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Article

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Dealing with the "Community Conundrum": Metis Responses to the Application of R v Powley in British Columbia—Litigation, Negotiation, and Practice

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Introduction

The Metis[1] have been called the "forgotten people" (Sealey and Lussier 1975)—people on the margins: living on road allowances, and alienated from both newcomer and Indigenous societies. These views have begun to change as a result of Metis political activism and cultural revitalization, with one result being the recognition of Metis as an Aboriginal people with protected rights under s. 35 of the Canadian Constitution Act, 1982.[2] Government studies such as the 1994 Royal Commission on Aboriginal Peoples and the 2013 Senate report on Metis identities have highlighted the importance of the Metis people within Canada and the need for Metis-Crown reconciliation. Recent Supreme Court of Canada (SCC) cases R v Powley (2003),[3] Manitoba Metis Federation v Canada (2014), and R v Daniels (2016), resulting from Metis efforts to protect legal rights, have also helped to advance Metis visibility.[4] These cases have created public awareness; more than ever since perhaps the late 1800s, Metis history, lands, and rights are subjects

1 I use the term "Metis" to denote all self-identifying Metis people, keeping in mind that this is a contested term. "Métis" is used where it appears in other works. A robust discussion of questions of Metis identity, which are divisive and complex, is beyond the scope of this paper. For various views on the formation of Metis political and cultural identities, see, e.g., Peterson and Brown (1985); Bell (1991); Chartrand (2002); St-Onge, Podruchny and Macdougall (2012); Adams, Dahl and Peach (2013); Andersen (2014). I discuss this topic at length in my dissertation (2016). Ultimately, decisions about identity are both private and communal and, in the context of Metis polities, will be made as an incident of self-determination and collective consensus-building.

2 Section 35(1) of the Constitution Act, 1982 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." Metis advocated for inclusion in s. 35 (Wherrett 1991; Teillet 2012), although debate exists about how the term "Métis" was or should have been defined (see Adese, 2016).

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

4 The SCC has held that Metis people may have Aboriginal harvesting rights (*Powley* 2003), that the federal government failed to uphold its obligations to preserve Metis lands following Manitoba's entry into confederation (*Manitoba Metis Federation* 2014), and that Metis people and lands are under federal jurisdiction (*Daniels* 2016).

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for national discussion and debate.

In British Columbia, however, Metis people are still largely "forgotten" in public discourse. This may seem curious, given that primary sources (e.g. explorers' diaries, church records, fur trade company records, oral histories) suggest Metis have had a presence in BC for at least 200 years, and the most recently published national census (2006) documents over 59,000 people in the province who identify as Metis.[5] However, secondary source materials on the Metis in BC are few,[6] and Metis oral history in BC has only just begun to be studied (e.g. Evans et al., 1999; Evans and Prince George Métis Elders Society 2004; Dolmage 2010).

Metis history and its interpretation—in BC and across Canada—have taken centre stage since the Powley case created a test for s. 35 Metis rights that includes having to show historical community continuity in an area where a right is being exercised, as well as ancestral ties to this community (paras. 21–35, 45). While only three of the more than fifty cases that follow Powley have been successful for Metis claimants, the situation in BC is even more dismal. Although many BC Metis rely on hunting, fishing, and gathering for sustenance, the BC government takes the position that, despite Powley, Metis harvesting rights do not exist in the province, and it therefore instructs its employees, "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" (Government of British Columbia 2011). The province's position derives from the fact that all three Metis rights claims in BC following *Powley* have been unsuccessful.[7] According to the courts of final decision in *R v Howse* (Kootenays),[8] *R v Nunn* (south Okanagan),[9] and *R v Willison* (Thompson/Shuswap),[10] the claimants were convicted of hunting-related offences because they were not able to provide sufficient evidence that Metis have historic communities in

5 The 2016 census data on Aboriginal identity will be published October 25, 2017. MNBC gives the Metis population of BC as approximately 70,000: <www.mnbc.ca/contacts>.

6 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 and Goulet (2008). Some of the few academic works that discuss BC Metis history specifically are Barman (1996); Van Kirk (2006); Barman and Evans (2009); Evans, Barman, and Legault (2012).

7 It is curious that the BC government takes the position that this is the case across the province, even though the areas at issue in the BC cases cover only a portion of the southern part of the province, and the application of the *Powley* test is dependent on the facts of each particular case.

8 *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 [*Howse* or *Howse* appeal].

9 *R v Nunn*, [2003] BCJ No. 3229 (BC Prov Ct) [*Nunn*].

10 *R v Willison*, [2005] BCJ No. 924; rev'd 2006 BCSC 985 [*Willison* or *Willison* appeal].

BC.[11] In part, this was because of lack of access to primary historical sources and lack of sufficient secondary sources, but it was also because what little literature exists has been seen through the lens of colonialist assumptions, and non-recognition of Metis realities.[12]

Given the lack of secondary research on Metis history in BC, it is difficult and expensive for claimants to gather historical evidence.[13] Sometimes, evidence is simply not readily available. For instance, one of the issues in the *Willison* trial was documentation of the number of Metis people living in and around Fort Kamloops. Even though expert historical evidence was tendered suggesting a Metis presence in the area during the early land-based fur trade period, the appeal judge held that this presence was insufficient to support the existence of a Metis "community" (*Willison* appeal, para. 44). Two weeks after the case wrapped up, Oblate records were unsealed showing the presence of more than seventy Metis individuals at Kamloops at the relevant time, many of whom would have had families. According to participants in my dissertation research about the application of *Powley* in BC (Sloan 2016), if this information had been available at the time of trial, Greg Willison's case would have been appeal-proof. Unfortunately, due to a lack of funds and other issues, a retrial was not pursued.[14]

The BC courts' failure to take Metis perspectives into account is rooted in the *Powley* requirement that s. 35 rights be vested in "historic" Metis "communities" (i.e. existing before "effective European control", para. 18), and that these communities have continuity with present-day communities. The SCC defines a "Métis 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" (*Powley*, para. 12). As many authors have pointed out, this test is problematic for a number of reasons, including the fact that it results in an over-focus on historicity and authenticity, with a concomitant skepticism about recent community revitalization, and an insistence on overly localized descriptions of Metis (Olthuis 2009; Ray 2011; Andersen 2012; Grammond and Groulx 2012; Wolfart 2012: Teillet 2013; Grammond, Lantagne, and Gagné 2016; Sloan 2016). Similarly, the interpretation of *Powley* by the BC courts of final decision in *Howse*, *Nunn*, and *Willison* includes the expectation of BC-based ethnogenesis, BC-centred political cohesion, and BC-distinctive cultural practices, rather than seeing local Metis communities as expressions of Metis nationhood (Sloan 2016; 2017).

