are interconnected, even inseparable; they describe the balance of different aspects of the self, showing that these also are interconnected and inseparable. The principle of balance is further reflected in the drive to consider and respect different opinions, and acknowledge and represent the diversity of Indigenous communities.

Other goals for employing Indigenous research methodologies are to decolonize oneself as researcher, and to decolonize researched people and communities and, obversely, to Indigenize the theories and processes of research (Chilisa).

In the paragraphs that follow, I will give some examples of Indigenous research methods and their rationales.

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<sup>14</sup> An example of such a group is the Metis of BC.

<sup>15</sup> Such works include those by the authors referenced in this chapter, and in the interviews with the research participants.

In terms of respecting Indigenous knowledge and knowledge-holders, research participants may be included during as many phases of the research process as are practicable. This inclusion means learning to be aware of what knowledge is privileged by the western academy and not being afraid to privilege Indigenous knowledge. It means becoming aware of power dynamics in the research process and trying to maximize agency of research participants, by, for example, including their own voices in the final product, and allowing them to have final say about what is included in the finished text.

Research participants may be involved in, for instance, suggesting research topics, devising research questions, reviewing interview transcripts or translations, or providing feedback on research results that will later be incorporated into the final report. Rather than simply answering scripted interview questions, research participants may be asked open-ended questions; interviews may be repeated after participants have the opportunity of reviewing preliminary findings; or group interviews may be used. Techniques other than interviews or questionnaires may be used, such as storytelling (Iseke & Moore),<sup>16</sup> talking circles, reference to physical cultural artifacts (Matilpi),<sup>17</sup> the use of cultural symbols or processes (Makokis, Lavallée<sup>18</sup>), videography (Evans, Foster, *et al*)<sup>19</sup> or photography (by or of research participants),

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<sup>16</sup> Judy Iseke & Sylvia Moore, "Community-Based Digital Indigenous Storytelling with Elders and Youth" (2011) 35:4 *American Indian Culture and Research Journal* 19 [Iseke & Moore].

<sup>17</sup> Maxine V Matilpi, *Button Blankets as Indigenous Legal Pedagogy* (LLM Project and Paper, University of Victoria, 2010). Online: <[http://www3.telus.net/mmatilpi/One\\_Degree\\_of\\_Separation/Statements.html](http://www3.telus.net/mmatilpi/One_Degree_of_Separation/Statements.html)>.

<sup>18</sup> Lynn F Lavallée, "Practical Application of an Indigenous Research Framework and Two Qualitative Indigenous Research Methods: Sharing Circles and Anishnaabe Symbol-Based Reflection" (2009) 8:1 *International Journal of Qualitative Methods* 21.

<sup>19</sup> Mike Evans, Stephen Foster, *et al*, "Representation in Participatory Video: Some Considerations from Research with Métis in British Columbia" (Winter 2009) 43:1 *Journal of Canadian Studies/Revue d'études canadiennes* 87 [Evans, Foster, *et al*]. This article discusses Metis community research in connection with the Prince George Métis Elders Documentary Project and the MNBC History and Culture DVD project. The DVD is entitled "The Métis of British

or creation of artistic works by participants. The use of participants' own words is encouraged, rather than simply having the researcher interpret and contextualize interview material. All of the above research methods are designed to respect the agency, voice and knowledge-holding of research participants.

In terms of relationality, methods that may be used include getting to know people who are involved in the research (participants, facilitators, Elders), and getting to know communities more generally where community research is being conducted. This includes learning about the history, culture(s) and worldview(s) of the nation/group/community, maintaining contact beyond the mere extraction of data, reporting research findings and being open to receive individual and community feedback about participants' research experiences, or about the research results. Relationality also includes the importance of the connection of researcher and researched to the land, spirit, and particular territories.

In terms of reciprocity, researchers are being instructed and likely also hosted by participants and are often included by in spiritual practices, cultural events and social gatherings.

Researchers may be expected to give back by literally giving gifts or holding feasts, by making research results known to the community, whether through distributing papers and summaries,

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Columbia: Culture, History, and the Contemporary Community" (Kelowna: Centre for Social, Spatial, and Economic Justice, University of British Columbia (nd)). The DVD deals with history, hunting, language, social organization, music and dance.

These projects grew out of a long-standing research relationship that created two oral history projects: Mike Evans *et al*, eds, *What It Is to Be a Métis: The Stories and Recollections of the Elders of the Prince George Métis Elders Society* (Prince George: University of Northern British Columbia Press, 1999); and Mike Evans, *et al* with the Prince George Métis Elders Society ("PGMES"), *A Brief History of the Short Life of the Island Cache* (Prince George: PGMES, CCI Press and Alberta Acadre Network, 2004). Out of this relationship, a Metis Studies Certificate was also created at the University of Northern BC. Evans, Foster, *et al* at 88. See Marni Amirault, *Potlucks, Bingo and Roadtrips: The Prince George Métis Elders Oral History Video Project* (MA Thesis, University of Alberta, 2006) [unpublished].

giving talks and multi-media presentations, or by participating in follow-up community action or dialogues.

Relationality, reciprocity and respect all imply the responsibilities of the researcher to insure she is honest and reliable in the research process, and that her research is accurate, valid and balanced. The researcher is also seen as having a responsibility to provide direction towards positive, practical social action and transformation. Researchers are responsible to ensure participants are protected from harm and treated fairly during the research process.

Relationality and reciprocity also involve engaging all aspects of the self in research: intellect, body, spirit and emotions (Wilson, Makokis). The researcher is encouraged to reflect on her relationships with others, on how she might be influenced by colonialist thinking and its results, and on her own identity and experiences and how these might influence her research (Walter & Andersen, Kovach<sup>20</sup>). Reflecting on the self in relation to research and bringing one's whole self to the research is considered important and even necessary (Absolon, Kovach). Thus, the use of personal experience narratives is common in reflecting on the research, for example by keeping a research journal and/or by including personal narratives in writing up the research.

Other analysis and writing techniques that reflect the Four Rs include introducing oneself and lineage according to protocol (e.g. using connection to territory, nation and family<sup>21</sup>) and explaining one's connection to the research community or research topic (Makokis). This is a form of respect, as is introducing research participants and their contributions (Makokis,

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<sup>20</sup> Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) [Kovach].

<sup>21</sup> This is a protocol common to many indigenous nations, including the Anishinabe and Maori.

Geniusz<sup>22</sup>), as long as anonymity is not required by the study (Dolmage).<sup>23</sup> Non-academic people, including mentors and family members, who have been influential to the researcher's thinking, may also be introduced (Ghostkeeper,<sup>24</sup> Morales<sup>25</sup>).

Many Indigenous researchers use a mixture of methods, some Indigenous, some non-Indigenous. Others use a mixture of voices (storytelling, personal reflection, plain language or specialized discourses) (Wilson<sup>26</sup>). This may also include materials in other languages, especially where translations are used, or where important conceptual terms cannot be accurately translated (Makokis, Macdougall<sup>27</sup>). Researchers may choose not to limit themselves to writing, often using audio or video recordings (Iseke & Moore; Evans, Foster, *et al*), or photographs, artifacts or works of art (Lavallée, Bluesky,<sup>28</sup> Kennedy<sup>29</sup>) in combination with writing to elicit and express the knowledge of research participants. (Note not all researchers cited here necessarily deal with community research.)

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<sup>22</sup> Wendy Makoons Genuisz, *Our Knowledge is Not Primitive: Decolonizing Botanical Anishinaabe Teachings* (Syracuse, NY: Syracuse University Press, 2009) [Geniusz].

<sup>23</sup> Erin Dolmage, *An Exceptional-Typical History of a Métis Elder in Fort St. John* (MA Thesis, University of British Columbia, 2010) [unpublished].

<sup>24</sup> Elmer Ghostkeeper, *Spirit Gifting: The Concept of Spiritual Exchange*, 2d ed (Raymond, AB: Writing On Stone Press, 2007) [Ghostkeeper].

<sup>25</sup> Sarah Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria, 2015) [unpublished] [Morales].

<sup>26</sup> Also see, for example, the work of John Borrows and Tracey Lindberg.

<sup>27</sup> Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: University of British Columbia Press, 2010).

<sup>28</sup> Kinwa Kaponicin Bluesky, *Art As My Kabeshinan of Indigenous Peoples* (LLM Thesis, University of Victoria, 2006) [unpublished].

<sup>29</sup> Anishinabe legal scholar Dawnis Minawaanigogizhigok Kennedy often uses slides of her beadwork to illustrate points about law.

In the examples above, references to individual researchers are meant as a guide for readers only, to illustrate the variety of Indigenous research methods. This list is not intended to be exhaustive. It does not reflect the wide variety of Indigenous scholarship around the world, and is based mostly on Canadian examples. For a more internationally-based overview, including Maori, Australian and African perspectives, see Chilisa, and for reflections on doing Indigenous research from researchers from many backgrounds, see Mertens, Cram and Chilisa.<sup>30</sup>

### **Missing Methodology: The Absence of the Metis in Literature on Indigenous Research Theory and Practice**

Metis methodology is undoubtedly practised but rarely referred to in the academic literature. However, practitioners have been working to create guidelines for Metis research, which will be canvassed here.

### ***Metis Research Methodologies***

While the literature on Indigenous research perspectives and practices is burgeoning, there is surprisingly very little literature about Metis research.<sup>31</sup> Perhaps this gap may be explained by the lack of community research done by Metis researchers that could provide the basis for a methodological discussion. However, according to Mike Evans, Chris Andersen, *et al* in their

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<sup>30</sup> Donna M Mertens, Fiona Cram & Bagele Chilisa, eds, *Indigenous Pathways into Social Research: Voices of a New Generation* (Walnut Creek, CA: Left Coast Press, 2013). For global sources on Indigenous legal research, see Kerry Sloan, "A Global Survey of Indigenous Legal Education and Research" (2013), online: "A Global Survey of Indigenous Legal Education and Research" (2013) Indigenous Bar Association, Accessing Justice and Reconciliation Project: <<http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2013/04/KLS-World-Indigenous-Legal-Education-Complete1.pdf>>.

<sup>31</sup> Although it might seem odd in a dissertation that is partly based on Metis community research to introduce Metis research concerns at the end of this overview, my decision was based on the fact that there are many similarities between Metis and other Indigenous approaches, which would be more easily explained in a general discussion. This is not to say that Metis perspectives are derivative, but that their differences deserve more comment than their similarities.

article “Funding and Ethics in Métis Community Based Research: The Complications of a Contemporary Context”,<sup>32</sup> it is also possible that Metis researchers may be hampered by the lack of research tools, and even by processes and funding agencies that create difficulties for Metis researchers because they are not enough like First Nations or Inuit researchers.

To try to fill the gap in the literature on Metis research, Evans, Andersen and other researchers were asked by the Metis Centre of the National Aboriginal Health Organization (NAHO) to address the lack of community research conducted by Metis researchers and to provide a statement of Metis research ethics with respect to health research. This was achieved through hosting a “think tank” in Kelowna in 2010 made up of Metis researchers, students, and organizations. The resulting paper, “Principles of Ethical Métis Research” outlines six major principles, which are similar, but not identical, to the Four Rs. These six principles are reproduced verbatim below:

1. **Reciprocal Relationships:** Building relationships between researchers & communities, while sharing responsibility & benefits & learning from each other
2. **“Respect For”:** Individual & collective; autonomy; identity; personal values; gender; confidentiality; practices & protocols
3. **Safe & Inclusive Environments:** Research should be safe for all – youth & Elders; gender & sexuality; aboriginality; & balance individual & collective
4. **Recognize Diversity:** Within & between Métis communities; in worldviews; in values & beliefs; in geographic orientation & in politics
5. **“Research Should”:** Be relevant; benefit all; accurate; accountable; responsible; acknowledge contribution; & protect Métis cultural knowledge

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<sup>32</sup> Mike Evans, *et al*, (2012) 5:1 Journal of Critical Indigenous Legal Studies 54. This paper critiques the impact of national research guidelines on Metis researchers .

6. **Métis Context:** Understand history, values & knowledge; advance Métis methodology & include Métis experts; straddle worldviews; & insider-outsider perspective<sup>33</sup>

Of particular note in the discussion of these categories, in term of their relevance to specific Metis concerns are 1) balancing of individual and collective perspectives and identities; 2) acknowledging that even individual perspectives can straddle Indigenous and western worldviews, with a spectrum of syncretic belief systems; and 3) respecting the diversity of personal and community identities. These concerns are interrelated.<sup>34</sup>

The researchers link both Items 1 and 2 when they state, “For the Metis participants, respect is for ‘both’ the individual and the collective. This is one thing that makes doing research in Metis communities unique and is consistent with the view that Metis live with a foot in two worlds, and Aboriginal one and a Western one. For example, given a particular situation, a Metis community may choose to want individual consent, collective consent, or both.”<sup>35</sup> As I will describe later in this chapter, this concern became relevant for me in my ethics review process.

Further to Item 2, the researchers advise learning about any existing protocols in researched communities, and respecting community practices and protocols. However, the researchers caution that such practices and protocols may vary between communities, and may not exist at all in certain communities.

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<sup>33</sup> NAHO, *supra* note 1 at 2.

<sup>34</sup> I do not mean to claim that these concerns are exclusive to Metis people, but they may be more relevant to Metis people.

<sup>35</sup> NAHO, *supra* note 1 at 2-3.

Again, linking Item 2 back to Item 1, individuals may ascribe to these practices and protocols differently, or not at all, and these differences should be respected. This reflects respect for individuals' autonomy and agency.<sup>36</sup>

Regarding Items 2 and 3, the researchers acknowledge that Metis research participants "may have a diverse set of ways of knowing, lenses, or worldviews. This can lead to a diverse set of values and beliefs."<sup>37</sup> Metis people's views on various subjects such as politics, the nature of communities and the nature of research may be varied; thus, respect and understanding is needed. The researchers advise against jumping to easy conclusions:

One important concept that researchers need to understand when doing research in a Metis context is that Metis may straddle worldviews. Making assumptions that Metis have either a Western or First Nation worldview can often be incorrect. Just as there is a need to balance the individual and collective there is also a need to balance traditional with contemporary because Metis can fall anywhere on that continuum. Many Metis experience both insider and outsider perspectives in a given situation.<sup>38</sup>

Community diversity is equally important: "There can be great diversity even within a single Metis community."<sup>39</sup>

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<sup>36</sup> *Ibid* at 3.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at 4-5.

<sup>39</sup> *Ibid* at 3. Note research is being conducted by the NAHO Metis centre on views of community. See "Métis Centre Exploring Ideas of Community", *NAHO Métis Centre Newsletter* (Spring 2011), online: <[www.naho.ca/documents/metiscentre/english/2011\\_SPRING\\_Metis\\_Centre\\_Newsletter.pdf](http://www.naho.ca/documents/metiscentre/english/2011_SPRING_Metis_Centre_Newsletter.pdf)>.

Finally, concerning Item 3, respect for diversity, the researchers note, “Metis are very diffuse geographically, tending not to live in easily recognized, politically bounded, dense areas.”<sup>40</sup> A footnote qualifies this statement, referring to the exceptions “such as the Metis settlements in Alberta or some smaller rural towns that are predominantly Metis.”<sup>41</sup>

Although there are some research projects that involve Metis community research (I only looked at those by Metis researchers), and while these researchers have adhered to many of the guidelines suggested by NAHO, the particularly Metis concerns outlined by the researchers are rarely discussed explicitly.

One of the largest Metis community research projects ever conducted was about law and involved group interviews of Elders as part of the North American Metis Elders’ Conference in 1991. The findings were later published as *Past Reflects the Present*.<sup>42</sup> While the process of the research was discussed, and many of the NAHO principles were alluded to, there was little attempt to specifically describe a Metis methodology. Similarly, Judy Iseke describes her community research with Metis Elders, and bases her research methods on Metis values, but does not set out her methodology as being specifically Metis.<sup>43</sup> Mike Evans, in his work describing various community research projects, suggests using methods that incorporate both

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<sup>40</sup> NAHO, *supra* note 1 at 4.

<sup>41</sup> *Ibid.*

<sup>42</sup> Fred J Shore & Lawrence J Barkwell, *Past Reflects the Present: The Metis Elders’ Conference* (Winnipeg: Manitoba Metis Federation, 1997).

<sup>43</sup> Judy Iseke, “Spirituality as Decolonizing: Elders Albert Desjarlais, George McDermott, and Tom McCallum Share Understandings of Life in Healing Practices” (2013) 2:1 *Decolonization: Indigeneity, Education & Society* 35.

Indigenous and non-Indigenous methodologies.<sup>44</sup> Evans has written about the use of video in community research, which emphasizes participation and input by people being interviewed. Video also personalizes and de-emphasizes written texts. Iseke uses film for similar reasons.

In fact, the methodological approach of most Metis researchers is idiosyncratic, likely because there is no widely available or accepted literature on Metis research ethics or methods. This may in itself be a Metis “move” and even the NAHO guidelines are not meant to be definitive.

What seems to be more important than strict rules is the value of respect in the research process. In terms of health research, according to Lois Edge and Tom McCallum, “Respect is considered as an important principle contributing to Métis health and healing — respect in listening, in a willingness to learn and better understand our relationships with others, to change and to grow, to respect our environments, ourselves and each other.”<sup>45</sup>

The literature about Metis values generally was instructive,<sup>46</sup> and these values were similar to what I had learned in my own family and from my research participants. Trying to understand

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<sup>44</sup> Mike Evans, *et al*, “Common Insights, Differing Methodologies: Towards a Fusion of Indigenous Methodologies, Participatory Action Research, and White Studies in an Urban Aboriginal Research Agenda” (2009) 15:3 *Qualitative Inquiry* 893. This was not a study specifically relating to Metis people.

<sup>45</sup> Lois Edge & Tom McCallum, “Metis Identity: Sharing Traditional Knowledge and Healing Practices at Metis Elders’ Gatherings” (2006) 4:2 *Pimatisiwin: A Journal of Indigenous and Aboriginal Community Health* 83. Online: <[www.pimatisiwin.com/uploads/1399918655.pdf](http://www.pimatisiwin.com/uploads/1399918655.pdf)>.

<sup>46</sup> Lawrence Barkwell of the Louis Riel Institute has compiled a list of Metis values, which includes the importance of family gatherings, especially since people may be geographically dispersed; the social importance of music, dance and food; the values of humour, honesty (e.g. written contracts were not required), loyalty, sharing (food, tools, work, knowledge and stories), self-respect, and respect for elders; storytelling as way of passing down history and values; allowing for a variety of spiritual practices (Indigenous spirituality, Catholicism, Protestantism); and environmental conservation and respect for animals. See online: <[www.scribd.com/doc/24087920/Traditional-Metis-Values](http://www.scribd.com/doc/24087920/Traditional-Metis-Values)>.

Leah Dorion of the Gabriel Dumont Institute has published a retelling of the traditional Metis story “The Giving Tree”, which expounds upon the 12 core Metis values of strength, kindness, courage, tolerance, honesty, respect, love, sharing, caring, balance, patience, and the connection with the Creator and Mother Earth. Leah

Metis philosophy as a basis for Metis methodology was more challenging. (Metis philosophy as a basis for legal critique is the subject of Chapter 7.)

Elmer Ghostkeeper's work is an example of an idiosyncratic approach that is also fundamentally Metis. Ghostkeeper's book *Spirit Gifting: The Concept of Spiritual Exchange* is one of the few works by a Metis researcher that attempts to explicitly outline Metis philosophy as it applies to research.<sup>47</sup> Ghostkeeper, a Metis from Paddle Prairie settlement in Alberta, undertook this research initially as a Master's student in order to grapple with changes caused in his community by oil and gas development. Although until the mid-1970s his family had lived life *with* the land, and based on traditional Metis philosophy, Ghostkeeper's involvement in the oil and gas industry caused him to recognize a dissonance between this worldview and one of exploitation, or living *off* the land. He realized he had moved away from the teachings he had received and tried to revitalize this knowledge in his own life. His Master's work with supervisor Michael Asch was a part of this process.

Ghostkeeper's methodology is to use personal reflection to narrate the two worldviews he is trying to juxtapose. He is careful to state that his "insights may conflict with those of other members of the community".<sup>48</sup> This reveals his awareness that there may be other valid views on this topic.

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Marie Dorion, *The Giving Tree: A Retelling of a Traditional Métis Story* (Saskatoon: Gabriel Dumont Institute, 2009).

Self-sufficiency and self-reliance are also seen as Metis values: Deborah Canada, Chief Executive Officer of the Métis Commission for Children and Families of BC (MCCF), online: <[www.metiscommission.com](http://www.metiscommission.com)>.

<sup>47</sup> Ghostkeeper, *supra* note 24.

<sup>48</sup> *Ibid* at 4.

Central to the Metis worldview as he describes it is “the Great Spirit”. His view of research is that it is a form of ceremony, or ritual; it is also a sacrifice (compare Wilson).<sup>49</sup> He states, “The activities of sacrifice and ritual are considered to be performed in a border region which overlaps and joins different worlds”.<sup>50</sup> Ghostkeepers’s methodology is to present information, then comment on it, as a form of dialogue between different worlds. In another expression of encompassing worlds, he states that both wild and domestic animals and plants were important to the Metis in living off the land.

Ghostkeeper was not able to find an appropriate anthropological model with which to analyze his own revitalization – he could only find a group model, which he adapted to create his own model. This model includes incorporating outside influences with traditional knowledge (e.g. synthesizing western and Indigenous scientific knowledge); comparatively analyzing two ways of being (off the land and with the land) through introspection and self-appraisal; formulating a concept of the ideal self and comparing codes with that; and rediscovering the Metis philosophy of spiritual exchange, which creates interconnection. Ultimately, Ghostkeeper rejects the group model as utopian – he says he prefers his own model, because it emphasizes syncretic knowledge in light of the real self.<sup>51</sup> Ghostkeeper notes many others have gone through similar processes in decolonizing themselves.

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<sup>49</sup> *Ibid* at 10.

<sup>50</sup> *Ibid* at 12.

<sup>51</sup> Metis critical literary scholar Dylan Miner also deliberately incorporates syncretism in his work. See his “Halfbreed Theory: Maria Campbell’s Storytelling as Indigenous Knowledge and *Une Petite Michin*” in Jolene Armstrong, ed, *Maria Campbell: Essays on Her Works* (Toronto: Guernica, 2012) 147.

Two student works briefly elucidate a Metis methodology: Tara Turner’s PhD dissertation and Amanda Lavallée’s Master’s thesis. Turner cites Lavallée for using the Metis infinity symbol to represent the integration of western and Indigenous research methodologies in a way that creates “ethical space”.<sup>52</sup> According to Turner, this is a “third space” method that is non-assimilating and decolonizing, but respects other traditions. Metis scholar Adam Gaudry does not set out a specifically Metis research methodology, but stresses the need to ground Indigenous “resurgent” research in communities, and to promote liberatory action that benefits Indigenous peoples and their communities.<sup>53</sup>

## **PART 2            RESEARCH PROCESS**

### **Broad Research Goals**

My larger goals in this research project are to provide a Metis-centred critique of the Canadian law of Metis rights, and to suggest the usefulness and appropriateness of formulating Metis theories and methodologies that can assist in the understanding of Canadian, Metis and other legal systems. In trying to pursue my research goals, I have had to first investigate the Metis ideas that might underpin or help me to fulfill these goals. While this added a layer of difficulty to this project, in my view it was essential to question the intellectual foundations of what I was doing. For me, going through this process revealed the richness of Metis thought, as expressed

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<sup>52</sup> Tara J Turner, *Re-Searching Metis Identity: My Metis Family Story* (PhD Thesis, University of Saskatchewan, Department of Psychology, 2010) [unpublished]; Amanda May Lavallée, *Graduate Indigenous Women: An Exploration of Strategies for Success and Well-being While in Graduate Studies* (MA Thesis, University of Regina, 2007) [unpublished].

<sup>53</sup> Adam JP Gaudry, “Insurgent Research” (Spring 2011) *Wicazo Sa Review* 113.

by a variety of Metis thinkers, and its relevance and vitality – not just for ourselves, but for other Indigenous and non-Indigenous people.

Another larger goal in pursuing this project was to try to conduct it based in Metis values and through creating community connections.

### **Research Questions**

In order to achieve my goals, I investigate Canadian courts' reliance on historiographies of the Metis that are rooted in colonialism; more widely, I problematize these same courts' erroneous and often polarized assumptions about Metis history, Metis thinking and the nature of Metis communities. I question how the law's misrecognition of the Metis has affected Metis people individually and collectively and whether this misrecognition can be remedied. I am particularly concerned about the extent to which legal pronouncements have caused us as Metis people to change the way we view ourselves.

However, beyond investigating Metis reactions to Canadian law more generally, I am interested in what Metis people think about the ideas raised in and by *Powley*<sup>54</sup> and *Willison*.<sup>55</sup> What do we think about harvesting, history, community, territory? Could Metis conceptualizations of these subjects provide alternative paradigms for Canadian law? How might they influence the development of Metis society?

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<sup>54</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff'd [2000] OJ No. 99 (Ont SC); aff'd [2001] OJ No. 607 (Ont CA); aff'd 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

<sup>55</sup> *R v Willison*, [2005] BCJ No. 924; rev'd (2006) BCSC 985 [*Willison* or *Willison BCSC*].

Because the issues set out in the *Willison* trial revolve around the questions raised above, my questions to participants were similar to these issues, and included:

- What does Metis community mean?
- Do you think there are Metis communities in BC (historic or modern)?
- Should Metis people have to prove that they have ancestral connections to historic Metis communities in order to have constitutionally protected harvesting rights?  
Should we have to prove there are modern Metis communities, and that these communities (or their practices) have continuity with historic communities?
- What about mobility – should harvesting rights have geographical limitations?

I was also interested in investigating the three-way split described by the appeal judge in *Willison*: 1) “distinctive collective identity”/ “identifiable” vs. “people of mixed ancestry”; 2) “living together in the same geographic area” vs. “geographically wide”; and 3) “sharing a common way of life” vs. “loosely affiliated group of people”.

### **Research Design**

In order to apply the idea of web-like relationality to ways of knowing and critiquing, I have used a combination of textual analysis (rhetoric, close reading, legal analysis) and oral community interviews.

This is a qualitative study based in Indigenous and participatory action methodologies, and exhibits some overlap with autoethnography.

## Research and Writing Methods

### *Research Methods*

In order to learn more about the ideas and questions described above, I have employed a combination of textual analysis and in-person interviews with Metis community members from southern BC. My methods are deliberately varied and are taken from a variety of disciplines, including law, history and literary criticism.<sup>56</sup> Rationales for using intersecting and sometimes diverging methods, along with a variety of forms of expression, include having the action, content and form of my research reflect, at least in some small way, the variety of Metis views and experiences. These ideas will be explored more fully in Chapter 7.

In terms of documentary research, I have analyzed case law and court documents from Canadian common law and Metis legal perspectives, and have conducted close readings of popular and scholarly historiographical works, and of scholarly works on law, history and critical theory. In some cases, I have analyzed the rhetorical and literary techniques of orators, storytellers and writers. While this dissertation is not primarily a work about history as such, I have researched some limited primary sources on Metis history in BC.

In addition to doing documentary research, I interviewed 23 adult Metis residents of the Thompson/Shuswap, Okanagan and Kootenay areas, areas where the harvesting activities at

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<sup>56</sup> Combined research methods are being increasingly employed in the social sciences. For a description of some approaches, see John Brewer & Albert Hunter, *Foundations of Multi-Method Research: Synthesizing Styles* (Thousand Oaks, CA: Sage, 2006).

issue in the *Willison, Nunn*<sup>57</sup> and *Howse* cases took place, to ask them about their perspectives on the issues raised by the cases.

### **Writing Methods**

I have tried to create a written form for this dissertation that braids different voices, including narrative, plain language, academic/legal language and participant conversations and quotations. This braiding technique seemed natural to me, although of course I was influenced by the work of John Borrows, and by certain trends in modern poetics, such as the trend to include “heard” speech and non-“standard” English (e.g. Maria Campbell).

Later, I discovered many Indigenous writers and researchers make use of a blend of voices and styles (Wilson) and many also use stories as a method of exploring ideas. For instance, Kovach uses conversations as part of her method. She also uses stories about her own experiences and situates her entire study within story. Metis researcher Jeannine Carrière uses conversation and participant quotations.<sup>58</sup> Other writers, such as Bonita Lawrence, both summarize and synthesize participant perspectives.<sup>59</sup> The respectful use of story in Indigenous research is an emerging field (Archibald<sup>60</sup>), as is critique of the use of storytelling that purports to be collaborative (McCall<sup>61</sup>). One of the important influences on me in terms of using a variety of

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<sup>57</sup> *R v Nunn*, [2003] BCJ No. 3229 [Nunn].

<sup>58</sup> Jeannine Carrière, ed, *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption* (Halifax: Fernwood, 2010).

<sup>59</sup> Bonita Lawrence, *“Real” Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: University of British Columbia Press, 2004).

<sup>60</sup> Jo-ann Archibald/Q’um Q’um Xiiem, *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit* (Vancouver: University of British Columbia Press, 2008).

<sup>61</sup> Sophie McCall, *First Person Plural: Aboriginal Storytelling and the Ethics of Authorship* (Vancouver: University of British Columbia Press, 2011).

voices has been the collective work of “Métissage: A Research Praxis”, which braids scholarly prose and narrative.<sup>62</sup>

Another writing technique I have tried to employ is the use of iteration. In this, I have been influenced by my background in language philosophy and semiotics, but I have also been influenced by the style of instruction I received in my family, including storytelling, which I would describe as recursive. The cyclical character and replication of natural processes, which I was taught about by my family, and which I observe as a hiker, forager and gardener, have also influenced my writing. I have noticed techniques of repetition in the work of Elmer Ghostkeeper and other Metis writers, and I also notice it in the speech patterns of some of my research participants.

### **Applicability and Reliability**

The material from research participants used here is not meant to necessarily be generalizable to views of other Metis people in BC or elsewhere. At the same time, I do think it represents an interesting spectrum of views, backgrounds, life histories and historical links which reveal the interconnectedness and irreducibility of Metis experience. The fact that these people, who were not chosen directly by me, happened to have such interesting connections to historic Metis people and events, as well as to a wide network of Metis and other communities, is representative of the webs of Metis history, territory and community.

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<sup>62</sup> Cynthia Chambers & Erika Hasebe-Ludt, *et al*, “Métissage: A Research Praxis” in Gary J Knowles & Ardra Cole, eds, *Handbook of the Arts in Qualitative Research: Perspectives, Methodologies, Examples, and Issues* (Los Angeles: Sage, 2008) 141.

Because the life histories and views of the research participants are particularly their own, I have chosen to not collapse them in the introductory section or in the legal critique sections in Chapters 5, and instead have created short biographies and have summarized peoples' views on the issues in *Willison*. Space does not allow the use of extensive quotations with 23 people.

In the traditional western sense of being replicable, this study is not "reliable" but, as Cree researcher Leona Makokis has explained, "Reliability in the traditional sense seems to be something of a misfit when applied to qualitative research."<sup>63</sup> The purpose of the design of this study is rather to grapple with the diversity and complexity of Metis views as they are presented by participants. As Makokis says, "It is important to realize that there are multiple realities emergent in the participants' knowledge and experience."<sup>64</sup>

The multiplicities of participants' realities raised the question of whether the participants' perspectives are "authentically" Metis. Throughout this dissertation I critique imposed notions of authenticity that require some "purity" of thought (not in the moral sense). Metis thinking is not monolithic and, in true Metis style, has incorporated many cultural and philosophical elements. Most Metis approaches to research are superficially ideosyncratic but have underlying commonalities, such as those concerns about the "four Rs" reflected in NAHO, and others. I raise this issue because it parallels the skepticism of some about the validity of Aboriginal oral history being occluded by "modern" knowledge and assumptions.<sup>65</sup>

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<sup>63</sup> Makokis, *supra* note 11 at 46.

<sup>64</sup> *Ibid.*

<sup>65</sup> For instance, crown counsel, when cross-examining Lottie Kozak, tried to determine to what extent her knowledge was "authentic", i.e. not influenced by written (or other external) sources. See Alexander von

I acknowledge a possible problem with my study in that I used the term “community” in my interviews, which could be “leading” (in the trial advocacy sense), but I don’t think this was too prejudicial, as I asked open-ended questions.

### **Description of Research Process**

In this part, I describe my research process. This process spans the origins of my interest in this inquiry, and my processes of conducting documentary research, community interviews and follow-up and my coding, analysis, writing and review process. Some of my rationales for choosing particular methods are alluded to, and these will be reflected upon more fully in Part 3.

In this part, I also situate myself in the research; that is, I describe my cultural, academic and professional background that is relevant to this research.

I have chosen to write this next part as a chronological narrative, as I decided this was the best way to avoid over-compartmentalizing my research process.

### ***Roots and Branches: A Research Narrative***

It is difficult to decide where my research journey relating to this paper began. In some ways, it began with my curiosity about the Metis community in the Salmon Arm area where my grandparents had settled, and in some ways it began with my frustration with Canadian law,

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Gernet, a frequent crown witness in Aboriginal law cases, on this and related topics: *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories* (Ottawa: Research and Analysis Directorate, Indian and Northern Affairs Canada, 1996).

since I had practised law for a number of years for First Nations and Metis clients and felt that Canadian legal definitions of Aboriginal peoples and cultures were misguided at best.

More immediately, my decision to research the *Willison* case stemmed from a conversation I had with my grandmother, Helen Venne Sloan, who lived a few miles from Falkland, the region in question in the case. We read a local newspaper article about the *Willison* appeal decision and she was surprised the court had concluded there was no Metis rights-bearing community in the environs of Falkland. She was more inclined to agree with the trial decision, which upheld Mr Willison's hunting rights. My grandmother's comment was that "there is a pretty big community here, with lots of cultural events". I knew myself that this was true, but I also knew the test requires proof of a "historical" community, with continuity to the present day.

My grandmother and I talked about the court's assertion that there was "insufficient evidence" to prove the existence of a historical Metis community in the area. My gram told me she thought this meant they didn't have enough *written* evidence, as she told me that even when they arrived from Saskatchewan in 1948 there were already Metis families in the area. She told me that, in those days, people didn't parade around with Metis flags, or sport sashes at the fall fair, but they "were often aware of each other". In essence, she told me that for many years it was risky to publicly identify as Metis. She also acknowledged that there might have been Metis families who never revealed their identities. Later, she told me, this changed, and for the previous 10-15 years she had seen Metis cultural events advertised, although she had never chosen to attend.

I recalled the statement in the leading Metis rights case, *Powley*, that allowed that community continuity might be hard to prove, given that for many years people downplayed their Metis identities and community associations, at least in public.

I was curious enough about the questions raised by the *Willison* case, the most significant case to follow *Powley* in BC, that I chose to pursue graduate studies in order to be able to find out what other Metis people thought about these issues. I chose to interview Metis people in the Falkland area, loosely defined, as well as in the areas of concern in the other BC harvesting cases, *Howse* (Kootenays) and *Nunn* (south Okanagan).

Among the many things I didn't anticipate in seeking Metis perspectives on these cases was that I would discover my own family's connections to BC, which far pre-dated my grandparents' migration from Saskatchewan. I discovered that I was related to some of my research participants, and that our family members had settled across BC, creating their own communities, some dating back to the early 1800s. Some relatives, like John McDougall, who set up the trading post at Kelowna, were well-known historical figures. I also discovered that some of our family had travelled to and lived in BC many years before my grandparents arrived. For instance, some of my ancestors and some of Greg Willison's ancestors had come to BC together in 1841 as part of the Sinclair expedition, and still others were connected with the trading post at Fort Kamloops, marrying into the Secwepemc (Shuswap) Nation. Another ancestor was connected to the fur trade in the Kootenays, eventually moving to the Rocky Mountain region. I was intrigued to realize that my ties to the areas of concern in *Willison*, *Nunn* and *Howse* were richer and older than I had expected.

Another aspect of my research I could not have anticipated was that I would deepen my connection with the territory where my Metis family had settled, a territory I already knew and loved, but from which I had become increasingly disconnected over the years. My mother's family lived at Gleneden, in the Fly Hills just outside Salmon Arm, where their raw wood barn, outbuildings, and combination A-frame/shanty house sat perched just below a rocky mountain outcropping and just above gently sloping fields of hay and alfalfa. I spent many happy holidays at their place, often together with my aunts, uncles and cousins – and cows, horses, cats and dogs – enjoying a reprieve from city life in Vancouver. I also visited my relatives at Eagle Bay, Kamloops, Westwold, and Osoyoos, so I became familiar with these landscapes over many years as well. However, with the death in the 1990s of my aunt and uncle in Eagle Bay and of my grandfather in Salmon Arm, my connections began to diminish. Then, just as I started to plan my field interviews, my grandmother died. A few years before, the family farm had been sold. The new owner subdivided the property, demolished the house and other buildings, and even changed the landscape, levelling the bench land on which the house and cabin had sat. The place I had always thought of as my “real” home was no more, and with the death of my grandmother, who by then had been living in town for some years, I wondered how I could continue to be connected to the Salmon Arm area. Unexpectedly, my community research allowed me to have new and positive connections and associations with this area, especially with Falkland – the “other side of the mountain” from Salmon Arm. Of course, these connections had actually always been there – I just hadn't realized it.

### ***A Genealogy of Influences: Work and Academe***

In my graduate courses, I returned to the theoretical concerns I had so willingly abandoned after my previous experience with grad studies in English and Comparative Literature.

Practising law had been a good antidote to these theoretical obsessions, although after a while I began to be dissatisfied with Canadian law and concerned about its theoretical underpinnings.

As a lawyer who worked for a number of years in a First Nation research department helping with litigation and land claims, I also became concerned about the ethics of research with Aboriginal people. Some of my department colleagues told me their family members had felt disrespected – “ripped off” was the term one person used – when thinking about one academic who had come to their reserve, extracting information from people, taking pictures, and then never returning. No copies of the eventual publication were provided to the interviewees or community. The publication itself, they said, was full of errors and incorrect assumptions, and made them feel like animals in a zoo, microbes under a microscope. They had conducted their own oral research project in their own language, with their own staff conducting the interviews, transcribing, translating, coding, copying, interpreting. While working for this First Nation, I also discovered, while looking through the archives, the gaps in the stories I had been told in school and in the media about the history of Canada, and I began to wonder about how judges’ and lawyers’ understandings of history influenced their decisions about Aboriginal people.

Once returning to thinking about theory, I realized I still had an interest in some of the ideas I’d explored in my previous attempts to be a scholar – deconstructionism, post-structuralism, feminist methodologies. I noticed some overlap between these ideas and Buddhist thought, which I had studied some years previously, and quantum physics and chaos theory, which had

always been lay “side interests”. While these convergences were intriguing, they seemed only tangential to concerns about colonialism and Indigenous resistance and resurgence.

Some of the literature we explored in the Law grad program concerned experiences of Indigenous people, such as Patricia Monture-Angus, Mary-Ellen Turpel-Lafond and Robert A Williams Jr, in law school, revealing cultural ruptures. Other literature addressed the ethics of research concerning Indigenous people. We read Linda Tuhiwai Smith’s seminal (ovarian?) *Decolonizing Methodologies*, which seemed to address some of the issues that had arisen in the First Nations community I had worked in. Many of these class materials resonated with me, and reaffirmed my decision to conduct community research to reflect Metis voices.

I took a few courses outside the Law faculty, one in the theory and practice of oral history research, and one in the history of Metis peoples in western Canada. I also audited a course on anti-colonial literature, another on the intellectual genealogy of anthropology and its effect on legal decisions, and a short summer course on Gitksan law. All of these ideas percolated in my mind, and influenced my thinking and my approach to research. Particularly relevant were issues of insider-outsider research in the social sciences, which I encountered in my Oral History course. These concerned the effect of being an insider, and outsider, or both and insider and outsider in the communities in which researchers conducted their research. Later, in a multi-disciplinary research project I was involved in, we held a student conference about ethics in research with Indigenous people. This was influential in my thinking, as was my involvement in a couple of Indigenous law research projects, through which I began to realize that it was not just that Metis perspectives differed from Canadian law perspectives, but that they had

different philosophical roots. I will return to a discussion of Metis philosophy, and its importance for law, in the next chapter.