Since the decision in *Willison*, Metis rights litigation has not been pursued in BC as,

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11 *Howse* appeal, *supra* note 6 at para. 34; *Nunn, supra* note 7 at para. 33; *Willison* appeal, *supra* note 8 at para. 44.

12 These were the views of the BC Metis participants in my dissertation research about the application of *Powley* in British Columbia (Sloan 2016).

13 See Teillet (2004) on this point generally.

14 The Oblate Fathers still require researchers to obtain written permission in order to access their records, held at the Archives of British Columbia. This requirement will remain in place until 2030. Oblate records held at the British Columbia central office in Vancouver are not available to the public, as the Oblates do not have an archivist who can oversee them.

unfortunately, Metis s. 35 rights have been rendered meaningless in the province, except perhaps in the context of consultation and negotiation. Their recognition by courts would require extensive—and expensive—historical research, plus a willingness to consider Metis perspectives. Provincial harvesting rights negotiations have only recently resumed after a long hiatus, possibly in light of *Daniels* (Federal Court of Appeal 2013; SCC 2016), which does not impose a "community connection" test. However, as *Daniels* is not about rights, but simply about Metis being a federal "matter" under the constitution (*Constitution Act, 1867*, s. 91(24)), it is not clear whether it can be the basis for the BC government to agree to a Metis harvesting rights accord. The closest the BC Crown has come to acknowledging Metis rights in the province is in the triggering of a medium degree of consultation for the proposed BC Hydro Site C Dam project, based on Metis land-use studies in the Peace region, site of a Metis community documented by a non-Indigenous schoolteacher in the 1920s.[15]

In this paper, I briefly examine the disjuncture between the historic Metis presence in British Columbia and the *Powley* community connection test. I call this disjuncture "the community conundrum," as the need to provide proof of the existence of historic Metis communities in order to ground rights forces Metis people to define themselves and their communities in unrealistic ways, thereby creating the bind of having to accept state definitions of Metis history and political organization in order to attract state rights recognition. While, ostensibly, the purpose of *Powley* is to protect Metis practices as expressed within Metis communities (para. 13), the result of *Powley* is to force Metis to define themselves on a community rather than on a national basis. Whether "historic" Metis "communities" exist in BC—a matter of some contention, as we shall see—the *Powley* court's focus on historicity, and its inappropriate definition of "community," is problematic. The fact is that Metis do exist in BC, and have done for generations, and our rights are neither recognized nor protected.

As a BC Metis lawyer and legal scholar, as someone who has been involved with local Metis governance and rights consultation, and as a harvester, I am interested in how Metis people in BC have been responding to this reality. My purpose in writing this paper is to present Metis perspectives both on the problem of the "community conundrum" and on the relative usefulness of Metis rights litigation, negotiation, and practice in British Columbia as vehicles for resolving it.

Methodology

Twenty-three Metis people[16] from the southern BC interior shared their perspectives with me about problems with the application of the *Powley* historic community connection test

15 While it is undoubtedly Metis efforts at documenting land use that have led to this result, it is telling that the only Metis community even grudgingly acknowledged by the Crown is one for which there is non-Metis corroborating evidence: see Andrews (1985).

16 For the purposes of my research, I interviewed people who self-identified as Metis, and were recommended to me by Elders and community leaders as being part of the wider Metis community/nation, regardless of Metis political affiliation or ethnicity.

in the three BC cases, *Howse*, *Nunn*, and *Willison*, and the need to respond to these and other Metis legal issues from Metis perspectives (Sloan 2016).

Research participants included Elders from Falkland, Salmon Arm and Lumby (Thompson/Shuswap/north Okanagan), who serve people in neighbouring areas, as well as an Elder from the Kootenays and an Elder from the south Okanagan, reflecting the three regions at issue in *Howse*, *Nunn* and *Willison*. Participants also included those directly affected by the three cases, either as rights claimants (defendants) or as witnesses. Finally, community members from the regions affected by the three cases also participated in the study.[17]

The research methods and approach were, as far as possible, carried out in line with Metis values and protocols, and with scholarship on Metis and other Indigenous research methodologies.[18]

Because I interviewed twenty-three people and the length of this paper does not permit the use of extensive quotations, for the most part I will summarize and interpret what the research participants said, quoting only occasionally.

Litigation, History, and the Community Conundrum

Litigation

Powley is the leading Metis rights case in Canada. The portion of the ten-part *Powley*

17 Thank you to all research participants (listed in chronological order of interview): Elder Eldon Clairmont (June 13, 2012, Salmon Arm); Elder Lottie McDougall Kozak (June 15, 2012, Falkland); Lois McNary (June 17, 2012, Tappen); Brenda Boyer Percell (June 18, 2012, Kamloops); Wayne Bousquet (June 19, 2012, Salmon Arm); Warren Ogden (June 19, 2012, Salmon Arm); Dean Trumbley (June 19, 2012, Falkland); John Sayers (June 21, 2012, Salmon Arm); Pat Normand (June 21, 2012, Eagle Bay); Mark Carlson (July 26, 2012, Trail); Elder Goldie McDougall (July 27, 2012, Trail); Bill Gagné (July 28, 2012, Vernon); Lori Michon Nicholson (July 30, 2012, Enderby); Lenore Willison (July 31, 2012, Salmon River); Sandy Milner (July 31, 2012, Vernon); Janet Gagné (August 1, 2012, Vernon); Elder Ann McBeth (August 1, 2012, Lumby); Elder Don McBeth (August 1, 2012, Lumby); Beryl Beaupré (August 3, 2012, Vernon); Elder Margaret Penner (August 4, 2012, Oliver); Ron Nunn (August 4–5, 2012, Oliver); Greg Willison (May 6, 2013, Salmon River); Dan LaFrance (May 7, 2013, Whitley Lake). Participants responded to questions about, among other things, their perspectives on the cases, on Metis views of history, territory and community, and on Metis values and ideas that should inform legal critique.

18 Thank you to Metis Elders Lottie McDougall Kozak, Eldon Clairmont and Samantha Sansregret for your knowledge and guidance. While the field of Indigenous research ethics and methodologies is burgeoning, little has been written explicitly about Metis research. One of the few guides to Metis research ethics was prepared for the Métis Centre at the National Aboriginal Health Organization (NAHO) after consultation with Metis researchers, students and organization members: "Principles of Ethical Métis Research" (2011), online: <www.naho.ca/metiscentre>. Important principles outlined in this guide include reciprocity, respect, safety, inclusivity, recognition of diversity, relevance and responsibility. Work on Metis research by McCallum and Edge (2006), Ghostkeeper (2007), Iseke and Moore (2011), Gaudry (2011), and Evans (2009; 2012) has also influenced my methodological approach. Other influences include Cajete (2000); Wilson (2008); Kovach (2009); Chilisa (2012); and Walter and Andersen (2013).

test[19] for Metis Aboriginal rights that is relevant to the historic community connection test requires a claimant to prove that 1) the claimant has an ancestral connection to a historic Metis community where harvesting rights were exercised; and that 2) there is continuity between the historic and the contemporary community.[20] "Historic" in this context implies continuity from a date prior to "effective European control" (*Powley*, para. 18) in the relevant region. These requirements are problematic, in part because of the lack of awareness about the Metis of history of BC, and in part because Canadian Metis rights law is rooted in colonialist assumptions and ignores Metis perspectives about history, territories and communities (Sloan 2016; 2017). These assumptions allow courts to impose modern, Eurocentric notions of community identity on Metis groups, which has the paradoxical effect of freezing Metis identity at some point in the past. Similarly, concepts of Metis territory in *Powley* reflect assumptions based in English property law (Teillet 2013), which do not reflect the historical realities of Metis communities.

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.[21] The Métis National Council and its provincial subsidiaries, including the Métis Nation of British Columbia (MNBC), have created citizenship and harvester registries that closely follow the *Powley* criteria. 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" (2003, iii). The SSCAP submitted its report after hearing the testimony of Metis people from across Canada, as well as from academics. At the same time, negotiations are ongoing between Metis political associations

19 Steps 2, 3, 4 and 7 of the ten-part test for Metis rights in *Powley* comprise the "community connection test," Step 2 (paras. 21–23) requires identification of the "historic rights-bearing community" where the impugned harvesting (e.g. hunting, fishing, trapping, gathering) took place. Step 3 (paras. 24–28) requires identification of the "contemporary rights-bearing community," and proof that the modern community is a continuation of the historic community. Step 4 (paras. 29–35) requires proof of the claimant's membership in the subject community. This includes proving a) self-identification as a member of the community; b) ancestral connection to the community; and c) acceptance by the community. Step 7 (para. 45) requires establishment of continuity between the historic community practice and the contemporary right.

20 Jean Teillet (2013) asserts that a more correct interpretation is that the test for continuity should refer to the continuity of the practices of the community, rather than to the continuity of the community itself. Horton and Mohr (2005) also make this point.

21 In British Columbia, documentary and oral history projects are currently being conducted in collaboration with the Métis Nation of BC. See, for instance, the BC Métis Mapping Research Project: <http://document.bcmetiscitizen.ca/>. For a description of this project, see Corbett et al. (2015).

and the provinces to create agreed-upon Metis harvesting laws.[22] I conjecture that 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.[23]

Since *Powley* was decided, it has been followed more than fifty times, and in only three cases have the Metis claimants been successful (*R v Laviolette*, Saskatchewan Provincial Court 2005; *R v Belhumeur*, Saskatchewan Provincial Court 2007; *R v Goodon*, Manitoba Provincial Court 2008). Significantly, these cases are from the so-called "Metis heartland" of the prairies, an area in which the existence of historic Metis communities is relatively uncontroversial.

In British Columbia, the success rate of Metis rights litigants is even lower. Of the three BC harvesting cases decided since the *Powley* case began, all have been decided against the Metis claimants, in great part because the claimants could not meet the historic community connection test.

The first Metis harvesting case in BC, Howse (2002), was the result of charges being laid against six Metis hunters who participated in a planned subsistence hunt in the Kootenays in southeastern BC, a traditional Metis hunting area. At trial, the judge was sympathetic, and accepted that Metis people had persistent, wide-ranging communities, and Aboriginal harvesting rights. His decision followed Mr. Justice O'Neill's reasoning in *Powley* at the Ontario Superior Court of Justice,[24] which was not based on the community connection test (this was developed in *Powley* at the Ontario Court of Appeal[25]), but was similar to *R*

22 Prior to the Supreme Court decision in Powley, provincial Metis political groups entered into harvesting-related MOUs with Saskatchewan (1995) and Manitoba (2002). Following Powley, in September of 2004, the Métis 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), 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 seventeen 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 launched its "hunt for justice," taking Metis rights claims to court; however, its test case, R v Hirsekorn (Alberta Court of Queen's Bench 2011), was not successful. For a critique of Hirsekorn, see Drake (2013). In July of 2004, the Métis 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 (Ontario Court of Justice 2007), in which the court held that a geographic limitation would not apply. Ontario now recognizes Metis harvesting cards, but caps the number of cards, which is contrary to the agreement. In 2012, the Manitoba Métis Federation signed a harvesting agreement with the Manitoba government. Please see below for a description of Metis-provincial negotiations in BC.
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.

23 See Imai (2004) on the advantages, in light of *Powley*, of pursuing both litigation and negotiation.

24 (2000), 47 OR (3d) 30 (Ont SCJ).

25 (2001), 53 OR (3d) 3 (Ont CA) [*Powley OCA*].

v Sparrow (SCC 1990), which required proof that the impugned practice was an integral part of a distinctive Aboriginal culture. The claimants called Metis Elders, Hunt Captains, and other knowledgeable Metis people to give cultural and historical evidence, but did not present any written historical evidence, partly because it was difficult to find, and partly because their *Sparrow* analysis created a focus on cultural rather than historical continuity. The trial judge decided in favour of the rights claimants. However, because the *Powley OCA* decision created the community connection test (*Powley OCA*, para. 90) and was rendered following the trial decision in *Howse*, the Crown in *Howse* appealed. Their appeal was successful; the appeal judge held that there was simply not enough evidence on the record[26] of a continuous historic Metis community in the Kootenays (para. 34). Leave to appeal was granted, but not pursued.