### ***More Reflections: Research Process***

My documentary research was ongoing throughout this time. I reviewed the court cases, the precedents they created, the antecedents they were derived from. I looked at the court transcripts. I read critiques of the cases, particularly by Metis authors. I conducted a review of the written works that addressed the history of Metis people in BC and read about Metis history generally. While I did not review many primary archival sources, as my focus was not Metis history *per se*, my review of secondary source material confirmed there was very little written about Metis history in BC, although archival evidence certainly existed. A project I was involved with about the origins of Louis Riel's political and religious philosophy, along with a project comparing sources of Metis laws, some written, some oral, gave me an introduction to the scope and variety of Metis thinking. My involvement with my local Metis community in Victoria, especially as a board (governing council) member, highlighted the multiplicity of Metis perspectives on governance, rights, identity and cultural issues.

While most of my research revolved around specifically Metis concerns, I felt I needed to look at other Indigenous perspectives on harvesting rights, mixed identities, communities and territories. I also looked at the works of non-Indigenous thinkers on these issues, particularly as they related to Indigenous issues. These works were not limited to scholarship on law, history, or critical theories, although they included those, but often strayed into my previous subject of literary criticism and, worryingly, into disciplines I was not familiar with – political science,

sociology. However, despite their disciplinary differences, the writings that interested me were the writings of other so-called “mixed” people, especially Indigenous mixed people. Latina/o and Chicana/o thinkers seemed to reflect many of my experiences and thoughts. Similar concerns were expressed by Caribbean writers. Unexpectedly, writings by and about diasporic and nomadic people such as Jews, Roma (Gypsies) and Irish Travellers particularly resonated with the Metis concerns I felt and was discovering through my research.

### ***Braiding Strands and Asking Questions***

While trying to weave all the intellectual threads of history, law and other disciplines together, threads I had gathered through documentary research, including some research into my own family’s history, I began to think about how my own history and thinking had influenced my research choices, in terms of both what and how I was researching. Why was I gathering so many different threads – how was I possibly going to be able to braid them all together? Couldn’t I just stick to the obviously Metis material? Why did I feel the compulsion to incorporate so many different kinds of sources – written, oral, written transcriptions of oral material, scholarly and non-scholarly? As I was to discover slightly later when I delved more specifically into scholarship on Indigenous critical theories and Indigenous research methodologies, this drive was not uncommon, and was even encouraged, as it was seen as reflective of holistic worldviews common to Indigenous philosophies. For me, it was reflective of my reluctance to present a static view – I wanted to represent the fact that a discussion was taking place, and I also hesitated to present facile conclusions. I wanted to illustrate that surveying a wide variety of sources was a necessary part of a Metis inquiry, that Metis thought

is neither reducible nor insular. While I think these were good impulses, they also led me down many labyrinthine paths, perhaps a little too far away from what I was supposed to be thinking about. I had to keep reminding myself that my overall research goals were to create an example of a Metis-centred critique of the Canadian law of Metis rights, and to suggest the usefulness and appropriateness of formulating Metis theories and methodologies that might assist in the understanding of Canadian, Metis and other legal systems. My research questions centred around how and why the community conundrum had been created, how it affected Metis people, why it was problematic, and what could be done about it.

Another reason I had to search out so many different sources was that there were simply not many sources dealing with Metis research methods or theories; in fact, I could not find a great deal of research conducted by Metis people about Metis people, let alone in the context of law. This was another reason I chose to conduct community research, but it was also a rationale for looking at Metis written and oral literature more widely, across many different disciplines.

Because of the scarcity of Metis materials on research practice and theory, I began to research Indigenous materials on these issues more widely, along with Indigenous critical theories more generally, focusing on works that critiqued state law from Indigenous perspectives.

While I did a great deal of documentary research, the most central research was yet to come – actually conducting interviews with research participants. I eventually interviewed 23 adult Metis residents of the Thompson/Shuswap, Okanagan and Kootenay areas, areas where the harvesting activities at issue in the *Willison*, *Nunn* and *Howse* cases took place. More specifically, I travelled to Kamloops, Tappen, Eagle Bay, Salmon Arm, Salmon River, Falkland,

Enderby, Vernon, Lumby, Oliver, Trail, and Whitley Lake, near 100 Mile House. Participants in this research included Elders, litigants, and those otherwise involved in and affected by the cases, including trial witnesses. These participants have already been introduced in the Dissertation Summary.

With the majority of documentary research completed, or so I thought, I began to plan my field research in earnest, but still had to survive the university ethics review process, a process that in my case illustrated the tendency of academic institutions to assume Metis communities operate similarly to First Nations or Inuit communities (although of course this process also essentializes First Nations and Inuit communities).

***The Ethics Review Process: An Example of the Community Conundrum at Work***

The university ethics board, which oversees research involving humans, is understandably particularly concerned about research involving Indigenous people, as there has been such an egregious history of exploitative research in Indigenous communities (Smith). In order to prevent abusive research, the revised Tri-Council Policy Statement (TCPS 2) of the Canadian Interagency Advisory Panel on Research Ethics (2010) was adopted to provide governing principles for research with humans, and contains specific sections outlining principles for doing research with Indigenous people and in Indigenous communities. Many of these principles reflect the concerns expressed in the literature on Indigenous research methodologies described above, so to that extent I think the drafters have made a valiant attempt to ensure that no inappropriate research practices are sanctioned by Canadian universities.

Despite these best intentions, I discovered that when these principles were applied to me as a Metis researcher, they distorted the reality of Metis experience, as they were based on a pan-Indigenous model that seemed to assume all Indigenous governance in Canada operated similarly, with people at the “head” of governing bodies who could authorize research being conducted in their communities. This assumption was based on the further assumption that Indigenous communities were static, and were located in discrete geographic areas. While I doubt this description applies uniformly to First Nations or Inuit communities, it certainly does not apply to Metis communities and governance systems, at least in BC.

When planning my research, I intended to contact the Elders in the Thompson/Okanagan area, which was the area of concern in the *Willison* case, the area that comprised the former Fur Brigade Trail that ran between trading posts in what became northern BC, then went to Kamloops, through to Falkland, and on to the Okanagan through Vernon and Kelowna. I had the good fortune of meeting one of the Elders, Lottie (McDougall) Kozak of Falkland, at a Metis cultural event in Abbotsford. Lottie, in her role as an Elder and knowledge keeper, had been a witness in the *Willison* case. I introduced myself, and explained my project, and she said she would be willing to be interviewed. We got to talking and realized we were cousins. She told me she would be happy to suggest some other people I could talk to, and mentioned another Elder, Eldon Clairmont, who at the time was also the president of the Salmon Arm Metis Association (SAMA). I contacted Eldon, and he also was willing to arrange some contacts for me. Eldon and Lottie agreed I could make a presentation about my project to a meeting of SAMA in order to see if any community members would be interested in participating. At the meeting, I could give people my contact information. I wrote this up in my ethics application,

and also said that I would contact litigants directly, which I eventually did with Greg Willison, and with Dan LaFrance, one of the co-claimants in the *Howse* case. The ethics board was fine with my methods of participant selection (although wary of confidentiality issues), but asked me to provide a letter from SAMA stating that I had permission to conduct research in “the community”. I asked Eldon and Lottie about getting such a letter, and was told that this was possible, but not necessary, or even appropriate, as far as they were concerned, as this would imply that Eldon, as president of SAMA, could speak for all members, and that SAMA could speak for people that might belong to other Metis locals, such as the Kamloops, Vernon and south Okanagan locals. This was also problematic, because these locals themselves were merely political organizations connected with the Metis Nation of BC, which was not the only political organization representing Metis people in the province, and there were many people I might speak with who were not affiliated with any political associations, but were still considered to be part of the wider Metis community. This wider community was not necessarily based in any one region, but encompassed a wide geographic area.

The concerns raised by Eldon and Lottie reflect the historic political and community organization of the Metis, in which political organizations were often created for temporary purposes, such as the buffalo hunt, and then disbanded. The Metis were known by the Cree as *otipemisiwak*, the “people who own themselves”, and Metis political history has revealed a balancing between independence and inter-dependence, as described in the work of Adam Gaudry.

I returned with this information to the ethics board, and explained that the Elders had told me they were reluctant to give me a letter of permission, because it would essentially be beyond their jurisdiction to do so. I received the surprising response that perhaps I could get a letter from Eldon (since he was the president, his voice seemed to matter more than Lottie's, as she was "just" an Elder) saying that I didn't need a letter! What I realized was that the ethics board just needed a piece of paper so that they could say they were in compliance with the Tri-Council Policy directive. Whether the actual people writing the letter thought it was appropriate was not really relevant. In the end, I did get a letter from Eldon, but he reiterated that he was just doing this to show support for my project, but that as far as he was concerned, it was up to the individuals to decide whether they wanted to participate, as he couldn't speak for them. This statement is also consistent with Metis philosophy, which holds that it is disrespectful to interfere with another person's agency. When I eventually spoke with the research participants about this issue, they agreed that they didn't think Eldon or SAMA was in a position to authorize my research, and participation was a matter of personal choice.

While I understand the intent of requiring prospective researchers to obtain permission from the communities where they wish to conduct research, such a requirement raises issues of representation, governance, territory and community that are not easy to resolve. In Metis contexts, these requirements may be inappropriate, and an insistence on them despite advice to the contrary from Metis Elders and leaders suggests the Tri-Council Policy and university ethics processes need to become more sensitive to Metis concerns, and to the diversity of Indigenous governance and cultural understandings.

### ***Community Research Process***

My actual field work was the most inspiring and interesting of all the research I conducted, because I got to meet many Metis people, including some relatives, and see at first hand how the issues I had been thinking about actually played out. I was very fortunate to be able to interview people with different opinions and backgrounds. I was pleased to discover that some of the concerns that I had about the Canadian law's view of Metis communities, history and rights were shared by many of the people I interviewed. It was also fascinating to discover the many family ties interviewees have with each other and with other Indigenous nations from BC and elsewhere.

My first research trip was what I described as a "scouting" trip, as I had not yet been granted my ethics certificate. On October 9, 2011, I gave a presentation about my project to community members from the Salmon Arm area, and attended community office hours the next day to answer questions people might have about the project. As a result of this trip, four participants self-selected themselves after I conducted in-person pre-interviews with them. However, unfortunately, only one of these people, Lois McNary, was available when I returned on two later occasions to conduct interviews. The other three people were all hunters and told me they were excited that someone cared about Metis hunting rights. They said they would like to be interviewed, but I couldn't do that at the time because I didn't have my ethics, and they were away when I was back the following summer to do interviews. However, they gave me permission to refer to information they provided me. Once I received my ethics certificate, I returned to the area, made another community presentation, and attended community office hours the next day to answer questions. I spoke with a number of other people who said they

were interested in being interviewed, but were not available when I was in their area.

However, this presentation resulted in Warren Ogden deciding to be interviewed.

In addition to the people whom I contacted through the community meeting, Lottie gave me contact information for Greg Willison, the claimant in the *Willison* case, and for Ron Nunn, a witness in *Willison*, and the claimant in the *Nunn* case. Both Mr Willison and Mr Nunn agreed to be interviewed. Regarding the *Howse* case, Ms Kozak put me in touch with Mark Carlson, a Hunt Captain in the Kootenays, and with Kootenay community Elder Goldie McDougall, who is a cousin by marriage of mine and Lottie's. Regarding the *Nunn* case, Lottie suggested I speak to Margaret Penner, who is an Elder from the south Okanagan, and an MNBC senator. Other contacts I received from Lottie were wildlife biologist Dean Trumbley, who lives down the road from her in Falkland, Wayne Bourget from Salmon Arm (a witness in *Willison*), and Lenore Willison, Greg Willison's mother.

Lottie then suggested I talk to then Vernon and District Metis Association President Bill Gagné, who could put me in touch with potential participants from Vernon and surrounding areas. Bill connected me with his sister Janet, who worked at the Native Friendship Centre in Vernon and taught Metis culture to students in the local school district; and with Vernon/Lumby area Elders Anne and Don McLeod. Both Bill and Janet suggested I talk to Vernon Metis artist Beryl Beaupre, and Vernon community member Sandy Milner, who agreed to be interviewed.

Eldon suggested I speak with a number of people who agreed to be interviewed: Brenda Boyer Percell of Kamloops, Pat Normand of Eagle Bay, John Sayers of Salmon Arm, and Lori Michon Nicholson of Enderby.

All of the participants except Lottie, Eldon, Lois and Warren, who self-selected themselves as a result of in-person conversations, agreed to participate after I conducted pre-interviews with them by telephone.

I contacted *Howse* case litigant Dan LaFrance directly, and he agreed to be interviewed after I conducted a pre-interview by telephone.

The purpose of the pre-interviews was to explain my research project, and what participation in my research would entail, and also to explain issues around confidentiality, voluntariness and potential risk.<sup>66</sup> All participants agreed to be named in my dissertation, and also agreed that I could use their interviews in future work. Participants gave either written or oral consent to being interviewed and recorded. Oral consent was recorded and noted on consent forms.

Participants will be provided with copies of their recordings and/or transcriptions if they wish, as well as summaries and complete copies of the completed dissertation.<sup>67</sup>

I was able to interview at least one claimant from each case, along with a number of witnesses and spectators at the trials and appeals. Elders, Hunt Captains and other community members were also interviewed.

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<sup>66</sup> Although the risk was described as being minimal, I did offer participants the contact information of local low cost counsellors.

<sup>67</sup> According to the agreement described in the consent forms, participant interviews and data have been stored on my computer, which is password protected, and will not be shared with anyone (without further permission), other than as I incorporate them into completed works. While some disciplines arrange for oral history or community research interviews to be archived and made available to other researchers, this was not contemplated at the time the consents were given. Of course, participants may consent to have their knowledge shared more widely. All works created by me using the interviews will be made available to participants and Metis organizations.

From June 13 to 21, 2012, I stayed in Salmon Arm and interviewed people from Kamloops, Eagle Bay, Tappen, Salmon Arm, and Falkland. For all but the first two days of this trip I was hosted by Elder Eldon Clairmont and his wife Shirley, staying with them in a trailer on their property. From July 26 to August 5, 2012, I stayed in Falkland, Trail and Oliver and interviewed people from Salmon River, Enderby, Vernon, Lumby, Trail and Oliver. While in Falkland I was hosted by Elder Lottie Kozak, her husband Bill, and their friend and housemate Barry Ward.<sup>68</sup> Lottie and I travelled together to Trail, where we were hosted by Mark Carlson and his wife Cindy. I camped while in the Oliver area. On May 6, 2013 I interviewed Greg Willison in Salmon River (near Falkland), camping near Falkland, and on May 7, 2013, I interviewed *Howse* case claimant Dan LaFrance in Whitley Lake, near 100 Mile House. During this trip, I was hosted by Dan and his wife Cathie. This interview took place outside the research region (although not far from the Brigade Trail) because Dan had moved since being involved with the *Howse* case. Being able to stay with community members, including Elders, was an invaluable experience and allowed me to expand my sense of my own Metis community.

I did not ask participants, or prospective participants, for any proof of Metis ancestry or community membership, as I did not think it my place to determine for others whether they were authentically Metis. All people who eventually participated self-identified as Metis, and described themselves as either active or former members of Metis communities. (That is, for political or personal reasons, some people had chosen to no longer participate in formal communities with which they had formerly associated.) I met all participants through Metis community contacts, and all had all been accepted at one time as community members, even if

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<sup>68</sup> Sadly, Bill died in 2013 and Barry in 2015.

they were no longer affiliated.<sup>69</sup> (It is noteworthy that “former” members were still considered by other participants as being part of the community.) I discovered through the course of my research that some of the participants were distantly related to me and/or to each other.

### ***Interviewing and Analyzing Responses***

I tried to conduct my research in a Metis way by getting advice from Elders, following a spiritual path, giving gifts, accepting hospitality, honouring people’s knowledge, really listening (including listening to feedback and criticism), keeping in touch with people as far as possible (although this was difficult, given work and other commitments, and increasing student financial struggles), and by being open to a wide variety of views. I also decided to become more involved with my “home” community in Victoria. I chose to do community research because the ideas being explored all revolved around community, and also because of concern from my own community that academics are not interested in the views of grassroots people. I chose to use of a wide variety of sources, including written and oral, scholarly and non-scholarly. While I chose to do my research in a Metis way, I did not attempt to reflect all the principles of Indigenous (or particularly Metis) research methodologies. For instance, research participants were not involved in the design of the study, although the goals of the study itself were prompted by Metis community concerns. However, participants could provide feedback

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<sup>69</sup> The Elders and community leaders who suggested participants to me were members of chartered communities of MNBC, but not all participants were charter community members, and even fewer were MNBC members. In fact, some of them had political differences with local charter communities or with MNBC. Some participants had positions (Hunt Captains, Senators) within MNBC. I did not ask people about their affiliations, but they usually offered this information. Shortly after I began my research, the BC Metis Federation split off from MNBC, and I did make some preliminary inquiries about recruiting participants among BC Metis Federation membership, but ultimately did not pursue this, as my participant selection method involved selection through Elders and leaders of the Salmon Arm Metis Association (see section on ethics process). Participants did not limit their understanding of community to membership in provincial or local political organizations.

about how I used their interviews in this dissertation. While some people chose not to review the use of material, others did, and some suggested making changes. One of the reasons I chose to do the re-checking was because, as there were 23 research participants, I could not use extensive quotations. While Indigenous theory and practice stresses agency and letting people speak with their own voice, and discourages (over)interpretation by the researcher, with so many participants and the length of the paper, quotations needed to be used judiciously and balanced with summarizing and interpretation.

I used regular interviews, which were digitally recorded, with a list of questions I wanted to ask based on Metis values, Metis views of community, Metis communities in BC, effect of BC Metis cases, issues in *Willison*, and ideas for going forward. However, questions were loosely phrased (I didn't stick exactly to the script) and participants were given opportunities to contribute their own thoughts.

I transcribed my own interviews, re-listening to them in their entirety and taking notes. Shortly after my research trips I summarized what the research participants had said.

### **PART 3            REFLECTIONS ON INDIGENOUS RESEARCH**

#### **Interrelationality: Creating Community through Indigenous Research**

Various Indigenous thinkers have referred to research as “ceremony”, owing to the transformative potential of research to create community through dialogue and intellectual co-creation (Wilson, Cajete). Gregory Cajete refers to community research as “an enactment of community”; he also views the process of creation as ceremony that creates an “artifact of

community”.<sup>70</sup> Doing community research is part of the recognition that we are interconnected, and that academics are not the only holders of knowledge.

The reclaiming of research as a kind of ceremony is a reflection of Indigenous values of interconnection – family, community, inter-national and inter-being connections – that are at the heart of many Indigenous philosophies (Umeek), including Metis philosophy (Ghostkeeper). The idea of research as ceremony is also an acknowledgment of the personal development and exploration that can happen through the process of research. Many Indigenous philosophies, including Metis philosophy, stress the importance of finding balance between 1) nourishing relations with others, and acting for others; and 2) self-understanding, self-expression and even respectful critique (Wilson, Kovach, Morales, Ghostkeeper). There can never be a complete balance, but the goal of trying to keep balance can help to prevent social and psychological unease. For instance, Cajete describes the process of doing research, even documentary research, as creating positive community and personal transformation.

Part of the personal transformation comes with the realization that all elements of the self are engaged in research: body, mind, emotions, and spirit (Wilson, Makokis). These elements of the self are interconnected and interact with people, other beings, the land: learning and assimilating new information, making new friends, discovering lost family history, wrestling with questions of identity, feeling tired, hot, irritated, overwhelmed, enjoying the spring air, dreaming vivid dreams about the landscape, having a sense of being spiritually guided to look at

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<sup>70</sup> Cajete, *supra* note 12 at 46, 52.

particular books. All of these experiences have been inseparable from my process, and have informed my research.

Self-reflexivity encompasses both responsibility towards research participants and personal transformation. Andersen and Walter's "recipe" for methodology does both in requiring a researcher to be up front about her social position, including class, ethnicity, work experience, etc., and how this might affect her research perspectives. Kovach describes being self-reflective and continually re-examining one's role in the research process as a form of decolonization. The researcher should discuss herself in relation to the research "and [reveal] the experiences and complexities of conducting research in colonial sites".<sup>71</sup> Thus, focus on self becomes a form of service to others in the research process.

Kovach's Cree approach seeks *nisitohtamowin* (understanding), or "self-in-relation".<sup>72</sup> This approach is congruent with "a philosophy that honours multiple truths" in conjunction with "a self-reflective narrative research process".<sup>73</sup> Similarly, Anishinabe botanist Genuisz says that one of the goals of decolonized research is to "bring people back to themselves".<sup>74</sup>

### *Reflection on Interconnection: Self and Community*

*In many ways, this chapter, together with Chapter 8, were the most difficult chapters to write, and took me about a year. The reason this process was so difficult was that it required me to examine my own thinking, actions and identity. It also required me to seriously consider many*

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<sup>71</sup> Kovach, *supra* note 20 at 83.

<sup>72</sup> *Ibid* at 27.

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

<sup>74</sup> Genuisz, *supra* note 22 at 159.

*views, some of which were conflicting. I was often unsure about my own views and feelings about many of the issues discussed in this chapter. I wanted to be respectful and inclusive, but at the same time felt the academic compulsion to pick things apart and put them back together. Categorizing and re-categorizing was helpful, yet sometimes it seemed to obscure the interconnections between things. Sometimes I needed to pick myself apart and put myself back together.*

*Interconnections between self and others are always tricky, especially when I am not just writing about my own ideas, but am trying to reflect a range of Metis ideas that describe the variety and complexity of Metis thought, and at the same time, I am trying to convey what I think about these ideas. So, how to balance being a cipher and being an interpreter? How to balance the importance of community with the importance of self-expression? Were my grandmother's injunctions against putting myself forward too much based in Metis ethics of respect or in a distorted Catholic day school-enforced view of the horrors of pride and the embarrassment caused by uppity women? How can I recognize the colonialism that has become entrenched even in the teachings I am trying to recover? How much of my hesitation is about feeling unworthy, unknowing, somehow not "authentic" enough as a Metis person not raised in a traditional environment?*

*I take heart from the practice of many Indigenous scholars, particularly women, who refer to their own heritages, their own experiences in their work. I learn that introducing oneself and background is itself a way of showing respect, and can be part of protocol, part of law. Thus, it is ceremony, a way of creating community. I also learn from other researchers and from my*

*research participants that I am not alone in my experiences of feeling alienated from an imagined “authentic” Metis culture. Where do these ideas come from? Who gets to decide what “authentic” means? At the same time, so many of us have lost parts of our culture. This seems to be especially true in southern BC. Should this make us feel less Metis?*

*While I began to feel better conceptually about the tendency in Indigenous research methodologies to require a great degree of self-disclosure, there remained an undercurrent of nervousness and skepticism. I am an extremely private person by nature, and the idea of putting not only my thoughts-in-progress but my biography in the public eye (however limited) is extremely anxiety provoking. Was this a simple case of personality discomfort, having nothing to do with ideology or culture? As the only child of a single mother who worked full time, I spent a great deal of time alone. It might have been said of me in my youth “does not play well with others”. My own mother grew up on the prairie miles from any settlements, and for many years went to school only with her siblings and cousins. Her community amounted to her own family. She was never a joiner and was mildly socially phobic. I was the first person in my close family to officially join a Metis organization. Am I hesitant to reveal my own lack of connection to a community, in a paper about Metis communities?*

*This brings me back to the question: how much information is “Too Much Information”? When does self-location spill over into self-absorption? I justified my story above by listening to my research participants talk about the silences they grew up with about their Metis backgrounds, their lack of connection to a Metis community – sometimes the embarrassment within their own families about their ancestry. I remembered how my mother told me how nervous she was*

*about filling in government forms and job applications in which she was asked to provide her ethnicity. I remember her stress when asked about her background, a common question from non-Aboriginal people who noticed her striking appearance, her slightly darker than expected skin.*

*I mentioned skepticism above. This may be related to my mother's resistance to being categorized, which has affected me as well. Is there a sense in which locating oneself in the research becomes a form of credentialling (I first heard Heidi Stark use this expression), either professionally or culturally? Leona Makokis, a Cree researcher, states she was an "appropriate researcher" to conduct research in a particular Cree First Nation, as she was a member of the nation, knew people, and could speak the language. She had a connection to the territory. What if I am a Metis researcher, who for many years had no community, and it was only through conducting my research that I discovered my connection to the community I was researching? What if I had known all my life the territory where I had conducted my research, and loved this territory like my true home, but only recently realized its Metis history? What if the people living in this territory have, like my family, connections to other territories? What if we have lost our languages? I am then an appropriate researcher?*

### **Ironies of Writing**

Chicana philosopher, writer and researcher Gloria Anzaldúa writes about writing being in a kind of borderland, like being a mestiza. Writing can be a reduction, but can also be a sacred process, an expansion, something that creates community. Anzaldúa says there is no

distinction between these seeming opposites. Writing is an exile, and yet it still expresses something.<sup>75</sup>

Cajete talks about the challenge of documentary research and of writing. Having to prepare, pay attention to sources, adhere to patterns, do things at the right time, in the right place (physically), letting go/becoming, exercising appropriate will, (un)packing of symbols; vigil, completion, give-away, appreciation, are all part of writing.<sup>76</sup> One has to deal with oneself as a creator, and also as creating something essentially incomplete, something in which “truth is not a fixed point”.<sup>77</sup> One is always becoming. In dealing with the self as creator, one deals with chaos, the seeming obverse yet necessary matrix of creation. Before the boiling point, water forms vortices, a “bifurcation point” – there is a point before system transformation where positive and negative feedback interact.<sup>78</sup> Is this like saying if people disagree, they have a real culture? Research (and writing) is an enactment of community at the moment where the insider and outsider boundaries are infinite – sense of exile and return encapsulated in the process of research (but note according to chaos theory, a seeming division is an endless border made up of infinitely intricate spirals and whorls ... what does this say about borderlands?) ...

*Reflection on Writing and Irreducibility ... and Other Conundrums*

*The web of knowledge and information encompassed within this dissertation is necessarily limited; the many interconnections I see between and among the ideas I have been exploring*

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<sup>75</sup> Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (San Francisco: Aunt Lute Press, 1987).

<sup>76</sup> Cajete, *supra* note 12 at 46-52.

<sup>77</sup> *Ibid* at 19.

<sup>78</sup> *Ibid* at 17-18.

*have made it difficult to decide how to limit my research. Similarly, it has been challenging to reflect the web-like nature of knowledge and the interconnection of beings, communities and nations through writing – especially through the standard dissertation format. While I have departed from this format in some ways, I am still only able to hint at some connections, while others may be completely ignored. This may be due to space or time limitations, or my own limitations in researching and writing. The footnotes are intended to be not only a vehicle for acknowledging the contributions of others, but as a form of commentary (often by others) on my own text, and as a resource for readers who may wish to follow the web in other directions. It is one of the many ironies inherent in this project that this is a text that has reduced to a static form the various modes of non-static relationality that it describes.*

*Other conundrums: On the one hand, I have been concerned about possible critiques that my research is not objective enough, and on the other hand I have been concerned about being viewed as not activist enough. Also, I'm struggling with wanting to respect views of my colleagues while learning and expressing my own. Sometimes, I discovered others had been wrestling with the same issues as me, which was encouraging, but I wondered if it would look like I was parroting others.*

*Mostly, I was concerned about how participants might view how I used their information. Most people were concerned about hunting rights, and my side journeys into Metis theory and methodology – not to mention deconstructionism, Buddhism and chaos theory – might be just a little too esoteric and removed from the main concerns of the project. However, I persisted with*

*theory and methodology partly out of a drive to understand the basis of my own thinking and approach.*

*The best antidote to participants' possible concerns about uses being made of their interview material would be to check with them in person, but – owing to financial and related time limitations, I was not able to travel back to meet with people in person to discuss their views. (Perhaps grad programs should fund such community research review trips.) Some people have already told me they are fine with not seeing drafts, or excerpts of materials concerning them. Others have asked me to see excerpts, and some have suggested changes. Some people have not responded to my suggestion that they can review their materials. If there is another iteration of this project, I hope to be able to follow up with everyone in person.*

*Meanwhile, I am happy I have been able to be in contact with many research participants, despite the time and physical distances involved, and despite the fact that some people have moved since our interviews. I hope to travel soon along the Brigade Trail, and into the Kootenays, to make presentations based on this community research project.*

## **CONCLUDING THOUGHTS**

In the first three chapters of this dissertation, I have attempted to introduce the nature of the community conundrum and possible responses to it (Chapter 1), provide historical and philosophical background to the community conundrum (Chapter 2), and illustrate how the law creates the community conundrum (Chapter 3).

In this chapter, I have set out my research goals, rationales and methods for how I will approach the community conundrum. I have described my use of documentary analysis and in-

person interviews in order to more fully understand the problem, as well as to identify possible responses. Key to my approach is to inquire what Metis perspectives on the community conundrum might be.

The next chapter will present my findings – the views of the 23 Metis research participants from the southern BC interior on the issues in *Willison*.

## Chapter 5

### METIS RESPONSES TO THE COMMUNITY CONUNDRUM

#### INTRODUCTION

In this chapter, I will present summaries of the views of the 23 research participants about the legal issues that were set out in *Willison*.<sup>1</sup> The trial judge's decisions on these issues were successfully appealed, except for on Issue 6 in part; that is, the appeal judge upheld the trial judge's finding that Mr Willison had an ancestral connection to people who were in the "environs of Falkland" in the mid-1800s but, as the appeal judge rejected the finding that there was a historic community in the area, this was not relevant.

The *Willison* issues are as follows:

1. What is the meaning of the word "community" in the context of Metis hunting cases?;
2. Whether at the time of European effective control there existed an historic Metis community either in the specific area in which Mr Willison was hunting, or in some wider area the trial judge would determine to be relevant;
3. Whether any Metis right to hunt in the Okanagan Thompson part of BC has geographical limitations similar to those established in First Nations hunting cases;
4. Whether there exists a Metis "community" in the relevant geographic area today;
5. Whether there has been demonstrated sufficient continuity from the time of European effective control until today between any historic community and any community the trial judge might find exists today;

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<sup>1</sup> *R v Willison*, [2005] BCJ No. 924; rev'd (2006) BCSC 985 [*Willison* or *Willison BCSC*].

6. Whether Mr Willison has a sufficient ancestral connection to any historic community in the relevant geographic area to entitle him to exercise a territorially based hunting right; that is, whether Mr Willison is a rights-bearing member of any such community.<sup>2</sup>

Below, I provide Metis perspectives on these issues and compare these with the court perspectives.

**Issue 1: The Meaning of “Community” in the Context of Metis Hunting Cases**

All but one participant stated that Metis community was extremely important to them and was a defining feature of Metis culture. Metis “community” could refer to the Metis nation as a whole, to Metis local communities (either politically affiliated communities, or communities in local areas – but these were not necessarily bounded geographic areas), or notional communities based on extended family relationships, work or other social connections (such as communities of hunters). Some interviewees agreed with the *Willison* appeal decision that modern Metis political organizations alone do not equate with communities, but that they are part of what makes communities function, especially as political organizations create laws – such as harvesting laws – that are followed by community members, and are even recognized by provincial governments. Many participants thought Metis political organizations were legitimate in light of attempts to revitalize Metis culture and self-government, and should not be slighted by courts because they may have been recently or self-consciously created.

Most commonly, community was seen as encompassing extended family and other social relationships, regardless of geographic location. Some people described Metis communities as

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<sup>2</sup> *Ibid* at para 18.

being like “webs” or “networks”, and as encompassing family members of Metis people, whether ethnically Metis or not (see also section on ancestry under Issue 6). Elder Lottie Kozak’s view of community was that it “was like a big family”.<sup>3</sup> Others added that community includes the earth and other living beings – the interconnectedness of “all my relations” (Lori, Beryl). People’s ancestors were described as if they were still living and were thought of as part of these extended family/community networks. These concepts seem to be in line with the concept of wahkootowin referred to by Maria Campbell and Brenda Macdougall in *One of the Family*.<sup>4</sup> Wahkootiwin, discussed in Chapter 2, is a Cree term that has been translated as “relationship” or “relation”, but refers to ethics of conduct in relationships as well as describing interfamilial relationships themselves.<sup>5</sup> Such ethics include reciprocity, mutual support, decency and order. Many of these precepts were described by interviewees as Metis values. Macdougall explains that,

Just as wahkootiwin mediated relationships between people, it also extended to the natural and spiritual worlds, regulating relationships between humans and non-humans, the living and the dead, and humans and the natural environment.<sup>6</sup>

The community as relationship was expressed eloquently by Brenda Boyer Percell,

This is where you get your sense of who you are, and your value ... you know, it completes you as a Metis person. It empowers you, it makes you who you are as a

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<sup>3</sup> Interview with Lottie Kozak, Falkland, BC, June 15, 2012.

<sup>4</sup> Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: University of British Columbia Press, 2010).

<sup>5</sup> *Ibid* at 8.

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

Metis person, because you're not alone. If you want your roots, you've got to find other Metis people to help you, to bring you to those roots. And if you know your roots, and you know who you are, you can then turn around and contribute your information and your giftings and you can help other people. I don't know, there's a give and take, right?<sup>7</sup>

Many people stressed the importance of Metis communities as providing many different kinds of support to people: this could include food, advice, spiritual support, cultural support, moral support, and financial support.

Community was important to some interviewees because it helped them get back in touch with their culture. It was important to others because it helped them overcome years of racism and silence. For instance, being part of a Metis community has been important to Lois McNary, as it has helped her to come to terms with her identity and the fact that it was repressed within her family. She also appreciates the opportunities to learn about Metis culture and meet other Metis people.<sup>8</sup>

For many research participants, community means getting together to help one another, to work together, and to enjoy Metis cultural activities, such as playing music, dancing and doing crafts. Community also means learning and teaching about Metis history and culture, and creating governance structures such as MNBC, and harvesting registries. It also means harvesting itself, and practising the laws of the hunt.

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<sup>7</sup> Interview with Brenda Boyer Percell, Kamloops, BC, June 18, 2012.

<sup>8</sup> Interview with Lois McNary, Tappen, BC, June 17, 2012.

All interviewees were emphatic that Metis communities were only rarely bounded in small geographic areas (exceptions were Sault Ste Marie, Alberta settlements, a few communities in Saskatchewan), but even when they were, people in such local communities had ties to other local Metis communities, as well as to more wide-ranging communities. In that sense, Metis communities could be described as overlapping or interconnecting webs/three-dimensional webs.

People expressed that communities were based on historical, as well as family ties. These communities persisted, even when people might only see each other occasionally (this was true in the past, and is still true today). For instance, in response to my question, “How do you see Metis community? What is a Metis community to you?” *Howse*<sup>9</sup> litigant Dan LaFrance, who is my distant cousin, stated,

You and I come from a Metis community. We’ve never met ‘til today, but I feel like we have. So, to me, you’re Metis. It’s not really so much the community which you’re in. It’s that we’re bound by certain things, you know – genetically, historically ... I don’t define community as a group of people in a certain area. I never have. ... For me, the community is important, but the community could be just the family across the road, and I’m here. That’s our Metis community. Today it’s you and I, you see. Like I said, I’ve got many Metis friends all across from here to Manitoba and into Ottawa even, but sometimes I might not talk to them for 10 years, but when we phone, or all of a sudden

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<sup>9</sup> *R v Howse, et al*, [2000] BCJ No. 905 (BC Prov Ct); rev’d [2002] BCJ No. 379 (BCSC); leave to appeal to BCCA granted [2003] BCJ No. 508 (BCCA) [*Howse*].

you get a call, or e-mail, it's just like you pick up where you left off. So, to me, that's the community.<sup>10</sup>

Interviewees stressed that the people in Metis communities lived, worked and travelled over vast distances in North America. This fact did not negate the existence of communities. Ron Nunn critiqued the *Willison* appeal decision on this basis:

I mean, Native people in their history have lived in vast, vast untamed wildernesses, and they were dispersed widely, dispersed in those vast tracts. Your community may be only 11 people in that family group, or that clan, that travels to the various harvesting areas, various areas for fish, medicine plants, that sort of thing. And not in a large sense, where the whole nation got together and all harvested fish at the same bank, the same stream. And this is the way the judge saw it in appeal, a very narrow view of it, that there was not enough ... Metis progenitors at Fort Kamloops, because the area was counted as part of the Fort Kamloops area in the *Willison* case. And there was not enough documented members, you know, like names, dates, how old they were, how many children they had, that sort of thing.<sup>11</sup>

Some interviewees said they had relatives all over North America (e.g. Québec, North Dakota, Montana, Florida, Mexico) and beyond (Aotearoa/New Zealand), some of whom had married into First Nations in the US (Greg, Lenore, Wayne).

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<sup>10</sup> Interview with Dan LaFrance, Whitley Lake, BC, May 7, 2013.

<sup>11</sup> Interview with Ron Nunn, Oliver, BC, August 4, 2012.

Some interviewees acknowledged the importance of women in preserving Metis communities (Anne, Brenda, Lori, Beryl, Dan, Lottie, Greg).

Many interviewees stressed that, while there might be problems with the functionality of Metis communities, such problems did not negate the existence of these communities (Bill, Janet).

Some saw community problems as stemming from the negative influences of modern society, especially on younger people, while elders exemplified proper community values (Greg).

According to Janet Gagné, “You get some of the old Metis, you couldn’t get better people.

Hardworking, trustworthy ...”<sup>12</sup> Many interviewees stressed the importance of listening to elders in trying to build and repair communities.

### ***Trial Judge’s Response to Issue 1***

The trial judge applied a “liberal interpretation consistent with the purposes of s. 35”, interpreting the meaning of community in its historical context, including the “nomadic” nature of the Metis people in the environs of Falkland prior to European control. He analogized the construction of a Metis community with the construction of other ethnic communities within Canada.

### ***Appeal Judge’s Response to Issue 1***

This construction of community was not appealed by the crown, but the court – in deciding on appeal Issues 1 and 2 (see below) – effectively negated the trial judge’s broad and contextual approach to the construction of community.

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<sup>12</sup> Interview with Janet Gagné, Vernon, BC, August 1, 2012.

The appeal judge thought the trial judge had made an error in “importing” modern definitions of community based on multiculturalism to the issue of whether there was a historic Metis community in the environs of Falkland. Crown counsel made this argument with reference to the statement in *Van der Peet*<sup>13</sup> that Aboriginal rights cannot be defined based on precepts from the liberal enlightenment; the appeal judge in *Willison* applied this reasoning to determine whether the Falkland area was the site of a historic Metis community.<sup>14</sup> This is also ironic, because the court is itself using modern western notions of community – rather than Metis notions of community – to ground Metis rights. Some interviewees thought that the courts generally did not understand Metis ideas of community at all – and this was one of the most common critiques of the *Powley* case.<sup>15</sup>

***Summaries of Research Participants’ Views:***<sup>16</sup>

**Eldon** says that Metis communities are very important because they help people to learn about and preserve their culture. They also provide a lot of support to people. Metis communities are not necessarily based in towns or specific areas, but are based on groups of people with common values and culture.

Metis community is very important to **Lottie**. She feels very supported by other community members, and as an Elder and as a person who is a “peacemaker” and connector of others in the community. Her view of community is very expansive and she thinks it doesn’t depend on a specific territory, but on the connections between people.

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<sup>13</sup> *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*].

<sup>14</sup> *Willison BCSC*, *supra* note 1 at para 17.

<sup>15</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff'd [2000] OJ No. 99 (Ont SC); aff'd [2001] OJ No. 607 (Ont CA); aff'd 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

<sup>16</sup> Presented in chronological order of interview.

To **Lois**, Metis people have always moved around and their communities are therefore “portable”. Metis people are all one people wherever they are. Provincial or regional boundaries should not matter, either to community or to rights.

**Brenda** doesn’t see there is any separation between the Metis “nations” of the various provinces. While she sees these organizations as important in a practical sense, for her the Metis nation is larger than any provincial political organizations. She sees Metis communities as “webs” of families and contacts, in which people may be physically distant but still connected. In her view, this reflects traditional Metis views of community.

For **Wayne**, Metis communities – and rights – transcend provincial or even national boundaries.

It was interesting to talk to **Pat** because, for her, Metis community is really not that important, and she is the only interviewee who expressed this. However, Pat does participate in the community, especially in doing Metis crafts.

**Mark** sees community as central to Metis society and, for him, one of the most important expressions of community is participating in hunting camps, which would include groups of families. Metis people kept community ties, despite being highly mobile. Mark sees having connections with Elders as being key to healthy communities.

As with many other interviewees, **Goldie** thinks of Metis communities as extended family groups, which may or may not be separated geographically. The Metis community has always been an important part of Goldie’s life, whether in Saskatchewan or BC. This importance was not self-conscious, but grew out of the daily realities of her life.

Metis community is important to **Bill**, because he can explore his culture and socialize with other Metis people. He is also very passionate about passing on the torch to the youth. Bill thinks of Metis communities as being highly mobile, and doesn’t think provincial boundaries are important to communities – they are just a way of dealing with the government, that wants to deal with recognizable entities.

For **Lori**, Metis communities are made up of extended family groups, which may be like webs all over the country. She views Metis people – historically and currently – as being mobile. She thinks the Metis nation extends throughout Canada and into the US. For her, ideas of nation and community overlap – although communities may be smaller units of the nation. Lori thinks that the “historic community connection” test in *Powley* is not appropriate for Metis communities, since communities may cover very large geographical areas, or are more like “virtual” communities.

Metis community is very important to **Sandy**, because it allows her to learn about her mother's background and gives her a sense of belonging. She thinks of Metis communities as being highly mobile.

**Janet** was concerned about the functionality of communities, telling me that there are many people who may be involved in the Metis community just for "what they can get". She said that, for a community to function properly, people must act more selflessly. At the same time, the fact that there are problems in Metis communities doesn't mean communities don't exist. She said that, when growing up, she gravitated to other Metis children, without even really knowing much about what it meant to be Metis.

**Anne** thinks of Metis people as highly mobile and as being very culturally inclusive.

For **Beryl**, Metis communities are more like extended family groups that may or may not depend on living in one place for a long time. She thinks that being mobile has been part of Metis identity since the beginning of the creation of the Metis nation, because as voyageurs, fur traders, hunters and carters, Metis had to cover huge distances, often seeing their extended families only a few times a year. People would often move to follow the buffalo, or other animals, or to follow economic opportunities. Many people who worked for the HBC or Northwest Company worked in many different parts of the country throughout their careers. This pattern of migration continued after many Metis went west from Red River and is still continuing today. Beryl thinks the Metis liked to keep moving so that they could get away from government control.

Beryl thinks that people shared their gifts and abilities with each other, and this is part of what created community.

For **Margaret**, "community" and "nation" overlap; Metis community is very wide-ranging and doesn't depend on a discrete territory, although there were/are traditional Metis territories. Margaret acknowledges that it is politically and organizationally expedient that, to be a citizen of MNBC, you must be a BC resident, but this doesn't reflect the true nature of Metis community.

For **Greg**, "community" can refer to the entire Metis Nation, or to a local community, although "local" communities have ties to the wider community, and members may not live in easily defined geographic areas. Community is made up of Metis people; membership in Metis organizations is not determinative – to this extent Greg is in agreement with the appeal judge's reasoning in his case. Greg thinks that *Powley* is not helpful to most Metis people because the facts in *Powley* don't reflect the facts of most Metis communities, which tend not to be centred in small, bounded, geographic areas.

Greg feels that one of the key Metis values is sharing, but that this value has been lost in the corporatization of Metis communities. While he believes it is necessary to have provincial Metis political organizations in order to have legitimacy with provincial governments, he is concerned that these don't reflect the values of Metis communities.

**Dan** thinks that Metis communities are based on family, social and work connections and not necessarily on living in "the same geographic area". Dan views Metis people as being highly mobile, and following work the way they once followed the buffalo. He acknowledges some Metis may have become more sedentary, but would still not think of community as necessarily located in a particular place.

Like Greg, Dan is worried about "corporatizing" Metis communities and replacing them with political bureaucracies.

**Issue 2: Was There a "Historic" Metis Community in the Environs of Falkland? (the south Okanagan/Kootenays)**

The interviewees for this study were from the three regions described in *Howse* (Kootenays), *Nunn*<sup>17</sup> (south Okanagan), and *Willison* (Falkland/Brigade Trail).

The elders and litigants were the most knowledgeable about Metis history in these areas, although there were a couple of other interviewees who were also very knowledgeable. There were some people who were born in BC (Lottie, Warren, Pat, Dan, John and Lois), some who came to BC as children (Bill, Janet, Greg, Mark), and the rest who came to BC as adults. Those born outside BC were from Alberta, Saskatchewan, Manitoba and the Great Lakes.

Those who had lived in BC the longest were the most adamant that there were historic Metis communities in the three case areas; in fact, most people thought there were historic Metis

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<sup>17</sup> *R v Nunn*, [2003] BCJ No. 3229 (BC Prov Ct).

communities in towns that were former fur trading posts, and along fur trade routes. I received more information about Falkland/Brigade Trail than the other two areas, but this may be because the majority of interviewees lived in this area. Lottie, Warren, Greg, Dean and Ron knew a great deal about the history of the fur trade in the area around Kamloops, Westwold, Falkland and Vernon, and told me there were Metis people who settled in this area and intermarried with Secwepemc and Okanagan people, as well as Nlaka'pamux in the Boston Bar area, and settlers. Goldie, Mark and Dan were knowledgeable about Metis history in the Kootenays, and Margaret and Ron about Metis history in the south Okanagan.

Some people who migrated from the prairies as adults said they weren't very knowledgeable about Metis history in BC.

What was particularly interesting was that, as with my family, some people (research participants, plus co-claimants from *Howse*) who came relatively recently from the prairies had family ties to people who had come to BC much earlier.<sup>18</sup>

Quite a few interviewees were critical of *Powley's* requirement that Metis claimants have to prove that the communities where the hunting took place had to be "historic" or that there had to be continuity between the "historic" and "modern" communities (I will discuss continuity below). Some interviewees – especially litigants – pointed out the difficulty of providing

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<sup>18</sup> Brenda is a Fort Langley descendant (McMillan); Greg's relatives came to BC in the 1840s (Klyne); Dan's relatives were trading in the Kootenays early on (Suzanne LaFrance married Michel Klyne), as were the relatives of John Grant Howse (Howse); Ron's relatives the Fletts were on the first Sinclair expedition and his relatives the Duchoquettes were involved in the fur trade in the south Okanagan.

evidence of Metis history in BC, especially as some of the documents – such as the Kamloops Oblate records – had been sealed until shortly after the *Willison* trial.

### ***Trial Judge’s Response to Issue 2***

The trial judge held there was “sufficient evidence” that there was a historic Metis community along the Fur Brigade Trail.

### ***Appeal Judge’s Response to Issue 2 (Issue 1 on Appeal)***

The appeal judge found that the evidence was not site-specific enough, that there was no evidence of permanent settlement, and that Metis were not culturally distinctive enough either from settlers or from other Aboriginal people. He distinguished this case from *Powley*, because that case involved a permanent, identifiable settlement. He also distinguished *Lavolette*,<sup>19</sup> which found a relatively large historic community in Saskatchewan, as in *Lavolette* there were strong kinship ties between the people of three settlements, so that the area triangulating these three settlements would have been the site where people exercised their rights.

What is striking to me in the appeal judge’s analysis is that it bothers him that there was nothing particularly distinctive about the Metis of the Brigade Trail. According to him, “While there is some demographic evidence, the distinguishing features of the Metis found by the learned trial judge were not ‘site specific’ to the fur brigade trail. Rather, as is set out at para. 74 of the trial judgment, these things were characteristic of Metis throughout the Northwest.”<sup>20</sup>

This is ironic, because the witnesses were deliberately trying to stress the connections of

<sup>19</sup> *R v Lavolette*, 2005 SKPC 70, [2005] 3 CNLR 202 [*Lavolette*].

<sup>20</sup> *Willison BCSC*, *supra* note 1 at para 26.

culture across the wider community precisely because they viewed their distinctive culture – and therefore their rights – as portable. This goes to the issue of community continuity – but on a broader scale. It also raises another critique by interviewees: that Metis hunting rights are grounded in the wider culture, were practised over a large territorial area, and are, thus, to Metis people, not necessarily “site-specific”.

The appeal judge discounted Ron Nunn’s evidence about Metis hunting law as making the practice of hunting distinctive among the Metis (for more on this, see Chapter 6), as the judge wanted to tie this distinctive practice to a specific site “in the environs of Falkland” and could not see how this practice was distinctive in the area.

### ***Summaries of Research Participants’ Views:***

**Eldon** doesn’t think that Metis communities need to be old to be “historic”, as history is continually being made.

According to **Lottie**: Her 2x great grandfather John McDougall first moved to BC from the Red River Settlement in the 1840s to work for the HBC and eventually ran the trading post at Kelowna (Westbank), which is now in the Kelowna museum. He had 10 sons, all of whom had many sons, so there are now McDougalls all over BC.

Lottie thinks there are historic communities in many places in BC, including the Falkland area, the south Okanagan, Kootenays, Prince George, Quesnel, 100 Mile House and the Peace country.

Lottie knows that a lot of people in the Merritt area were/are Metis, and some married into the First Nations of that area. Similarly, in Westwold and Falkland, which were along the Fur Brigade Trail, most of the original settlers were Metis, either Red River Metis or “local” Metis. A lot of Metis people, including the McDougalls, married into the Okanagan First Nation. According to her, this history was later “swept under the rug” as more Euro-descended settlers moved into the area. She thinks there were many Metis families that moved to BC from the prairies to work for the HBC, some as early as the early 1800s, and that some came and went, but that other families stayed and disbursed throughout BC.

**Lois** doesn't think it should matter that people come from a "historic" Metis community, especially since there was so much prejudice that many people kept their identities a secret, so there weren't publicly-known communities until the last 20 years or so ago, at least in BC. For instance, until recently, Lois was not aware there were so many Metis people in the Salmon Arm area.

Regarding Metis history in BC, **Brenda** said that many Red River families came to BC to all the trading posts, some very early on. Some stayed, and some went back to the prairies. She thinks there are "historic" Metis communities throughout BC, centred around wherever the fur trading posts used to be, such as Kamloops. She talked about the Fort Langley settlement as a "Metis community" although many of those people did not have ties to Red River. She thinks there were probably other families like hers, in which there were marriages between "historic" Metis and more recent migrants. Again, some people stayed, and some went back to the prairies. As with her family, many of those who returned to the prairies eventually ended up back in BC.

**Warren** states that Metis people, both from Red River and "local" Metis, lived in the Westwold area from the beginnings of the land-based fur trade in BC, since Westwold and Falkland were on the Fur Brigade Trail. It makes sense to Warren that there was a lot of intermarriage with local Aboriginal women, since there were very few non-Aboriginal women in the area. Warren says that most of the original families of Westwold – e.g. the Ingrams, Kings, Pringles, Joneses, Blackbourns and possibly the McLeods (the family of my cousin's husband, who are also related to Lottie) – were Metis and many of their descendents continue to live in the area. (Warren is also related to Lottie by marriage.) While they might not have referred to themselves as Metis, they were aware of each other and functioned as a community. Warren is descended from the Ingrams and the Kings, who had local Aboriginal ancestry.<sup>21</sup>

**Dean** was the first person to tell me about the memorial in Armstrong to the Overlander expedition that portrays an image of a Red River cart. He thinks that some of the Overlanders, who travelled from Manitoba by Red River cart, were Metis. He also told me that Cristina Lake is an area where many Metis people settled, and that Metis people have been hunting in the Chetwynd area since the beginning of the fur trade.

**John** grew up in Maillardville, a francophone district of Coquitlam, near Vancouver. According to John, many of the people who grew up in this area were Metis, and knew each other to be

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<sup>21</sup> Interestingly, these families, along with other fur trade families in Westwold, are described in a history of Westwold without any mention of their Aboriginality. See Margaret F Young, *Quelle Grande Prairie: A History of Grande Prairie, Adelphi and Westwold* (Vernon: Wayside Press, 1994).

Metis. He and some of his friends were in a gang together, which was made up almost entirely of Metis youth. Metis people would get together for meals, or just to hang out. However, community members only identified in a “vague” way as being Metis and didn’t know a lot of their own history.

He thinks of Maillardville as a historic Metis community, as most of the francophones there were Metis and settled there a long time ago, but he is aware that to non-Metis it is considered a French-Canadian community. He pointed out there aren’t any public acknowledgments of the Metis history of Maillardville, such as on plaques or in the museum.

John definitely doesn’t think Metis people should have to prove that they are from “historic” communities, especially since Metis identity was suppressed for so long, and this might make community continuity difficult to prove.

**Pat** is a descendant of fur trader/explorer Peter Skene Ogden and his Flathead (or Nez Percé) wife, Julia Rivet. Ogden was a trader with the HBC’s Columbia District and worked as far north as the Nass, and throughout the Oregon Territory. According to Pat, after Ogden’s death, his family (by Julia) settled in Lac la Hache, where there were a lot of Metis people. Some of his descendants lived in Kamloops, Savona, Cache Creek, Westwold and Williams Lake, and also had First Nations and Metis wives.

Pat thinks it might be important to document ancestry in order to prove entitlement to Metis rights, but she doesn’t think it should be important to have to prove you are from a “historic” community. However, she thinks many Metis people have lived in BC for a long time, since the beginnings of the fur trade in the Columbia District.

**Mark** said that the “historic community connection test” is not appropriate. For him, claimants should only have to prove that they are part of a community – that community needn’t be “historic”. Anyway, he said that it was unclear what the court meant by “historic” or by “community”.

Even though Mark doesn’t think Metis people should have to prove in court that their communities are historic, he does think that there were and are a lot of Metis people in the Kootenays, and in the Trail area in particular. He said that people used to come through the Kootenays as part of the fur trade route, and that trading used to be done in the Flathead Valley, which straddles Canada and the US. Some Metis people settled in the area at that time, and others traditionally came from other regions to hunt in “the Flathead”, an area not far from Trail where there is particularly good hunting. Mark organizes a hunt there every year, and he knows older Metis people who have also always hunted there. As far as he knows, the earliest documented Metis use of this area was in the late 1700s. In the early 1900s, Metis guide Joe

McDougall cut the first trail into the Flathead from the Canadian side. On the US side, Mitchell Mountain is named after a Metis man who is the grandfather of Josie Ahearn, an Elder who lives in Nelson.

**Goldie's** husband was descended from the same McDougall family as the BC McDougalls, so she is related to me and Lottie by marriage – but she and her husband were originally from Duck Lake, Saskatchewan. Goldie says that many Metis came to Trail after WW2 because there was work in the smelter. Goldie says that the 60 plus years that these people have been in Trail should be enough to classify them as a “historic” community, even though she thinks there were also Metis people in the area much earlier with the fur trade, the gold rush and mining. She mentioned that Metis people have hunted in the Flathead for many generations.

**Bill** was not really aware of how long Metis people had lived in the Vernon area, but knew about the fur brigade trail. He thinks that many of the people from the Overlander expeditions were Metis and suggested I view the memorial to the Overlanders in Armstrong, which shows an image of the Red River carts the people used. Many of the Overlander descendants live in the Armstrong area.

**Bill** and his sister **Janet** both say that a lot of Okanagan people married Metis people over many years and that many Okanagan people have Metis names.

**Lori** wasn't sure about the history of Metis people in the Enderby area specifically, but thought there were Metis families in the general area over time.

**Lenore** and **Greg** are related to the Klyne family from Red River, who came to BC in the 1840s. This is documented in the *Willison* trial.

**Lenore** has lived in BC for many years and she thinks there has been a Metis presence in the north Okanagan since the time of the fur trade.

**Sandy** says that many Metis people have come to BC from the prairies since WW2.

**Janet** says that there were many Metis families living in the Vernon area, and she went to school with them. She did some research and she thinks the first Vernon postmaster, Luc Girouard, was Metis, or at least his descendants were. She thinks that the evidence that was provided in the *Willison* trial should have been sufficient to show that a Metis community existed in the area.

Janet doesn't think the historical community connection test makes sense, and thinks this is just a way to allow the government to avoid acknowledging there are historic Metis communities in

BC and elsewhere in Canada. She thinks that the Canadian law is based on English ideas of communities and property, which are too restrictive to describe Metis realities.

**Don** and **Anne** both said they thought that Metis people had originally moved to the Lumby/Cherryville area (just east of Vernon) with the fur trade and the gold rush, as early as the mid-1800s. In their view, about one-third of current area residents are Metis.

While **Don** doesn't agree that people should have to prove they are from "historic communities", that is the way the law is at the moment, and people have to work with that.

**Beryl** doesn't think it should be important to have to prove that Metis rights claimants are part of "historic" Metis communities or that there should have to be continuity between the historic and modern communities. She doesn't see why it shouldn't be enough to prove Metis ancestry and acceptance by a Metis community.

**Ron** thinks that there were and are many intermarriages between Okanagan and Metis people, and that many Okanagan people have Metis family names. (Actually, Ron's ex-wife is Okanagan and Metis, and is descended from the Red River Marcellais family that settled in BC in the 1840s.)

Ron thinks that it has been difficult for Metis rights claimants in BC because BC Metis history hasn't been studied much, or even recognized.

Ron did not agree with having to prove that he was from a historical Metis community. For him, if he has rights they are good throughout the country and the nature of the community is irrelevant.

While **Greg** understands it is important to prove Metis ancestry (not necessarily by blood – can be by adoption), self-identification and community acceptance, he doesn't see why it is important to prove that the community where the hunting took place was "historic". However, Greg does think there was a historic Metis community in the area of the Fur Brigade Trail. He also believes the history of Metis people in BC has been suppressed.

According to **Dan**, the Flathead area in the Kootenays has been a traditional hunting area for many Metis since the beginning of the fur trade in what is now BC. Dan also says that after WW2, many Metis people were brought from the prairies to BC to work for West Fraser Mills. His own family lived in Maillardville for a time, where a lot of Metis families settled.

**Issue 3:           Whether the Metis Right to Hunt in the Thompson/Okanagan Has a Geographic Limitation**

While this issue does not directly relate to the “community conundrum”, it is important because it illustrates the *Willison* court’s awareness of the issue of mobility and how mobility impacts community construction.

In the *Willison* trial decision, the judge followed the reasoning in *Powley* to conclude that Metis hunting rights are “contextual” and “site specific” and limited the right at issue as extending along the path of the Brigade Trail from Kamloops through Westwold, Falkland, Vernon, through the Okanagan, and down into Washington state (although one of the trails ended in Oregon).

For many of the interviewees, this conclusion did not reflect Metis understandings of their rights, which they viewed as having always been portable. While there was a tradition of asking permission of First Nations to harvest or travel through their territories, the mobility of the Metis meant that Metis had always harvested throughout North America, and more specifically in northwestern North America.

I was told by most research participants that Metis people in BC had traditionally and recently hunted all over BC; a group Lottie hunts with regularly hunts in the Kootenays, as well as near Chetwynd and even as far north as Atlin. Metis people also come from other provinces to hunt, especially in the Rocky Mountains (Mark).

It so happened that Greg Willison had been hunting close to where he lived when he was charged; Ron Nunn was also in the general area of his residence, and the hunters in *Howse*

were living in the Kootenays at the time; although Dan, for example, only lived in the area for a short time. (He moved many times, living all over BC, as well as in Manitoba.) But it could easily happen that a Metis person might be charged in relation to hunting in an area that would not be in his/her “community”. What if Greg had been in Atlin at the time he was charged, but still living in Falkland? Even though his local community was in Falkland, he would be in the position of having to prove that there was a historic Metis community in Atlin and that he had an ancestral connection to such a community. Although it is probable, based on the complexity of Metis history and migrations, that an individual might have family ties and other connections to many local communities, it does not seem as if there is enough of a rational connection between the community where a person lives at a given moment, and the place where that person is hunting. What if one person were charged with harvesting offences in more than one place? Would s/he have to prove there was a historical/modern community/ancestral connection to more than one local community? This possibility illustrates yet another weakness of the *Powley* test. This test, which is based on the test for Aboriginal rights in *Van der Peet*, considers that harvesting is a site-specific right. I am not clear this can or should apply to Metis people, given their historical and current tendency to be highly mobile, even nomadic. This raises the question of what is a Metis territory. Of course, the court in *Hirsehorn* tried to address this but, according to Metis legal scholar Karen Drake, did not base this expanded test on either existing Canadian jurisprudence, or on Metis law or perspectives.

Some interviewees asserted that Metis did not have “traditional territories” like First Nations, other than perhaps around the original Red River settlement, or in northern Alberta and

Saskatchewan. Dan described the Metis as the “nomadic Aboriginal people of Canada”.<sup>22</sup> Being nomadic, which many people viewed as being a modern, as well as a historic characteristic of Metis people, means that Metis people have always hunted, trapped, fished and gathered wherever they were.

### ***Trial Judge’s Response to Issue 3***

There was a geographical limit imposed by the trial judge – that of the Fur Brigade Trail (although it is not given exact borders) – but this was much broader than the construction of the crown, which argued that Greg’s rights could only be exercised in the immediate vicinity of Falkland.

### ***Appeal Judge’s Response to Issue 3***

This was not a specific ground of appeal, as the crown argued there was no historic or modern community, and thus no rights. However, the appeal judge did hold that part of the problem with the claimed rights was that they were claimed to be operating in too broad an area.

Neither the trial judge nor the appeal judge really addressed the portability of rights.

Note that the judge in *Goodon*<sup>23</sup> does recognize the problem that the site where the right was exercised and the site of the community might be different, but this is not addressed any

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<sup>22</sup> Interview with Dan LaFrance, Whitley Lake, BC, May 7, 2013.

<sup>23</sup> *R v Goodon*, 2008 MBPC 59.

further. This problem is not acknowledged in either *Powley* or *Willison*, other than that the crown conceded that Greg Willison would have hunting rights in Lebret, Saskatchewan.<sup>24</sup>

***Summaries of Research Participants' Views:***

**Brenda** thinks Metis harvesting rights should apply across the country and not be limited to areas where there are “historic” Metis communities.

**Wayne** is interested in Metis land rights, including rights in the US. Members of his own family actually tried to get their land back in the US, without success. He closely followed the *Manitoba Metis Federation* title case.

For Wayne, Metis rights transcend provincial or even national boundaries.

Wayne mentioned that the Metis negotiated peace and resource-sharing treaties with the Dakota, and also with the *Saulteaux*.

**Dean** thought that it was good that the *Willison* trial judge had said that the “environs of Falkland” was actually a fairly large area that reflected the history of the Metis in the fur trade, and that this finding was undisturbed on appeal; however, he thought that the courts still didn’t understand Metis ideas of community or territory.

Dean told me about the human rights complaint filed by MNBC/BC MANR regarding the lack of mobility rights under the *BC Wildlife Act*, and said that a positive outcome could be favourable to negotiations with the province on Metis harvesting rights.

**Anne** says the border was never important to Metis people except after the Riel Resistance in 1885 when many Metis people went to the US to avoid prosecution.

**Beryl** thinks of the whole of Canada (and part of the northern prairie US), especially the west, as Metis territory, even though much of that territory was shared with other Aboriginal people. She thinks that, traditionally, Metis and First Nations worked out harvesting agreements among themselves.

**Margaret** thinks there were/are traditional Metis territories in BC.

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<sup>24</sup> Note *R v Belhumeur*, 2007 SKPC 114 is about the Lebret area; some of the witnesses are my relatives, some are Greg’s.

According to **Greg**, one of the problems with *Powley* is that he views Metis harvesting rights as being portable, and thus having to prove there is a community connection in the area where the hunting took place doesn't make sense, as Metis people hunt over very large areas, and often not in places where they live. In his case, he happened to be hunting close to home when he was charged, but this was not representative of Metis practice as a whole.

Regarding Metis territories, Greg agrees with First Nations in the area that Metis people don't have "territory" as such in BC. Perhaps they did in other areas, such as in Red River, or in some long-standing settlements, but more often there were "shared use" areas. Greg thinks that Metis people don't really have "traditional territories" like First Nations do, and this leads to some of the problems associated with *Powley*. Greg's view of Metis territory is more that the Metis have a "homeland" which encompasses Ontario west to the Pacific and north into the Northwest Territories and Yukon, and south into the Dakotas, Montana and some of the other northwestern states. Metis always exercised their rights in this large area and sometimes had to negotiate access with other Aboriginal groups. This was often accomplished by asking permission, by negotiation, or occasionally by treaty, as in the case of the treaty between the Metis and the Sioux.

Buying into the idea of provincial boundaries goes against Greg's idea of the Metis homeland. Greg thinks it might be possible to reinterpret *Powley* to reflect Metis understandings of community and territory, but isn't completely convinced.

The nomadic nature of the Metis means that, for **Dan**, the *Powley* case is hugely problematic. Dan thinks that the "community connection test" does not reflect a Metis understanding of rights, community or territory.

Dan views Metis territory similarly to Greg: there are no (or few) Metis "traditional territories" as such, but Metis rights have always been practised in the "homeland" area of northwestern North America. Dan asserts that this is one thing First Nations people may not understand and a reason they might feel threatened by Metis claims, but Metis people are not trying to take any territory away from First Nations.

Dan is hopeful that the Canadian law of Metis rights will eventually be able to incorporate Metis perspectives on communities, territories and harvesting, and that doing this could make *Powley* workable, as long as the community connection test were removed. However, he isn't totally convinced that courts would ever dispense with the community connection test, or allow fully mobile harvesting rights within Canada.

**Issue 4: Does a Modern Metis Community Exist in the Environs of Falkland/Brigade Trail (Okanagan/Kootenays)?**

Most interviewees thought that there were “modern” Metis communities in these areas, especially since most of them felt they belonged to these communities. Some agreed with the *Willison* appeal judge (and with *Powley*) that having a modern Metis political organization did not necessarily mean there was a community, but others critiqued this claim, saying that a political organization could be a community, in that creating such an organization was a way to begin to reconstitute Metis communities that had “gone underground”.

Many interviewees did not see the relevance of the distinction between modern and historic communities, explaining that history was part of a continuum and was constantly being created (e.g. Eldon, Goldie).

Interviewees expressed frustration with the *Willison* appeal court’s critique of people getting together, wearing sashes and participating in other Metis social and cultural events as not being evidence of a modern community.

Witnesses at Greg’s trial gave evidence about modern community practices, such as governance of the Métis National Council and provincial sub-organizations, including MNBC (Dean), distinctive fiddling and jigging (Dean, Greg and Wayne), eating wild meat and bannock (Dean, Greg and Wayne), hunting law (Greg, Ron), social/cultural gatherings being the same at the coast as in Saskatchewan (Greg), hunting with his kids (Greg), learning Michif (Greg), wearing a “prairie rose” necklace (Greg) and sash (Greg, Dean), using distinctive Metis designs

in artwork (Lottie), making models of Red River carts (Wayne), holding yearly gatherings (Wayne), participating in communal hunts (Ron).

***Trial Judge’s Response to Issue 4***

The trial judge interpreted “community” in a wide and liberal sense to find a modern community in the environs of Falkland. The crown conceded that Greg Willison was a member of the modern community.

***Appeal Judge’s Response to Issue 4 (Issue 2 on Appeal)***

The appeal judge held that the trial judge erred by inappropriately expanding the definition of “community” to include “a geographically wide, loosely affiliated group of people of mixed ancestry”, rather than the *Powley* requirement that there be “a people with a distinctive collective identity, living together in the same geographic area, and living a common way of life.”

***Summaries of Research Participants’ Views:***

According to **Eldon**, there are about 350 members of the Salmon Arm Metis Community (SAMA), but not more than 20 people attend the monthly community meetings. However, many more people attend cultural events, hunts, youth camps and social gatherings.

**Lottie** says there are modern Metis communities all over BC, especially in the area of former fur trade posts. She associates with the Salmon Arm, Kamloops and Vernon locals, as Falkland is in the centre of a triangle plotted by these three communities. She says there are many Metis people in the area who are not members of a Metis local, but still consider themselves part of the Metis community. Lottie is connected with Metis people all over BC, and travels to many BC Metis communities either to hunt or to exhibit her artwork.

**Brenda** lived for many years in Revelstoke and helped to establish a Metis association there, although it was short-lived. Now in Kamloops, she participates in the Two Rivers Metis

Association (TRMA), and is a member of the Salmon Arm Metis Association. TRMA has at least 300 members, although Brenda says there are many more Metis people in the Kamloops area. Brenda is connected to the Fort Langley descendants group and has participated in their events, and is also connected to the Batoche community, where she lived as a child.

**Mark** About 300 people are members of the local (out of a city population of over 7,000) and a lot fewer than that regularly participate in Metis community events; however, people view themselves as belonging to a community. He thinks there are many people in the Trail area who may not want to publicly identify as Metis, so the Metis population is likely much higher.

**Goldie** says that many prairie Metis families came to Trail so that they could work in the smelter. This was the reason she and her husband moved there, and they moved together with some other families and friends from the Duck Lake area, who continued to be part of the “modern” community in the area throughout their lives. She thinks that about 10% of the current population of Trail is Metis.

**Bill** says that the Vernon local has about 350 registered members, but he thinks there might be three times that number who are not registered. Bill was the outgoing president of the Vernon local.

**Don and Anne** are Elders and members of the Vernon local. They live in Lumby, which is about 35 kms from Vernon. According to them, there are many Vernon local members from the Lumby valley. (Actually, Lumby is near the convergence of three valleys, but many people use “the valley” to refer to the valley areas generally, or to the Coldstream valley.) In fact, the McBeths estimate about 1,200 people in the valley – populated by about 3,000 people – are Metis. Not all these people are members of the Vernon local – membership is about 300-400. Don and Anne are managers of the trailer park where they live, and Don says that at least a third of all the 100 plus residents are Metis. The day of the interview was rent day, so I got to meet quite a few of the residents, and Don mentioned some in particular who were Metis.

**Margaret** says there are hundreds of Metis people in the Okanagan valley, which is home to three different locals.

#### **Issue 5: Has There Been Sufficient Continuity between the Historic and Modern Communities?**

The relevance of this question was critiqued by most interviewees, most of whom thought there was community continuity, but that this might be either difficult to prove, e.g. because of

communities or individuals “going underground” or that continuity might not look like the kind of continuity that would be evident, say, in non-Aboriginal settlements. One interesting critique was that continuity was looked at with too short a lens; some interviewees thought there was a kind of “long-view” continuity: continuity that reflected trends of Metis communities over many generations and years.

Interestingly, about a third of the interviewees said that they either didn’t know about their Metis ancestry until adulthood, or that their ancestry was not discussed outside the family. Others said they knew about their heritage, but were not taught to care about it, and only began to value it later in life. Some interviewees expressed that this reflected the common trend of their parents’ generation (most interviewees were in early middle age or older) to hide or devalue their Metis ancestry and culture. Reasons given for this were racism, discrimination, shame (instilled in them by others), fear, ignorance of the dominant culture about Metis people, and lack of awareness/education about Metis history among Metis people themselves, as well as among the general population. Their parents were the “lost generation” of Metis, many of whom tended to deliberately assimilate; there was a period of 50-100 years, ending only recently, when it was socially risky to identify as being Metis.

Lottie testified in the *Willison* trial that Metis people kept quiet about their ancestry because “at that time there was too much prejudice so nobody would admit they were Metis people” and thus for a period there were no public gatherings or displays of Metis identity.<sup>25</sup>

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<sup>25</sup> Evidence in chief of Lottie Kozak, *Willison* trial transcript, June 21, 2004 at 85.

People often expressed to me that they had identified in different ways for different purposes at different times, but that this didn't negate their Metisness; rather it reflected a method of social survival. Even within individual families, Metis people might choose to identify as Metis, or not, depending on how they responded to external pressures. This is exemplified in my conversation with Janet Gagné:

JG Even today, half of the family will say "I'm Metis" and the other half says "Oh no, there's no Native around me". So how can you have the same family sitting there, and one half embraces the Aboriginal culture and the other half says, "Oh, no"?

KS Why do you think it is that way?

JG Because of how they've seen the stereotyping over the years.

KS Do you think they experienced prejudice?

JG When I was growing up, yes, I know I did.<sup>26</sup>

Despite these issues, many interviewees asserted that communities persisted, although they may have gone underground.

All of these issues illustrate the difficulty of trying to show community continuity.

Ron gave evidence in *Willison* about continuity between the traditional Metis hunting laws and practices and the modern ones.<sup>27</sup> This point was also made to me in interviews with Mark, Dean, Lottie, Greg and Dan.

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<sup>26</sup> Interview with Janet Gagné, Vernon, BC, August 1, 2012.

<sup>27</sup> Evidence in chief of Ron Nunn, *Willison* trial transcript, June 21, 2004, beginning at 108.

Note that *Powley* says

In addition to demographic evidence, proof of shared customs, traditions and a collective identity is required to demonstrate the existence of a Metis community that can support a claim to site-specific Aboriginal rights. We recognize that different groups of Metis have often lacked political structures and have experienced shifts in their members' self-identification. However, *the existence of an identifiable Metis community must be demonstrated with some degree of continuity* and stability in order to support a site-specific Aboriginal rights claim ...<sup>28</sup>

Participants critiqued why continuity was important. When I asked Lois McNary how long a community would have to exist before it could be considered a *bona fide* community, she responded, "Not long. Not even 10 years. I mean, if there's a group of people that get together, and they start up, and they're consistent for a couple of years, I think that's classed as a community. I don't think it has to be years and years of them ... centuries ..."<sup>29</sup>

A larger critique was about the nature of historicity. A number of participants questioned the meaning of "historic" in terms of Metis communities.

### ***Trial Judge's Response to Issue 5***

The trial judge held there was continuity, even though the community went underground to some extent. He held that to not find community in such a situation would be contrary to the purpose of s. 35.

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<sup>28</sup> *Powley*, *supra* note 15 at para 23 [emphasis added].

<sup>29</sup> Interview with Lois McNary, Tappen, BC, June 17, 2012.

***Appeal Judge's Response to Issue 5 (Issue 3 on Appeal)***

The appeal judge found that the trial judge was focused on whether there was continuity of community, rather than of continuity of practice, which is supposed to be the focus of the *Powley* test. He held that the evidence did not sustain the conclusion that there was continuity of practice, even though various people led evidence of hunting in both historic and modern contexts.

The appeal judge did acknowledge that Metis communities and practices may have become invisible because of discrimination, but held that this does not absolve claimants from having to lead evidence of continuity of practice.

***Summaries of Research Participants' Views:***

As an adult, **Lottie** didn't associate with a Metis community as such until in later years, as her first husband was very abusive and controlling and didn't want her to socialize with anyone, particularly not with Aboriginal people, as he was racist. She eventually left him. After his death, about 30 years ago, she married Bill, who supported her art and encouraged her to get together with other Metis people. Lottie told me that when she was younger it was common for people not to talk about having Metis ancestry because there was so much racism.

Lottie also told me she thought the Metis history of BC was deliberately suppressed, which would make it difficult to prove community continuity. That's why she was happy to give oral history evidence at Greg's trial. However, she was disappointed with how ignorant crown counsel was about Metis history, and says she didn't think that he respected her knowledge. The trial judge, while not particularly knowledgeable, was at least open and interested in hearing her evidence, as well as the documentary historical evidence that was presented. At the same time, Lottie thought that the history could have been brought out better by the historical expert. She is aware that some of the records of the Oblates in Kamloops only became available after the trial. She says that she thinks Greg would have won the case if more documentary and oral history had been available.

In any event, Lottie never understood why the question of community continuity in BC was contentious; continuity seemed obvious to her.

**Lois** grew up not knowing that she was Metis, and found out as an adult. After that, many things she had learned from her mother made more sense. She had always felt that she was “different” but didn’t realize why. She knew my family in Salmon Arm, but wasn’t aware they were Metis. She went to school with my aunt Pat. She thinks many people hid the fact that they were Metis out of fear, because of the racism that existed in society. In her view, racism still exists, but not to the same extent – this is partly due to the efforts of Aboriginal and other non-“white” people speaking out about their experiences. Lois’ mother was a residential school survivor.

**Brenda** was aware of the difficulty of trying to prove the “historic community connection” and was aware of the work of the historian hired by MNBC, which she thought could help with self-governance and with any future BC hunting cases.

**Wayne** was adopted by an uncle but not told that he was Metis until he was an adult. Like Lois, he always felt “different” but didn’t know why. He spent years contending with his identity.

Wayne gave evidence at the *Willison* trial, and felt that the judge was respectful of Lottie’s oral history evidence, but that crown lawyers were not. He also thought the historical evidence that was presented was thorough, and said the expert, Dr Michael Angel, was “very knowledgeable” but that he still didn’t have access to all the records. He was aware that these records (Oblate records) have since become available. He thought that if the court had had the Oblate records, the case might never have gone to appeal, or that an appeal wouldn’t have been successful, because the existence of a historical community – and its persistence to the present – would have been more clearly proved.

Wayne said that one of the reasons the *Howse* case failed is that the claimants didn’t do enough work to put forward their historical evidence; however, according to Wayne, they didn’t have enough financial support, and the historical literature is scanty.

**Warren’s** mother did not speak much about her Aboriginal ancestry, but her mother did. Warren told me he was punished for mentioning in public that his mother was Aboriginal.

**Dean** was very knowledgeable about the “missing” evidence in the *Willison* case. Research has now been done that Dean thinks would have resulted in an “appeal proof” case. Dean said the case was lost only on the point of the continuity of the connection between the historic and

modern communities, which he thinks could be proven now with all the new historical research.

**John** said that in Maillardville, where he grew up, community members only identified in a “vague” way as being Metis and didn’t know a lot of their own history. For instance, John didn’t know until he was an adult that he is a direct descendent of Guillaume Sayer, the Metis fur trader who broke the HBC monopoly and was defended at his trial by Louis Riel, Sr. After learning about this, he felt a lot more pride as a Metis, learning that his own ancestors had played an important role in the history of the Metis and of Canada.

In John’s view, many Metis people went “underground”, especially people of his generation and perhaps a little bit older (he is near retirement age). John thinks Metis identity was suppressed for a long time, and this might make community continuity difficult to prove.

**Pat** and her husband knew my aunt and uncle, who lived in Eagle Bay, but wasn’t aware they were Metis. She isn’t aware if there are other Metis people in Eagle Bay but it wouldn’t surprise her if there were.

**Mark** said that a complete historical picture was not presented to the trial court in *Willison*. He knows about the evidence that became available after the trial. Mark was surprised that the *Willison* trial went as well as it did, considering the evidence presented was incomplete. He thought the trial judge was very sympathetic, and genuinely wanted to learn about Metis history and rights, and that this was why he acquitted Greg Willison, not because of the historical evidence presented. However, he did think that Lottie’s evidence was important in the trial and that the judge respected her knowledge. Regarding the appeal, Mark thinks the judge was hampered by the historical record.

Regarding *Howse*, Mark said that the historical evidence that was presented was presented by the claimants themselves – they represented themselves in the beginning and didn’t call any expert witnesses. Thus, the appeal judge didn’t have much to go on.

**Goldie** says that members of the Metis community in Trail were always aware of who they were, but for many years didn’t discuss this in the wider community. That has only happened in the last 20 years or so.

**Bill** grew up only being vaguely aware that he was Metis. His francophone identity was stressed within his family more than his Aboriginal identity, perhaps because they lived in an area of northern Alberta that was predominantly francophone. He is not sure that his neighbours and

classmates in BC knew his family was Metis. He has had the experience as an adult of people not believing he has Aboriginal ancestry because they think he seems stereotypically French Canadian. Bill's first language was French, and his parents knew Michif, but Bill became exclusively anglophone when they moved to BC.

**Lenore** was orphaned at a young age. Some of her siblings were looked after by relatives, but before her father died he arranged for her and her brother to attend a Ukrainian Catholic boarding school in Ituna, Saskatchewan. She says she thinks her father thought this would be better than going to "regular" residential school, but she says it was still horrible. They were fed and clothed properly, and not beaten – although the discipline was very strict – but she says there was no love and they were shamed for being "Indians". They were told they were stupid and dirty and were forbidden from speaking Michif, which she used to know a little bit when she was a child. She doesn't remember Michif at all now, but she does remember some Ukrainian, because they had to study it along with the other children. She and her brother were the only Aboriginal children in the school. She was rarely allowed home to see her relatives.

Lenore said for years she used to feel shame about being Aboriginal because of this experience. For her, because she says she "looks like an Indian", her ancestry is not something she can hide.