The next case, *Nunn* (2004), was a possession of wildlife case from the south Okanagan, and followed the *Powley OCA* decision. The claimant, Ron Nunn, did not have counsel, but presented a binder of his own historical research and called a number of witnesses, including Elders and Hunt Captains. The court decided against Mr. Nunn on the basis that, in its view, there was not enough evidence presented of a continuous historic Metis community in the south Okanagan (para. 33). Mr. Nunn chose not to appeal.

The last of the cases, *Willison* (2006), was the most significant, as it followed the *Powley* Supreme Court of Canada decision (which expanded on the historic community focus in *Powley OCA*), but also because of the volume of historical evidence considered and the complexity of reasons delivered. The *Willison* case arose out of charges against Greg Willison for hunting without a licence and out of season in Falkland, near his home, which is approximately thirty kilometres from Salmon Arm in south central BC. Falkland is on the portion of the historic Fur Brigade Trail between Kamloops and Vernon (see Gibson 1997).

In *Willison*, the *Howse* scenario repeated: at trial, the judge in *Willison* was sympathetic, and accepted both the oral and written historical evidence presented as proving the existence of a continuous historic Metis presence in the area. However, on appeal, Mr. Justice Williamson held that the trial judge had erred by importing a twenty-first century perspective of community into his analysis of whether there was a historic community in the area. Rather than a group of people meeting the *Powley* definition of community—"a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life" (para. 12)—he found a "loosely affiliated group of people of mixed ancestry living in a wide geographic area" (*Willison* appeal, paras. 46–48), and therefore not a group that fit the "proper" description of a historic Metis community.[27] Further, he found that, even if there had been a historic community, there was not enough continuity between it and the modern community to support a site-specific right (para. 49).

Because of the failure of the claimants in the three Metis harvesting rights cases, the provincial Crown has taken the position that there are no historic Metis communities in BC

26 For a discussion of some of the evidence presented in *Howse*, see Grammond and Groulx (2012).

27 For a discussion of some of the evidence presented in *Willison*, see Bellemare (2006).

and, thus, the principles of *Powley* do not apply in the province. However, in practice, BC has been talking intermittently with MNBC and other Metis groups. Meanwhile, MNBC has asked its members to obtain hunting licences and tags.

History

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. Yet, Metis are also distinctive.

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.[28] The connections among these various groups have confounded simplistic notions of who Metis are, and how they are connected, in much the same way that Metis people generally have confounded simplistic notions of heritage and culture.

Historians Jean Barman and Mike Evans (2009) 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. In the Thompson-Okanagan region, for example, many Metis families, including my own, married into the Secwepemc (Shuswap) and Syilx (Okanagan) nations.[29] 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. Barman and Evans, along with Metis historian Gabrielle Legault, have expanded on the tracing of Metis networks in BC.[30]

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28 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 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. Even the simple term "mixed" implies ideas of breeding, which some people may find offensive.

29 The LaRocques married into the Tk'emlúps (Kamloops) First Nation (e.g. Fromhold 2011); the McDougalls married into the Syilx nation (e.g. Louis 1996).

30 The views of Barman, Evans, and Legault have been challenged by Duane Thompson (2016). In his article, Thompson asserts that the "Metis" people that the authors refer to (Barman and Evans 2009; Evans, Barman, and Legault 2013) in Tsilhqot'in (Chilcotin) territory in central BC were really "mixed-ancestry" people. Barman's more recent work on French Canadian men and Indigenous women in the Pacific Northwest (2014) in my view does not negate her earlier work that deals with Metis people in the same region.

Historians of the Metis in BC acknowledge that Metis (or proto-Metis) may have been in what is now BC as early as the late 1700s, as explorers, guides, and fur traders (Goulet and Goulet 2008; Watson 2010).[31] It is not clear whether Metis were at the BC coast with the maritime fur trade as early as the late 1700s,[32] 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 on the Pacific slopes.[33]

The merger of the North West Company (NWC) and the Hudson's Bay Company (HBC) in 1821 resulted in part from the Metis uprising in Red River over HBC attempts to control Metis traders from the NWC. Fort Shuswap, a NWC post, and Fort Cumcloops, an HBC post,[34] were combined after the merger, and became Fort Kamloops. The number of Metis families living at or near this fort became a point of contention in the *Willison* case.

Beginning in the 1810s, 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 fur trading posts at Fort Langley, Kamloops, Prince George, and Fort St John, among many others. Metis also settled in the Nanaimo and Victoria areas, as early as non-Indigenous settlement occurred there. Trading routes included those through northeastern and central BC, and across the

31 Early Metis in what is now known as BC included Francois Beaulieu, a guide and interpreter with Alexander Mackenzie's expeditions to the Arctic Ocean in 1789 and the Pacific Ocean in 1793; and Metis explorers Jean-Baptiste ("Waccan") Boucher, interpreter and guide for Simon Fraser, and Charlotte Small, the wife of David Thompson. In the early 1800s, Metis Jacques Raphaël ("Jaco") Finlay traded in the Kootenays, and his descendants became part of the fur trade in the Flathead region (Watson 2010). The Flathead is on the border shared by BC, Alberta, and Montana, and is a well-known hunting area for Metis even today (interview with Mark Carlson 2012).

32 J. R. Miller (1989) suggests there were Indigenous/non-Indigenous families that arose as a result of the maritime trade.

33 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 established in the far northwest before European explorers and traders. Ron Nunn expressed a similar idea to me in his interview (2012). Watson (2010) cites Matthews et al. (1987) as a source for information about Indigenous trade between the northern prairies through what is now northern and central BC (Athabasca and Columbia Department routes) into Washington and Oregon. According to Matthews et al., archaeological evidence suggests trade had been carried out on these routes through Edziza (upper Stikine) for at least 10,000 years, and through Anahim (Chilcotin) for at least 5,000 years.

34 A group of Metis LaRocques were associated with the trading post at Rocky Mountain House, traded into Secwepemc territory near Kamloops and knew the Klyne family—the ancestors of Greg Willison of the *Willison c*ase. It is not clear whether these LaRocques were related to the Joseph LaRocque who was head of the Kamloops NWC post, or the Joseph LaRocque who worked at the Kamloops HBC post. See MacLaren (2007); Fromhold (2011). Tk̓emlúps Nation Elder Christine Tronson says the LaRocques were "the foundations of the reserve": "Interview with Christine Tronson," *Kamloops This Week,* August 23, 2012.

Rocky Mountains, comprising the Columbia Department (present-day BC, Washington, and Oregon) and the Athabasca Department (present-day BC, Alberta, and NWT). These routes were linked to others across Canada eastward and northward.

In the BC southern interior, the Fur Brigade Trail traversed the land from the northern and central posts[35] to Fort Kamloops/Shuswap, and on through Monte Creek, through Grande Prairie (Westwold) and Falkland, and down through the Okanagan valley to posts at Similkameen/Keremeos and Osoyoos.[36] This trail followed the Columbia River through Fort Okanogan in what is now Washington to the river's mouth at Fort Vancouver.[37] 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.[38] 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 in 1841 to settle Oregon territory for the British.[39] 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 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, fifty 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 modern Highway 3), 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).

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35 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 Gibson (1997).

36 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).

37 Alexander Ross was a Scot who married an Okanagan woman and settled in Red River. In 1811, Ross, along with his colleague David Stuart, 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.

38 For a history of the Indigenous/non-Indigenous migration and interaction in this region, see Jetté (2015). While the resulting communities are not described by Jetté specifically as "Metis," I know from my own family history that Metis people did migrate to this area, sometimes leaving, then returning, or being followed by the next generation.

39 Interview with Greg Willison (2013); interview with Ron Nunn (2012); "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.

Communities continued to be centred around many former fur trading posts. Some people stayed in these areas, some did not, although a common pattern was for Metis to consider their settlements as part of a web of Metis territories across North America.[40] 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 the research participants.

While it is not my intention in this paper to prove that "historic" Metis "communities" exist in BC according to the *Powley* definition, I believe, based on my own archival and oral history research, that they do, and this was the view of the research participants. Although I have provided a short overview of Metis history in BC as expressed in mostly secondary sources, and although I value recent and emerging work (e.g. Barman and Evans 2009; Evans, Barman, and Legault 2012; Legault 2015[41]; Douglas, 2017[42]) on the history of Metis people in the province, I acknowledge that further research about BC Metis communities and their continuity is required. Regardless of the outcome of this research, however, I assert that the *Powley* focus on historicity and community continuity is misplaced, and works to eviscerate Metis rights rather than to protect them.

Issues Raised by the Historic Community Connection Test

The SCC defines a "Métis 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" (*Powley*, para. 12). The appeal judge in *Willison* described the Metis in the "environs of Falkland" as a "loosely affiliated group of people of mixed ancestry living in a wide geographic area" (*Willison* appeal, paras. 46–48). This description raises three issues that have become central to debate about the existence of Metis in BC, and thus about BC Metis rights. One issue is whether Metis in the province have a "distinctive collective identity" or are simply "people of mixed ancestry"; another is whether BC Metis share "a common way of life" or are "loosely affiliated"; then there is the issue of territory: Should it be "the same" or can it be "wide"? While I argue elsewhere that neither end of the

40 Among the research participants, communities were described as being web-like, with overlapping local, regional, provincial and national collectivities made up of groups interlinked by family, work and social connections. Territories were also seen as overlapping, fanning out from various hubs, which consist of former fur trade posts. Campbell (2010), Macdougall (2010), Teillet (2013), and Gaudry (2014) also describe Metis territories and social networks as webs.

41 Legault's work focuses on the Metis architectural influences of McDougall family buildings in BC.

42 Among other things, Douglas's work focuses on the interaction of Metis on the various trade routes, on early Roman Catholic church records concerning Metis in BC, on early Metis-Secwepemc interactions, and on BC Metis who participated in the Treaty 8 Half-Breed Claims Commission.

spectrum (if it is a spectrum) reflects Metis perspectives (Sloan 2016),[43] these debates will be addressed briefly here. As well, because of the requirement that Metis "communities" must be "historic" and that there needs to be continuity between historic and modern communities (or community practices), the meanings of "community" and "historic" must be addressed, as must the requirements for continuity. For a Metis community to support a site-specific Aboriginal right, it must be "identifiable" and have "a sufficient degree of continuity and stability" (*Powley*, para. 12).

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 recognizable group identity separate from their Indian or Inuit and European forebears" (para. 10).

On the face of it, the *Powley* court's drive to distinguish between identities of Metis and those of their Indigenous and non-Indigenous relations seems respectful of Metis particularity; however, it has some unfortunate results when combined with assumptions that Metis people have rigidly bounded identities or that acting in a way that is deemed inauthentic will negate Metis identity. For instance, the appeal judge in *Willison* seemed to suggest that rights claimant Greg Willison's great-aunt Jane Klyne, who was the daughter of fur traders and postmasters, and who settled in BC in the 1840s, could not be seen as legitimately Metis because she married into a wealthy family and became "the epitome of a respectable Victorian matron" (*Willison* appeal, para. 25). While in reality Jane Klyne's life experience encompassed living on a trapline, helping to manage a fur trade post—and also integrating into settler society—her very respectability within that society was seen as erasing her Metis identity. While Greg Willison's ancestral connection to Klyne was acknowledged, the fact of Klyne's existence was not seen as supporting the existence of a historic Metis community. Similarly, witness Lottie McDougall Kozak, who is descended from the Red River McDougall family, but has many other Indigenous family ties, was questioned quite closely by Crown counsel about her non-Metis relations.

43 Research participants 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 participants. Generally, participants described the courts' view of Metis communities as not being expansive or nuanced enough. According to them, Metis people may identify and affiliate differently at different times and for different purposes. Metis community networks are like webs that stretch across North America and even beyond. Throughout history, Metis have always been highly mobile, with connections to territory in various centres, such as Red River, northwestern 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 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.