**Sandy** is related to the Caron family from Red River, but didn't know she was Metis until a few years ago. Her mother never spoke about this, and she only found out about her ancestry after her mother died. Sandy says she thinks it was very common for people of her mother's generation to hide their Metis ancestry because of the racism that was so rampant at that time.

**Janet** has been involved for the last few years as an Aboriginal support worker, teaching about Metis culture and history in schools in the Vernon school district. She thinks the school project, which also teaches students about First Nations cultures in the area, has been hugely successful. She has seen kids go from feeling ashamed about being Aboriginal to being proud, and this has positively affected their outlook generally and their performance in school. Since learning about Metis culture through this program, a lot of the Metis students have been "sashed" – or have formally become members of the Metis community.

**Don** has Red River and Scottish ancestry and grew up in Saskatchewan. His parents didn't say much to him and his siblings about being Metis, but it wasn't a complete secret. To this day, a couple of his brothers don't acknowledge their Metis heritage and get annoyed when Don brings it up. He says he thinks this divided attitude is pretty common in Metis families. He also says some non-Aboriginal people seem unwilling to believe he is Metis, because he "looks more

like the Scottish side”. He says feels sad that his brothers can’t feel proud of their heritage and thinks this is a carry-over from the days when Metis people were discriminated against more than they are now.

**Beryl** has always known that she was Metis, although she didn’t always care about this when she was younger.

Beryl doesn’t think that having Metis rights should have to depend on continuity between the historic and modern communities.

**Margaret** grew up in Saskatchewan being only vaguely aware of her Metis heritage, which is originally from Red River. She didn’t really explore her Metis identity until she was in her 60s (she is now in her 80s). She is now an Elder and a senator for MNBC.

**Ron** thinks that the trial judge in *Willison* was sympathetic and willing to learn, but that the lawyers were fairly ignorant of anything to do with Metis people and were not particularly respectful of Lottie’s evidence.

Regarding the written historical record, Ron was not impressed with the historical evidence given by Dr Angel in *Willison*. However, he realizes that not all the data was available at the time of the trial. He thinks that if Greg had had access to more historical evidence, the trial decision would have been appeal proof.

Ron did a great deal of historical research for his own case, as he represented himself. He felt that the judge in his case was sympathetic and interested, and would really rather have acquitted him.

Ron thinks that it has been difficult for Metis rights claimants in BC because BC Metis history hasn’t been studied much, or even recognized. Again, until recently, many important church records were sealed. He questions the timing of the unsealing of these records – why were they only unsealed just after the *Willison* case was decided? He also thinks that many Metis people “went underground”, making it difficult to prove community continuity.

Ron said that the claimants in *Howse* were not really prepared with their historical evidence and didn’t call any expert witnesses. He isn’t surprised that the appeal didn’t work out, as the appeal judge could only base his decision on the evidence that was presented.

**Greg** is not sure about whether community continuity could be proved in the Falkland area, but doesn't see why proving this is important. However, he views the migrations of his own family and their connection to BC as exhibiting a Metis notion of continuity. He also believes the history of Metis people in BC has been suppressed.

From Greg's perspective, a difficulty with his case was the lack of available historical material on the Metis of BC. Greg did much of his own research, and asked Lottie to testify about Metis history in BC. Greg felt Lottie's oral history evidence was treated respectfully by the trial judge, but that the crown lawyers, while not overtly disrespectful of any of the Metis witnesses, revealed their ignorance about Metis history and culture by the kinds of questions they asked. Greg was happy with the historical report provided by Dr Michael Angel, but was frustrated that only two weeks after his trial the Oblate Mission records in Kamloops were unsealed, and these records had information on over 200 Metis families in the Thompson/Shuswap area, including his own. Greg felt that one of the reasons that the appeal court later reversed the trial judge's finding that there was a historic Metis community "in the environs of Falkland" was that this information had not been available to the trial judge.

**Dan** says his wife Cathie has Metis ancestry, but she wasn't told about this growing up. Dan's father identified as Metis, but his mother only admitted her Metis ancestry a few years ago.

Dan felt that he had done a lot of preparation about getting the historical evidence together for his case, although he, like Greg, was frustrated with the dearth of materials on Metis history in BC. Dan said that much of the case was conducted, at least by their side, in a light-hearted manner, and that he found the trial judge very respectful and attentive. He found crown counsel was a decent person, but didn't think he was very knowledgeable about Metis issues.

**Issue 6: Do the Claimants Have a Sufficient Ancestral Connection to Any Historic Community Where the Impugned Hunting Took Place (In Other Words, Are the Claimants Rights-Bearing Members of These Communities)?**

While many of the interviewees thought it was reasonable to have to prove that they had Metis ancestry "by birth, adoption or other means",<sup>30</sup> they did not think it was necessary that a person's Metis ancestors be connected to the place where s/he was hunting. This is related to

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<sup>30</sup> Powley, *supra* note 15 at para 32.

the idea of the mobility of harvesting rights, as well as to the broad definition of community provided by many interviewees.

It was interesting that Greg was able to show he had an ancestral connection to BC, as were Dan LaFrance and John Grant Howse in the *Howse* case. However, these instances were “flukes”. Some BC Metis have ancestral Metis connections to BC; others do not (although I am discovering more and more who do).

Almost all interviewees were fine with the requirement of having to prove Metis ancestry and acceptance by a Metis community (which often now requires proof of ancestry; whether this is a “traditional” practice is debatable). Nevertheless, they did not think that their ancestry needed to be connected to where they were hunting.

Whether Metis ancestry had to be from Red River was debatable: some were adamant that if you weren’t descended from Red River families, you weren’t Metis (Wayne, Greg); some people identified as being Metis although they don’t (or may not have) Red River ancestry (Pat, Warren); Pat specifically said she identifies as Metis but doesn’t really relate to Red River culture; others said that Metis locals were less interested than MNBC in whether people had Red River ancestry. Some communities, like SAMA, accept people who self-identify, but in most cases MNBC membership is based on Red River ancestry. Some interviewees with Red River heritage identified as Metis, although they also had other Aboriginal ancestry (Lottie, Anne); some identified as both Metis and “Indian” (Lenore). Some interviewees had First Nations partners or former partners (Ron, John), Metis partners (Greg, Dan, Lori; Don and Anne were a

couple); many interviewees had in-laws from various Indigenous nations (First Nations, Metis, Maori).

Many people stressed that they viewed community acceptance as more legitimately coming from the local community than from MNBC, although some people supported the idea of MNBC citizenship as an incident of self-government. Margaret, and MNBC senator who decides on citizenship applications, discussed some of the issues with me (see below).

In none of these discussions about ancestry was it stressed that it was important that ancestry be connected to where a person was harvesting.

#### ***Trial Judge's Response to Issue 6***

The crown conceded that Greg was related to various Metis people in the far northwest, including Michel Klyne, Jane Klyne, and her husband and in-laws, the McDonalds. The trial judge noted the difficulty in obtaining source documents; however, he found a sufficient ancestral connection.

#### ***Appeal Judge's Response to Issue 6 (Issue 4 on Appeal)***

The appeal judge did not overturn the trial judge's finding, saying that the evidence was tenuous, but sufficient. However, the appeal judge stated that the existence of Greg's ancestral links does not mean that there is a Metis community in the area "in a *Powley* sense". Of course, the appeal judge had to stress this point because the issue was whether Greg's ancestral connection was to the historic community, but he had just held that there was no historic community.

***Summaries of Research Participants' Views:***

The following comments are not necessarily about the connection between Metis ancestry and where the hunting took place; mostly they show people's thoughts about proof of ancestry more generally.

**Eldon** accepts people who self-identify as Metis and doesn't think people necessarily have to have Red River ancestry to be Metis. SAMA admits people as members who self-identify but will help them to prove their Red River ancestry if they wish to become citizens of the Metis Nation of BC (MNBC).

**Wayne** thinks it is important to document Metis ancestry to support Metis rights. He thinks if you're not descended from Red River people, you're not Metis

**Pat** also can see why this might be important to document Metis ancestry.

**Mark** thinks it is important to prove community acceptance; ancestry is less important, although these things are linked.

**Anne** thinks that many of the Red River people originated in the Great Lakes and St Lawrence valley. She also believes there are Metis people in Québec, although they are not acknowledged by the Métis National Council.

**Anne** and **Don** have a number of children who have married and are raising families. They stated proudly that their children's spouses were from many different cultures/countries, including India and Israel. For Anne and Don, being Metis means accepting people from other cultures, and including them in "the mix". They do not feel that to be Metis you must have Red River ancestry. Anne says that even though their grandchildren have other ancestry, they are still think of themselves as Metis and are proud of their Metis heritage, which she and Don have tried to teach them about over the years.

**Beryl** thinks it is important to prove Metis ancestry.

**Margaret** explained that one of her tasks as an MNBC senator is to decide, along with other senators, on appeals relating to MNBC citizenship applications. She says these decisions are often very difficult and she realizes that they have a huge impact on people, on how they view themselves. She says that her own view is that the Red River people are culturally distinct, but that other people may also be legitimately Metis. Recently, in one of the Senate's decisions on

citizenship, it was decided that a Metis person of non-Red River ancestry was entitled to become a citizen of MNBC.

Margaret views the right to determine citizenship as an essential part of self-government, but views MNBC as only part of the larger Metis nation.

**Ron** submitted a copy of his genealogy as evidence in his case.

**Greg** thinks it is important to prove Metis ancestry (not necessarily by blood – can be by adoption). He entered a copy of his genealogy in evidence in his trial. Greg strongly identifies with the Red River Metis. However, he doesn't think it is important whether a person's ancestry is related to where s/he is hunting.

**Dan** also thinks it is important to prove Metis ancestry, and provided a genealogy as evidence in his case. He had his genealogy prepared by the Centre du Patrimoine in St Boniface.<sup>31</sup> Dan does not think ancestry has to be related to hunting territory.

### **SUMMARY OF METIS PERSPECTIVES ON THE ISSUES IN *WILLISON***

Despite the diversity in viewpoints expressed in the interviews, some common themes emerged that were relevant to the appeal decision in *Willison*:

- most people confirmed that their idea of Metis community does not require a specific, discrete territory – Metis people were and are mobile and community is more like a web of family, friends and associates that may span the country and portions of the US, although there may be areas where Metis people have settled for a long time;
- many people thought that there had been Metis people in BC for a long time, including since before permanent European settlement; these people created what they viewed as communities;
- communities were viewed as smaller, localized (in a diffused way) units of the larger Metis nation; some people thought either that the terms “community” and “nation”

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<sup>31</sup> Note the *Howse* trial was before the Ontario Court of Appeal in *Powley* modified the lower court's stress on the need to prove Metis genealogy.

were interchangeable, or that neither really represented the nature of Metis polities and social units;

- mobility was a key characteristic of Metis people and Metis the constitution of Metis communities reflects this;
- community continuity exists, but in many cases had gone underground as, especially during the middle of the last century, many people's identities had been suppressed – many people either had not been told of their Metis ancestry in their younger years, or their Metis ancestry had been known within the family but not discussed publicly;
- many interviewees questioned the meaning of “historic”, stating that history is being constantly created and that the Metis nation is thus constantly “becoming”;
- some people had been taught to feel shame about being Metis, but had experienced a transformation and resurgence of pride in themselves as Metis people; building community was important to this transformation and resurgence;
- most people agreed that hunting and other forms of harvesting were/are a critical part of Metis culture, and that many Metis people, especially older people, relied/rely on wild food for sustenance; continuing to hunt, fish, trap, harvest plants, etc. according to Metis values and laws is part of creating community;
- most people thought the outcome of the hunting cases was positive, even though the claimants did not succeed, because the cases raised awareness about Metis people and their rights in BC;
- in terms of the *Powley* test, most people thought it was important for Metis people to prove that they are actually Metis and/or accepted by a Metis community, but couldn't see why it should be important that the community where impugned harvesting takes place is a “historic” Metis community;

- many people expressed concern that people were becoming members of Metis associations only to get financial benefits, such as assistance with education; others felt that both Metis political organizations and/or the Canadian law make inappropriate distinctions between Metis with Red River and other ancestry, and in some cases between Metis and other Aboriginal people; some people pondered about whether Metis people should be defining themselves based on the Canadian law rather than on Metis ideas of identity, history, community, citizenship, etc.;
- many interviewees were concerned about the political divisions among the Metis; they stated that overcoming these and presenting a “united front” would be important to having Metis culture and rights recognized; unity, public education, and passing culture to Metis youth were seen in many cases as being more important to preserving Metis culture and rights than either litigation or negotiation with the crown.

The *Willison* appeal judge says that the trial judge “expanded the definition of community found in *Powley* to include a geographically wide, loosely affiliated group of people of mixed ancestry rather than a group with a distinctive, collective identity, living together in the same geographic area and sharing a common way of life. I respectfully find this to be an error.” (para 48) What is difficult about this reasoning is that these distinctions are fuzzy if one looks at Metis communities and history from a Metis perspective – and this is the fundamental critique of this dissertation. This critique will be explored further in Chapter 8. Many research participants also critiqued this three-part split, saying that Metis communities and culture are distinctive, but their ancestry and sense of collective identity might be complex, and that they might live “together” in a very large geographic area; they might share a common way of life, but this might be noticeable from a more “long” view; being “loosely” affiliated might be how others would perceive Metis connections, even though this was not experienced as being

“loose” by the people I talked to. Generally, people described the courts’ view of Metis communities as not being expansive or nuanced enough.

Two of the broader themes that emerged from the views of the research participants were that 1) the BC cases reflect a lack of sufficient historical research on the Metis in the province, but they also reflect colonialist perspectives on the history that is known; and 2) the BC cases do not take into account Metis perspectives about history, communities, and territories. These critiques will be explored in more detail in the next two chapters.

## **CROSSING THE MOUNTAINS**

*Ptii Sourii sat in the cab of the truck as it rattled over the icy potholes of the Monashee Pass road. It was early December and she and her family were moving to Salmon Arm. Her husband's arms and eyes were claimed by the road, his lips set in determination and concentration. Her six children were camped out in the truck bed, propped up on bedrolls and blankets, huddled together near the kerosene stove. A canvas tarp was stretched across the frame that was rigged to the sides of the truck, keeping everyone partially dry and only marginally warm.*

*Ptii Sourii thought, when they left Saskatchewan, that their rig looked a little bit like the Red River carts that her Grandma Millie had told her about. With those carts, grandma said, you could get out and walk for a bit, you could get away from the insistent, loud squeaking of the wheels. You weren't stuck in such a small space all the time, as she was now, listening to the sounds of the tires on the snow, the laughter of her kids, and looking at the windshield that kept threatening to ice over, making her window on the world that much smaller.*

*Her gram had been born in Fort Garry and then her family left for Saskatchewan. She had never been farther than that. Her father, who called her "little mouse" because she was small but industrious, had been many places, but he had never been to BC. She thought of him, and how long it might be until the next time she saw him.*

*She wondered what waited for her and her family in across the divide. Her gram's brother had gone there, had settled down, but that was long ago. She had heard stories of the mountains that loomed, blocking out the hugeness of the sky, the trees that were everywhere, inescapable.*

*She had only gotten to know trees when they lived for a while in the Cypress Hills. Most of her life trees had been a novelty – and a delight. Where they'd lived before you could look as far as the eye could see and all you could see was prairie. She longed for trees, but mountains were another matter. Now they were huge, craggy, covered with snow. Would she grow to love them? Ptii Sourii covered her belly with her hand as her growing baby suddenly nudged her in the ribs. He would be born here. Did he know he was crossing the mountains?*

## Chapter 6

### MISSING HISTORY: HISTORIOGRAPHY AND THE COMMUNITY CONUNDRUM

#### INTRODUCTION

“... the Metis culture ... is an integral part of British Columbia’s multicultural character, and ... throughout history, Metis citizens have made significant contributions to the history of Our Province.”

BC Government Proclamation, 1993

“The Government of British Columbia does not consult with the Métis because it is of the view that no Métis community is capable of successfully asserting site specific Section 35 rights in British Columbia. It is important that staff do not waiver from this view.”

*British Columbia’s Approach to the Métis Peoples of British Columbia in Relation to Land and Resource Issues – BC government policy framework, October 2011*

“The government in Saskatchewan spends quite a bit of money promoting Metis identity. They name highways, they do research projects ... I mean, they’re confronted continually with court cases ... but you know here [in BC] ... you have to deal with a government that’s unwilling to, to me, to discuss the historic nature of the foundations of this province.”

Greg Willison, Salmon River, BC  
May 6, 2013

This chapter deals with the first overriding problem identified by research participants: the fact that BC Metis people seem to mostly be absent from the written historical record, which leaves them at a loss when trying to meet the *Powley*<sup>1</sup> community connection test. A related problem

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<sup>1</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff’d [2000] OJ No. 99 (Ont SC); aff’d [2001] OJ No. 607 (Ont CA); aff’d 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

identified by research participants is that the courts do not attempt to look at the history of the Metis in BC from a Metis perspective. For instance, they see through a colonialist lens the written history and expert evidence that is presented, and they give little weight to oral history testimony.

In the first part of this chapter, I present a necessarily brief overview of the historiography of the Metis of BC, with a focus on how racism and assumptions about the absence of Metis communities in BC led to a paucity of secondary literature on the subject. This part will also explore research participants' suggestions that this lack of easily accessible history led to their rights claims being unsuccessful.

In Part 2, I show that while the problems with Dr Angel's evidence in *Willison*<sup>2</sup> in part reflect the historiography of the Metis of BC, his claims in favour of Metis rights were interpreted very narrowly by the appeal judge. Similarly, Metis witness testimony about history, territory and community in all three BC cases was interpreted without taking Metis perspectives into account.

## **PART 1 THE MISSING METIS IN BC HISTORIOGRAPHY**

Many research participants who were involved with the *Willison* case thought that the case could have been won if more historical evidence had been presented, or if it had been better presented. (Similar comments were made about the evidence in *Howse*<sup>3</sup> and *Nunn*.<sup>4</sup>) One of

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<sup>2</sup> *R v Willison*, [2005] BCJ No. 924; rev'd (2006) BCSC 985 [*Willison* or *Willison BCSC*].

<sup>3</sup> *R v Howse, et al*, [2000] BCJ No. 905 (BC Prov Ct); rev'd [2002] BCJ No. 379 (BCSC); leave to appeal to BCCA granted [2003] BCJ No. 508 (BCCA) [*Howse*].

the problems was that the records of the Oblate Fathers in Kamloops were only unsealed a couple of weeks after the case was concluded, and these records apparently contained a great deal of information about Metis families in the Kamloops area. Many who followed the *Willison* case felt sure there would have been a positive result for Greg Willison if this evidence had been presented (Dean, Mark, Greg). For instance, *Nunn* litigant and former Hunt Captain Ron Nunn, who also testified in *Willison*, said, “Well, the Hudson Bay keeps records, and they kept good records. But the records we never had access to were the records of the Oblate missionaries. And the Oblates kept accurate records of all Metis and who they ministered to, who were their flock, how many came and went. And if we had accessed them in the *Willison* case, we would have met that thing.”<sup>5</sup>

While there has been a great deal written about the Metis in Canada and even in the United States, historians and other writers have had little to say about the Metis history of British Columbia. This is curious given that Aboriginal/non-Aboriginal unions and families were as common in the fur trade west of the Rockies as they were elsewhere,<sup>6</sup> and that there are many primary resources referring to their descendants, as well as to migrant Metis.<sup>7</sup> It is also curious given the famous BC Metis that come to mind: Tête Jeune, or Pierre Bostonais, the blond Iroquois Metis who leant his nickname to Tête Jeune Cache and the Yellowhead Highway; David

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<sup>4</sup> *R v Nunn*, [2003] BCJ No. 3229 (BC Prov Ct) [*Nunn*].

<sup>5</sup> Interview with Ron Nunn, Oliver, BC, August 4, 2012.

<sup>6</sup> Partly, this is in reliance on primary sources, but partly it is based on common sense: until about 1850, almost all children born in what is now BC were either Aboriginal or mixed ancestry, as there were almost no women of non-Aboriginal descent until that time. As settlers did not begin to outnumber Aboriginal people until the 1890s, it would be surprising if many of the families in BC did not have some Aboriginal ancestry. Various authors cite population figures, including Wilson Duff and Cole Harris, *infra*.

<sup>7</sup> Categories of records were described in Chapter 2, and include explorers’ journals, fur trade company records, church records, government records, newspaper articles, etc.

Thompson's intrepid wife Charlotte Small; Jean Baptiste Boucher (Waccan) – interpreter and guide of Simon Fraser; Joseph William McKay, the founder of Nanaimo; Amelia Douglas, the “First Lady” of British Columbia; Amelia's daughter Martha, the first Aboriginal woman to be published in Canada – before Pauline Johnson; the infamous McLean gang – a band of “halfbreed” brothers from Kamloops hanged for the murder of a policeman;<sup>8</sup> Premier Tolmie; Mel Couvelier; Carole James ... While these people may be historic personages, they are not often identified as Metis. How much more invisible then were the many Metis trappers, traders, ranchers and farmers of this province?

With the assumption, based in part on later colonial classifications of mixed ancestry people as either “white” or “Indian”, and on the chosen isolation of the BC government in terms of Aboriginal policy, there hasn't been much acknowledgment of Metis people in BC as being authentic historical subjects. Compounding this is the skepticism about whether “real” Metis communities exist and persist in BC, and of concerns about conflating Metis history with the history of Aboriginal mixed ancestry communities.<sup>9</sup>

Notwithstanding the primary sources that would suggest the clear inclusion of Metis people in the fabric of the post-contact history of what is now BC, the traditional written histories of BC are silent even as to the existence of the Metis.<sup>10</sup> Studies specifically on Aboriginal/non-

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<sup>8</sup> Mel Rothenberger, *We've Killed Johnny Ussher: The Story of the Wild McLean Boys and Alex Hare* (Vancouver: Mitchell Press, 1974). Rothenberger and his cousin Pat Spiers, who did research for the book, are both direct descendants of the McLean family. See also Hamar Foster, “The Kamloops Outlaws and Commissions of Assize in Nineteenth-Century British Columbia” in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 2, 2nd ed (Toronto: University of Toronto Press, 2012) 308. First published 1983.

<sup>9</sup> This concern is raised by crown counsel in cross-examination of expert witness Michael Angel in *Willison*.

<sup>10</sup> See Bancroft and others cited *infra* at 29.

Aboriginal relationships in BC for the most part ignore the Metis, other than as “by-products” of the fur trade, or as evidence of the intent of Aboriginal people and newcomers to get along with one another.<sup>11</sup>

I could find no dedicated book-length studies of the Metis in British Columbia, except the recent popular book by George and Terry Goulet.

However, historians Jean Barman,<sup>12</sup> Mike Evans, Bruce Watson, Adele Perry, Renisa Mawani and others have discussed aspects of settler-Aboriginal relations in the province, with specific mention being made of Metis people. Sylvia Van Kirk writes about prominent Metis families in Victoria<sup>13</sup> and legal historian Hamar Foster has highlighted the importance of the Victoria Voltigeurs, a police force and militia comprised of Metis and French Canadian members of the Hudson’s Bay Company.<sup>14</sup>

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<sup>11</sup> Wilson Duff, a well-known early historian of Aboriginal-settler relations in BC, does not discuss Metis or mixed ancestry people in the fur trade, but does muse in curiously archaic terms on the causes of the later burgeoning First Nations population: “The reasons usually given for this rapid increase of the Indians – better living conditions, better medical care, lack of birth control and so on – may not provide the whole explanation. It is possible that other factors may be involved; for example, the biological phenomenon of heterosis (hybrid vigor) that results in unusually abundant and fertile progeny when different races interbreed.” *The Indian History of British Columbia: The Impact of the White Man* (Victoria: British Columbia Department of Recreation and Conservation, Provincial Museum of Natural History and Anthropology, 1964). Revised and reprinted 1997 by the Royal British Columbia Museum. Cited to 1997 reprint at 63.

<sup>12</sup> The first comprehensive recent history of BC is also one of the first works to take Metis and Aboriginal mixed ancestry families seriously: Jean Barman, *The West beyond the West: A History of British Columbia*, 2nd ed (Toronto: University of Toronto Press, 1996).

<sup>13</sup> Sylvia Van Kirk, “Colonized Lives: The Native Wives and Daughters of Five Founding Families of Victoria” in Mary-Ellen Kelm & Lorna Townsend, eds, *In the Days of Our Grandmothers: A Reader in Aboriginal Women’s History in Canada* (Toronto: University of Toronto Press, 2006) 170.

<sup>14</sup> Hamar Foster & John McLaren, eds, *Essays in the History of Canadian Law*, vol 6 (Toronto: University of Toronto Press, 1995), refer to the Metis members’ roles as mediators in Aboriginal/non-Aboriginal conflicts. See also Barry M Gough, *Gunboat Frontier: British Maritime Authority and the Northwest Coast Indians, 1846-90* (Vancouver: UBC Press, 1984). Even Mark Thorburn’s *Bathroom Book of BC History* (Edmonton: Blue Bike, 2006) mentions the Metis militia! Interestingly, well-known historian of Aboriginal-settler relations in BC, Robin Fisher,

Cole Harris<sup>15</sup> and James R Gibson<sup>16</sup> and John C Jackson<sup>17</sup> do offer the occasional insight into Metis in the Pacific Northwest as a whole; while in one instance a francophone scholar, Albert Métin, offers more information about the Metis in the far western fur trade than do his anglophone counterparts. But even that is minimal.<sup>18</sup>

Scholars of Metis history generally tend to give the “BC question” glancing treatment – or none at all. One exception is Metis scholar Olive Dickason, although hers is more of an anti-history, as she does not believe that a Metis society crystallized in the province. BC Metis history is acknowledged briefly in *Metis Legacy*.<sup>19</sup>

Most of the useful literature on the Metis in BC was written after the three BC Metis rights cases, in some cases in response to them. For instance, partly in response to the *Willison* case,

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mentions the Voltigeurs in his classic *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: UBC Press, 1977), but fails to mention any Metis connection.

<sup>15</sup> Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997).

<sup>16</sup> James R Gibson, *The Lifeline of the Oregon Country: The Fraser-Columbia Brigade System, 1811-47* (Vancouver: UBC Press, 1997).

<sup>17</sup> John C Jackson, *Children of the Fur Trade: Forgotten Métis of the Pacific Northwest* (Missoula, MT: Mountain Press, 1995).

<sup>18</sup> Albert Métin, *La Colombie Britannique: Étude sur la colonisation au Canada* (Paris: Librairie Armand Colin, 1908). Métin, a French professor of colonial studies, cites the figures from the fourth Canadian census, in 1901: in that year there was a total of 93,460 “Indians” federally, with 25,488 from British Columbia. The Metis of BC numbered 3,461, out of a total of 34,481 throughout Canada. Of the Metis in BC, 372 lived north of the Burrard Inlet, 429 lived in the lower Fraser delta, and 902 on Vancouver Island. 1,758 Metis were recorded as living in the interior of the province, with the majority living in the central Fraser basin.<sup>18</sup> The term “métis” is not defined.

Métin does not delve much into the phenomenon of the Metis, other than to note their existence. However, at 383 he does indicate that in the Nechako region, scouts and adventurers without families were said to partner with Aboriginal women, “thereby creating *métissage* as in the times of the *coureurs des bois*, or as formerly was the case in the Columbia region” [translation by author]. This trend was described negatively in *The Undeveloped Areas of the Great Interior of B.C.* Bureau of Provincial Information, 1903, 22-24. Cited to Métin at 383.

<sup>19</sup> Lawrence J Barkwell, Leah Dorion & Darren R Préfontaine, eds, *Métis Legacy: A Métis Historiography and Annotated Bibliography* (Winnipeg: Pemmican, 2001).

Metis historian Mike Evans, along with UBC Okanagan student researchers, and together with MNBC, created a database of BC Metis historical documents and a historical sites map.<sup>20</sup> A BC Metis historiography was also created.<sup>21</sup> A genealogical database containing over 100,000 documents, created by Mike Evans, Nicole St-Onge, Brenda Macdougall, Chris Andersen and Ramon Lawrence, was recently launched, and includes the many primary documents identified by Bruce Watson in his monumental three-volume work *Lives Lived West of the Divide*, which focuses to some extent on Metis people, but also on Aboriginal mixed ancestry people.<sup>22</sup> MNBC has also hired researchers to go through the Kamloops archives in search of Metis families.<sup>23</sup> (Participants commented that the interest in Metis historical research was one of the positive outcomes of the BC cases.) Historical land use studies have also been done for the Site C Dam consultation, with a historical report prepared by MNBC consultation representative Brody Douglas.

The facts of both Metis settlement and genesis in BC are borne out by various primary sources.

While space does not allow me to deal with these in any detail here, the following, briefly, are

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<sup>20</sup> BC Metis Research Mapping Project, online: <<http://document.bcmetsicitizen.ca>>.

<sup>21</sup> For a historiography of the Metis in BC see online: <[http://www.indigenousinstitute.ca/Summer\\_Institute\\_2/MNBC\\_Research.html](http://www.indigenousinstitute.ca/Summer_Institute_2/MNBC_Research.html)> (work in progress as part of a research partnership of the Métis Nation of BC and UBC Okanagan campus); and see Kerry Sloan "Many Tenuous Ties: Toward an Historiography of the Metis of BC" (August 29, 2007) [unpublished].

<sup>22</sup> Digital Archives Database Project, online: <<http://dadp.ok.ubc.ca/>>. See Bruce McIntyre Watson, *Lives Lived West of the Divide: A Biographical Dictionary of Fur Traders Working West of the Rockies, 1793-1853*, vol 1 (Kelowna: Centre for Social, Spatial and Economic Justice, University of British Columbia, 2010). Watson has researched the many records relating to the trading post at Fort Langley. The archives there contain extensive employee records, including personal journals of those in charge of the fort. Others who have researched in this area are Morag Maclachlan, ed, *The Fort Langley Journals, 1827-30* (Vancouver: UBC Press 1998); Jean Barman, "Family Life at Fort Langley" (1999) 32:4 *British Columbia Historical News* 16; Keith Thor Carlson, ed, *You Are Asked to Witness: The Stó:lō in Canada's West Coast History* (Chilliwack: Stó:lō Heritage Trust, 1996). This volume is refreshing in that it discusses the impact of intermarriage from both European and Stó:lō viewpoints.

<sup>23</sup> Interview with Mark Carlson, Trail, BC, July 26, 2012.

some examples: there are references to “halfbreeds” or “Métis”, as well as *bois brûlés*, and “country born” people in the diaries of explorers and politicians and everyday people. There are references in Hudson’s Bay and other fur company records. There are references in court cases, newspapers and in censuses and other government documents. There are also a few Métis biographies and autobiographies,<sup>24</sup> but these are relatively rare. Métis oral history sources are finally now beginning to be explored.<sup>25</sup>

Unfortunately, until very recently, there have been no written histories of Métis people in BC actually authored by BC Métis people. In 2008, George Goulet and Terry Goulet published the first book-length history of the Métis in BC, a popular history.<sup>26</sup> Métis historian Mike Evans has worked with other professional and student historians, some of them Métis, on a number of oral history projects in the Prince George and Island Cache areas. One of Evans’ students,

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<sup>24</sup> A biography: Erin Dolmage, *An Exceptional-Typical History of a Métis Elder in Fort St. John* (MA Thesis, University of British Columbia, 2010) [unpublished]. An autobiography: Henry Pennier, *Chiefly Indian: The Warm and Witty Story of a British Columbia Half Breed Logger* (West Vancouver: Graydonald, 1972) for a first-hand account of the life of a Stó:lō-French resident of BC. “Hank” Pennier considered himself a “halfbreed” and wrote in his memoirs about his life “in-between” cultures. The spouse of a Coast Salish/Chinese woman, he was wry about his experiences of racism.

<sup>25</sup> See, for example, Mike Evans *et al*, eds, *What It Is to Be a Métis: The Stories and Recollections of the Elders of the Prince George Métis Elders Society* (Prince George: UNBC Press, 1999). The 2007 web-based edition can be accessed online: <<http://web.ubc.ca/okanagan/ccgs/faculty/mevans.html>>; Mike Evans, *et al* with the Prince George Métis Elders Society (“PGMES”), *A Brief History of the Short Life of the Island Cache* (Prince George: PGMES, CCI Press and Alberta Acadre Network, 2004); Leona Point & The Métis Curriculum Committee, *Métis People of Quesnel: People of Mixed Heritage Living in the North Cariboo of British Columbia* (Quesnel: Quesnel Tillicum Society, 1994).

<sup>26</sup> George Goulet & Terry Goulet, *The Métis in British Columbia: From Fur Trade Outposts to Colony* (Vancouver: FabJob, 2008).

Gabrielle Legault, has written about Metis architecture in BC (McDougall family houses).<sup>27</sup>

Notably, all of this research by Metis historians was only undertaken after *Powley*.

Evans and others have recently conducted community oral history projects regarding the prominence of the Metis in the Nechako-Fraser junction area. In the preface to a history of the Island Cache community (now part of modern Prince George), Evans states, “Prince George is at a joining of both rivers and peoples. It was and is one of the most important centres for Aboriginal European interaction in the British Columbia interior”.<sup>28</sup>

One of the reasons older sources<sup>29</sup> do not acknowledge Metis history or Aboriginal-settler mixing is racism. Racism and legal discrimination against Métis people occurred across Canada and thus, after the dispersal of the Red River community in the late 1880s, the Métis culture – and often self-identity – went underground. But nowhere was the mixed-blood history of Canada erased as it was in BC. According to Barman,

The past was remade. The earliest histories of British Columbia – Hubert Howe Bancroft’s in 1887 and Alexander Begg’s in 1894 – ignored interraciality, as did their successors. Obituaries of prominent men with interracial families, and there were many such, were written as if their children were conceived by a kind of reverse immaculate

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<sup>27</sup> Gabrielle Monique Legault, *Changing in Place: A Generational Study of an Indigenous Family in the Okanagan* (MA Thesis, University of British Columbia, 2012) [unpublished].

<sup>28</sup> Mike Evans & Lisa Krebs, with John Bogle, Bob Parris & Heidi Standeven, *A Brief History of the Short Life of the Island Cache*, project undertaken in cooperation with the University of Northern British Columbia, the University of Alberta, and the Prince George Métis Elders Society (“PGMES”). Solstice Series No. 2 (Prince George: PGMES, CCI Press and Alberta Acadre Network, 2004).

<sup>29</sup> For example, see Hubert Howe Bancroft, *History of British Columbia, 1792-1887* (San Francisco: History Co., 1890); Ethelbert Olaf Stuart Scholefield, *British Columbia from Earliest Times to the Present* (Vancouver: SJ Clarke, 1914); Frederic William Howay, *British Columbia: The Making of a Province* (Toronto: Ryerson, 1928).

conception. The early archives and libraries were organized as if interraciality never occurred, so much so it is still impossible to find any general references to it. It is only by starting with family stories and working backwards to read records against the grain, so to speak, that the phenomenon emerges.<sup>30</sup>

In histories of BC by Bancroft, Scholefield and Howay, discussion of Aboriginal peoples is mostly relegated to beginning chapters on the province's "pre-history". Further occasional references are scattered throughout the texts, but there is no attempt to discuss Aboriginal peoples as integral to BC history even from a Euro-Canadian perspective, or as having their own history.

In Bancroft's case, such omissions are not surprising, given his racist description of Aboriginal miscegenation as "the Fur-traders' Curse". In his *History of the Northwest Coast*, he opined,

I could never understand how such men as John McLoughlin, James Douglas, Ogden, Finlayson, Work and Tolmie and the rest could endure the thought of having their name and honors descend to a degenerate posterity. Surely they were possessed of sufficient intelligence to know that by giving their children Indian or half-breed mothers, their old Scotch, Irish or English blood would in them be greatly debased, and hence they were doing all concerned a great wrong.<sup>31</sup>

Given this kind of attitude, which reflects the racism of the time, it is not surprising to discover that secondary sources on Metis history during this period are almost non-existent.

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<sup>30</sup> Jean Barman, "At the Edge of Law's Empire: Interraciality, Citizenship and the Law in British Columbia", (2006) 24 Windsor Yearbook of Access to Justice 1 [Barman, "Edge of Law's Empire"].

<sup>31</sup> Hubert Howe Bancroft, *History of the Northwest Coast*, vol 2 (San Francisco: History Co., 1886) at 650-51. Note Douglas, Finlayson, Tod, Work and Tolmie all settled in Victoria.

The next comprehensive history of BC<sup>32</sup> was written half a century later by Margaret Ormsby, prolific author and respected professor at UBC. Ormsby's classic *British Columbia: A History*, first published in 1958,<sup>33</sup> did relegate Aboriginal history mostly to earlier sections of the book, and like her predecessors she did not choose to foreground Aboriginal history throughout the rest of her text. However, according to Jean Barman, Ormsby had discovered in her research the Aboriginal (and other) mixed origins of many BC families. While Ormsby wished to include these details in her book, she was asked by a number of descendants to keep their histories quiet.<sup>34</sup> She did. While the subject families were likely relieved that their "secrets" would remain unexposed, BC history suffered an unfortunate blow. Not until the work of Jean Barman and Adele Perry would the Indigenous mixed ancestry history of BC become more widely known.

For instance, Adele Perry's work *On the Edge of Empire*<sup>35</sup> investigates how notions of gender and race shaped colonial society in British Columbia, where the common practice of Aboriginal/non-Aboriginal marriage challenged colonial attempts to impose middle-class Victorian social norms. Perry points out that mixed ancestry children grew up against a backdrop of representations of themselves as inferiors. From the point of view of the urban, white middle class, the tendency of interracial relationships to "degrade" or "deracinate" white

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<sup>32</sup> Other historians writing about BC in this period included AG Maurice, Walter Sage and W Kaye Lamb.

<sup>33</sup> Margaret A Ormsby, *British Columbia: A History* (Toronto: Macmillan, 1958). Reprinted 1991.

<sup>34</sup> Jean Barman, address to Victoria Historical Society, March 22, 2007.

<sup>35</sup> Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001).

men "...compromised British Columbia's colonial project. So too did the simple existence of mixed-race people."<sup>36</sup>

Given the racism prevalent with the influx of European-descended settlers in the mid-1800s, and the growing popularity of the "science" of racial classification at that time, it is not surprising that Metis and Aboriginal mixed ancestry people often chose to downplay their heritage. For instance, prominent "white" British Columbians, such as Premier Simon Fraser Tolmie, had Aboriginal ancestry but preferred not to acknowledge it. Tolmie was the son of a Hudson's Bay trader whose wife was the daughter of fellow trader John Work and his French-Spokane wife Josette Legacé.<sup>37</sup> Barman concludes such reluctance may not have been uncommon, even though "far more British Columbians than generally acknowledged share a common ancestry".<sup>38</sup>

Even now, racism and self-silencing help to mute the voices of Metis and Aboriginal mixed ancestry people. Barman has said that in working with descendants who have shared with her their family histories, Barman has been able to compile a database of approximately 1,500 relationships occurring during the 19th century between male settlers and Aboriginal women.<sup>39</sup>

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<sup>36</sup> *Ibid* at 74.

<sup>37</sup> An intriguing collection of biographies of fur trade women who spoke Chinook jargon, including Josette Legacé, is provided online: <[www.arts.ualberta.ca/~chinook/VoyageurWives/listofvw.htm](http://www.arts.ualberta.ca/~chinook/VoyageurWives/listofvw.htm)>.

Many of these short life histories also reveal the complexity and interconnectedness of Metis families.

<sup>38</sup> Jean Barman, *The West beyond the West: A History of British Columbia*, 2nd ed (Toronto: University of Toronto Press, 1996) at 172.

<sup>39</sup> Barman, "Edge of Law's Empire", *supra* note 30.

However, often their descendants were reluctant to reveal their family histories, and some of them did not want her to share this information with others.<sup>40</sup>

Many of the research participants echoed similar sentiments in explaining why they or their families have not advertised their histories. This raises the question of why this should be particularly the case in BC, and this in turn raises the spectre of the lack of political cohesion of Metis people in BC. However, this is to assume that the Metis people of BC were isolated from the rest of the Metis nation. With continual migration to BC and mobility throughout much of North America, I can only see that a lack of political cohesion would be temporary, and not far out of line with the tendency of Metis people to have wide-reaching political structures for particular purposes. As to the particularities of BC history, I think that racism and self-silencing were common experience of many Metis in BC and elsewhere, and I think Metis people continued to associate, even if they did it intermittently and quietly. What is different in BC is the outsider perspective, which constructed Metis people in the province as invisible, owing in part to the lack of a “Metis” legal category in BC, and owing in part to colonialist assumptions about Metis communities and territories. These perspectives will be revealed in the next part, which deals with the evidence in the three BC harvesting cases.