While distinctions between Metis and mixed-ancestry Indigenous people are not highlighted in *Willison, Howse* or *Nunn*—as proving litigants' ancestral connections to BC and other Metis families was relatively unproblematic in these cases—this issue has been addressed by academics (Dickason 1985; Barman 2006; Barman and Evans 2009; Mawani 2009; Evans, Barman, and Legault 2012; Andersen 2014; Thompson 2016). Scholars of Metis history more generally have debated extensively about Metis collective identities; related questions include: Should the term "Metis" (or "Métis") encompass only those Metis with French ancestry and cultural connections, or should it include "half-breeds," i.e. descendants of unions between Indigenous and Scottish, Irish, or English (or other non-French) people? (Spry 1985; Campbell 2007; Dahl 2013)? Is "half-breed" a term that should be reclaimed (Miner 2012), or is it subject to racist use (Andersen 2014)? Where did the Metis nation crystallize—at Red River (see Ens 2012; Andersen 2011; 2014), or in the Great Lakes (Bell 2013; O'Toole 2013)? Are the Metis a "nation," as opposed to a loosely affiliated group of "mixed" people with common economic (or other) interests (Flanagan 1985)—and, if so, what does that mean? Are the descendants of Metis who are thought to have cohered at Red River and thereafter to have populated the Northwest the only "true" Metis (Chartrand 2002; Andersen 2014)? Could there be more than one Metis nation (or group) within Canada (Thomas 1985; Fagan 2012; *Powley*, para. 11)? If so, should these groups be called "metis," as opposed to the Red River "Metis" (Bell 1989[44])? Even among some Metis people today, the existence of Metis communities outside of the prairies is controversial, as members of such communities may be less likely to be descendants of the Red River Metis, or "Metis of the Northwest." In BC, these kinds of questions manifest as: Was there a group (or groups) of Metis that politically crystallized or culturally cohered in what is now BC? Did these groups persist as Metis? What is the meaning of the family, social, and economic connections between Metis and groups of mixed-ancestry Indigenous people in BC? In my view, these questions, while important, are not necessarily relevant to determining Metis Aboriginal rights in BC.[45]

For instance, why should separate political/cultural cohesion for Metis in BC have to be established if, for instance, the larger Metis nation has already crystallized (Respondent's Memorandum of Law for *Willison* appeal, 2005)? Why can it not be acknowledged that Metis in BC—as with Metis in Alberta or Saskatchewan—are simply members of this larger nation that has already politically cohered?[46] Of course, there may be localized instances of

44 Note that Bell no longer holds this view (personal communication with Catherine Bell, February 4, 2016).

45 I agree with Bruce Leslie Poitras, as suggested in his unpublished paper "By Birth, Adoption or Other Means: Being, Becoming, and Belonging as Métis in British Columbia" (nd) (on file with author), that it would be useful to have an expansive, non-ethnic definition of "Metis" in the BC context, but one that is rooted in Metis political agency and community dialogue.

46 This is the view of MNBC: <https://www.mnbc.ca/about/metis-history>. Note that Michael Angel, the defence expert witness in *Willison*, provides a number of examples of connections at the relevant time between Metis in "BC" and at Red River, such as instances in which BC Metis went to Red River to fight with Riel (John McLaughlin), or to claim scrip (William Todd) (Angel, *Willison* trial evidence, Exhibit 3).

"ethnogenesis," such as that described by Brenda Macdougall among the Metis of northern Saskatchewan (2010), but this does not require such local communities to be disassociated from the larger Metis nation. If, as Barman and Evans (2009) suggest, it is possible both to "be" and "become" Metis in British Columbia, it may also be possible for both Metis and groups of culturally distinctive Indigenous mixed ancestry people to possess s. 35 rights.

In a BC twist to the *Powley* definition of "distinctive collective identity" as referring to distinctiveness from "Indian or Inuit and European forebears" (para. 10), the Crown in *Willison* argued that "distinctive" should also mean distinctive to or within BC, or even within the specific area at issue. Thus, testimony regarding the continuity between Metis culture in BC and elsewhere, given by rights claimant Greg Willison and community witnesses (including an Elder and a Hunt Captain), was seen by the appeal judge as not providing evidence of a distinctive culture in BC or in the environs of Falkland. For instance, the Crown and the appeal judge expected to find evidence of hunting practices that were distinctive to the Falkland area. However, from the point of view of the witnesses in *Willison*, the Metis practice of hunting (in BC and elsewhere) was distinctive because of the laws that governed it (Sloan 2016). These laws are still upheld, although the organization of Metis hunts is today on a much smaller scale.[47] While some aspects of the law of the hunt are concerned with the organization of the buffalo hunt, which did not take place in BC, many other aspects were and are transferrable, including laws about conservation and habitat preservation, sharing and correct allocation of resources, and appropriate harvesting methods, including spiritual preparation for harvesters and respect for animal carcasses (Sloan 2013; 2016). However, the appeal judge in *Willison* had the following to say about Ron Nunn's expert testimony as a Hunt Captain:

> 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 [of trial transcript]). There was no explanation of how such hunts might define a culturally distinct people in the environs of Falkland. (*Willison* appeal, para. 42)

Thus, attempts by witnesses to show that Metis people in the environs of Falkland were part of a larger web of Metis culture, law, and practice backfired when the appeal judge accepted the Crown's argument that distinctiveness must be defined within discrete geographic areas in BC.

The concern with the specifics of BC boundaries was also reflected in the *Willison* appeal judge's interpretation of the evidence of expert witness Michael Angel as being too concerned with Metis in the context of the Pacific Northwest fur trade, rather than within the BC context alone (paras. 26, 38). This dismissal of a wider geographic focus ignores the fact that BC did not exist in 1846, the date of the Oregon Boundary Treaty, and did not exist in its current form until after the "post-contact, pre-control" period of 1858–64

47 For descriptions of traditional Metis hunting law and practice, see Shore and Barkwell (1997); Drake (2013).

established in *Willison*; it also ignores Angel's assertion that there were Metis in BC as part of Northwest networks prior to this period (Angel, *Willison* trial evidence, Exhibit 3). Dr. Angel's (and other witnesses') construction of the evidence was more in line with Metis thinking than the court's insistence that the historic Metis in the Pacific Northwest must be seen within a disembodied "BC" context. Saler and Podruchny (2010) point out that fur trade narratives in Canada focus on 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." The insistence by witnesses that the Pacific Northwest fur trade was relevant to Canadian Metis was perhaps unsettling and thus not easily absorbed by the court.