## **PART 2            THE INTERPRETATION OF HISTORICAL EVIDENCE IN THE BC CASES**

### **The Expert Evidence of Dr Michael Angel in *Willison***

In the *Willison* trial, the court qualified Dr Angel as an expert entitled to express expert opinion evidence regarding Metis culture in the Pacific Northwest. This ended up being a problem for

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<sup>40</sup> Jean Barman, Address to Victoria Historical Society, March 22, 2007.

the appeal judge, who felt that this qualification was too broad, and that Angel should have focused on the Metis of the Brigade Trail. The court's concern with the expansiveness of BC networks reflects the *Powley* test's requirement that people to live within a discrete geographic area. The trial judge also frequently asked Dr Angel to give responses that were more specific to the Thompson/Okanagan, rather than to the Northwest as a whole (although he initially did ask about evidence of Metis ethnogenesis in the Pacific Northwest).

In his written and oral evidence, Angel tried to stress both the expansiveness and the particularity of Metis communities. My assessment of his evidence is that it was more nuanced than the appeal judge's conclusions about it would suggest. The appeal judge tended to focus on Angel's statements about the expansiveness, purported assimilation and mixedness of the Okanagan Metis rather than his statements about their presence, importance and distinctiveness. Of course, there are a number of weaknesses with Dr Angel's evidence, notably his lack of reference to original sources, including oral history sources, and his relative lack of professional expertise in the field. The scarcity of sources Angel refers to reflects the dearth of research to that point on the Metis of BC. As Angel himself states, "... studies of the mixed ancestry individuals and communities in the Pacific Northwest continue to be scattered, in comparison to work on the Métis in other areas."<sup>41</sup>

In many places Angel stresses the broad geographic base of the Metis, stating "that while there are obvious differences between the Métis in the Pacific Northwest and their counterparts in

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<sup>41</sup> Michael Angel, "The Métis of the Pacific Northwest: A Literature Review of Sources" (nd) [unpublished] (*Willison* trial evidence, Exhibit 4, Tab 8) [Tab 8] at 4.

Red River or the Great Lakes region, the differences are balanced by family connections, and socio-economic connections that helped weld the distant family communities together.”<sup>42</sup>

Similarly, he states that “... while the number of families of mixed ancestry never reached anywhere near the mass that it did in and around French Prairie, Ft. Vancouver or even Fort Colville, such families did exist in British Columbia’s interior. Moreover, they definitely considered themselves part of the broad web of mixed ancestry families in the Pacific Northwest and beyond.”<sup>43</sup>

Angel gives a broad context to the history in the environs of Falkland by describing the community connections of Metis in that area with the Metis involved in the fur trade in the Pacific Northwest, including those Metis who settled in Oregon after the Oregon Boundary Treaty in 1846, and after the gold rush and subsequent decline in the fur trade. Even prior to that, according to his evidence, many Metis people were operating in what is now the US because they were trying to escape the HBC monopoly. Others went with the Sinclair expeditions in 1841 and 1854 and Dr Angel mused that after the Oregon Treaty, Metis people in BC were cut off from their compatriots south of the border. Thus, he suggested there may have been more Metis people in Washington and Oregon than in BC.

At the same time, he did stress that there were Metis people working out of Lillooet, Kamloops, and the Shuswap. There was reference in primary documents to Metis families settling at

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<sup>42</sup> *Ibid* at 2.

<sup>43</sup> *Ibid* at 6.

Westbank, Osoyoos, Kamloops (between Monte Creek and Westwold), but not much archeological evidence.<sup>44</sup>

This evidence was provided in response to the question of whether he had specific knowledge of Metis settlements in BC. Angel mentioned David Thompson's wife Charlotte Small and Jaco Findlay as some of the earliest Metis migrants to BC from Red River; he also mentioned "Iroquois Metis" as a separate group. The court wanted to know if any of these people lived near Kamloops. Angel replied that they lived in the general area. However, he later mentioned some Metis from Red River who did live at Kamloops. Based on the available evidence, their numbers were small – perhaps only 20 people or so. According to Dr Angel, it is not clear whether all of these people were Metis – he either cannot prove it on the record or hasn't tried. At Tab 8, while he does suggest that there is not much evidence for the presence of more than a few Metis families in the Kamloops area: "In the period from the 1820s to the 1840s the

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<sup>44</sup> This attempt to balance what might be seen as conflicting views is similarly expressed in the conclusion to his unpublished paper, in which he states, "Unlike in the Great Lakes, Red River or even the Athabasca regions, the Pacific Northwest fur trade period was relatively short (from 1808-1858). With a few exceptions, only two generations of families of mixed ancestry (Métis) lived in the region before both they and the local Aboriginal people were engulfed by waves of new "immigrants" and a Euro-American settler society established. Thus the new communities had a shorter time to take root and develop than in other regions. Moreover, the change to Euro-American hegemony was more sudden and more dramatic in terms of the decline of Aboriginal populations and influence, and the rapid growth of Euro-American, and in some areas Asian populations.

Nevertheless, Métis families were a recognized part of the population for some time in the Thompson/Okanagan area. They continued to be associated with the HBC operations even after it had changed its focus to more emphasis on the retail trade. Some of them continued to fulfill their role as Indian traders, while expanding it to include Euro-Americans as well. Others among them employed their traditional skills by becoming involved in the business of freighting, both during and after the Cariboo Gold Rush. Still others became involved in operating everything from ferries to hotels to restaurants in the growing settler communities. And many of them became ranchers noted for their proficiency as horsemen – not surprisingly, given the importance of horses for the fur brigades, particularly in places such as Fort Okanagan [sic] and Fort Kamloops." Tab 8 at 32-33 [notes omitted].

The court obviously favoured the first part of this evidence.

[Kamloops] post never housed more than 9-11 men”,<sup>45</sup> in giving oral evidence he stressed that it was likely there were many more Metis people in and around the fort, but that it was difficult to obtain historical or archaeological evidence for this. Numbers of Metis people in BC increased during the gold rush, and some of these people stayed in BC.

At the same time, Angel did resist the trial’s judge’s initial focus on settlement, explaining that Metis communities were not just based in settlements, and that they were connected more broadly to Metis people throughout the Pacific Northwest.<sup>46</sup> In explaining why he refers to the broader context, he states,

... what I'm trying to make clear is that you can't simply take a Metis community in much the same sense that you might want to take a white community and say that people have come in here and settled and this is their community because of the very fact that the fur trade was based on the communication system, that it was in constant motion every year and people just did not live in one little community.<sup>47</sup>

He also stated that there were connections between the Metis of BC and Red River. For instance, there were some Metis people in BC who went back to Manitoba to get scrip – this shows their identity as Metis. In another example, Angel mentioned that one of the mixed ancestry sons of trader John McLoughlin, whose mother was a local Indigenous woman, participated in the Red River resistance. This shows both the connection between the BC and prairie Metis, but also the fact that McLoughlin considered himself to be Metis, although he

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<sup>45</sup> Tab 8 at 15.

<sup>46</sup> Cross-examination of Michael Angel on *voir dire*, *Willison* trial transcript, June 16, 2004 at 30.

<sup>47</sup> *Ibid.*

was not a Red River migrant. Angel cites Sylvia Van Kirk and Jennifer Brown as support for the reality of interchange between Northwest Metis communities and Red River. Angel gives some examples of the webs of Metis relations, referring to different family patterns: some Metis settled in what is now BC, others went to the US, or to Red River.

In their essay *Reflections on Being, and Becoming, Métis in British Columbia*, Jean Barman and Mike Evans point out that in the *Willison* appeal

... the Court accepted the Crown's contention "that most of the Métis who were employees of the Hudson's Bay Company left the area at the end of their careers" (para. 31). In doing so, the Court was influenced by the testimony of a defence witness [Angel] in the original trial who said that "there was no evidence of fur traders putting down roots at either Fort Kamloops or Fort Okanagan" (para. 31).<sup>24</sup> The decision, then, was largely constrained by the limits of the facts given in evidence in the original trial.<sup>48</sup>

Footnote 24 to this cite reads:

The principal defence witness was Michael Angel, who explained on the stand that his insights came from published sources. His testimony indicates that his understandings were very broadly based, mostly relating to areas around Fort Vancouver and present-day Oregon and Washington, rather than British Columbia or the area in question" (Provincial Court of British Columbia 2004).<sup>49</sup>

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<sup>48</sup> Jean Barman & Mike Evans, "Reflections on Being, and Becoming, Métis in British Columbia" (Spring 2009) 161 BC Studies 59 at 71.

<sup>49</sup> *Ibid.*

This quotation highlights some of the problems with Angel's expertise, despite what appears to be fluid knowledge. Although he is trained as a historian and librarian, and has always been interested in Aboriginal history, he admitted in the *voir dire* that most of his expertise with respect to Aboriginal people relates to Ojibway communities in Ontario, with whom he did family research. His one published book is on the Midewiwin (Anishinabe religious society): *Preserving the Sacred: Historical Perspectives on the Ojibwa Midewiwin* (Winnipeg: University of Manitoba Press, 2002). He was called as an expert witness on Ojibway worldview in a gaming case in Manitoba, *R v Nelson*. While Angel completed an interdisciplinary PhD on the Pacific Northwest, it didn't focus on Metis issues. His previous professional work involving Metis people was some community research with Metis in Ontario, in the Great Lakes region. In fact, Angel had never formally studied or published on Metis history in the Pacific Northwest – it was simply one of his interests. His unpublished paper "The Métis of the Pacific Northwest" (Tab 8) was not prepared for the *Willison* case, but for his private edification – although he hoped eventually to publish it (this has not happened, to my knowledge). The paper referred to a few primary sources but, as Barman and Evans note, was mostly based on secondary material. Dr Angel, at one time an instructor at Red River College, was a contract historical researcher at the time of the trial. The reason Tab 8 was put into evidence was because Angel wanted to refer to his paper as a memory aid when responding to a question the court asked about Metis ethnogenesis in the Pacific Northwest; counsel on both sides had to be provided with this essay, which was later entered in evidence.

Angel referred in his evidence to first-hand accounts of various fur traders in archives in Kamloops, Victoria and Winnipeg. He said he had looked at some NWC records, although

stated many of these were destroyed upon the merger with the HBC. He acknowledged these were not materials specifically concerned with Metis in the Northwest, but provided a social history, occasionally mentioning Metis people and what they were doing at the time. He also had looked at some compilations of primary sources, including Fort Langley records, and church records that provided information about Metis families (e.g. compiled by Harriet Munnick). Other than these few sources, Angel's evidence was based on his study of some of the secondary source material available at the time, but certainly not on all the literature that was then available (e.g. he refers to only two of Jean Barman's works<sup>50</sup>). Much of the secondary literature he does cite is about the fur trade in the Pacific Northwest (e.g. Gibson,<sup>51</sup> Harris,<sup>52</sup> Jackson<sup>53</sup>), and not about the Metis in the area at issue. Of course, the secondary sources mentioned were necessarily few, given that there had not been much study of Metis history in BC to that point. Further, on cross-examination on the *voir dire*, the Crown asked about oral history evidence, but Angel admitted he didn't use it in his study. This reveals a huge

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<sup>50</sup> Other Jean Barman titles relevant to the Metis in the Pacific Northwest generally include Jean Barman & Bruce Watson, "Fort Colville's Fur Trade Families and the Dynamics of Aboriginal Racial Intermixture in the Pacific Northwest," (1999) 90:3 *Pacific Northwest Quarterly* 140; Barman, "What a Difference a Border Makes: Aboriginal Racial Intermixture in the Pacific Northwest," (1999) 38:3 *Journal of the West* 14; as well as numerous titles about Metis and Aboriginal mixed ancestry people in what became BC.

<sup>51</sup> Gibson, *supra* note 16. In this study of the Fraser-Columbia brigade system, Gibson painstakingly reconstructs personalities, places, obstacles, and operations involved in the brigade system, from Fort St James, the depot of New Caledonia on the upper reaches of the Fraser, to Fort Vancouver, the Columbia Department's depot on the lower Columbia.

<sup>52</sup> Harris, *supra* note 15, is primarily a geographical history of the European and Asian settlement of BC, with descriptions of how settlement displaced Aboriginal people and altered overall demographics. However, the chapter "Strategies of Power in the Cordilleran Fur Trade" reveals the participation of the Metis in the Columbia fur trade.

<sup>53</sup> While the above two titles refer to the Metis incidentally, Jackson, *supra* note 17, is a dedicated history of the Northwest Coast Metis, although it is in some respects more of a popular history than a scholarly work, and is criticized for not distinguishing between Metis and Aboriginal mixed ancestry people. There are many references relevant to BC in Jackson, in particular the last part of Chapter 17, "A Dispersed Community". Jackson makes clear the interconnections between the American and Canadian Metis – even those as far away as Red River.

gap in evidence that could have been presented if more oral histories had been compiled. To a certain extent, the defence called Lottie Kozak to rectify this, as she was knowledgeable about Metis history in the southern BC interior.

One of the problems with the appeal court's construction of Dr Angel's testimony is that the appeal judge's insistence that the evidence was too broad – that it concerned the entire Pacific Northwest – ignores the fact that BC didn't exist at the time, and the fact that there were Metis networks across the whole northwest. Bethel Saler and Carolyn Podruchny talk about the effect of the border on the Metis in the far northwest,<sup>54</sup> as does Michel Hogue in the northwest more generally.<sup>55</sup> Even after the border existed, most Metis continued to ignore it to the extent possible. This illustrates that Dr Angel's – and other witnesses' – construction of the evidence was more in line with Metis thinking that the court's insistence that the evidence conform to the BC narrative. Saler and Podruchny point out that fur trade narratives in Canada follow the Canadian narrative about the centrality of the fur trade, and its cross-cultural and even constitutional aspects, whereas US fur trade narratives tend to focus on the individualism and pioneering spirit of fur traders going out into the “unknown wilds”.<sup>56</sup> The insistence by witnesses that the US fur trade was relevant to the Canadian Metis was unsettling and not easily absorbed by the court.

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<sup>54</sup> Bethel Saler & Carolyn Podruchny, “Glass Curtains and Storied Landscapes: The Fur Trade, National Boundaries, and Historians” in Andrew Graybill, Benjamin Johnson & Joseph E Taylor III, eds, *Bridging National Borders in North America* (Duke University Press, 2010).

<sup>55</sup> Michel Hogue, *Metis and the Medicine Line: Creating a Border and Dividing a People* (Durham: University of North Carolina Press, 2015).

<sup>56</sup> Saler & Podruchny, *supra* note 54.

## Testimony of Metis Witnesses

All the witnesses in *Willison*, *Howse* and *Nunn* gave evidence about Metis history and culture in BC, and in the Pacific Northwest more generally. In *Willison*, and in the *Howse* trial, the trial judge took trouble, in the view of Metis participants, to listen closely to the evidence and – as much as possible – to try to understand it from a Metis perspective. Ron Nunn also said he thought the trial judge in his case was sympathetic and would really rather not have convicted him, but based on the evidence presented, could not find in his favour.

What is interesting about the *Willison* and *Howse* appeals, and the *Nunn* trial, are the judges' interpretations of Metis evidence as being about a community that is not site-specific enough, culturally specific enough or permanent enough. However, in the views of the participants, the courts weren't listening to the evidence from a Metis perspective. The most egregious example, in the view of the litigant participants, was that the court didn't take seriously their assertions that Metis hunting laws are evidence of a distinctive Metis cultural practice. That is, in their view, the Metis practice of hunting was distinctive because of the laws that governed it. These laws are still upheld today, although the organization of Metis hunts is today on a much smaller scale.<sup>57</sup> In fact, both Ron Nunn and Dan LaFrance were at one time Hunt Captains. However, the appeal judge in *Willison* goes so far as to say about Ron Nunn's expert testimony that

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<sup>57</sup> For a description of traditional Metis hunting law and practice, see Karen Drake, "*R v Hirsekorn: Are Métis Rights a Constitutional Myth?*" (2013) 92:1 Canadian Bar Review 149.

When asked by the Court what about Métis sustenance hunting made it culturally distinct (as opposed to an aspect of survival), the witness testified about the culture and structure of buffalo hunts (para. 70). There was no explanation of how such hunts might define a culturally distinct people in the environs of Falkland.<sup>58</sup>

One of the points of giving this evidence, according to Ron Nunn, was to show that Metis people in the environs of Falkland were part of a larger web of Metis culture and law.

This leads to a related concern that Metis cultural practices were supposed to be distinctive in BC, while the purpose of much of the evidence led by participants was about cultural continuity with the wider Metis web. Part of this comes from the sense that they were obliged to show that they were legitimately Metis, perhaps illustrating a BC Metis cultural inferiority complex, due to the perception that Metis people were not important to BC history.

Too much cultural similarity to First Nations was seen as making the Metis not distinctive enough; similarly, the fact that Jane Klyne was characterized by the court as a “proper Victorian matron” implied she couldn’t be legitimately Metis, and a leap was taken from this to suggest that the existence of people such as her negated the possibility of the existence of a real Metis community in the environs of Falkland.

While the appeal judge in *Willison* did refer to the evidence of Michael Angel and Ron Nunn as experts, he did not mention Lottie Kozak’s oral history evidence about her McDougall family in BC, the Metis people of the Merritt area where she was born and lived as a child, or the Metis

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<sup>58</sup> *Willison BCSC, supra* note 2 at para 42.

and Aboriginal mixed ancestry people in the valley between Monte Creek and Vernon, especially in Falkland and Westwold. In his cross-examination, the crown prosecutor kept trying to get Lottie to distinguish between the knowledge she learned from her family and Elders, and the information she subsequently learned from books. In Lottie's view, the crown lawyer was very disrespectful in the way he asked her these questions, and also revealed his ignorance by them. She did not believe her knowledge was "contaminated" or any less valid because it had more than one source, especially since the sources tended to agree. The crown's aim in trying to get Lottie to split her historical knowledge was based in the belief that Aboriginal knowledge is somehow corrupted because it incorporates other knowledge. Participants who heard Lottie's cross-examination asserted that this does not reflect a Metis viewpoint and was not respectful of Lottie's knowledge or role in Metis society. The fact that it was not even mentioned in the appeal judgment reveals that the court did not give much weight to her oral history testimony.

The Metis evidence that was referred to in all the final determinations in *Willison*, *Howse* and *Nunn* tended to ignore evidence about governance of the hunt and governance generally; about similarities between Metis culture in BC and elsewhere; about how Metis people construe communities; about mobility; and even about genealogical evidence. Sébastien Grammond & Lynne Proulx have closely analyzed the evidence in *Howse*, coming to similar conclusions and also suggesting the fact that the claimants were not represented at trial (although they had advice from counsel, and counsel made closing arguments) accounted for

the evidence being more based in Metis understandings (e.g. regarding mobility), and thus not more closely matched to the *Powley* tests.<sup>59</sup>

### **CONCLUDING THOUGHTS: SIGNIFICANCE OF HISTORICAL SOURCES ON THE BC METIS**

What has become apparent from the above review of the literature is that the number of secondary sources texts on the BC Metis is limited, although primary sources would indicate a relatively large and subsisting population of Aboriginal/non-Aboriginal people (including Metis) in the province.<sup>60</sup> This illustrates the pressing need for more research into primary sources – both oral and written – on the Metis presence in British Columbia. The sources have become noticeably more useful with the passage of time, but only in the last 25 years or so have scholars really begun to look critically at the many facets of BC Metis history. Certainly, views of Metis history from Metis perspectives have been sadly lacking until very recently. Perspectives of Metis and Aboriginal mixed ancestry women have also only been recently published in the scholarly literature.

Of course, an inherent problem with all secondary sources on the Metis is precisely that they are secondary. As Peterson and Brown note in the “Introduction” to *The New Peoples*, “Few métis generated their own documents. Most records before the late nineteenth century come

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<sup>59</sup> Sébastien Grammond & Lynne Proulx, “Finding Metis Communities” (2012) 32:1 Canadian Journal of Native Studies 33.

<sup>60</sup> One issue that could come up in future cases, as it was critiqued in Dr Angel’s evidence on cross-examination, is the degree to which the histories refer to Metis people as opposed to Aboriginal mixed ancestry people. This is further complicated by the fact that people may refer to people as being Metis, or as not being Metis, for various reasons, including political aims. Sometimes people are considered Metis in some contexts or works, but not in others.

from outside observers, and have in turn been used and interpreted by outsiders whose intercultural perspectives have often been deficient.”<sup>61</sup>

I am hopeful that oral history will help to uncover the “lost” or “underground” history of the Metis in BC and throughout Canada, but am concerned that the courts will take the same dim view of Metis oral history as they do of Aboriginal oral history in general.

While some secondary source materials were referred to in the claimant’s expert witness report, and oral history evidence was provided for the defence, the appeal court lamented that “better” evidence had not been brought forward at trial. Unfortunately, there is simply not a great body of written or documented oral history that may be presented as evidence.

Since the decision of the BC Court of Appeal in *Willison*, the Metis Nation of BC and the BC Metis Assembly of Natural Resources have conducted historical and genealogical research concerning the communities of the Thompson/Okanagan region. In an electronic newsletter, they assert

We have moved forward significantly in the areas of Historic and Contemporary Communities and Continuity. We believe there is now sufficient evidence to have won the Willison Case if this newly found evidence was available at the lower court trial. At Appeal, the Crown argued that, during the early 1800s, the Hudson Bay Post at Fort Kamloops (historic community) only had seven Metis servants and if it were not for the HBC they would not have been there. Mr. Willison was not able to provide primary

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<sup>61</sup> Jacqueline Peterson & Jennifer SH Brown, eds, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) at 9.

source evidence to dispute this fact, even though a Professional Witness stated that there would have been many more Metis that were not recorded in HBC Post documents. MNBC researchers have since established, through primary source documents (Oblate Mission Records), the existence of more than seventy Metis individuals at Fort Kamloops, some of which would have also had families.<sup>62</sup>

It will be interesting to see what ongoing research uncovers that might lead to the possibility of successful Metis rights litigation in the future.

Of course, it is not just that there has been little literature on the topic of Metis people in BC, but it is also that what there is has been seen through the lens of colonialist assumptions, and non-recognition of Metis realities. A positive outcome for the claimant in *Willison* would have depended on a proper understanding of the history of the Metis “in the environs of Falkland”. This type of problem would not arise in a case involving First Nations or Inuit aboriginal rights claimants – it is a particularly Metis problem.

The existence of this problem, then, and its conjunction with Canadian law, illustrates the need for a Metis critical theory of law.

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<sup>62</sup> BC Metis Assembly of Natural Resources newsletter, online: <<http://www.bcmanr.ca/news.htm>>.

## **TEA WITH LOUIS**

*The young woman (OK, maybe now not so young) sits in front of the computer, her eyes burning, her hands aching. Her backside is numb and her ankles are swollen. She glances at an article she saved a few years before from the Victoria Times-Colonist about the Willison case. “Why are they still calling the paper the “Colonist”?” she mutters to herself as she rises, the first time she’s moved anything but her eyeballs or her fingers in many hours. It is 3:58 a.m and she’s thirsty.*

*She tries to remember why she wanted to do a PhD in the first place. Her grandmother – never a big fan of either the Canadian law or academia – had asked her this question. She had answered that it was because she wanted to contribute, at least in a small way, to justice for Metis people. Her grandmother had snorted and declaimed that people should “stop making such a fuss”, and should just “get along”. She had continued, “Yes, the Indians and the Metis got shafted, but there’s nothing to be done about it now that doesn’t involve upsetting people, starting a lot of fights, and spending a lot of money on lawyers. Lawyers are getting rich off of Native people.” Of course, as the young woman was also a lawyer who usually represented Native people, this jibe was hard to take. Her grandmother sure knew how to take her down a peg.*

*The young woman’s mind rolls back to another, seemingly inconsistent statement her grandmother had made years previously at a family dinner. The usual political conversation peppered with funny stories and the occasional off-colour joke was going on amidst the usual laughter, when someone brought up the topic of the early colonial settlement of what would*

*become known as Canada. People were making fun of the European settlers, who knew nothing about Canadian winters, or about the need to take spruce tea to ward off scurvy. It was agreed that the Indigenous people were generous in teaching the settlers about local antiscorbutics, as this allowed them to survive and adapt – and their settlements to flourish. The young woman's grandmother became very stern and said with both sadness and anger, "If we had known what they were going to do to us, we would have killed them all."*

*How could the young woman reconcile her grandmother's seemingly contradictory statements? How could her grandmother advocate both violent resistance and the need to "forgive and forget"? How could she identify with being Aboriginal one moment, but refer to Indigenous people as "them" the next? These questions were puzzling, just like many of the other tensions she had encountered in thinking about Metis issues.*

*The young woman puts her aching head down on her crossed arms on the table. She tells herself she will get up in a minute to make a cup of strong, black tea – before she falls asleep. But first she thinks she will try to remember if her readings about Louis Riel might help her to understand what her grandmother was saying. Riel often said things that people thought were contradictory, like how he talked at his trial about Metis rights and title one moment and advocated for more European immigration the next.*

*As she muses, the young woman begins to have the impression that someone is looking at her, when she hears a sonorous male voice say, "Yes, le thé would be good a ce moment ..." She isn't sure who is speaking, but she remembers her decision to make tea. When she returns from the kitchen, she spots the back of a head of curly dark hair and of an old-fashioned checked*

wool jacket. *Who could this be? "Strange, I don't feel frightened", she thinks to herself, as she realizes for some reason she is carrying two mugs of tea. She sets one down before her unexpected guest, who has a full, dark beard and laughing brown eyes. She immediately feels comfortable with him.*

*"Since you asked my advice," says the man, who looks strangely familiar, "I wouldn't try to resolve all of this Metis stuff. You won't be able to anyway. J'ai essayé de le faire, to encompass it all, even philosophies from all over the world, in my masterwork, the Massinahican. I wanted to create a statement of Metis philosophy, a Metis 'bible', comme tu veut. It was interfering with my sleep to the point where I was starting to hallucinate. People started to worry I was going crazy, that I had two heads – or maybe more." He laughs a warm, self-deprecating laugh. "Maybe Kishay Manidou thought I was getting a little too puffed up about my own intellectualism – all that work, and only a few fragments remain. That, and maybe some practical results. Hein, merci pour le thé – and don't forget ... keep on the good road."*

*She finally realizes who he is. Louis places his empty mug decisively on the table. The noise of ceramic hitting melmac startles her awake. After rubbing her eyes, when her vision clears, she sees two empty mugs on the table. Has she been dreaming or hallucinating? She decides she'd better get some real sleep.*

## Chapter 7

### MISSING PERSPECTIVES: METIS PHILOSOPHY, METCRIT AND THE COMMUNITY CONUNDRUM

#### INTRODUCTION

“Beware of the single story.”

John Borrows, presentation to Law 340 class, University of Victoria, March 26, 2014, referencing Chimamanda Adichie

As identified by the research participants, ignorance about Metis perspectives is one of the larger problems with the Canadian law concerning Metis people. This problem is reflected in *Willison* and in the other BC cases. Participants have some ideas about how to address this problem (see Chapter 9), but I think it would first be helpful to consider developing intellectual tools for legal critique.

In this chapter, I will argue for the usefulness of conceptualizing theory in responding to how Metis people are affected by law, and particularly by the community conundrum. The intersection between Metis law and history, as exemplified in the BC cases, suggests that having particularly Metis approaches to legal critique could be helpful. However, I recognize that while theory itself is important, it should be sensitive to, and not overshadow, real experiences of Metis people dealing with law. In other words, it should be capable of producing, in Louis Riel’s words, “practical results”. At the same time, I am not proposing that

theory be strictly utilitarian. Critical theories are important tools, and are expressions of the philosophies and cultures that underlie them; thus, they are significant in their own right.

Theory has often been opposed by proponents of “real” law, “real” history, as “fashionable and felicitous obfuscation”,<sup>1</sup> a form of misrecognition that has supposedly hijacked and contaminated scholarship. Similarly, some Indigenous and “post-colonial” writers have been skeptical of theory as promoting depoliticized ambivalence, in which practical change takes a back seat to academic posturing, or – worse – as deliberately co-opting and defusing/diffusing nationalist and sovereigntist claims.

I hope in this chapter to suggest the possibility that theory can contribute to both real legal and political change for Metis people, and to the enrichment of Metis culture and governance.

First, it could introduce non-Metis thinkers to Metis ideas and worldviews, which could influence the way law and history are interpreted, potentially importing Metis perspectives into litigation and negotiation about Metis rights. Second, considering theories and their bases would encourage us as Metis thinkers to revitalize and develop our own philosophies, promoting Metis intellectualism and self-determination.

In Part 1, I reveal that there has been very little written on theorizing law from a Metis perspective. Most of the work done on Metis critical theory generally has been done in the field of literary criticism. This lack of Metis law theorizing is itself a rationale for developing MetCrit. Other rationales will be described briefly here, and possible characteristics of MetCrit will be sketched.

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<sup>1</sup> R Radhakrishnan, *History, the Human, and the World Between* (Durham & London: Duke University Press, 2008) at 5.

In Part 2, I describe some Metis philosophical perspectives that could be important for legal critique. These perspectives come from my own family teachings and from the research participants, and are complemented by works by Metis scholars, orators and storytellers. These strands of Metis philosophy reveal similarities and dissimilarities, which themselves reflect the interconnectedness and irreducibility of Metis thinking and theorizing.

In Part 3, I develop the ideas of interconnectedness and irreducibility in light of non-Metis critical perspectives that may offer ideas that are useful for Metis critical legal theory.

In Part 4, I reflect on the following questions: What might be some concerns in proposing MetCrit? What would be the connection between Metis theory and methodology? How would MetCrit respond to the community conundrum?

## **PART 1        THE ABSENCE OF THE METIS IN CRITICAL LEGAL THEORY**

While there are many Metis and non-Metis writers who write about law, even about law as it concerns Metis people, there is no critical legal theory literature that specifically addresses Metis concerns. Metis scholars have criticized Metis rights law, undoubtedly incorporating into their critiques Metis ways of thinking and Metis-centred perspectives, but they have not done so in a self-conscious way, deliberately setting out the intellectual foundations of their thinking. (Perhaps the reluctance to spell out one's philosophy is itself a Metis practice, reflecting non-reductionism, and this tension and questions about the usefulness of theory will be investigated in this chapter.)

Even literature on Metis theory apart from law is sparse, and is mostly focused on literary criticism. Very little has been written directly about Metis philosophy, upon which Metis theories might be based. Of course, Metis theory and philosophy exist, and have existed for centuries, but have not been written about much. Students and scholars seeking to base their work on Metis perspectives have thus been in the position of having to write their own manuals, which we saw in Chapter 4 was reflected in the methodological approaches of Metis researchers.

Before we continue, I should point out that I am not using the word “theory” only in the sense of a system of ideas that explains or accounts for certain phenomena. I am using the term more broadly to include sets of perspectives that allow phenomena to be perceived in a particular way. I certainly do not mean “theory” to be all-encompassing, to accurately explain all legal phenomena affecting Metis people. My proposal is merely that looking at law through Metis lenses can reveal where law is lacking with respect to Metis people and, potentially, can reveal where Metis perspectives themselves can contribute to positive change.

### **Why a Metis Critical Theory of Law?**

Why am I arguing for a Metis-specific critical legal theory and how might it best provide ways of dealing with the community conundrum in BC and other Metis legal issues?

Deliberately creating a Metis critical theory of law would

- take the history and experiences of Metis people seriously;

- acknowledge differences and similarities between positions of Metis and other Indigenous nations;
- acknowledge the complexity, multiplicity and intersectionality of Metis reality: Metis people have inherited a blending of Indigenous and European (and sometimes other) cultures (e.g. although arguably Metis are Indigenous because of Indigenous ancestry and cultural influences, as well as genesis as a unique society (or societies) in what is now Canada, nevertheless European philosophies, cultures, religions, laws, languages and histories are part of our heritage);
- subvert previous erroneous understandings of Metis people; subvert dualism of other and non-other, centrality and marginality (celebration of “road allowance people”); subvert privileging of Euro-oriented thinking about law, history, community, while also borrowing from and adapting Euro-oriented thinking – a Metis tendency with a long history;
- contribute to development of Indigenous philosophy.

Among other things, MetCrit could provide tools for considering the multiplicities and complexities of Metis history in BC (and elsewhere), while acknowledging complexity and uncertainty in the law. MetCrit could also address the conflict between essentialism and anti-essentialism.

### ***Why a Particularly Metis Critical Theory?***

In developing MetCrit, particularities of Metis concerns with law would be the focus. This is not to pit such concerns against the law-related concerns of First Nations and Inuit people and

collectivities; in fact, I would expect there to be a great deal of overlap between the law-related concerns of Indigenous peoples. For instance, many Aboriginal nations in what is now Canada have been displaced from their homelands through forced resettlement and incursions by settlers. This includes the Metis, who were displaced from their lands in Manitoba, then again from the lands they fled to in Saskatchewan – but who also had continually migrated for work since the days of the fur trade. While commonalities of Indigenous experience might be important to consider, the following particularly Metis concerns would need to be addressed by MetCrit: implications of mobility; loss of territory/overlapping territories; lack of traditional territories since “time immemorial”; the relative lack of formal structures for transmission of oral history; overlapping identifications (i.e. as both Metis and “Indian” or Inuit); historical mutability of identity; historical factors leading to Metis identity going “underground”; experiences of intersectionality; cross-cutting prejudice and discrimination; historical invisibility of, and ignorance about, Metis people in Canadian discourse, including legal discourse; self-hatred, or “auto-racism”; potential for some Metis to assimilate, e.g. because of not being phenotypically Indigenous; significance for Metis of European (or other non-Indigenous) ancestry and what is inherited culturally from this; distinctiveness of Metis; many ways of being Metis; possibility of the existence of different Metis peoples, not all of whom are descended from the Red River Metis, and implications; in BC, intermarriage between migrant Metis and Indigenous mixed ancestry people; that is, differences between “being and becoming” Metis.<sup>2</sup>

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<sup>2</sup> See Jean Barman & Mike Evans, “Reflections on Being, and Becoming, Métis in British Columbia” (Spring 2009) 161 BC Studies 59.

While many First Nations people who have other ancestry may predominantly identify as Cree, or Mi'kmaq or Tsimshian, Metis people identify as something which is “new” – it is inherently mixed, although not just mixed – it has become distinctive. Metis culture grew out of radically distinct cultures that met and in many ways merged over time. It was the dialogues between European (and other) and Indigenous cultures that have made Metis people what they are. For instance, Michif, (a) Metis language(s), has elements of French, as well as Nehiyawewin (Cree) and Anishinabemowin (Ojibway/Saulteaux). Another less frequently spoken Metis language, Bungee, contained elements of Scots (Scottish dialects of English),<sup>3</sup> Scottish Gaelic and Anishinabemowin. Metis jigging, country dancing and fiddling derives from Indigenous and Celtic (Breton, Irish, Scottish) traditions.

Indigenous peoples in colonized lands cannot get away from having to live “between” cultures, but with Metis, “between-ness” is bred in the bone.

Thus, despite Metis people’s commonalities with other Indigenous peoples, and despite the fact that many Metis and First Nations (and sometimes Inuit) people are interrelated, Metis experiences have been distinctive. Thus, in my view, while Indigenous critical legal theory can address Metis many concerns, there are some concerns that will be particular to Metis experiences.

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<sup>3</sup> Some linguists argue Scots is a separate language that itself has various dialects.

### **Characterization (Purposes) of MetCrit and Sources**

Potential sources of MetCrit would of course include Metis philosophical sources, both traditional and developing, and such sources would not necessarily be directly concerned with the law. In fact, I suggest MetCrit would be fundamentally interdisciplinary. Other Indigenous philosophical sources could also be consulted, including sources on multi-Indigenous identities. Also relevant would be mestiza/o, Chicana/o and Latina/o theories that address pan-ethnic/cultural and poly-ethnic/cultural identifications that resist colonialist Indigenous/non-Indigenous “splits”. AsianCrit, multiracial crit, queer theory and intersectionality theory might also be relevant to the Metis experience in that they address complex and overlapping identities and reveal how these identities intersect with law and other social phenomena. Theories addressing the concerns of nomadic and diasporic peoples could also be relevant, although I am not claiming Metis people are inherently either nomadic or diasporic, merely that some of the concerns expressed by nomadic and diasporic peoples may resonate for Metis. Ideas adapted from hybridity theory could be used to explore ideas of purity and hybridity as social and legal constructs (critiques of hybridity theory will be explored below). Following from this, extensions of “third space” or anti-essentialist theories could be considered. Other relevant theoretical perspectives could include multiculturalism, trans-nationalism and border studies.

What interests me about non-Metis but Metis-friendly theories are ideas that encourage non-dualistic thinking, thinking that is literally and figuratively transgressive.

## **PART 2            METIS SOURCES OF METCRIT**

The most obvious source of MetCrit is Metis philosophy. I have characterized MetCrit in the way I have above because of the stress in Metis philosophy on interconnectedness, including of things that might seem disparate. Interconnectedness, as exemplified in the concept of *wahkootowin*, is directly relevant to the issues in *Willison*<sup>4</sup> (views of harvesting, territory, community, history). Harvesting, as Dan LaFrance says, is not just “harvesting” but is inseparable from the land and the physical, mental and spiritual experience of being on the land. Similarly, my grandmother’s stories about the “environs of Falkland” relate to how the land is connected to the people who live there, to animals, and to more distant family members.

Another important Metis philosophical concept is irreducibility: irreducibility encompasses difference, even seeming contradictions, but does not necessarily require resolution. Thus, the diasporic and nationalist strains in Metis political thinking, the multiplicity and absence that characterize Metis history and community construction, are tensions that do not need to be polarized but can be accepted as being mutually constitutive.

### **Metis Philosophy: Interconnection and Irreducibility**

#### *Reflection*

*After a long time of trying to create some kind of overriding metaphor for Metisness, I saw this failure as appropriate and instructive.*

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<sup>4</sup> *R v Willison*, [2005] BCJ No. 924; rev'd (2006) BCSC 985 [*Willison*].

*At first, I attempted to “braid” strands of thinking, to create a Metis sash, so to speak, of distinctive strands that made up a colourful whole; I also tried to see different elements of Metisness on some kind of continuum represented by the Metis flag’s infinity symbol, a sort of Mobius strip of interrelatedness yet separateness, with the lobes of the infinity symbol standing for (respectively and respectfully) the Indigenous and settler ancestors of the Metis; finally, I tried to look at the spokes of the Metis cart wheel as representative of Metis legal principles, as suggested by Leah Dorion in her beautiful book *The Giving Tree*. I found resonance and utility in all of these symbols, but for different purposes. However, I don’t think there is one unitary symbol that defines the complexity, the tensions, and the joy of being Metis. Perhaps the symbol of a three-dimensional web comes closest to what I hope to express, as Brenda Macdougall, Nicole St-Onge and others, including the research participants, have spoken about Metis family and social connections as webs, and I can also see the web as a metaphor for Metis understandings of territory and for Metis epistemology (ways of knowing). Webs are metaphors of relationality, where things that appear superficially distant may be connected in important ways. Webs also suggest holism, and at the same time shifting perspectives. So, I have tried to apply the idea of web-like relationality to ways of knowing and critiquing.*

*Nevertheless, I am not suggesting that the metaphor of the web encompasses Metis community relations, conceptions of territory, or epistemologies. Thankfully, achieving complete cohesion is a goal that has eluded me. In any case, it is futile: to give the example of the Metis sash, strands fray, unravel, and some get tied into knots – some of them Gordian. I think this is appropriate, as my claim is that Metis philosophy speaks to the irreducible nature of reality, including Metis*

realities.<sup>5</sup> At the same time, the web is also part of Metis reality – and this reality reflects the web of interrelationality.

Because the Metis web is theoretically infinite, but dissertations are not, this discussion of Metis philosophy will be limited to ideas that are relevant to the community conundrum. I focus below on a few Metis philosophical concepts that are relevant to my investigation of what might constitute a Metis critique of the Canadian law of Metis rights. The discussion of the relevance of Metis philosophy to legal critique and research will, I hope, be ongoing. I am not attempting here to write a treatise on Metis philosophy, or even more narrowly on Metis epistemology – such an undertaking could take many lifetimes and many volumes, and would certainly need to be based on broader community perspectives. However, because there is so little written on groundings for Metis research theory and practice, or about Metis philosophy itself, I hope some philosophical context will be as helpful for readers as it was for me.

The ideas considered in this part concern interrelationships among humans, other beings and the land over time, which are relevant to the concerns of harvesting, community (identity is included in this), territory and history raised by the *Powley*<sup>6</sup> and *Willison* cases. These relationships are interconnected in ways not imagined by the Canadian law of Metis rights. As well, the Metis concern with irreducibility highlights the oversimplicity of the Canadian law

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<sup>5</sup> Such a philosophical position is common to other Indigenous philosophies. For instance, Umeek (E Richard Atleo) states in *Principles of Tsawalk: An Indigenous Approach to Global Crisis* (Vancouver: University of British Columbia Press, 2011) at 140 that, “The Nuu-chah-nulth struggle towards wholeness meant a deliberate exclusion of any form of reductionism.” See also Gregory Cajete, *Native Science: Natural Laws of Interdependence* (Santa Fe, NM: Clear Light, 2000).

<sup>6</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff'd [2000] OJ No. 99 (Ont SC); aff'd [2001] OJ No. 607 (Ont CA); aff'd 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

perspective on Metis realities, which encompass loss, marginalization and exile, as well as recovery, revitalization and return. Interconnection is critical to an understanding of Metis perspectives about *Powley* and the cases that follow it. In fact, these concerns have already been revisited and elaborated on as part of the critique of the BC Metis cases in this dissertation.

### **Philosophical Claims: Interconnection and Irreducibility**

I would like to make the following claims about Metis philosophy, which are based on what I have learned from my family, friends, community and Elders, as well as from Metis storytellers, writers and academics.

1. All beings (e.g. animals [including humans], plants, rocks, water, spirits, the Creator) and things (note things may be animate) are interconnected in multiple ways on multiple levels; aggregations of beings are similarly interconnected; interconnection in this sense does not mean independent interaction, but interdependence and mutual constitution; that is, beings (things) only exist due to their dependence on other beings (things).<sup>7</sup>
2. This interconnection is necessary and good, and creates mutual obligations (i.e. law) between beings and aggregations of beings. For instance, people and the animals they eat have mutual obligations; parents and children have mutual obligations. To realize the highest good, these obligations are carried out in a spirit of respect and love.

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<sup>7</sup> For a similar perspective grounded in microbiology, see Kriti Sharma, *Interdependence: Biology and Beyond* (New York: Fordham University Press, 2015).

3. Although the concepts of duality and binary can be useful, they do not reflect the complexity of reality; similarly, boundaries between beings, things and ideas may be apparent rather than actual.

4. Tensions between seemingly competing ideas create conflicts that may or may not be resolved, or may or may not need to be resolved. Many of these tensions arise because of seeming binaries such as cultural concreteness vs. cultural ambivalence; nationalism vs. diversity; place-ness vs. diaspora; continuity vs. change.

### **Philosophical Claims: Family Teachings**

The teachings of my grandmother, mother and other family members are sources (among others) for my claims about interconnection and irreducibility.<sup>8</sup>

From my family I learned that humans are part of nature, and are not more important than other beings; all living beings are interrelated and depend on one another – therefore, we should care for one another, and try to understand each other’s experiences. Animals and plants may benefit people, but were not created solely for our benefit. In fact, humans have obligations to treat other beings with respect and thus should not: tease or hurt animals, destroy plants, waste food (especially meat) or water, or pollute the air or water. These obligations apply whether animals or plants are wild or domesticated. Animals have

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<sup>8</sup> As with many Metis people raised in “non-traditional” environments, I learned Metis values and ideas without realizing until later that they were Metis. Our family did not formally participate in a Metis community, although we knew in some cases who other Metis families were. I didn’t realize until I was an adult and participated in a broader community how similar what I was taught was to what other Metis people had been taught. This experience was also shared by some of the research participants, including Lois McNary and Sandy Milner, who had not grown up knowing they were Metis. When, as adults, they got to know Metis people beyond their own families, they realized how Metis ways of thinking and being had been taught to them indirectly.

awareness, memory and emotions, and will treat people respectfully if they are shown respect.

My uncle Todd, who has a special affinity for horses, taught me that training an animal is not about dominion, but about understanding and working with the animal's intelligence and feelings.<sup>9</sup>

I further learned that the earth (including water and rocks) is alive and should be treated respectfully. My mother, who was fascinated with volcanism and plate tectonics, always said that rocks are alive, but that they usually just move more slowly than other beings.

Although observing nature is important, both for survival and instruction, excessive talking about it while outdoors is disrespectful. One should experience nature fully and too much talking creates cognitive distance.

In addition to the relationships between humans and other beings, my family taught me about how to create good human relationships:

People should treat each other with respect and not interfere with each other's agency unless it is critical to someone's health or welfare to do so; people should listen more than they speak; older people and their knowledge should be respected; people should not brag about

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<sup>9</sup> Although members of my family loved animals and all had an abiding interest in the natural world, they were generally not sentimental about the relationship between people and the animals they depended on. Sometimes it was necessary to kill and eat animals; other times it was necessary to work with animals to get things done. Vegetarianism was viewed with humour, as were animal rights activists who didn't appreciate the demonstration in a rodeo, for instance, of the working relationship between animals and people. The one exception to this was steer or bull riding, which my grandmother described as a "totally useless" and "stupid" exhibition, since no one would do this in real farming or ranching. My cousin and her husband carry on the family farming tradition, operating a ranch in Westwold, on the Fur Brigade road between Kamloops and Falkland. My cousin's husband's family has been ranching for four generations, three of them in Westwold.

themselves or draw unnecessary attention to themselves; people should not gossip or complain about others.

“Family” means the extended family, not the so-called “nuclear” family; even though we all lived in different places, we all got together at least once a year, as far as possible.

In addition to these basic teachings about interconnection, there were more subtle teachings about irreducibility. Some of these have already been illustrated in the narratives in this dissertation, but I will give another example here:

I was taught that the idea of owning land is a convenient fiction and ownership is temporary; we are a part of the land. At the same time, the agency of owners should be respected unless that agency is being exercised at the expense of the agency of others. In this teaching, there is no single story, but an ethics of contingency, weighing benefits and of holding seemingly conflicting values.

Something I learned indirectly from my mother’s family was that connection with the land might apply to the territory of one’s birth as well as to an adopted (or re-adopted) territory. There was no conflict in these attachments. In the reflections below, I illustrate the connection my grandmother developed with the land “in the environs of Falkland”, the site of the community at issue in *Willison*. This connection also reflects some Metis ideas about territory and shared use, and Metis connections with the land as not being limited to “traditional” Aboriginal uses. These ideas will be expanded upon further by the research participants.

***Home/Lands: A Metis Way of "Being on the Land"***

My mother and grandmother were “natural scientists”. This is a deliberate pun (not an oxymoron) that reflects their powers of observation of the natural world, whether in the forest or on the farm. My mother’s parents were farmers, but my grandfather also trapped and hunted, and was a coal miner (in Saskatchewan) and mill worker (in BC). Although my grandparents grew up in Saskatchewan, and my mother was already 17 by the time they moved to BC, I only knew their place and lives in Salmon Arm. When I was younger, my family ran a “you-pick” cherry and strawberry operation, and sold their own grass-fed beef, milk and cream to the farmers’ co-op. They also grew fruit trees, a kitchen garden, and occasionally experimented with growing grapes and keeping bees. They kept my cousin’s horse, a few dogs, and cats – sometimes lots of cats.

For a “city slicker”, as my grandpa called me, I was lucky to have the opportunity to experience life on a farm, and to visit – two or three times a year – my grandparents’ place in the Fly Hills, where their house sat perched just below a rocky outcropping and just above gently sloping fields of hay and alfalfa. We went on many walks and hikes in the Fly Hills, and drove occasionally to Wallenstein Lake, at the top of “the mountain” above the farm. My grandmother’s one annoyance on these trips in the winter was the parade of snowmobilers, whose noise and fumes seemed disrespectful of the quiet atmosphere and otherwise pristine air of the region. Also pristine was the water supplied to the house, from a nearby creek. It was the best-tasting water I ever drank, unfortunately polluted years later by a neighbour’s subdivision. The sullyng of this creek was another grief for my grandmother, who had taught

us all for years how important it was to keep the water clean and healthy. We could drink from the creek, but we weren't supposed to play in it.

My grandmother loved nature and often spoke to her animals, as well as to wild animals, and sometimes to plants. She often voiced what she thought they were saying, sometimes in conversation with them. She made many observations on their habits, preferences, and the seasonal changes that affected them. She also commented on rocks, geological formations, and weather, including how weather affected plants and animals.

She explained how she had gotten used to the mountains after a lifetime of living under the wide prairie skies. At first, she said, the mountains made her feel claustrophobic – they blocked out the sun. Later, however, she grew to love the mountains, especially Mount Ida (in Secwepemc, *Kela7scen*, meaning “volcano”), which dominated the landscape, giving – she said – a protective feeling to the surrounding valley. From the top of the rocky outcropping above the house, which we often visited, even into her eighties, my grandmother would survey with fondness the panorama of the Salmon Arm valley, with Mount Ida to the right, Shuswap Lake to the left, and the valley and its creeks spread out at the feet of the Fly Hills. This was a favourite spot for a picnic, with the dogs, and sometimes even the cats in tow.

My grandparents and youngest uncle had defended their land from a forest fire in the early 1970s, and saw most of their beloved hillside burned, and neighbours evacuated. The fire came right down to the house. Because they disobeyed the evacuation order, my grandparents were able to save their house, barn and outbuildings; those of their neighbours were mostly destroyed; many people lived in trailers for the next few years. I remember my grandmother's

anger at the foresters' carelessness, as it was determined the fire was caused by the forestry workers not putting out their cigarettes. My grandmother experienced a similar anguish again in 1998, when fire burned most of the trees off of the Salmon Arm side of Mount Ida, and over 7,000 people had to be evacuated. Again, this happened because of logging, logging on a mountain she told me the Secwepemc people believed was sacred. She described her own sadness at these events, as well as that of the Secwepemc and non-Aboriginal residents of Salmon Arm, but she also told me she thought the mountain was sad that people had treated it this way.<sup>10</sup> This reflected similar thoughts she had expressed during the construction of a large hotel development on the Shuswap Lake waterfront downtown. She reminded me of a terrible flood that had occurred when I was a child and told me that one of the Shuswap Elders informed her then that there were cyclic floods on the lake – some of them high enough to flood the hotel. The flood of 2012, after my gram's death and during my first research trip, was significant, doing damage to the nearby lumber mill at Canoe, but the hotel was spared – that time.

In addition to the stories she told me of Salmon Arm and its surroundings, sometimes my grandmother talked to me about her childhood and young adulthood on the prairie, describing the waving grasses, the alkali sloughs that ruined her moccasins, the cactus fruit savoured in

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<sup>10</sup> Compare the sentiments of Secwepemc Elder Mary Thomas, as recorded by ethnobotanist Nancy J Turner: "Mary has always talked about the sacred mountain of her people, *Kela7scen* (Mount Ida). For generations, *Kela7scen* provided the Secwepemc with a great variety of resources necessary to their physical and spiritual well-being." In Turner, *The Earth's Blanket* (Vancouver: Douglas & McIntyre, 2005) at 140. See also Michael D Blackstock's account of Mary Thomas' work in resolving resource disputes on Mount Ida: "Blue Ecology: A Cross-Cultural Approach to Reconciling Forest-Related Conflicts" (2005) 6:2 Perspectives: BC Journal of Ecosystems and Management 38.

summer. Even the Saskatchewan winters that produced layers of frost on wool blankets were recalled with joking fondness.

Like my grandparents, my great-grandparents were farmers, as well as hunters and trappers. My grandmother told me of the hard work of cutting and grinding pork scraps for headcheese, and the consolation of eating deliciously crispy, dripping pork cracklings. She described the elusiveness of the antelope, the many patient hours it took her father to stalk it, and his frustration – and wry delight – when it bolted too quickly out of the range of his rifle. Often, she told me about her nostalgia for the berry-picking parties and swimming holes of her youth, the fiddle music played by her brothers' band for weddings and dances. Her eyes would light up at the thought of wagon trips to town, but also of solitary walks punctuated by the cries of hawks and meadowlarks. These were the days of plenty before the Depression, before the prairie turned dry and dusty, before she raised seven children.

Many years later, after coming to know her new home in BC, my grandmother went back to Saskatchewan. She told me she had been home, but was glad to be home when she got back.

My grandmother's sense of "homes" and the interconnection in her mind between community, territory, history and between people and nature is reflected in the perspectives of the study participants described below.

### **Interdependence and Irreducibility: Perspectives of Study Participants**

Many study participants talked about respect and sharing as being fundamental Metis values (e.g. Lori, Beryl, Greg, and see below). This related to how they approached their dealings with

other people, with animals and with the land. The importance of sharing meat, fish, fruit and other things that are harvested was stressed by all of the Elders, and by many other participants. It was seen as being especially important to make sure Elders, single parents, the unemployed and young families have enough food (Lottie, Eldon, Dean). People shared food with family members. Sharing of work was also seen as important, with children being expected to chip in to the best of their ability (Eldon, Lois, Brenda). For instance, Lois McNary told the story of how, when she went berry picking with her family, she was expected to pitch in, even when she was very young. Everyone had a bucket or some other container to put berries in; hers was the littlest – a cleaned-out bean can. “I know it didn’t seem like I could contribute much with my little can, but I was expected to do my bit just like everybody else and my contribution was seen as valuable.”<sup>11</sup>

The principles of sharing food and contributing labour inform the traditional Metis “Law of the Hunt”, which continues to be practised in modern forms (Lottie, Eldon, Dean, Mark, Warren, Wayne).<sup>12</sup> Key to the Law of the Hunt is to make sure group hunts are collective and do not benefit people unevenly. Hunt leaders, or “Captains”, are respected members of the community known for their fairness. People going on an organized hunt collectively make the rules for the hunt, and allocate roles for different members (e.g. camp guards, cooks). One of the roles of the Hunt Captain is to ensure that meat and other parts are distributed fairly.

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<sup>11</sup> Personal communication with Lois McNary, October 11, 2011.

<sup>12</sup> For a more detailed description of the Law of the Hunt, see my presentation for the Canadian Bar Association, Aboriginal Law Subsection annual meeting in Victoria, BC, entitled “The Metis Law of the Hunt: A Mechanism for Governance and Conflict Resolution” (April 11, 2013), online: CBA Professional Development <[http://www.cbapd.org/papers\\_en.aspx?id=NA\\_ABL13](http://www.cbapd.org/papers_en.aspx?id=NA_ABL13)> (login required).

Prayers were always said for a good hunt, and if any animals were killed, offerings were given for them such as tobacco or other herbs. The carcass of an animal was to be treated with respect, and all the meat and other parts were to be used, so that the animal did not give its life in vain (Lottie, Eldon, Dean, Mark, Wayne, Greg, Dan). Prayers and offerings were also given for fish and plants that were taken (Lottie, Dan).

Dan believes “harvesting” is not just harvesting itself, but reflects a way of thinking and being and respectful relating to the earth and animals. He believes that the Creator allows him to take animals, and that he is obliged not to waste any parts of the animal, and to take only as many animals as he needs.

While not all of the 23 people who participated in this study were hunters, most described themselves more broadly as harvesters, and many non-harvesters had family members who harvested for them (e.g. Lois). Most commonly, people hunt and fish. Dan and his wife Cathie have had traplines over the years. Many people harvest berries and food plants (Sandy, Ron) and some harvest mushrooms (Lottie) and medicinal plants (Lori, Lottie). Some people cut timber for firewood or building materials or brush for kindling. Other participants also garden (Lenore), or ranch (Dan).<sup>13</sup>

The experience of harvesting was not viewed as utilitarian or chore-like, or as a form of domination or entertainment. All participants talked about how much they enjoyed being in nature and the holistic experience they had of the sights, sounds and smells of the place they

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<sup>13</sup> I am suggesting here that the connection with the land also applies to farming, gardening and raising domestic animals – this domestic/wild combination was common in Metis practice. See, for example, Elmer Ghostkeeper, *Spirit Gifting: The Concept of Spiritual Exchange*, 2nd ed (Raymond, AB: Writing on Stone Press, 2007).

were in at the time (e.g. Dan, Wayne). Some people who harvested with others enjoyed being with friends and family; others enjoyed passing on their skills to the youth (Eldon, Mark, Wayne); still others felt a sense of kinship with their relatives and community members who had harvested over the generations, and felt proud that they were carrying on Metis traditions (Greg, Dan).

The research participants described an interconnection between providing for their families and their communities, being on the land, and being in relation with animals and other beings. Some people described harvesting or being on the land as a spiritual experience (Lottie, Dan, Beryl). Other participants revealed the connections between past, present and future: harvesting was seen as a central practice in Metis culture, and as something that is important to Metis history and the continuation of the Metis people (Bill, Dan, Greg).

In this view, Metis families and communities are connected to the land and other beings throughout time. Metis “community” is not an add-on part of a “lifestyle” but is inseparable from the land, from other beings, and is continual. The notion of community itself was linked by many participants to the idea of extended families (Goldie, Brenda), with many community members being distantly related to one another (e.g. Goldie is related to me and Lottie by marriage, and is also related to Brenda and Wayne). Other participants saw community relationships as webs (Lori, Beryl). This idea is similar to the concept of *wahkootowin* described by Metis philosophers Maria Campbell and Brenda Macdougall. Work and social connections were also seen as important foundations of community (Dan).

Community was not limited by geographic location, but encompassed large regions, or even the whole Metis nation (Brenda, Dan, Margaret, Greg). This was consistent with most participants' descriptions of Metis people and families as "highly mobile" over time. Metis community was also seen as including family members by marriage or adoption, regardless of biological ancestry (Eldon, Dan, Beryl, John, Anne, Margaret, Ron, Greg).

Community was described by most participants as being "very important" to them, as it provided them with a way of expressing their Metisness. This was especially important for participants whose Metis identities had either been repressed to some extent by their families (Sandy, Lois, Bill, Don), or who had felt marginalized and discriminated against (Lottie, Lenore). Many participants were involved with Metis communities as a way of trying to ensure the continuity of Metis practices, including harvesting (Eldon, Wayne, Mark, Ron), plant knowledge (Lottie, Lori), arts and crafts (Lottie, Warren, Beryl, Ron, Pat, Sandy), spiritual practices (Lori, Beryl), governance (Margaret) or to ensure that Metis history and culture was not forgotten (Brenda, Janet, Bill, Don, Anne, Eldon, John).

As community was not necessarily tied to a relatively small geographic location, and Metis people were highly mobile, ideas of territory were seen as flexible (all participants). Some participants spoke of the idea of a Metis "homeland" that stretched from BC to Ontario (Anne included Québec) and from the northern territories to Montana and North Dakota (Dan, Greg, Wayne). "Homeland" in this sense comprised not full ownership, necessarily, but shared use (Ron, Dan, Greg), which, in many cases, was agreed to with other Indigenous nations through treaties, such as the one between the Metis and the Dakota (Wayne). However, there were

territories that some participants thought of as being more exclusively Metis, such as the area around Red River (which was lost in part through government in/action), or areas in Saskatchewan (Greg) or Montana (Wayne) that were almost exclusively settled by Metis. Others mentioned the Metis settlements in Alberta, the Metis community in the Peace River region (BC/Alberta), and areas of BC which had been either been permanent settlements, or shared use areas (Okanagan region, Fort Langley, Kootenays). However, all research participants said that they respected the territories of First Nations and all the litigants explained that they attempted to negotiate with First Nations in the areas at issue in the *Howse*, *Willison*, and *Nunn*<sup>14</sup> cases.

Regarding ideas of history, many people felt that “history” was not something frozen in the past, but was being continually generated (Eldon). Thus, a historical era was not necessarily seen as a period in the distant past (Goldie). Many participants questioned what was really meant in the *Powley* test by “historical”.

In this review of participants’ perspectives, it can be seen that the ideas of history, community and territory are not separable, but are inextricably linked. Further, they illustrate that the colonialist-constructed dualities of past and present; of people and nature; and of politics and culture are not descriptive of Metis thinking.

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<sup>14</sup> *R v Nunn*, [2003] BCJ No. 3229 [*Nunn*].

## Literature by Metis Storytellers and Writers

The duality-busting understandings of Metis people are also expressed in Metis written literature (including oral literature that has been written down<sup>15</sup>). In such literature, there are often found seemingly “impossible” splits. These splits have been noted by literary critics such as Dylan AT Miner and Sophie McCall, who point out the twin drives of nation and diaspora reflected in the works of, for instance, Louis Riel, Maria Campbell, Greg Scofield and Howard Adams. Miner, who compares the work of storyteller/author Maria Campbell to that of mestiza writer Gloria Anzaldúa, has proposed a “Halfbreed Theory” as a decolonizing lens through which to look at Metis literature.<sup>16</sup> This theory reclaims halfbreed identity as a tool of resistance. In McCall’s “Diaspora and Nation in Metis Writing”, she suggests that a critical approach to Metis literature should encompass both diasporic/exilic and nationalist strains, as both are so evidently part of Metis discourse. While Miner doesn’t specifically talk about the home/exile dichotomy, he alludes to it. Monika Kaup looks at similar themes in the writing of Campbell and Anzaldúa.<sup>17</sup>

McCall’s and Miner’s ideas come closest to my own in terms of Metis thinking encompassing dichotomies, and busting dualities. I point this out with respect to Louis Riel’s political thinking in my recent paper on his trial speeches, which describes how Riel copes intellectually with the

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<sup>15</sup> For instance, Maria Campbell refers to herself as a storyteller, not as a writer.

<sup>16</sup> Dylan AT Miner, “Halfbreed Theory: Maria Campbell’s Storytelling as Indigenous Knowledge and *Une Petite Michin*” in Jolene Armstrong, ed, *Maria Campbell: Essays on Her Works* (Toronto: Guernica, 2012) 147. Note Chris Andersen critiques “halfbreed theory” as being racialized, but I think Miner’s point is that Metis thinking encompasses dualities.

<sup>17</sup> Monika Kaup, “Constituting Hybridity as Hybrid: Métis Canadian and Mexican American Formations” in Monica Kaup & Debra J Rosenthal, eds, *Mixing Race, Mixing Culture: Inter-American Literary Dialogues* (Austin: University of Texas Press, 2002) 185.

influx of settlers into Manitoba by reconciling his belief in Metis rights and title with his idea of the Metis nation as not only welcoming newcomers, but subsuming them into a wider Metis nation. In my view, Riel's speech to the judge in his sentencing hearing is a fugal interweaving of themes of Metis nation-building and immigration, as well as of exile and return.<sup>18</sup>

Another writer who contends with apparently competing ideas is Metis political theorist Adam Gaudry, who looks at Metis political culture in the late 1800s. Gaudry talks about Metis political ideas as reflecting both independence – *katipeyimishoyaahk*; and interrelatedness – *wahkoohtowin*. These are not seen as cancelling each other out, but form part of an inseparable whole.<sup>19</sup>

Metis scholars Cathy Richardson, Gabrielle Legault, Annette Chrétien, and Sylvie Cottell all discuss fluidity of identity, and being on the borders of a people already marginalized.<sup>20</sup> Cottell says, about trying to reclaim her identity as a Metis person brought up in an urban, assimilated setting:

Metis people outside of the areas considered the main hubs of Metis culture are likely to be faced with a myriad of different factors that impact their identity, including lack of

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<sup>18</sup> Kerry Sloan, "'A New German-Indian World in the North-West': A Métis Deconstruction of the Rhetoric of Immigration in Louis Riel's Trial Speeches" in Hans V Hansen, ed, *Riel's Defence: Perspectives on His Speeches* (Montréal & Kingston: McGill-Queen's University Press, 2014) 166.

<sup>19</sup> Adam James Patrick Gaudry, *Kaa-tipeyimishoyaahk – "We are those who own ourselves": A Political History of Métis Self-Determination in the North-West, 1830-1870* (PhD Dissertation, University of Victoria, 2014) [unpublished].

<sup>20</sup> Cathy Richardson, "Metis Identity Creation and Tactical Responses to Oppression and Racism" (2006) 2 *Variegations* 56; Gabrielle Monique Legault, *Changing in Place: A Generational Study of an Indigenous Family in the Okanagan* (MA Thesis, University of British Columbia, 2012) [unpublished]; Annette Chrétien, "*Mattawa, Where the Waters Meet*": *The Question of Identity in Métis Culture* (MMus Thesis, University of Ottawa, 1996) [unpublished]; Sylvia Rae Cottell, *My People Will Sleep for One Hundred Years: Story of a Métis Self* (Master's Thesis, University of Victoria, Department of Educational Psychology and Leadership Studies, 2004) [unpublished].

community connections and limited contact with Metis cultural influences. There is a need to openly voice the diverse experiences of being Metis in order to affirm the experiences of many Metis people.<sup>21</sup>

In all these works, there is there is a recognition that wrestling with apparent splits is fundamental to Metis understandings of experience.

In the next part, I will investigate how non-Metis sources could also help MetCrit to navigate the tensions between seemingly contradictory views that inform the historical and legal issues addressed in this dissertation. One view highlights complexity, indeterminacy, and absence, as illustrated by many realities of Metis history, particularly in British Columbia. The other view values Metis distinctiveness, certainty and continuity.

### **PART 3        OTHER POTENTIAL SOURCES FOR METCRIT**

#### **Critical Legal Theories**

“The same [...] mirror, brings its reflections together and spawns a genealogy.”<sup>22</sup>

Themes of multiplicity and absence are evident in critical legal theory, which critiques the law’s historical silencing of the experiences of marginalized peoples, and which, after developing for more than 40 years, now reflects the multiethnic and multicultural postmodern society.

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<sup>21</sup> Cottell, *ibid* at iv.

<sup>22</sup> Luce Irigaray, *Speculum of the Other Woman*, trans Gillian C Gill (Ithaca, NY: Cornell University Press, 1985) at 294.

However, critical legal theories, especially as they reflect deconstructionism, are troublesome for some Indigenous scholars, who are concerned that their political and social experiences may be obscured by the calling into question of objective reality.

In the section below, I briefly trace the development of recent critical legal theories, especially critical race theory, Indigenous critical legal theory, and Latina/o critical legal theory, which have particular relevance for Metis critical legal theory. The development of these various critical legal theories illustrates a gradual attempt at grappling with multiple and complex identities, with one branch of theory critiquing the notion of identity itself. Some of the dilemmas on this path illustrate the kinds of issues that MetCrit would hopefully address.

While I argue that works of Metis critical theory already exist, as do works of Metis and mestiza/o philosophy that could be important in its elaboration, the ideas expressed in them do not deal directly with law. This literature review illustrates both the parallels and the gaps between existing critical legal theories and MetCrit. It also suggests the tensions between multiplicity and distinctiveness, and between theory and social action.

### ***Critical Race Theory and Indigenous Critical Legal Theory: A Condensed Genealogy***

Indigenous people in Canada and throughout the world are experiencing a resurgence of their cultures, philosophies, languages, arts and sciences. They are also experiencing a renewed interest in strengthening sovereignty and shoring up their political power *vis à vis* the state.

With this movement, which has been gaining momentum over the last 60 years, has come a renewed interest in revisiting Indigenous legal traditions.<sup>23</sup>

Metis people are certainly not exempt from this trend; Metis philosophy and culture have undergone a significant revitalization, particularly in the last 30-40 years. Louis Riel once said, “My people will sleep for a hundred years, and when they awake, it will be the artists who give them their spirit back.”<sup>24</sup> This prophecy has come to pass, with a renewal of all aspects of Metis arts, language, philosophy and governance.

Parallel to the Indigenous resurgence has been the development of rights and protest movements such as the civil rights movement, the anti-war movement, the feminist movement, and the LGBTQ rights movement. These and many other movements questioned state and/or elite political and legal authority and the philosophical foundations on which they rested. An outgrowth of these social movements was a branch of legal scholarship known as critical legal theory (CLT), which called into question many of the assumptions about the role of law in society.<sup>25</sup>

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<sup>23</sup> See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

<sup>24</sup> Metis oral tradition, cited in Cottell, *supra* note 20.

<sup>25</sup> For an overview of the CRT literature, see Kimberlé Crenshaw, ed, *Critical Race Theory: The Writings that Formed the Movement* (New York: New Press, 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001). Major contributors include Crenshaw, David Kennedy, Catharine MacKinnon, Mari Matsuda and Sharene Razack.

CLT was an outgrowth of the “legal realism” movement, which began in the United States and western Europe. This movement critiqued legal formalism and the failure of previous legal thinkers to realize the political and social features of law.<sup>26</sup>

Simply put, the function of critical legal theories is to critique the law, particularly as it is applied to people traditionally seen as marginalized and oppressed, people who are seen as exiled from the spheres of privilege and power. Although, politically, CLT thinkers were certainly not a uniform group – some were left-leaning liberals, others radical post-Marxists – all seemed to have in common the political goals of questioning the monolithic rule of law, and its liberal ideological underpinnings, and to propose some form of radical change.<sup>27</sup>

Ideologically, CLT practitioners attacked the supposed “political neutrality and objectivism of the Western liberal rule of law”.<sup>28</sup>

Discrimination based on “race”, gender and class was certainly the early driving force behind the development of CLT.<sup>29</sup> Later, CLT itself was critiqued as being too middle-class, too focused on white males, and thus rife with unexamined elitism. Another major critique was that not

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<sup>26</sup> Jíří Příbáň, “Sharing the Paradigms? Critical Legal Studies and the Sociology of Law” in Reza Banakar & Max Travers, eds, *An Introduction to Law and Social Theory* (Oxford: Hart, 2002) at 120.

<sup>27</sup> *Ibid* at 119-20.

<sup>28</sup> *Ibid* at 120.

<sup>29</sup> CLT lawyers, legislators and activists addressed discrimination through constitutional rights litigation, hate-crime legislation, and sexual harassment and affirmative action laws and policies. Nevertheless, some argued that the rights being promoted were those leading to an “equality of sameness”. See Dan Danielsen & Karen Engle, eds, *After Identity: A Reader in Law and Culture* (New York: Routledge, 1995). Daniels and Engel, in their “Introduction” at xiii to their edited volume, describe the tension between 1) designing remedies for people who have been disadvantaged because of the categories they are seen to inhabit, and 2) discouraging people from referring to these categories. At xiv-xv.

enough practical solutions were being offered; real change rarely occurred.<sup>30</sup> Some critics suggested this was because proponents were too absorbed by theoretical concerns such as post-structuralism (questions linearity of history, “correct” interpretability) and deconstructionism (questions the possibility of interpretability).<sup>31</sup> Some advocates for the practices of deconstructionism mocked the social crusading tendencies of CLT practitioners whom they felt simply wanted “to argue for grand theories of legal reform.”<sup>32</sup> Other critics held that rights movements themselves were misguided, as they were outgrowths of European “enlightenment” philosophy (albeit with later influences of Marxism and deconstructionism), and also because they looked for state recognition, rather than challenging the validity of the state and its foundations.<sup>33</sup>

In order to address some of the critiques of CLT – and as a response to discrimination against blacks in the US – critical race theory was developed to investigate the effect of law on “race”<sup>34</sup> relations. CRT was more sensitive to the connections between colonialism and the law, and it also dealt with issues of legal pluralism. Critical race feminism combined the interests of anti-

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<sup>30</sup> Robert A Williams Jr, “Taking Rights Aggressively: The Perils and Promise of Critical Legal Studies for Peoples of Color” (1987-88) 5:1 *Law & Inequality* 103.

<sup>31</sup> Some people’s frustration with the relevance of deconstructionism was put diplomatically: “Deconstructive practices in CLS [critical legal studies] have consequently sought to liberate the reader from the author’s text.” In Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (New York: New York University Press, 1995) at 117. Others charged it simply didn’t make sense.

<sup>32</sup> *Ibid* at 146. This debate is not new: in fact, an earlier version can be found in the 2,000-year-old division between Buddhist traditionalists, the Theravadins (“Elders”), who focused only on their own mental liberation, and the “Mahayana” practitioners, who espoused the additional need for practical compassion and social activism.

<sup>33</sup> Even today, R Radhakrishnan and others critique deconstructionism as being too Eurocentric. Others see it as being influenced by Buddhism. My own view is that the work of Jacques Derrida bears interesting resemblances to Jewish mystical philosophy and plays on themes of exile (which may not be surprising, given his Algerian Jewish background). However, both post-structuralism and deconstructionism were developed in Europe.

<sup>34</sup> The idea that race is anything other than a social construct has been discredited by most scholars.

racists, anti-colonialists and feminists, stressing the relationship between philosophy and activism, and giving importance to the lived experience of real people dealing with oppression.

Although critical race theory was initially concerned with legal discrimination against blacks in the United States, it has now expanded to include AsianCrit, Latina/o and Chicana/o critical legal theory and Indigenous critical legal theory (TribalCrit). While these movements certainly have their highly theoretical branches, Indigenous critical legal theory has had a large, practical impact on how law affects Indigenous people(s).<sup>35</sup> This is, in part, because of the parallel development of Indigenous critical legal theory and the Indigenous resurgence movement. This movement has highlighted the importance of revitalizing Indigenous philosophy in many areas, including the law, and developing Indigenous-based legal theories and practices.

According to Indigenous scholar Jeanette Haynes Writer, “Lumbee scholar Bryan Brayboy (2005) introduced Tribal Critical Race Theory (TribalCrit) to examine the issues of Indigenous People in relationship to the United States and its laws and policies.”<sup>36</sup> Rather than focusing exclusively on racism, TribalCrit looks at colonial power structures and devises practical strategies for dismantling them. The term “TribalCrit” is used more commonly in the US, whereas elsewhere “Indigenous critical legal theory” is used.

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<sup>35</sup> There are many proponents, too numerous to mention here. A very small, and certainly not exclusive sampling: Patricia Monture-Angus, John Borrows, Mary-ellen Turpel-Lafond, James (Sákéj) Youngblood Henderson, Gordon Christie, Val Napoleon, Robert A Williams Jr, Christine Zuni Cruz, Jeannette Haynes Writer, Jacinta Ruru, Carwyn Jones, Irene Watson. See John Borrows, “Creating an Indigenous Legal Community” (2005) 50 McGill Law Journal 154, at 161; Robert A Williams, “Vampires Anonymous and Critical Race Practice” (1997) 95 Michigan Law Review 742. For more information on proponents, see Kerry Sloan, “A Global Survey of Indigenous Legal Education and Research” (2013) Indigenous Bar Association, Accessing Justice and Reconciliation Project, online: <<http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2013/04/KLS-World-Indigenous-Legal-Education-Complete1.pdf>>.

<sup>36</sup> Jeanette Haynes Writer, “Unmasking, Exposing and Confronting: Critical Race Theory, Tribal Critical Race Theory and Multicultural Education” (2008) 10:2 International Journal of Multicultural Education 1 at 3.

AsianCrit was similarly developed to consider the specific impacts of law on Asian people in North America and in other parts of the world where Asians are in the minority.<sup>37</sup>

Latina/o, Chicana/o and other mixed ancestry thinkers have in turn criticized CRT, Indigenous critical legal theory and AsianCrit as not accounting for the effect of law on multiethnic and multicultural people.<sup>38</sup> Because of their efforts, CRT is finally beginning to transcend Aboriginal/white, black/white, Asian/white distinctions. For instance, “LatCrit”, or critical Latina/o studies, takes into account the mixed ethnic, cultural and philosophical heritage of Latina/o peoples.<sup>39</sup> LatCrit extended the concepts introduced by critical race and feminist legal scholars – concepts of multiplicity, multi-dimensionality and intersectionality – in the context of Latina/o realities. Proponents are encouraged to look inward to “integrate the multiplicities of our selves, lives and communities”.<sup>40</sup> Self-essentializing, or “strategic essentialism” is seen as being able to temper the essentializing tendency of the proper noun “Latina/o”, which embraces many different persons and communities.<sup>41</sup> Thus, LatCrit attempts to negotiate the

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<sup>37</sup> For a paper that compares the experiences of Latina/o and Asian people in the United States, see Rodolfo D Torres & ChorSwang Ngin, “Racialized Boundaries, Class Relations, and Cultural Politics: The Asian-American and Latino Experience” in Antonia Darder, ed, *Culture and Difference: Critical Perspectives on the Bicultural Experience in the United States* (1995) 55.

<sup>38</sup> Historically, Latina/os had been forced to situate themselves as either black or white. See, for instance, Juan Perea, “The Black/White Binary Paradigm of Race: The ‘Normal Science’ of American Racial Thought” (1997) 85 *California Law Review* 1213; Richard Delgado, “Roderigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary” (1997) 75 *Texas Law Review* 1181; Martha Menchaca, “Chicano Indianism: A Historical Account of Racial Repression in the United States” (1993) 20 *American Ethnologist* 583.

<sup>39</sup> Mixed-ness is an inescapable feature of Latina/o reality. There is (among others) ethnic, national, and religious mixing. For example, Latina/o heritage can include European, Indigenous and black identities; Cuban, Mexican and Puerto Rican national identities; African and “American” Indigenous spiritual identities, Catholic identities.

<sup>40</sup> Francisco Valdes, “Foreword Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment” (1997) 2 *Harvard Latino Law Review* 1 at 12, quoting Elvia Arriola.

<sup>41</sup> *Ibid* at 10, referencing Stephanie Wildman.

tension between specificity and inclusivity, and to celebrate pan-ethnic and poly-ethnic identifications among Latina/os.

Multiple identifications are also celebrated by proponents of critical mixed race studies (CMRS), who offer "... transracial, transdisciplinary, and transnational critical analysis of social, cultural and political orders based on dominant conceptions of race. CMRS emphasizes the mutability of race and the porosity of racial boundaries in order to critique processes of racialization and social stratification based on race. CMRS addresses local and global systemic injustices rooted in systems of racialization."<sup>42</sup>

In addition to seeing the need for addressing the legal situations of multiethnic and multicultural people, scholars turned to examining issues about other kinds of multiple identities. For instance, intersectionality theory looks at the experiences of people who may be subject to multiple, overlapping forms of discrimination based on perceived racial, ethnic, class, gender and other categories. Intersectionality scholars examine the reality that people do not simply have one identity, or even one perceived identity.

Varieties of sexual and gendered identities also came to be explored in queer theory, which looks at law's impact on lesbian, gay, bisexual, transgendered and queer people.

Eventually, some theorists came to question whether identity itself was an appropriate category in socio-legal inquiry, as all identities, however complex, tend to become

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<sup>42</sup> Critical Mixed Race Studies Biennial Conference 2012, conference poster, online: <[www.depaul.edu](http://www.depaul.edu)>. CMRS is not limited to legal critique, but there are critical legal voices coming from multiethnic and multicultural perspectives. See Deborah Ramirez, "Multicultural Empowerment: It's Not Just Black and White Anymore" (1995) 47 *Stanford Law Review* 957.

essentialized.<sup>43</sup> In their edited volume *After Identity*, Dan Danielsen and Karen Engle state, "... post-identity scholars articulate a set of strategies that acknowledge our simultaneous and ambivalent desire both to affirm our identities and to transcend them. They do so through ... a refusal to treat any identity category as determinate, fixed."<sup>44</sup>

An example of a shift from multiple to post-identity theory can be seen in the work of lesbian Chicana theorist Gloria Anzaldúa, who deals with the ways her Indigenous, mixed ancestry, feminist and queer identities intersect and inform each other. In earlier work (*Borderlands/La Frontera*, 1987), Anzaldúa developed "*mestiza* consciousness", in which the *mestiza* is a bridge between cultures and identities that literally and figuratively cross borders.<sup>45</sup> Later, however,

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<sup>43</sup> The preoccupation with identity in intersectionality theory is also critiqued by many. See Emily Grabham, who asks whether intersectionality simply adds "to the law's propensity to classify without mounting a challenge to anything important": in "Intersectionality: Traumatic Impressions" in Emily Grabham, *et al*, eds, *Intersectionality and Beyond: Law, Power, and the Politics of Location* (Abingdon, UK: Routledge-Cavendish, 2008) at 183, cited in Richard Delgado, "Roderigo's Reconsideration: Intersectionality and the Future of Critical Race Theory" (2011) 96 *Iowa Law Review* 1247, footnote 128 at 1273 [Delgado, "Roderigo's Reconsideration"]. Delgado himself asks, "If we allow gay Brazilian nursing-home residents to sue for intersectional discrimination, where will it stop?" in joking reference to the kinds of concerns that are raised about the potentially infinite divisions of intersectionality. Footnote 127 at 1273.