It should be noted that research participants questioned why it should matter to their rights whether Metis communities existed at the time of "effective European control," as required by *Powley* (para. 18). While it is understandable that the Crown would be reluctant to admit the existence of rights (and thus the potential of title and sovereignty) in territories over which it has itself claimed title and sovereignty, from a Metis perspective this date is arbitrary; according to participants, Metis community presence in what is now BC predates the "control" period, and persists to the present day, although it may have gone "underground" at some points due to racism and self-silencing.[48]

The issues raised by the *Powley* requirement that Metis must share "a common way of life" overlap with issues of distinctiveness and geography and raise further issues about authenticity. While, according to *Willison*, a group of people who are merely "loosely affiliated" cannot be seen as a Metis community, it is not clear to me what is meant by "common way of life" or why this should be an indicator of community. It is unlikely that all people living in the environs of Falkland, including between Kamloops and Vernon, and along the Salmon River from Falkland to Salmon Arm, live a common way of life; however, courts would probably not have difficulty finding distinctive communities in these areas.[49]

Metis have been stereotypically associated with the fur trade and the buffalo hunt, but they have pursued many other occupations, and have exhibited a wide variety of intercultural, spiritual, linguistic, and political connections (St-Onge 1992; St-Onge and Podruchny 2012). In *Willison*, various witnesses led evidence as to how Metis people in the Falkland area associated with each other, both in the historic period and at the time of the trial. In the historic period, the reality of Metis participation in the fur trade, and in various other economic activities, was not debated, but this was held as not sufficient to define a Metis community; as discussed above, neither was the common practice of hunting, which was not seen as sufficiently distinctive. In the current era, commonality of economic pursuit was not necessarily seen as a connecting factor, but witnesses described getting together to practice, celebrate and teach their culture, including harvesting, preparing food, practising outdoor survival skills, doing beadwork and other artwork, fiddling, jigging, and learning

48 *Powley* recognizes this phenomenon at para. 13, stating that it should not be a bar to a finding of community continuity.

49 Compare Barsh and Henderson's humorous application (1997) of the reasoning in *R v Van der Peet* (SCC 1996), *Powley*'s predecessor case, to Québec as a distinct society.

Michif. Various other cultural and political activities were described. Again, many of these activities were linked by witnesses to the wider Metis culture, and thus the appeal judge found they did not exhibit the required specificity (para. 41).

Issues surrounding the existence of BC Metis political organizations link ideas of affiliation and "common way of life" to questions of community persistence and stability. While the government finds it more comprehensible and more convenient to deal with larger "umbrella" groups such as MNBC, the *Powley* test says that it is "communities" that are rights-holding entities, and that membership in modern political communities is not sufficient to ground Metis rights (paras. 32–33).[50] While downplaying the importance of Metis political action, this position situates modern political expression as somehow opposed to authentic indigeneity. It also promotes linear ideas of history derived from European philosophy, rather than exemplifying a Metis view that history is not only associated with the distant past but is being constantly created, and that the Metis nation is constantly changing and revitalizing itself (interview with Elder Eldon Clairmont, 2012; interview with Elder Goldie McDougall, 2012). John Borrows points out that the focus on historicity in Aboriginal rights cases is contrary to the "living tree" doctrine of constitutional interpretation (2016), and is also contrary to international Indigenous rights doctrines (2017).

In addition to historicity, research participants questioned the meaning of "community." For instance, litigant Dan LaFrance of the *Howse* case questioned whether Metis had traditionally thought of themselves in terms of communities, suggesting that "community" was a more recently imposed term (interview with Dan LaFrance, 2013). Many scholars have also critiqued the *Powley* court's approach to the idea of "community": Horton and Mohr (2005); Olthuis (2009); Ray (2011; 2016); Andersen (2012; 2014); Grammond and Proulx (2012); Teillet (2013); Grammond, Lantagne, and Gagné (2016); Sloan (2016).

The focus by the SCC on localized community continuity rather than on wider societal continuity follows acceptance of Crown arguments in *Powley OCA* (Sloan 2016).[51] However, even according to the *Powley* SCC decision, the focus should be on the continuity of practice of the right, not on continuity of community (Teillet 2013). While the appeal judge in *Willison* followed this reasoning, it is difficult to discuss continuity of community practice without addressing community continuity: thus, the community conundrum arises.

Negotiations

Attempts by MNBC to negotiate harvesting agreements with the provincial government follow signing of the *Métis Nation Relationship Accord* by MNBC and the province of BC.[52] While according to my 2012 interview with research participant Mark Carlson,

50 The claim that recent organizations are inauthentic is one way the state "dams/damns" Indigenous peoples: Borrows (2016).

51 See, for example, Appellants' Appeal Factum, *Powley OCA* (2000), in which this argument is introduced, but not supported. Previous iterations of *Powley*, in line with other Aboriginal rights cases, focused on Aboriginal "societies" or "cultures".

52 Online: <http://www.mnbc.ca/pdf/metis_accord.pdf>.

Hunt Captain for MNBC Region 3 (Kootenays), these negotiations were stalled, they have resumed following the Federal Court of Appeal decision in *Daniels*[53] that the federal government has jurisdiction with respect to Metis people.

One of the challenges of conducting negotiations with the provincial government is the question of who speaks for the more than 70,000 Metis people in BC. The Métis Nation of British Columbia (MNBC) grew out of earlier Metis political organizations, the most recent being the Métis Provincial Council of BC, established in 1996. MNBC is the largest Metis political organization in BC, with a citizenship of over 11,500.[54] MNBC also has charter communities, whose members may or may not be citizens of MNBC itself. While MNBC has done the most work in terms of negotiating with the provincial government on many fronts, including harvesting rights, it is not the only organization that represents Metis people in BC. The BC Métis Federation (BCMF) split off from MNBC in 2011. Now with over 6,300 members,[55] it has also begun to negotiate various matters with the province. Both groups now participate in consultation with the province and third parties, often on the same matters. There are independent local groups that represent Metis people, but these tend not to be recognized by the provincial government.[56]

This leads to one of the conundrums of negotiation, which is that the province prefers to deal with province-wide political groups because these are more easily recognizable and less bureaucratically challenging than dealing with numbers of smaller, more localized groups. However, according to *Powley*, Metis rights belong to people who are from historic Metis communities, not to people who have membership in modern political organizations.[57] Of course, these things are not necessarily inconsistent, but the court in *Powley* specifically states that membership in a modern Metis political organization is not sufficient to ground Metis rights (paras. 32–33).