<sup>44</sup> Danielsen & Engle, *supra* note 29, xiii at xv.

<sup>45</sup> Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (San Francisco: Aunt Lute Press, 1987). Anzaldúa describes the *mestiza* (a "mixed" woman who also is a theorist and practitioner of mixedness) as the goddess Coatlicue who, like the Hindu goddess Kali, embodies creation and destruction, life and death, virgin and serpent. She embodies contradiction, "simultaneously, depending on the person she represents: duality in life, a synthesis of duality, and a third perspective – something more than mere duality or synthesis of duality": at 46. Similarly, when referring to the *mestiza*, Ellen Demas and Cinthya M Saavedra note, "La *mestiza* deconstructs oppressive colonizing traditions and constructs new metaphors; she unlearns patriarchal assumptions and engages in a transnational feminist struggle; she interprets history and writes new myths; she tears down category and invites ambiguity": Ellen Demas & Cinthya Saavedra, "(Re)conceptualizing Language Advocacy: Weaving a Postmodern *Mestizaje* Image of Language" in Kagendo Mutua & Beth Blue Swaedener, eds, *Decolonizing Research in Cross-Cultural Contexts: Critical Personal Narratives* (Albany: State University of New York Press, 2004) 215, cited in Bagele Chilisa, *Indigenous Research Methodologies* (Los Angeles: Sage, 2102) at 270. According to Saavedra and Nymark, *mestiza* methodology "... entails grappling with multiple epistemologies and rejecting binary, simplistic and deterministic ways of theorizing and researching": Cinthya M Saavedra & Ellen Nymark, "Borderland/*Mestizaje* Feminism: The New Tribalism" in Norman K Denzin, Yvonna S Lincoln & Linda Tuhiwai Smith, eds, *Handbook of Critical and Indigenous Methodologies* (Thousand Oaks, CA: Sage, 2008) 225. Cited in Chilisa, *ibid*, at 270.

she develops the idea of the *nepantlera*, which destabilizes the identities themselves.<sup>46</sup> As Martina Koegler-Abdi explains, "... while a mestiza is constantly bridging differences and deconstructing the impact of identity and ethnic frames through multiplicity and synthesis, a nepantlera works to dissolve the categories that require the bridge in the first place."<sup>47</sup>

The movement in CLT to ever finer gradations of identity and, finally, to questions about whether identity is even relevant reveals the Metis experience of both the nationalist/sovereigntist and diasporic/nomadic (exilic?) strains that have been explored by various Metis writers. This progression raises the dilemmas of the relevance of multi-identity Indigenous experiences to Metis experience. In embracing critiques that are based in mixedness, or hyphenation, MetCrit would run the risk of leaning towards the diasporic/nomadic perspective, towards multiplicity. On the other hand, to ignore this work would be to lean (too much?) to the nationalist/sovereigntist perspective, towards distinctiveness. I would suggest that all these are relevant, and do not need to be balanced in the moment; they are encompassed by the totality of Metis discourse.

I suggest, then, that the work of scholars like Bonita Lawrence<sup>48</sup> and Pamela Palmater,<sup>49</sup> who look at Indigenous multi-identity issues and the law, would be important for MetCrit. Literature and literary criticism on multi-identity issues in Indigenous and post-colonial contexts is rich

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<sup>46</sup> Gloria Anzaldúa & AnaLouise Keating, eds, *This Bridge We Call Home: Radical Visions for Transformation* (New York: Routledge, 2002).

<sup>47</sup> Martina Koegler-Abdi, "Shifting Subjectivities: Mestizas, Nepantleras, and Gloria Anzaldúa's Legacy" (2013) 38:2 *Melus* 71 at 81.

<sup>48</sup> Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: University of British Columbia Press, 2004).

<sup>49</sup> Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich, 2011).

(e.g. Drew Hayden Taylor, Marilyn Dumont, Gregory Scofield, Karen Froman, Janice Acoose, Natasha Beeds, Thomas King). Similar concerns have been investigated by critics of colonialism internationally in various disciplines, looking at syncretic identities in French Indochina, the Caribbean, South and Central America, and among Acadians, Cajuns and Creoles.

Theories relating to nomadic and diasporic peoples could also be relevant to MetCrit, as they explore the colonial intent of fracturing and/or assimilating collectivities by re-settling them. Thus, colonialism attempts to create communities out of nations. People without a territory are “unsettling” for the settled (e.g. Jews, Roma, Palestinians, Kurds). Cross-border people are also unsettling. In this sense, border studies, and scholarship that focuses on multiculturalism and citizenship, trans-nationalism, and non-state theories of sovereignty, may be instructive (e.g. Jeremy Webber, Jim Tully, Will Kymlicka, Rosa Braidotti, Victoria Bernal, Richard Yearwood). Some of these questions have been specifically addressed by Metis scholars such as Larry Chartrand.<sup>50</sup> Questions about identity and citizenship inform ideas about community and about how community and nation are interconnected.

Modern debates about community reveal a spectrum of views that parallel debates (misconceptions?) about Metis communities. Some thinkers, such as Raymond Williams, construct community in a traditional western, localized way, which is posited as an ideal version of community that existed prior to the incursion of capitalism. Other writers, such as Martin

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<sup>50</sup> Larry Chartrand, “Metis Identity and Citizenship” (2001) 12 Windsor Review of Law & Social Issues 5. See also Craig Proulx, *Reclaiming Aboriginal Justice, Identity and Community* (Saskatoon: Purich, 2003); and see Evelyn Peters & Chris Andersen on Indigenous urban identity and concepts of territory in the “Introduction” of their book *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: University of British Columbia Press, 2013) 1.

Heidegger, find notions of community appalling as a form of group-think, which may threaten to take over individual identities and aspirations. Still others, notably Jacques Derrida, question the reality of community, pointing to the essential isolation of individuals and the impossibility of crossing the divide between individual conceptions of reality. The deconstruction of community itself is a musing on alienation, exile and, ultimately, death.<sup>51</sup> In and amidst these views are attempts to grapple with the bewildering variety of post-modern (but not only?) community configurations: virtual communities, trans-national communities, notional communities, interest-based communities. What all of these have in common is the lack of a persistent connection to a(n outside) recognized territory, and the lack of a common way of life, except for in terms of limited spheres of interest. This mirrors questions about the three-way splits created by the definition of “community” in *Powley* and *Willison*. At the same time, Euro-derived skepticisms about the possibility of community may ignore the centrality of community to Metis society despite its non-centralized and seemingly “impossible” nature.

### **Hybridity Theory: Essentialism and Anti-Essentialism**

There is an emerging international literature on “metisness” (Spanish *mestizaje*) and hybridity which deals with theories of community which are more than just “vapid and empty liberal pluralism[s]” but which engage with the realities of “mixed” history in all its complexity and diversity. In fact “... numerous ... critics have sought to demonstrate that concrete forms of

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<sup>51</sup> These views are canvassed in J Hillis Miller, *Communities in Fiction* (New York: Fordham University Press, 2015) at 1-17.

hybridity – racial, social, cultural, and political – can promote a theoretical and critical apparatus that is not depoliticized, ahistorical, and aesthetically generalized.”<sup>52</sup>

Like race, ideas of purity and hybridity are social constructs – and the desire to erase hybridity is also a social construct. A claimant trying to prove rights under *Powley* will be in the strange position of having to prove Aboriginal ancestry while also having to prove that Aboriginal ancestry has been subsumed by the new Metis culture. Once mixing is complete, it is safe. While it is still in progress, it evokes all the colonial fears of the hybrid<sup>53</sup> – and perhaps accounts for the fetish for purity and authenticity.<sup>54</sup>

The debates surrounding hybridity reveal the tension between essentialism and anti-essentialism, which is also addressed in *mestiza/o* theory and *Lat Crit*. This tension will be explored below with reference to the so-called “third space”, a term coined by hybridity theorist Homi Bhabha in his *Location of Culture*,<sup>55</sup> to try to avoid falling into the trap of essentializing individual and community/national identities. The third space has been used by many Indigenous and anti-colonialist theorists, including Metis scholar Cathy Richardson, who uses it as a tool against racism and essentialism. Some writers, such as Sharron A Fitzgerald and Renisa Mawani, have applied hybridity concepts in literature specifically about Metis issues.<sup>56</sup>

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<sup>52</sup> Rafael Pérez-Torres, “Misegenation Now!” (2005) 17:2 *American Literary History* 369 at 369-70.

<sup>53</sup> The term “hybrid” in Latin referred to the offspring of a tame sow and a wild boar.

<sup>54</sup> I would argue this fetish influences the desire of some to exclude seemingly marginal Metis communities, such as some BC Metis communities, from the Metis nation.

<sup>55</sup> Homi Bhabha, *The Location of Culture* (London: Routledge, 1994).

<sup>56</sup> Sharron A Fitzgerald, “Hybrid Identities in Canada’s Red River Colony” (2007) 51:2 *The Canadian Geographer/Le Géographe canadien* 186; Renisa Mawani “‘Half-breeds’, Racial Opacity, and Geographies of Crime: Law’s Search for the ‘Original’ Indian” (2010) 17:4 *Cultural Geographies* 487. Hybridity has also been used to examine

Mestiza writer Anzaldúa provides a description of a “third element”:

That focal point or fulcrum, that juncture where the mestiza stands, is where phenomena tend to collide. It is where the possibility of uniting all that is separate occurs. This assembly is not one where severed or separated pieces merely come together. Nor is it a balancing of opposing powers. In attempting to work out a synthesis, the self has added a third element which is greater than the sum of its severed parts. That third element is a new consciousness - a mestiza consciousness - and though it is a source of intense pain, its energy comes from continual creative motion that keeps breaking down the unitary aspect of each new paradigm.<sup>57</sup>

While some progressive thinkers have found uses for hybridity theory, especially the concept of the third space, other scholars are more skeptical. For instance, Ella Shohat thinks of hybridity as a *fait accompli* “rubber stamping” colonialism.<sup>58</sup> This position is reminiscent of Adam Gaudry and Rob Hancock’s criticism of John Ralston Saul’s *A Fair Country* as saying that because we are “a Metis nation” we are “one big happy family”, and colonialism is either ignored or normalized/justified.<sup>59</sup> Laura Smyth Groening asserts that, for Metis writers, the concept of hybridity “emerges as yet another politically correct, alien term, a term that really means

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Maori/Pakeha (non-Maori) issues: Paul Meredith, “Hybridity in the Third Space: Rethinking Bi-Cultural Politics in Aotearoa/New Zealand” (paper presented to Te Oru Rangahau Maori Research and Development Conference, July 7-9, 1998, Massey University).

<sup>57</sup> Anzaldúa, *supra* note 45 at 79-80.

<sup>58</sup> Ella Shohat, “Notes on the ‘Post-Colonial’” (1992) 31/32 *Social Text* 99 at 109.

<sup>59</sup> Adam Gaudry & Rob LA Hancock. “Decolonizing Metis Pedagogies in Post-Secondary Settings” (2012) 35:1 *Canadian Journal of Native Education* 7. See John Ralston Saul, *A Fair Country: Telling Truths about Canada* (Toronto: Penguin Canada, 2009).

‘assimilation’”.<sup>60</sup> Katharyne Mitchell doubts the usefulness of hybridity as an anti-colonial tool, as it can be easily co-opted, or can “go either way”.<sup>61</sup>

Hybridity has been seen as a problematic descendant of deconstructionism. To explain: There is a stream of critical theory that focuses on the value of individual and distinctive community experience, an outgrowth of critical race theory and feminist theory, and their corresponding methodologies. There is tension between this perspective and that of the deconstructionists, who question the possibility that the self, culture, thought, law are concrete notions. Rather, like Buddhist thinkers, deconstructionists think of these things as “empty”, they are not “solid”, either à la Plato (platonically?) or otherwise.

This latter trend has concerned a number of Indigenous philosophers, such as Gordon Christie, who is just as critical of the deconstructionist agenda as he is of the liberal agenda:

Just as there is no self that is fixed and determinate, there is no culture that is fixed and determinate – the edges of selves and cultures are blurred, with even the centres open for revision, as cultures meet and interact.

One might wonder, though, what becomes of being Aboriginal. If Aboriginal people are both individually and collectively little more than contingently arranged characteristics, all of them “up for grabs,” what ultimately is the marker of difference between Aboriginal and non-Aboriginal societies and the people that make them up? Here we

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<sup>60</sup> Laura Smyth Groening, *Listening to Old Woman Speak: Natives and AlterNatives in Canadian Literature* (Montréal & Kingston: McGill-Queen’s University Press, 2004) at 143. However, Groening says that perhaps hybridity could offer hope if it “is based on reciprocal merging”. *Ibid.*

<sup>61</sup> Katharyne Mitchell, “Different Diasporas and the Hype of Hybridity” (1997) 15:5 *Environment & Planning D: Society and Space* 533.

witness critical theories in their attempt to slide *universal* claims under the cultural chasm separating Aboriginal and non-Aboriginal societies, threatening the very existence of Aboriginal peoples *as Aboriginal peoples*.<sup>62</sup>

Despite hesitations about hybridity theory, there have been attempts to reclaim it, positing that Bhabha's third space has been misunderstood, that others have actually essentialized it, although it was meant to be a space where essentialism was not possible.<sup>63</sup>

Delgado takes a pragmatic approach, known as strategic essentialism: "So, essentialism and common cause will be in order at certain times and for certain campaigns, while at other times, hunkering down with others just like you and gathering your forces will be what is called for."<sup>64</sup>

This is akin to Christie's suggestions that theory (generally) can be put to use by Indigenous legal critics, but it cannot be taken to its logical end point, because this leads to reifying theory as opposed to Indigenous realities.<sup>65</sup>

Thus, essentializing for political or social aims could be equated with trying to meet the *Powley* test in order to prove constitutionally protected rights, while essentializing could also mean the kinds of strictures surrounding notions of "community" that Metis people are expected to meet in *Powley*.

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<sup>62</sup> Gordon Christie, "Law, Theory and Aboriginal Peoples" (Fall 2003) 2 Indigenous Law Journal 67 at 110 [emphasis in original].

<sup>63</sup> See, for example, Jan Nederveen Pieterse "Hybridity, So What? The Anti-Hybridity Backlash and the Riddles of Recognition" (2001) 18:2-3 Theory, Culture and Society 219; Simone Driichel, "The Time of Hybridity" (2008) 34 Philosophy & Social Criticism 587.

<sup>64</sup> Delgado, "Roderigo's Reconsideration", *supra* note 43 at 1281.

<sup>65</sup> Gordon Christie, "Critical Theory and Aboriginal Rights" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights* (Don Mills, ON: Oxford University Press, 2013) 123.

The debate between Nikolas Kompridis and Seyla Benhabib about essentializing the hybrid is instructive. Kompridis charges that, where Benhabib's anti-essentialism

... exaggerates the fluidity, permeability, and renegotiability of culture, it is a view of culture that tends to obscure the empirical complexity of the phenomena it claims to illuminate. What we are offered is a concept of culture that undermines its own application, such that nothing empirical can actually conform to it.

...

If cultures really are as fluid, porous, renegotiable, and unbounded as they are said to be, it is very hard to see how their political claims could have become a problem for us.<sup>66</sup>

Kompridis argues that hybridity has undergone a premature, largely unnoticed normativization which obscures cultural distinctions and undermines the importance of attempts at cultural preservation. He critiques the following statement by Jeremy Waldron as amounting to "cultural Darwinism":

... to immerse oneself in the traditional practices of, say, an aboriginal culture might be a fascinating anthropological experiment, but it involves an artificial dislocation from what is actually going on in the world. That it is an artifice is evidenced by the fact that such immersion often requires special subsidization and extraordinary provision by those who live in the world where culture and practices are not so sealed off from each other

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<sup>66</sup> Nikolas Kompridis, "Normativizing Hybridity/Neutralizing Culture" (2005) 33:3 *Political Theory* 318 at 319-20. This paper is a critique of Seyla Benhabib's *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002).

... From a cosmopolitan point of view, the immersion in the traditions of a particular community in the modern world is like living in Disneyland and thinking that one's surroundings epitomize what it is for a culture really to exist ...<sup>67</sup>

According to Kompridis, this normativization of "the other" subverts grounds for preserving difference and preventing the endangerment of cultural resources. He asserts that hybridity is the "ideal conceptual tool" for those "... political theorists whose skepticism towards the political claims of culture inclines them to frame those claims as requiring citizens of multicultural democracies to choose between their 'rights' and their 'culture'."<sup>68</sup>

It would be tempting to argue that Kompridis is actually advocating an essentialist viewpoint himself, in reaction to what he sees as Waldron's modernist and cosmopolitan hybridity, and Benhabib's anti-essentialist and anti-holistic concept of culture. But Kompridis sees himself as proposing a middle way. While he agrees with Benhabib that her

... metaphysical position begins from a correct anti-essentialist premise that there can be no fixed or 'fixable' identities, no categories or distinctions impervious to historical change, [she comes] to the erroneous conclusion that all identities are fictitious and all distinctions necessarily repressive and exclusionary.<sup>69</sup>

Kompridis is concerned that such overemphasis on "reinvention, reappropriation and subversion" will itself subvert the power of cultural traditions and practices, and negate any

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<sup>67</sup> Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" (1992) 25:3-4 University of Michigan Journal of Law Reform" 751 at 763.

<sup>68</sup> Kompridis, *supra* note 66 at 322.

<sup>69</sup> *Ibid* at 325.

rights that may flow from them.<sup>70</sup> But he also agrees that under-emphasis on fluidity and multiplicity is problematic. Kompridis describes his own approach as one which re-envision the relationship between identity and non-identity, between old and new, and between hybridity and heterogeneity.<sup>71</sup> In his view, neither essentialism nor anti-essentialism should have the last word.<sup>72</sup>

In terms of the Kompridis-Benhabib debate and the construction of Metis communities, I believe Metisness contains enough distinctiveness that debates can exist about discontinuities. In fact, such debate would not arise if there were not concretized historical responses to such questions. In support, I can marshal Benhabib's response to Kompridis that debate is the mark of a vivid and persistent culture, however fragmented "... a cultural tradition dies or ossifies when its members no longer find the resources through which to contest the past, present, and future narratives of their collective existence."<sup>73</sup> Benhabib's defense of her work *Claims of Culture*, discussed above, is that her insistence on narrativity prevents her from lapsing, as Kompridis suggests, into essentializing the hybrid. She asserts

... the contest within cultures and among cultures occurs within narrative structures, which at the end of the day have to 'make sense,' have to 'enable' their members to go on in a meaningful way. This is the moment of the 'identity of the non-identical' in the work of culture, when conflicting narratives nonetheless are woven together to form an

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<sup>70</sup> *Ibid* at 335-36.

<sup>71</sup> *Ibid* at 339.

<sup>72</sup> *Ibid* at 323.

<sup>73</sup> Seyla Benhabib, "The 'Claims' of Culture Properly Interpreted: Response to Nikolas Kompridis" (2006) 34:3 *Political Theory* 383 at 385.

epistemically plausible whole in the light of which cultural groups continue to resignify ... revalorizing the work of the imagination in continuing the project of culture.<sup>74</sup>

Such narratives can be generated and retrieved by participating in debate, generating commentary, and by listening to oral histories – re-discovering the “lost” history of the Metis. The creation of new Metis communities and the revitalization of historical ones could equally promote a robust hybridity which has not “un-bounded” itself out of existence.

#### **PART 4 ADDRESSING POTENTIAL CRITIQUES OF METCRIT**

##### **What is “Metis” about MetCrit?**

Is there anything particularly Metis about this hybrid methodology? After all, Metisness is about much more than just hybridity. How would/should a Metis methodology differ from other methodologies that may be “hybrid” or “Indigenous”? Could a Metis methodology help to create more sensitive scholarship, or would it be just an exercise in trying to create yet another academic niche?

Is creating a closer connection with LatCrit than with Indigenous critical approaches just another way of defining ourselves against a “more Indigenous” other?

##### ***Fiddling While Batoche Burns?***

Perhaps a more all-encompassing concern is whether the creation of a Metis methodology could help even in a small way to create positive change in the lives of real people. Further, by seeming to superimpose the post-modern (and by now somewhat dated) “hybridity theory”

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<sup>74</sup> *Ibid* at 384.

onto Metis scholarship, and even Metis experience, have I somehow erased elements of my own perspective? Am I co-opted to such an extent that I can't even tell the difference between my own culture and an academic label?<sup>75</sup> While I would disagree that "hybridity" is an essentially post-modern notion, and while I might dismiss my own angst as yet more post-modern hand-wringing, I am not at all convinced that any of this matters in the face of the many concrete problems facing Metis people now.

What might people want to keep, chuck or change in the ideas presented above? How would these concepts be discussed and developed – or trashed – within Metis communities? Are Metis methodologies already being employed among community and academic researchers? How? Where?

### **Theory as Essentialism**

MetCrit would have to address Kompridis' and Christie's argument that hybridity has undergone a premature, largely unnoticed normativization which obscures cultural distinctions and undermines the importance of attempts at cultural preservation. MetCrit would have to transcend vapid liberal pluralisms<sup>76</sup> and engage with the reality of "mixed" history in all its complexity and diversity. Admittedly, this might be a tough call. While the complex nature of Metis history and experience could preclude lapsing into the essentialism of the hybrid, the political and legal drives to concretize Metis identity are very strong. This is especially so after *Powley* and the community connection test that has Metis people documenting their own

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<sup>75</sup> The work of Johnny Mack deals with similar questions.

<sup>76</sup> See Pérez-Torres, *supra* note 52 at 370.

histories with a view to proving the existence of recognizable (i.e. by the dominant society) cultures and communities.

Further, there is the tendency to create a hybrid of essentialism and anti-essentialism and call this the third space, a unitary space. (Is this purely based on utilitarian principles? practicality/survival as a Metis ethic?) From this view, it seems that my suggestions about Metis theory are either so unbounded as to be meaningless, or are simply a collection of dualisms held together as the hybrid third space. As I will suggest below, it may be impossible to get out of this *mise en abyme* situation. This is why perhaps “spectrums of space” might be a more useful concept when talking about Metis theory, but perhaps even this is artificial.

Again, there is the risk of essentializing Metis philosophy. This is akin to essentializing what might be thought of as “the middle way” between the various ascribed dualities of being Metis (can I limit discussion of Metis philosophy to an aversion to duality? A recognition of uncertainty?).

These kinds of dualism-avoiding dilemmas have been questioned in a humorous way by Buddhist philosopher Peter Fenner, who says of avoiding “going to extremes”:

... the problem that presents itself is how to be in a way that doesn't fall into either the orthodox or the unorthodox extreme. However, as soon as we try to do this, we fall into the orthodox extreme of trying to do or not do something. On the other hand, if we just let things be as they are, without any concern for observing how we might fall into these extremes, we have fallen into the unorthodox extreme of letting go.

Perhaps our mistake is taking this notion of “falling to extremes” too seriously. Perhaps there is no such thing as an extreme at all. We might declare that we are simply “thinking what we are thinking” when we think we are falling to an extreme. In other words, thinking that we are falling to an extreme isn't really falling to an extreme at all; it is just thinking that we are falling to an extreme. However, this is a position that

stands in contrast to believing that we can fall to an extreme, and as a position, it falls to the unorthodox extreme of non-referentiality and meaninglessness.

So, whether we like it or not, it seems that we are left with the notion of falling to an extreme, that it actually means something. In fact, it begins to seem that all we can ever do is fall to an extreme. If we want to forge ahead, we fall to the orthodox extreme. If we decide to give up, we fall to the unorthodox extreme.

At this point, we might advocate a balanced or integrated approach that harmonizes both perspectives into a balanced way of life. However, in rejecting a dualistic approach in favor of an integrated perspective, what we really have done is create a new dualistic structure ...

As soon as we distinguish a middle ground from the extremes, this becomes a new extreme, in the sense that the new options are that we are either in the middle or on the edge. We are either balanced or unbalanced, appropriate or inappropriate. To the extent that the middle ground is the place where we should be, therefore, it becomes a pole in another dualistic structure.

We might now be inclined to seek a resolution by boldly declaring that ultimately “there is nothing to do or not to do,” or that we are “neither orthodox nor unorthodox.” However, if we say this in a mood of “insight and understanding,” we fall to the extreme of over-valuing what we are saying. We believe that the bi-negation really says something and that we know what this is. On the other hand, if we find that we are thrown into silence, or mouth the bi-negation “knowing” that it really doesn’t say anything, we fall to the unorthodox extreme of meaninglessness and non-referentiality.<sup>77</sup>

Fenner leaves this dilemma unresolved.

### **Inherent Difficulties and the Impossibility of Their Resolution**

In essence (pardon the essentialist joke<sup>78</sup>) this dissertation is about definitions and their significance: What is meant by “Metis”? “History”? “Territory”? “Community”? Whose

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<sup>77</sup> Peter Fenner, *The Edge of Certainty: Dilemmas on the Buddhist Path* (York Beach, ME: Nicholas-Hays, 2002) at 109-10.

<sup>78</sup> Can essentialism have an essence? See Pnina Werbner, “Essentialising Essentialism, Essentialising Silence: Ambivalence and Multiplicity in the Constructions of Racism and Ethnicity” in Pnina Werbner & Tariq Modood, eds, *Debating Cultural Hybridity: Multi-Cultural Identities and the Politics of Anti-Racism* (London: Zed, 1997) 226.

definitions become accepted, and why? What are the harms generated by problematic definitions, and how can these harms be remedied or prevented?

The word “define” itself comes from a Latin root meaning “of the end” – or “pertaining to the finite”. Something that is definite is an instance of “the proper”, what is appropriate, or appropriately contained. Beyond “the pale” things are unsettling: uncolonized, uncivilized, other.

As definitions (including legal definitions) have so often been used to diminish, to dominate and exclude, it is understandable that anti-colonial and other critical theorists would call them into question. Perhaps older are critical questions surrounding where limits should be, if and how they should be transgressed, and if they are valid, or enforceable. Similarly, questions of the nature of limits, whether they exist inherently or are culturally conditioned or arbitrary, are reflected in such diverse (and sometimes ancient) arenas of inquiry as Buddhist philosophy, quantum physics, political theory and literary criticism.<sup>79</sup>

In my view, Metis philosophy is also concerned with definitions, limits, borders. In many ways, the thinking of the Metis people referred to in this dissertation explores – and explodes – definitions. However, if I say that Metis thinking can bust dualities, I fall into the trap of creating another duality, the duality of duality-busting and non-duality busting in Metis thinking *viz* Fenner. This is the dilemma of those who voice concerns about “essentializing the hybrid”. Hybridity theory, seen by some as providing an antidote to dualistic definitions and calcified

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<sup>79</sup> Regarding physics and legal theory, see Andrew W Hayes, “An Introduction to Chaos and the Law” (1992) 60 University of Missouri-Kansas City Law Review 751; Stephen H Kellert, “Extrascientific Uses of Physics: The Case of Nonlinear Dynamics and Legal Theory” (2001) 68:3 Philosophy of Science S455.

perceptions, has also been seen as politically dangerous because overly fluid boundaries call into question cultural and ethnic distinctiveness and, thus, potentially, political aspirations. On the other hand, because of the dualism dilemma (even the concept of “dilemma” is dualistic), any helpful non-essentializing ideas in hybridity theory can themselves become dualistic and calcified.

Where Homi Bhabha was going with his “third space” I think was in the direction of avoiding rather than reinscribing duality; the third space was not meant to be singular. I think many Metis philosophers would also object to the third space as being a singularity. For instance, Richardson describes the third space as a tool for resisting colonialism precisely because it is a tool Metis people can use to resist duality.<sup>80</sup> In the same way, as Metis people, we object to being defined as merely a “product” of our dual heritages (which are rarely dual in any case).

## CONCLUDING THOUGHTS

In this chapter, I have argued that the complexities of Metis history and law in Canada – and particularly in British Columbia – highlight the need for a particularly Metis critical theory. At the intersection between Metis history and the Canadian law of Metis rights is the idea of “Metis community”, defined in *Powley* as group of people with a “distinctive collective identity, living together in the same geographic area, and sharing a common way of life. As the appeal judge held in *Willison* that there was no Metis community in the environs of Falkland capable of supporting a site-specific right, he described the Metis people of this area as a non-community: a loosely affiliated group of people of mixed ancestry living in a wide geographic area. These

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<sup>80</sup> Richardson, *supra* note 20.

court-imposed oppositions 1) “distinctive collective identity”/ “identifiable” vs. “people of mixed ancestry”; 2) “living together in the same geographic area” vs. “geographically wide”; and 3) “sharing a common way of life” vs. “loosely affiliated group of people” are based on assumptions about other oppositions (Indigenous/non-Indigenous, other/non-other, inside/outside, traditional/modern, sovereign/colonized, assimilated/unassimilated, urban/rural, authentic/inauthentic) that purport to be “true” about Metis people. While I would critique this kind of dichotomizing as yet another example of colonialist thinking, what is true is that Metis-ness is complex. This makes fundamentalist theories problematic. So we are left with the Metis conjunctions of complexity and distinctiveness, multiplicity and absence. Neither fully describes being Metis; so-called splits can be mutually constitutive.

Metis communities might be seen from a colonialist viewpoint as being impossible, but that does not make them any less real. The impossibility of Metis communities might suggest a Metis theory that is also “impossible”, and yet it may be both as distinctive and multiplicitous as Michif.<sup>81</sup>

I have tried to suggest there may be many ideas that could be useful for developing MetCrit, including LatCrit and CMRS theories and practices. Their inclusion would not necessarily make MetCrit any less Metis.

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<sup>81</sup> “Locke, in the seventeenth century, postulated (and rejected) an impossible language in which each individual thing, each stone, each bird and each branch, would have its own name; Funes once projected an analogous language, but discarded it because it seemed too general to him, too ambiguous.” Jorge Luis Borges, “Funes the Memorious”, trans James E Irby, in *Labyrinths: Selected Stories and Other Writings*, rev ed (New York: New Directions, 1964) 65. Angela P Harris discusses “Funes” and the tension between acknowledging multiplicity, and creating community and positive action in “Race and Essentialism in Feminist Legal Theory” (1989-90) 42 *Stanford Law Review* 581.

## **BEARING WITNESS**

*The young man stood up in the courtroom. He looked at his hunting companions, and at the gallery full of Metis and other supporters, many of whom were wearing Metis sashes – ceintures flecheés. He had never felt more pride at being Metis than at this moment. His wife and sons smiled at him, encouraging him. After all, he had done this so that they could have food for the winter. His friends and community members smiled too. One of the Elders nodded. So he began. He had never spoken in a courtroom before. He found it intimidating, with all its rules, jargon, formulas and protocols that he was only just starting to learn. He didn't like being called "the accused". But it had been a long road getting here, a long road of preparation, sweat and expense – and he was ready. So he began.*

*He talked about the sash he was wearing, and its usefulness: as a back support, a carrying strap, a belt. He told the court that the fringes has also been used as a kind of calendar, a method of keeping track of the days out on the trapline, or on a long journey. In the old days, if a man had been gone too long, his friends and family would send out a search party. He talked about how different groups of Metis had different sash patterns and colours, and that the colours had meaning. Green was the colour of the earth who gave birth to all things; blue the colour of the spirit who enlivened all things. Yellow was the colour of the eastern sun, of beginnings. Red was the colour of life, of blood, but also of the Metis blood that was shed during the history of his people. Black was the colour of the dark times, but white was the colour of the future, of possibility.*

*He looked up again at his fellow hunters, at the gallery. His heart was lighter, and the medicine bag hanging by a leather thong around his neck felt warm.*

*He told everyone in the courtroom about how his family came out to BC from Manitoba to work at a mill in Port Moody. He told them about how he learned to fish at a young age because his family was poor. Back in Manitoba, he learned to hunt. Eventually, his family came back to BC and he continued to help his family by hunting and fishing. They ate lots of fish, and cooked grouse more than chicken. Since getting married, he and his wife have moved all over BC and he has always hunted, fished and trapped. He has done many other things too to earn a living, including guiding, ranching, and shoeing horses. It has been a great life, sometimes in the bush, sometimes on the ranch, sometimes in town. He has been a Captain of the Hunt for some time and helped to organize the communal hunt he and his friends were on when they were charged. He organized another one before that, on Vancouver Island. He explains how the Metis people have governed the hunt – and how they’ve governed themselves over the past years since he’s become politically involved.*

*He tells the court of his family in Manitoba, traced back many generations. But he also knows there is a creek in the Kootenays named after his family, who traded for furs there many years ago. Other family members lived at Rocky Mountain House, trading into Shuswap territory.*

*He smiles broadly, and gestures that he is done. He thanks the court and the other witnesses – all the witnesses who have heard him today talking about his family and his nation. Suddenly, he is tired. It has been a long road to get here, and he knows he has many more miles to travel.*

## Chapter 8

### CASE STUDY OF *R v WILLISON*

#### INTRODUCTION

##### Proto-MetCrit Analysis of Application of *Powley* to *Willison* Case

In this chapter, I would like to investigate the validity of the *Willison*<sup>1</sup> appeal court's opposition of the following concepts: 1) "distinctive collective identity"/ "identifiable" vs. "people of mixed ancestry"; 2) "living together in the same geographic area" vs. "geographically wide"; and 3) "sharing a common way of life" vs. "loosely affiliated group of people". I argued in the previous chapter that this three-way split suggests the usefulness of developing MetCrit. These splits raise many questions: Are these terms truly opposable in terms of Metis history and notions of community, especially in BC? What kinds of socio-cultural bias do these oppositions reflect? What are the implications for Metis mobility rights? How distinctive does Metis culture have to be?

#### THREE PRAIRIE HARVESTING CASES: EXPANSION OF NOTIONS OF COMMUNITY

Three recent prairie cases – *R v Laviolette*,<sup>2</sup> *R v Belhumeur*,<sup>3</sup> *R v Goodon*<sup>4</sup> – have expanded the *Powley*<sup>5</sup> definition of community to include greater acceptance of community mobility and

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<sup>1</sup> *R v Willison*, [2005] BCJ No. 924; rev'd [2006] BCSC 985 [*Willison* or *Willison BCSC*].

<sup>2</sup> *R v Laviolette*, 2005 SKPC 70, [2005] 3 CNRL 202 [*Laviolette*].

<sup>3</sup> *R v Belhumeur*, 2007 SKPC 114 [*Belhumeur*].

<sup>4</sup> *R v Goodon*, 2008 MBPC 59 [*Goodon*].

<sup>5</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff'd [2000] OJ No. 99 (Ont SC); aff'd [2001] OJ No. 607 (Ont CA); aff'd 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

interconnection with other Indigenous communities, as well as a recognition that Metis communities can be located in relatively large geographic regions. However, simple expansion of territory and recognition of some degree of mobility still does not equate with fully considering Metis perspectives.<sup>6</sup>

Ron Laviolette, a member of the Meadow Lake Métis Nation and resident of the Flying Dust First Nation located near Meadow Lake, Saskatchewan, was ice fishing with two treaty Indians on Green Lake in April 2001, when he was charged with fishing contrary to the regulations. Mr Laviolette was charged as he was fishing outside of the Northern Administration District (“NAD”) in which the province of Saskatchewan recognizes Metis hunting rights. In fact, at the time Laviolette was charged, a Metis from Green Lake who was fishing nearby was not charged, as Green Lake is part of the NAD.

One of the central issues in *Laviolette* was the characterization of Metis community. The essence of the provincial crown’s position was that only Metis who were ancestrally connected to a historic Metis settlement within the NAD, and who continued to live in that settlement, could exercise Metis harvesting rights.

Kalenith PCJ of the Saskatchewan Provincial Court nevertheless did not adopt the Crown’s arguments, and recognized the Metis as a “highly mobile people”. The court in *Laviolette* found

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<sup>6</sup> This is true of the decision in *R v Hirsekorn*, [2010] AJ No. 1389 (ABPC); aff’d in part 2011 ABQB 682; aff’d 2013 ABCA 242; leave to appeal to SCC denied [*Hirsekorn*]. In *Hirsekorn*, the Alberta Court of Appeal created a test for mobile Aboriginal nations claiming site-specific rights. While purporting to take Metis perspectives (i.e. mobility) into account, in reality this case ignores Metis legal traditions allowing for mobile jurisdiction and hunting – and is also out of step with previous jurisprudence. See Karen Drake, “*R v Hirsekorn*: Are Métis Rights a Constitutional Myth?” (2013) 92:1 Canadian Bar Review 149.

that the Metis community in northwest Saskatchewan “moved often and travelled far and wide for food, trapping and work. They moved frequently between the fixed settlements and between the settlements within a given region.”<sup>7</sup> The court reached this finding in the context of a *Powley* analysis, following and expanding on the reasoning of the court in that case that allowed for the mobility of Metis communities.

Further supporting acceptance of community mobility and interconnection, the court found Mr Laviolette was not disqualified from being a member of the northwest Saskatchewan Metis community, even though he had lived part of his life on the Kikino Métis Settlement in Alberta and had lived in various other locations for work. Similarly, Mr Laviolette’s residence with a First Nations community – and his exercise of Aboriginal rights with members of that community – was not seen as detracting from his membership in the Metis community.

The *Belhumeur* case followed the *Laviolette* court’s regional community approach to determine that an urban Metis from Regina had an Aboriginal right to fish in the Qu’Appelle Valley.<sup>8</sup>

The more recently-decided *Goodon* case further enforces the broader approach to the identification of Metis communities. In October 2004, Will Goodon was charged with unlawful possession of a ringneck duck he had harvested for food in the Turtle Mountains of southwestern Manitoba. Combs PCJ of the Provincial Court of Manitoba found that

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<sup>7</sup> *Laviolette*, *supra* note 4 at para 28.

<sup>8</sup> *Belhumeur*, *supra* note 5. The crown filed a Notice of Appeal in this case on November 13, 2007, but the appeal was not pursued.

The Metis community of Western Canada had its own distinctive identity. As the Metis of this region were a creature of the fur trade and as they were compelled to be mobile in order to maintain their collective livelihood, the Metis “community” was more extensive than, for instance, the Metis community described at Sault Ste. Marie in Powley. The Metis created a large, inter-related community that included numerous settlements in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States.

This area was one community as the same people and their families used this entire territory as their homes, living off the land, and only periodically settling at a distinct location when it met their purposes.<sup>9</sup>

The court concluded that the Metis rights-bearing community of Manitoba encompassed the southwest of the province, from Winnipeg and south to the US border, and west to the Saskatchewan border. Turtle Mountain was thus considered part of the community area.<sup>10</sup>

Although Mr Goodon lived in Brandon, and not at Turtle Mountain, this was not found to disqualify him from membership in the ongoing Metis community in the region.<sup>11</sup>

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<sup>9</sup> *Goodon*, *supra* note 6 at paras 46-47.

<sup>10</sup> *Ibid* at para 48.

<sup>11</sup> *Ibid* at para 64.

## A CRITIQUE OF NOTIONS OF COMMUNITY IN *POWLEY*, *WILLISON*, *LAVIOLETTE* AND *GOODON*

*Powley* defines a Metis community as “a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life”.<sup>12</sup> For a Metis community to support a site-specific Aboriginal right it must be “identifiable” and have “a sufficient degree of continuity and stability”.<sup>13</sup>

The BC Supreme Court in *Willison* critiqued the trial judge’s interpretation of *Powley* thus: “I agree with the crown that in effect the learned trial judge expanded the definition of community found in *Powley* to include a geographically wide, loosely affiliated group of people of mixed ancestry rather than a group with a distinctive, collective identity.”<sup>14</sup>

I will investigate the following court-opposed concepts in turn: 1) “distinctive collective identity”/ “identifiable” vs. “people of mixed ancestry”; 2) “living together in the same geographic area” vs. “geographically wide”; and 3) “sharing a common way of life” vs. “loosely affiliated group of people”. I will also examine the concepts of “continuity and stability” in terms of the required connection between “historical” and “modern” Metis communities.

The idea of Metis “distinctive collective identity” was explained in *Powley* as not encompassing “all individuals with mixed Indian and European heritage” but as referring to “...distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and

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<sup>12</sup> *Powley*, *supra* note 7 at para 12.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Willison BCSC*, *supra* note 1 at paras 46-48.

recognizable group identity separate from their Indian or Inuit and European forebears.”<sup>15</sup> This is why the BC Court of Appeal in *Willison* spurns the reasoning of the trial judge, which it opines seems to allow a “loosely affiliated group of people of mixed ancestry” to own a distinctive collective Metis identity.

The opposition of the concepts “a recognizable group identity separate from [that of] Indian or Inuit and European forebears” and “people of mixed ancestry” reflects a common misunderstanding about Metis identity. As is suggested by the facts in *Lavolette*, Metis individuals and communities have ongoing ties to other Aboriginal communities. This may be because of territorial proximity, family relationships, common language, common lifestyles, or other factors. Metis identity can be fluid at the same time as it is distinctive; it intersects rather than opposes other Aboriginal identities. Metis distinctiveness encompasses both Metis and European identities, but this does not mean that Metis identity is rigidly separate from Metis and European identities. (And in BC, there may be people of mixed Aboriginal ancestry who, for various reasons described throughout this dissertation, may be tied to the historic Metis nation.)

However, Canadian law will have difficulty ascribing rights to Metis who are not identifiable in some respect; and I think most Metis would argue that their culture(s) is/are distinctive.

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<sup>15</sup> *Powley*, *supra* note 7 at para 10.

Nevertheless, while being distinctive, Metis people have often viewed themselves as mutable, as living with multiple cultures and having multiple identities.<sup>16</sup>

Given these complexities, the court in *Powley* can be commended to some extent for not purporting to enumerate or overtly define Metis community identity and, indeed, the court strongly suggests Metis communities should be researching their own histories. However, it remains the case that the *Powley* tests for Metis community identity and continuity reflect a modern, European-based understanding of communities as being stable over time and as subsisting in a relatively small area.

The acknowledgement of the court in *Powley* that Metis communities were mobile seems hollow in light of its requirement that members of Metis communities must also live together in the same geographic area. This has resulted in some awkward but somewhat helpful adaptations in *Lavolette* and *Goodon* that extend the location of Metis communities into larger regions. I am not sure that this has not allowed communities to be “geographically wide”, the descriptor applied disdainfully by the appeal judge in *Willison*. At the same time, the view of community location upheld in *Lavolette* and *Goodon* is not truly a Metis one. The obsession with defining boundaries of a territory, no matter how large, is not born of Aboriginal philosophy. The need to attach usufructary rights to an identifiable land-base is, rather, an

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<sup>16</sup> This view, which was discussed in Chapter 2, was reflected in Jacqueline Peterson’s essay “Many Roads to Red River: Métis Genesis in the Great Lakes Region, 1680-1815” in Jacqueline Peterson & Jennifer SH Brown, *Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) 37. This essay was presented in evidence for the defence in *Powley*.

incident of English property law,<sup>17</sup> which developed on a small island inhabited by a comparatively large population.

Metis concepts of territory are similar to Metis concepts of lifestyle and livelihood, which were and still are based more on the concept of networks. What does it mean to “live together”? For people who may have lived on the land for months at a time, traversing large areas, and who only socialized with community members periodically, the concept of “sharing a common way of life” was not much different from the concept of being “loosely affiliated” with people of the same culture. According to Metis legal scholar and lawyer Jean Teillet:

... it is suggested that the Northwest Métis society requires a more nuanced understanding because it is a social organization that consists of a changing social network of relations based on marriage, political influence and dependence on mobile, economic resources.<sup>18</sup>

As reflected in *Lavolette*, Metis may at the same time share “a common way of life” with other Aboriginal and non-Aboriginal communities.

The tests in *Powley* further compel Metis to characterize their communities as either “historical” or “modern”, assuming a conception of linear time often attributed to European enlightenment philosophy. *Powley* requires proof of an ongoing link between the historical and the modern community. While an exploration of social science literature on the construction of

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<sup>17</sup> See Jean Teillet, *Métis Law in Canada* (Toronto: Pape Salter Teillet, 2013) at 1-37, online: <[www.pstlaw.ca/resources](http://www.pstlaw.ca/resources)>.

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

communities is beyond the purview of this dissertation, concepts of community identity are culturally situated.<sup>19</sup> While the tendency to divide ideas of community into the modern and pre-modern obscures more than it clarifies, it also works to delegitimize the efforts of current Metis communities in reconstituting themselves, either culturally or politically.

As a point of comparison, could not the *Powley* test be used to defeat the notion of a Canadian community?<sup>20</sup> Do Canadians have a distinctive collective identity? Arguably, we only have regional identities; our national identity is tenuous at best. I suppose most of us do live together in a common (very large) geographic area – within the boundaries of Canada – but Canadians are a nation of Indigenous peoples and immigrants (and sometimes both) who have migrated over time, are still moving within the national boundaries. And the boundaries of Canada may be seen in some senses as arbitrary in terms of identity with the land; more common are regional attachments, but these also fluctuate greatly for a large proportion of the population. Do Canadians share a common way of life? To a limited extent, I suppose, but there are so many variations in multicultural Canada that many Canadians might identify more with a local or virtual community than with a national one. What really holds Canada together (if it in fact does do that) is its existence as a nation state. Since the Metis may be said to have national identity (of course that is also contested) but not at this moment a nation state, Metis cannot fall back on such an artificial notion of community.

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<sup>19</sup> This topic was discussed briefly in Chapter 2.

<sup>20</sup> Russell Lawrence Barsh & James Youngblood Henderson subject *Van der Peet* to a similar analysis in “The Supreme Court’s *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42 McGill Law Journal 993.

This is not to take a position on whether there is a provable Canadian identity. It is merely to illustrate difficulties with the *Powley* test. We have seen how those difficulties have been compounded in British Columbia, where it is more difficult to provide the kind or extent of evidence required by the courts.

## **SUMMARY AND SUGGESTIONS**

I have questioned the legitimacy and usefulness of the tests enumerated in *Powley* with regard to proving the existence of Metis community continuity. The situation in British Columbia illustrates the difficulties with *Powley* as it has generally been interpreted, first in terms of the lack of historical scholarship and, second, in terms of the acceptance of non-Metis assumptions about community identity.

I fear that the Canadian law will continue to have a difficult time with the realities of Metis history, unless we take that history seriously and seek to deconstruct Canadian law approaches to it in the public arena.

While Metis oral history has often been discounted by Canadian judges, the courts may be forced to value it increasingly, particularly in BC, due to the directive in *Powley* to provide evidence of the existence of Metis rights-bearing communities. It will be interesting to follow the development of the case law as oral histories are collected and used in evidence.

While *Lavolette*, *Belhumeur* and *Goodon* represent a positive development, these cases are the exception in the jurisprudence following *Powley*. If *Powley* is to be truly aligned with constitutional principles supporting protection of Metis rights, we will need more than just

“Metis data” plugged into a court-imposed definition of community. While there is no harm in *Powley* spurring a reacquaintance with our own histories and a further engagement in dialogue about identity and community membership, I hope that, at some point, the law will become curious about *Metis* notions of community. Perhaps this curiosity will be engendered by ongoing research into Metis history, culture and law, which continue to shape Canadian law.

## **FOR THE BIRDS**

*Ptii Jean sat perched in a high fir tree, looking down at a Metis hunter. This hunter was not happy. Ptii Jean was in one of his favourite guises – a chickadee – and he had pretty good vision. He saw the Metis man talking to another guy, a conservation officer. Between them was a half-ton truck with a freshly killed deer inside. Ptii Jean had the distinct impression things were not going well. (He had pretty good hearing, too.) “You know this is a closed season?” “Yeah.” “Can I see your licence?” The Metis man pulled out a Metis membership card and handed it to the officer. “This is my licence. I’m Metis and I’m just hunting to feed my family and a couple of my neighbours down the road.” “Metis, eh?” The officer scrutinized him closely. “Been drinking?” The man frowned and answered bluntly, “No.” He never drank, especially not while hunting. This would not be right because of the offerings he made for the animal. “Well, I’m afraid I’m gonna have to charge you. And I’m gonna take this deer.”*

*Ptii Jean watched the Metis man’s eyes follow the officer’s truck as it drove away with his winter meat. Ptii Jean was sober, too. Some days he played tricks on people, but today he just didn’t have the heart for it.*

*The Metis man wondered what he should do. Even now, the officer was probably dreaming about barbequed deer burgers or venison stew. Or worse, he would waste it. There weren’t as many deer in this part of the woods as there used to be. The populations of many animals had declined in recent years. Maybe conservation officers blamed Metis hunters but, for the most part, the hunter knew this wasn’t right. Last month, he’d seen three carcasses left in the bush. He would never do that.*

*As he was pondering, a whole flock of chickadees suddenly alighted on the fir tree above him, raising an incredible racket. There certainly was no shortage of these guys around. "Chick-a-dee-dee-dee" they declaimed. "Sweet-eee, sweet-eee" they sang. The hunter laughed in spite of himself. "I'm going to fight this", he realized, as the birds flew away.*

## Chapter 9

### WAYS FORWARD: COMMUNITY PERSPECTIVES ON RESPONDING TO THE COMMUNITY CONUNDRUM

#### INTRODUCTION

What is the way forward for Metis in BC? In this chapter, I provide a brief review of participants' suggestions about alternatives to navigating the *Powley*<sup>1</sup> test, such as negotiation and political action, which are being resorted to in BC.

#### PART 1 VIEWS OF LITIGATION

One of the questions I asked research participants was whether they had any hope that litigation might be an effective way of protecting Metis rights in BC. Some said that they thought litigation might be helpful, but only if there were a “perfect” test case. This would involve an individual or individuals hunting in their “home” community, thus avoiding *Powley*'s inadequate consideration of mobility issues. A test case would also have to involve a community that could be previously established through research as being “historic”. The harvesters would have to have ancestral ties to this historic community.

Elder Lottie Kozak, who was a witness for Greg Willison at his trial, thought that compiling oral histories would also be important to the success of any future litigation,

If they don't believe that there's enough Metis for Metis communities, why don't they get together with somebody like me and I can give them all the information they want,

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<sup>1</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff'd [2000] OJ No. 99 (Ont SC); aff'd [2001] OJ No. 607 (Ont CA); aff'd 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

and years and times, and how many Metis people are here, and then other groups do the same thing, put them all together? Then you've got a big group of Metis. If it comes down to that, that's what should be done. You see, they can't prove ... how many Metis are here just by counting Eldon's group [Salmon Arm local]. There's way more people than that. Then there's Osoyoos, Penticton, Peachland, Kelowna, Westbank, all that whole group into Kamloops, Merritt. That's the only thing they can do is to put out there proof of how much Metis there is ... I wish I could speak to people who would listen. I'm not educated, but I can speak my mind.<sup>2</sup>

However, some participants pointed out that even if there were more oral and documentary research that could be submitted as evidence in a future BC Metis rights case, a favourable judgment in such a case would only be applicable to other similar cases. The rights of a hunter from Falkland such as Ms Kozak, who hunts as far away as Chetwynd and Atlin, who grew up in the bush near Merritt, who has lived all over BC, and whose Metis ancestors settled throughout the province, might have difficulty in defending her Aboriginal hunting rights before the court. In fact, as Ms Kozak has Shuswap, Okanagan, and Interior Salish ancestry, as well as Red River ancestry, she might have more success in defending her rights as a First Nations person.

While some interviewees thought litigation could be a helpful tool in the right circumstances, or as long as better historical research became available, others thought that *Powley* could never accommodate Metis perspectives about history, community and territory. When asked about the possibility of creating a better interpretation of *Powley* to apply to the complexities of the

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<sup>2</sup> Interview with Lottie Kozak, Falkland, BC, June 15, 2012.

BC situation, former Hunt Captain Dan LaFrance, a claimant in the *Howse*<sup>3</sup> case, described a conversation he had with Metis leaders about *Powley*:

- DLF ... I said that *Powley's* going to be a hindrance to us. And it is.
- KS I think there's something like four out of 40 cases went in favour of Aboriginal claimants.
- DLF Exactly.
- KS I mean, they've expanded things a little bit; so now the geographic areas are wider, but I still feel like they're not getting it.
- DLF No, they're not.
- KS And I don't know ... Do you think they're ever going to get it?
- DLF No, I don't.
- KS Do you think it's possible?
- DLF Nope. Not with the *Powley*. And how are they going to change that? Now, the only way I might eventually say they could be changed is to have a [test] case go through, like I mentioned earlier ... but like I said to them, 'Why would you want a perfect case? They're not all going to fit that.'<sup>4</sup>

Skepticism about the usefulness of *Powley* is echoed by litigant Ron Nunn, who was also a witness in the *Willison* case.<sup>5</sup> Mr Nunn thinks *Powley* is problematic because it doesn't allow for mobility and Metis ideas of territory, and partly because it takes an unreasonably narrow view of what is required to establish a Metis community. On the first point, Mr Nunn says

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<sup>3</sup> *R v Howse, et al*, [2000] BCJ No. 905 (BC Prov Ct); rev'd [2002] BCJ No. 379 (BCSC); leave to appeal to BCCA granted [2003] BCJ No. 508 (BCCA) [*Howse*].

<sup>4</sup> Interview with Dan LaFrance, Whitley Lake, BC, May 7, 2013.

<sup>5</sup> *R v Willison*, [2005] BCJ No. 924; rev'd (2006) BCSC 985 [*Willison* or *Willison* BCSC].

One thing about Metis people – we always bring our culture with us because our culture is portable. It's not established to a land base, since we never had a land base like Indians did [in BC]. We used the land, but this was not viewed as "this was our land", you know, since time immemorial ... Not that we didn't have a tie to the land, culturally and spiritually, but we had more of a mobile history, a mobile culture. The mobility factor is that Metis moved where the best opportunities were for them. They lived along the road allowances because they were not wanted any other place.<sup>6</sup>

On the second point, he says

I think [the judge] was looking again for that whitewashed house, little picket fences, and rosebushes by the door, that prove without a doubt that a Metis lived here, either in the south Okanagan or in Fort Kamloops, or anywhere else. That's what they decided they wanted to see ...

On the *Howse* case it was ruled we didn't show enough of a community and we didn't show enough existing rights. They weren't applicable to us. I don't know how the judge worded it, but it was kind of a shock, after one judge on the bench saying, 'Yeah, this is the way it is' and the other one saying, 'No, it's not', you know. This is the dichotomy of legalism in adjudicating Metis rights. You're really at the mercy of judges who take two different views: either a long view of things, an open view of things, that rights do exist, they're within the constitution of our country, and this is how they look like – they look

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<sup>6</sup> Interview with Ron Nunn, Oliver, BC, August 4, 2012.

like that we harvest for cultural, ceremonial and sustenance purposes, and those rights specifically grant that. Then you have the narrow view, that says ‘No, no, no’, they haven’t defined the community, they haven’t defined the Metis community enough, rendered it down to who were the progenitors of it ... and how many Metis were at, for instance, in the *Willison* case, how many Metis lived at Fort Kamloops, where basically he uses a yardstick to determine rights. And this is where the judge was totally in error, totally in error, because no other court case has ever said there weren’t enough Indians around to have rights.<sup>7</sup>

Mr Nunn raises an interesting critique of *Powley* in the above quotation, which is that while Metis rights can only be exercised by individuals, they are dependent on the existence of a historic community, which is not a requirement for a First Nations or Inuit person trying to claim rights. It is interesting that Mr Nunn points out that *Powley* is merely an adaptation of what is essentially a First Nations case, *Van der Peet*,<sup>8</sup> and the adaptation is inappropriate because it does not recognize the mobility issues that may be more prominent for Metis people. Combining Mr Nunn’s and Mr LaFrance’s critiques, one might say that the Metis are getting the worst of all possible worlds in *Powley*, at least with respect to the protection of Metis rights as compared to the protection of other Aboriginal people’s rights.

One final critique of the possibility of using *Powley* is the questioning by some of the interviewees of what is meant by “historic”. For instance, two Elders stated that history is

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

<sup>8</sup> *R v Van der Peet*, [1996] 2 SCR 507.

always being created, and there is no point at which it crystallizes, no sharp demarcation between what is historical and what is not.<sup>9</sup> What some of the participants suggested was that the courts' fixation on historicity reflects the expectation that Metis people need to authenticate themselves and their communities, to prove that they are "really" Metis.

On a more positive note, some research participants were happy with the outcome of the three harvesting cases, because they felt that at least some aspects of Metis history and culture had been recognized by the courts, including on appeal, and that the cases had at least raised awareness among members of the public that Metis people exist and are exercising rights in BC. Research participant Dean Trumbley, a wildlife biologist, and at the time of our interview the president of the local Vernon MNBC charter community, said that he thought that at least the court in *Willison* had expanded the definition of Metis communities somewhat by holding that they were not necessarily rigidly bounded by geography; they only had to exist "on the land".<sup>10</sup> This victory rang hollow for Mr Willison, though, when the appeal judge held that while there might have been a community in the Falkland area at one time, it lacked sufficient continuity to support site-specific rights.

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<sup>9</sup> Interview with Elder Eldon Clairmont, Salmon Arm, BC, June 13, 2012; interview with Elder Goldie McDougall, Trail, BC, July 27, 2012. Similar observations about the differences between Indigenous and western approaches to historicity are made by Linda Tuhiwai Smith in *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed (London: Zed Books, 2012).

<sup>10</sup> *Willison BCSC*, *supra* note 3 at para 24. Interview with Dean Trumbley, June 19, 2012, Falkland, BC. This point is also made by Chris Andersen in "Settling for Community? Juridical Visions of Historical Metis Collectivity in and after *R. v. Powley*" in Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, eds, *Contours of a People: Metis Family, Mobility, and History* (Norman: University of Oklahoma Press) 392.

## **PART 2        VIEWS OF NEGOTIATION**

Since many of the research participants thought the benefits of *Powley*, at least in BC, were questionable, I asked whether people were more hopeful about the possibilities of negotiating protection for Metis harvesting rights with the provincial government. Most people were optimistic to some extent, but many were disappointed that, at the time I conducted my interviews, negotiations between MNBC and the province had stalled. They saw this as a result of the failure of the three harvesting cases. However, these talks have now resumed.

When I asked research participants about the potential positive effects of consultation on negotiations, some people thought that future land use studies showing the extent of Metis people's reliance on harvesting might produce helpful results. Others were cautious about revealing land use information, either because they thought harvesting was about more than just how many animals were taken and where, or because they wondered whether they could trust the crown or third parties with such sensitive information. Others were skeptical about the consultation process generally, stating that proponents and governments didn't take their concerns seriously, and stated that providing land use studies would be like giving away something for nothing.

On the other hand, some people were concerned that not participating in consultation was like saying that Metis rights didn't matter, and thus might lead to the province being less likely to negotiate with Metis people. Some people were angry that MNBC had signed agreements with third-party proponents even before consultation processes had been completed. This was seen as giving away Metis rights, and as potentially compromising relationships with First Nations

who might be opposed to MNBC-supported projects. Others were in favour of Metis signing on to certain projects, usually out of support for what they thought would be good-paying jobs for Metis people in northern BC, but were still concerned that prior discussions with First Nations hadn't taken place.

In fact, one of the biggest concerns among many research participants was the effect attempts to protect Metis rights through litigation, negotiations and consultation might have on Metis relationships with First Nations in the province. Many people thought that negotiations with the BC government should be conducted with the knowledge and consent of First Nations in the relevant areas. Participants were generally in favour of direct talks with First Nations groups, although some people had concerns that while grassroots members might be open to negotiations, leadership might oppose it.<sup>11</sup>

All the litigants stated they had tried to seek permission from First Nations in whose territories they planned to hunt, either in an official or unofficial capacity. Mr LaFrance (along with the other hunters on their planned hunt) and Mr Nunn asked permission, but were refused.<sup>12</sup>

However, Mr LaFrance stated he had been more successful in getting permission from the local First Nations to live on his trapline near Vanderhoof.

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<sup>11</sup> The Okanagan Nation Alliance applied to be intervenors in the *Willison* appeal; this was an unusual move, but the Okanagan alleged they hadn't known about the case in time to intervene at the trial level. Although the intervention application was not granted, Okanagan leaders attended the appeal hearing, which some Metis attendees found intimidating. Some online comments I viewed during this time were highly critical of the Metis, but civil, others vitriolic and derogatory. Some of the Metis people who were involved with the *Willison* case claimed to have received death threats. At the same time, it was said that this kind of behaviour was coming from the leadership, or was being promoted by the leadership, and was not truly a grassroots response. In fact, in practice, many First Nations and Metis people hunt together (and in fact are related to one another), and agreements are reached that may not go through official leadership channels.

<sup>12</sup> Mr Willison also sought permission, and initially received a positive response from someone working in the band office. He wasn't sure with whom he should speak.

### **PART 3            VIEWS OF PRACTICE**

Regardless of the outcome of litigation, negotiation and consultation, most of the participants informed me that the most important thing in protecting Metis rights was to continue to exercise them. While all participants said they believed Metis have a right to harvest without licences, or even without harvesting cards issued by MNBC or other Metis organizations, most did not see any ideological problem with getting hunting licences and tags, although for some people this did present a financial hardship. Many participants did not take issue with provincial regulatory regimes, stating that as long as they supported conservation, they were in line with Metis values. Some people thought hunting and fishing licences should be obtained, at least pending the outcome of negotiation or further litigation.<sup>13</sup> As expected, the three litigants I interviewed were all disappointed that they now had to get licences (although one no longer hunts, for health reasons). They did so, they said, because they thought it was better to practise their rights in this way than not at all.

Most of the research participants said that it was important for them to pass their harvesting and wilderness skills on to the youth, and many were actively involved in doing this. Some participants had been involved with an Aboriginal skills camp that was attended by Metis and First Nations youth.

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<sup>13</sup> One hunter did mention he had occasionally hunted without a licence, and that wildlife officers were aware of this, but didn't charge him. They knew who he was, and that he had a Metis harvesting card. Another harvester said he cut timber on crown land without a permit.

Regarding trying to obtain permission from First Nations to harvest in their territories, litigants stated they tried to be respectful by asking first, but when denied they decided to exercise what they viewed as their rights, particularly in the face of some confusion about First Nations territorial boundaries and overlaps. However, this was not viewed as being the end of the story. All interviewees hoped that negotiations with First Nations would continue into the future, but that this would take many years of intercultural dialogue. While it is possible some Metis may not respect First Nations rights or may worry that the complications of multi-party negotiations might hinder Metis-provincial talks, most of the people I interviewed said they recognized the importance of ongoing talks with First Nations. This was viewed as being especially important in light of Metis claims to mobility rights.

According to Mark Carlson, the current Kootenay region Hunt Captain, and according to the evidence given at trial in *Howse*, Metis people have been hunting in the Flathead region in the Kootenays for over 150 years. While this is not the same as exercising rights since time immemorial, and the Metis harvesters I talked to recognize this, they believe they have inherent rights, and that these rights are portable, and do not necessarily attach to particular territories. According to many of the research participants, these rights do not stem from *Powley*, or from the Canadian state, nor do they exist by virtue of permissions from First Nations groups. As Dan LaFrance says, “To me, inherent rights isn’t what we can get. I already have them.”<sup>14</sup> Community member Lois McNary of Tappen, whose two sons hunt for her, says “We’ve always hunted. We never had licences before. Whether that was legal or not, I don’t know, because that’s just the way it was ... In my family, we always hunted. And I don’t think

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<sup>14</sup> Interview with Dan LaFrance, Whitley Lake, BC, May 7, 2013.

we need a licence. We lived off the land. We're not abusing it."<sup>15</sup> Given support for the idea of portable, inherent rights, and for the idea of Metis mobility, conducting negotiations with First Nations will become more important into the future. This possibility has already been anticipated to some extent by the drafters of the *MNBC Natural Resource Act* (2010), which in s. 7.2 provides a mechanism for entering into wildlife management agreements with First Nations.

An example that could be followed in BC is that of the Metis Nation of Ontario (MNO), whose members always had the support of the Anishinabe of the region. The MNO welcomed the Anishinabek Grand Council, whose members insisted they participate in talks between the MNO and the government of Ontario.<sup>16</sup> I would hope Metis collectivities in BC might go further, and invite First Nations to speak with them in preparation for continued talks with the provincial government. Eventually, tripartite negotiations could take place. As there are many ethnic divisions among First Nations in BC, many of whom have territorial overlaps, negotiations could be challenging, but hopefully the process will be productive.

## **CONCLUDING THOUGHTS**

The research participants have suggested that to create legal change for Metis people in BC we can research our history, develop our laws and self-government, practise our rights, educate our youth, and establish good communication between ourselves and with our neighbours.

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<sup>15</sup> Interview with Lois McNary, Tappen, BC, June 17, 2012.

<sup>16</sup> Brent Olthuis makes this point, and refers to the possibility of Metis hunting in face of Anishinabe non-agreement, in "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act*, 1982" (2009) 54 *McGill Law Journal* 1 at 22.

None of these tasks will be easy. One last difficult but useful suggestion comes from litigant Greg Willison. He cautions that we should not allow the law to unwittingly change how we view ourselves. While he agrees that Metis people have inherent rights, he worries that people are trying to fit themselves within the *Powley* criteria, when those criteria may not apply. Mr Willison suggests there is a danger in too much reliance on state recognition, when the real source of change is Metis wisdom,

The Metis community, in my view, was stronger before we were recognized constitutionally in 1982. ... We were closer to the source, then, with all those older people that are almost all gone now ... Even when they started to put together the governing bodies, it just didn't seem to be the same. And today, in fact, it's very weak, the Metis community. That's why our hunting rights, it was vital that something be done ... It was about putting back aspects of our community that were being lost.<sup>17</sup>

This comment also suggests that hunting is about more than just practising our "rights";<sup>18</sup> it is about practising our law and our culture. Greg Willison asserts that harvesting could be a central part of revitalizing Metis community, if done with "the source" (i.e. respect for Metis values) in mind. Unthinkingly trying to fit ourselves with the strictures of Canadian law can

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<sup>17</sup> Interview with Greg Willison, Salmon River, BC, May 6, 2013.

<sup>18</sup> The term "rights" does not do justice (pun intended) to Metis harvesting practices; neither does the term "harvesting", which does not encompass the holistic experience of being on and with the land. I have the same difficulty with terms like "resource management", which seems to treat other beings as mere chattels to be used for human benefit, rather than as our relatives. Rights discourse has come under scrutiny for many reasons, one of which is that reliance on rights is equated with the necessity of state recognition, which is disdained by some Indigenous activists. See, for instance, the work of Aaron Mills. I have been using the term "rights" throughout this dissertation, although advisedly, because it was the term used most frequently by the research participants, who for the most part do care about state recognition of their rights. However, ongoing practice of rights was seen as ultimately more important.

cause division and cultural dilution. Greg hopes that we will not lose our communities in the process of defending our harvesting rights.

## Chapter 10

### REFLECTIONS

When I first decided to research and write about the conjunction of law and history with respect to the Metis of BC, it was in response to a conversation I had with my grandmother. After seeing a local newspaper article in Salmon Arm about the *Willison*<sup>1</sup> appeal judgment, she told me she was surprised that the court found there was no historic Metis community in the environs of Falkland. At the time, I was interested enough, as a lawyer and a Metis person from BC, to decide this was something I wanted to look into further. I had little idea that this would entail learning about my family's own "lost" history in BC, and would mean getting to know family members I never ever knew existed. I also had little idea how this project would spur me to examine my own Metis identity, to get involved in Metis governance, and to learn about Metis philosophy, values and law. It has been a long and interesting journey that is ongoing, and I have many people to thank for helping to teach me about all these things, and more.

My process as a researcher has been about creating Metis community, about re-tracing the webs that were already there, and about creating new webs. I have learned of a vast network of relations across the province and beyond. My process as a writer has been about learning about myself, and my place in the Metis web.

Because of this project, I am now more involved in the Metis communities of southern BC, especially in the environs of Falkland, where I have many relatives, and in Victoria, where I live.

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<sup>1</sup> *R v Willison*, [2005] BCJ No. 924; rev'd (2006) BCSC 985 [*Willison* or *Willison BCSC*].

I now have a close relationship with my newly-discovered cousin, Elder Lottie Kozak, one of the witnesses in *Willison*. She lives down the road from one of my other cousins, whom I've known all my life. I have met other relatives in my research participants, in Trail (Goldie), in Kamloops (Brenda) and in Whitley Lake (Dan), and have also discovered some of my research participants (Warren, Lois, Pat) knew some of my relatives, but didn't know they were Metis.

While, at first glance, this absence of connection may seem to negate the claim of Metis community, I believe this is a reflection of the time that Metis identification went underground. The traces of connection were there all along, to be picked up at a more favourable time when community could be reconstituted.

The many times my family's paths crossed with Greg Willison's family are also a sign of those faint traces of history that were just waiting to be illuminated.

The appeal court in *Willison* suggests these traces of loose affiliation are not enough to make a community, especially when those people so loosely affiliated live in such a wide geographic area, pursuing their various dissimilar ways of life.

For me, part of the problem with the *Willison* splits is that the court is applying a definition of a localized community to what is a community-as-part-of-a-nation. Perhaps this goes back to some of the difficulties Metis people have had with the definitions of "community" and "nation" not quite encompassing the overlapping national/community polities that make up Metis society, and not taking into account the broad and complex notions of territory that

Metis society embodies. As I tried to illustrate in Chapter 8, applying the *Powley*<sup>2</sup> definition of community to Canada creates a multitude of problems. Even applying the definition to a localized community such as Victoria would create the problem that not all people are living “a common way of life”. To take account of the Metis perspective would be to see the Metis as a people (or peoples), which means that not everyone lives all the time in the same geographic area, or has common lifeways. The community conundrum is created by an over-focus on western notions of community that do not describe the Metis nation, or even local communities. (I also doubt they really apply to settler communities in Canada.) Discussion of the possibility that the Metis are a people – or a confederacy of peoples – was not discussed by the court in *Powley*, likely because peoplehood would imply sovereignty, which would challenge the sovereignty of the crown.<sup>3</sup>

### **COMMUNITY, HISTORY, MOBILITY AND RIGHTS**

Another significant difficulty with the community conundrum is the lack of recognition of the importance of mobility to Metis people, and the insistence of the courts that harvesting rights be site-specific. I will provide a short history of my own family, which is essentially the history of the Metis, to illustrate this.

My family’s earliest progenitors in what is now known as Canada came from Anishinabe, Cree and Six Nations territories; I am also descended from French settlers to Québec. Later, my

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<sup>2</sup> *R v Powley*, [1999] 1 CNLR 153 (Ont Prov Ct); aff’d [2000] OJ No. 99 (Ont SC); aff’d [2001] OJ No. 607 (Ont CA); aff’d 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

<sup>3</sup> According to Aboriginal rights jurisprudence, one of the purposes of s. 35 of the *Constitution Act, 1982* is to effect reconciliation between Aboriginal “occupation” and crown sovereignty, rather than between competing crown and Aboriginal sovereignties.

relatives worked for the Hudson's Bay Company and Northwest Company based in Ontario, and allied with settlers from the Scottish highlands and islands, who married into their families. Their children were some of the earliest European-descended people living at Red River. My family was involved with the fur trade wars, Cuthbert Grant's resistance, and later took various positions on (or were neutral regarding) the Riel Resistances. Some of them went north and intermarried with Dene people. Some of those people stayed, and some ended up in Alberta, working at Fort Edmonton and Rocky Mountain House. Some of them left Red River to go on the Sinclair expedition across the prairies, through BC, Washington, and down to the Willamette Valley in Oregon. Some stayed, and some went back to Red River. Some left Red River to go to BC and stayed, marrying Metis and First Nations people, and settlers. Their descendants live all over the province. Some of the people still living at Red River took scrip after the creation of Manitoba, but afterwards went to Saskatchewan. During the second Riel Resistance, to avoid prosecution – or worse – some of those people went to Montana and North Dakota. Some stayed, marrying into the Turtle Mountain Band of Chippewas in North Dakota. Some went to Oregon, to live near relatives who were already there. Some went back to Canada, living for a time in Saskatchewan, and eventually coming to BC. My mother was born in Saskatchewan and grew up partly there, and partly in Salmon Arm. My mother's mother was born in Saskatchewan; her parents were born in North Dakota. They attended residential school there, and met through a hole in the fence between the boys' side and the girls' side. My mother's father was also born in North Dakota, four miles from the border, and came to Saskatchewan as a young boy. My father, who was born in Calgary, is Jewish, his grandparents from various parts of Europe. I was born in Halifax, lived briefly in Ontario, and

grew up in BC, both in the Lower Mainland and in “the environs of Falkland”. I have also lived in Alberta and overseas, and have travelled in Asia, the Middle East, North Africa, Europe, and throughout North America.

While I would describe this as in some ways a typical peripatetic Metis family and personal history, the existence of these webs begs the question – where would I have provable Metis rights? I have ancestral Metis connections to many places, as well as ancestral non-Metis connections to many places. I have non-ancestral connections to many places, including places where some of my Metis ancestors lived. What if I had been caught fishing without a licence at the mouth of the Capilano River, as I almost did one day before my law journey ever began?

While I grew up in Coquitlam and lived in Vancouver for many years, I don’t have an ancestral connection to the Lower Mainland that I know of. And it might be difficult to find evidence of the existence of a historic Metis community in the region. Questions would then flood in: is Vancouver close enough to Fort Langley? Was Fort Langley really a Metis community? Is there continuity? If I had been, say, hunting in the environs of Falkland, I might have fared similarly to Greg Willison, or perhaps slightly better, as I am related to Metis people who travelled along the Brigade Trails and lived at the trading posts in BC in the early 1800s, and who settled in the Okanagan valley and environs in the mid-1800s and actually stayed. However, what if I had been hunting in Falkland, but lived in Victoria (a likely scenario)? Even if there was found to be a historic Metis community in Falkland, and I had an ancestral connection to it – and even if there was found to be continuity with the present-day community, there would still be a disconnect.

My and my family's wanderings have convinced me it would be very difficult for me to evade the community conundrum under any configuration, despite having documented Red River ancestry, an ancestral connection to many parts of Metis territory, including in BC; despite self-identification, community acceptance; and despite living in a community (Victoria) and being associated with a community (Thompson/Okanagan) that could – in my view – meet the *Powley* criteria as being "historic".

As I discovered, these were the kinds of issues that similarly frustrated other Metis people in southern BC, and particularly frustrated the rights claimants in the Metis cases.

#### **DISSERTATION SUMMARY**

In this dissertation, I have tried to give voice to community members' concerns, and to listen to their suggestions about how to grapple with the community conundrum. In the Dissertation Summary, I tried to create a stand-alone summary of my research project that also interlinks with the main body of the dissertation. In the Dissertation Summary, I also introduced the 23 research participants. In Chapter 1, I introduced the problem of the community conundrum and how it might be addressed by my research. In Chapter 2, I provided some historical and other background to the community conundrum, and in Chapter 3, I provided the background to the *Powley* case and the BC cases, and gave their histories. These first chapters together characterized the problem of the community conundrum. In Chapter 4, I described how I planned to investigate the problem and responses to it, and also gave some rationales for the processes I chose to use. The remaining chapters described the Metis responses to the issues in *Willison* (Chapter 5), and their broader critiques of the lack of proper understanding and

consideration of BC Metis history in the law (Chapter 6) and the lack of taking Metis perspectives into account (Chapter 7). Chapter 6 looked at the historiography of the Metis in BC and how it related to the evidence presented in *Willison*, and Chapter 7 proposed the need for Metis critical approaches to law (MetCrit). In Chapter 7 I also rationalized the philosophical foundations for my particular MetCrit approach and supported my approach with examples from various Metis sources. Further, I suggested some non-Metis, but potentially Metis-friendly, sources for MetCrit. To round out my critique, based on all I had learned, I interrogated the three-way splits in *Willison*, and revealed how they are not supportable on a Metis analysis. Finally, in Chapter 9, I presented the research participants' suggestions for how to deal with the community conundrum, and how to go forward despite it. In Chapter 9, the participants also suggest ways to create positive change for Metis people and Metis rights in BC.

### **SOME FURTHER THOUGHTS ABOUT METIS IN BC**

I think that courts could accept non-Red River Metis as Metis within *Powley*,<sup>4</sup> but I would also like to suggest there are certain "Indigenous Metis" in BC that should be accepted as part of the historic Metis nation, and thus be recognized by *Powley*. This is because to do otherwise creates ridiculous situations like the one theorized in Barman and Evans, in which members of the same family would be treated differently by Canadian law. To do otherwise also ignores the reality that the Metis nation is always becoming. The Metis in BC are an extension of the

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<sup>4</sup> See Jean Barman & Mike Evans, "Reflections on Being, and Becoming, Métis in British Columbia" (Spring 2009) 161 BC Studies 59.

greater Metis nation; while not all mixed ancestry people would be part of this nation, some people might be, depending on family and community connections.

### **SOME FURTHER THOUGHTS ABOUT METCRIT**

While MetCrit might not directly improve outcomes for Metis rights claimants in Canadian courts (unless a dialogue could be established between Canadian and Metis legal systems and principles), it could further the understanding of Metis legal, cultural and political situations in BC, especially as Metis people become stronger and more organized politically, and especially as issues of our harvesting rights are being litigated and negotiated. Ideally, MetCrit could be used to obtain a more realistic picture of the intersection of Metis history and law. This is evidenced by the actual critique generated in conversation with the research participants.

However, I also hope MetCrit could help to address the broader questions of how to contribute to Metis self-determination, positive identity formation, and successes in dialogue with other Indigenous nations and the state.

While MetCrit would be primarily designed to be used by Metis people, it could also open dialogue with other Indigenous thinkers seeking to expand their perspectives, and could hopefully encourage non-Indigenous thinkers to take Metis philosophy seriously.

Finally, and perhaps most significantly, MetCrit could emphasize the importance of Metis legal and political concepts of community. It could suggest that Metis understandings of community and peoplehood could contribute to the development of Canadian law, as well as to Metis self-government.

I have alluded a number of times to the fact that the Metis, though a so-called “impossible” people, nevertheless exist. This so-called impossibility is, in fact, engendered by a kind of colonialist thinking, to which many of us have become habituated. This thinking fixates on definitions to the detriment of dialogue; it promotes reification rather than relationship. I call this thinking “colonialist” not because it derives from European philosophy – after all, much of the post-modernist thought that critiques enlightenment-derived liberalism and materialism is also European (think, for instance, of Jacques Derrida, Paul de Man, Gilles Deleuze, Rosi Braidotti). I call this thinking “colonialist” because, like liberalism and materialism, it has been used by colonizers as a justification for entrenching static perceptions of Indigenous peoples, creating legal leg-holds aimed at political marginalization and cultural erosion/ossification. The impossibility of Michif is created by a reflex of reductionism, a dialectic of division. European “enlightenment” thinking, proposing to be scientific, over-valuing classifications and hierarchies, has led us to mimic the butt of the judicial joke, “If you can think of two things as being separate when they in fact have some logical connection, then you can think like a lawyer.” Hair-splitting, the creation of ever-finer distinctions, has become the hallmark of proper analytical reasoning. While I certainly wouldn’t want to suggest the uselessness of various forms of analytical reasoning, which of course exist in Metis and other Indigenous philosophies, I do think we have become constrained by the kind of analysis that leads to false dualisms.<sup>5</sup>

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<sup>5</sup> Further to this, of course there is room in Metis philosophy for distinctions and classifications. Such forms of mental processing are not inherently “western”; in fact, Tibetan Buddhist philosophy, for example, is ornately organized, but is also greatly concerned with non-dualism. I am not intending to create a false duality between distinction and dualism. It seems to me that in Metis thinking there is an awareness that distinctions and classifications are functional, not foundational.

Throughout this dissertation, I have argued that harm is caused to Metis people by problematic (e.g. colonialist) definitions, including those that create the community conundrum. What concerns me most is that sometimes we internalize and even deliberately apply such definitions to ourselves.

I hope we can reclaim and develop Metis ideas that are rooted in Indigenous, European and other philosophies, and that are continually becoming Metis.

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