Because MNBC operates provincially and negotiates provincially, but also has local charter communities, there may be differences of opinion between provincial leaders and local members and leaders. This creates problems when divisive issues are being discussed. For instance, there were conflicts between MNBC and Metis local governments, and between MNBC and BCMANR (the BC Métis Assembly of Natural Resources, the conservation and wildlife management branch of MNBC, consisting of all BC Hunt Captains) over the signing of contracts with Enbridge in connection with the proposed Northern Gateway pipeline project, and with Kinder Morgan in connection with the proposed TransMountain pipeline expansion project. After the MNBC-Enbridge deal was signed, some local charter

53 This ruling was upheld by the Supreme Court of Canada: *Daniels v Canada*, [2013] FCR 6; aff'd 2016 SCC 12, [2016] 1 SCR 99.

54 Figures from MNBC website: <www.mnbc.ca/contacts>.

55 Figures according to BC Métis Federation: <www.bcmetis.com>.

56 However, the Kelly Lake Métis Association has participated in various government consultation processes.

57 Kelly L Saunders (2013) makes a similar point.

community councillors resigned.[58] The Métis Nation of Greater Victoria, an MNBC charter community of which I am a member,[59] also protested MNBC's signing of an agreement with Kinder Morgan before consultations with local communities could be completed. These issues point to a need to develop better communication between provincial-level and local Metis governments, including internal consultation mechanisms. They also point to the need for provincial and federal governments to consult and negotiate with local, as well as provincial, Metis polities.[60]

Another difficulty with negotiations is they may not take other Indigenous nations' rights into account. For instance, when Alberta signed the *Interim Métis Harvesting Agreement* (2004) with the Métis Nation of Alberta, many Alberta First Nations people and governments were frustrated, alleging that this agreement had been signed without consultation with them. This, in part, led to the original accord being terminated.

In BC, consultations with First Nations at the provincial level regarding Metis negotiations with BC or third parties have not taken place, at least not to my knowledge.[61] Nevertheless, many individual Metis harvesters seek permission to hunt within particular First Nations territories, and many local Metis communities work hard to foster good relations with First Nations. While provincial or federal governments and third parties may enter into some form of consultation process with MNBC, or with the BCMF, these consultations are unfortunately conducted in a vacuum, and overlaps with claimed rights of First Nations are not considered.

Practice

MNBC has made many strides in regulating harvesting among its own members, by enacting legislation and policy (MNBC *Natural Resource Act* 2010; BCMANR Policy 2006), setting up a wildlife management scheme, and creating channels of political responsibility. MNBC has also created BCMANR, an organization of Hunt Captains who work alongside wildlife biologists to promote conservation by encouraging harvesters to report how many animals are taken and from which regions. All these governance methods are an outgrowth of the traditional Metis law of the hunt, by which Metis people chose Hunt Captains and other personnel, such as hunting camp guards, to ensure hunts were conducted properly, and meat and other parts of animal carcasses were distributed fairly.

58 "Enbridge Deal Divides Metis," *Terrace Standard*, June 19, 2012.

59 I am not a citizen of MNBC.

60 Consultation is required where government action could negatively affect Aboriginal rights and there is actual or constructive government knowledge that such rights—even potential rights—may exist (although the nature of consultation may vary with the strength of the claim): *Haida Nation v BC* (SCC 2004). The SCC in *Daniels* (2016) holds that the existence of the Crown's duty to negotiate with Metis regarding rights is settled law.

61 Of course, this does not negate the fact that Metis organizations may officially support various aims or rights of First Nations.

Many Metis people throughout BC harvest in various forms, and many people rely on wild meat, fish, and plants for sustenance. Some would suffer hardship over the winter without having wild meat in the freezer. All of the people I interviewed for my study were either harvesters themselves, or had family or community members harvesting for them. Metis people continue to hunt, fish, trap, and gather throughout BC, often travelling to regions far from home to do so. This is another problem with *Powley*, which assumes people only harvest in the areas where they usually live (Sloan 2016).

Many Metis people practise some form of the traditional laws of the hunt, including abiding by those laws relating to conservation and sharing, and respecting the animal through the giving of offerings. Many participants pointed out that the traditional law of the hunt also includes obtaining permission to harvest in First Nations or Inuit territories. Sometimes requests may have been made in connection with particular planned hunts, but when hunting carried on year after year in particular areas, treaties were often negotiated (Gaudry 2014). Some territories were already seen as Metis or shared territories, such recognition being the product of kinship ties and resulting use and occupation (Innes 2013). Sometimes conflicts did arise, and fighting ensued. A well-known treaty that granted Metis people hunting rights in Dakota territory in the wake of violence was negotiated for the Metis in 1862 by Jean-Baptiste Wilkie, who had family ties with the Dakota.[62]

While this tradition of negotiating harvesting access may be carried out on a smaller scale among individuals or small groups of Metis today, it has not been pursued at the provincial level by Metis provincial organizations. This may have as much to do with the internal politics of various First Nations as it does with Metis politics. It is not an exaggeration to say that the Metis harvesting cases in BC have caused great division between Metis and First Nations people. For instance, the Okanagan Nation Alliance (ONA)[63] strongly objected to the Metis claiming rights in what it considers to be their territory. This territory, near Falkland, is also claimed by the Secwepemc (Shuswap). Falkland is in a border region between Syilx (Okanagan) and Secwepemc territory, and this apparent overlap has caused problems between the two nations. However, possibly because the Metis and Secwepemc had been working steadily at improving their relations, the main complainants about rights infringements were the ONA, who eventually applied to be intervenors at the appeal level in the *Willison* case. This was an unusual move, but the ONA alleged they had not known about the case in time to intervene at the trial level. Although the intervention application was not granted, Okanagan nation representatives attended the appeal hearing.

In practice, many First Nations and Metis people hunt together, and may be related to one another, and agreements are reached that may not go through official leadership channels. I was told by two research participants of a fairly regular shared group hunt conducted by Metis and Secwepemc people. According to the Metis participants, the Secwepemc actually invited the Metis to organize the hunt, although it was hosted by

62 For an account, see the *St. Ann's Centennial* book (1985), 231–32.

63 The Okanagan Nation Alliance (ONA) represents eight member communities in Syilx traditional territory in British Columbia and Washington State. See ONA <http://www.syilx.org/who-we-are/organization-information/>.

Secwepemc Elders on their territory, and the location was chosen by them. I was shown photos from this hunt, including a picture of Metis and Secwepemc people drying moose meat together. Participants in my study were of the view that many individual First Nation members, at least privately, were not averse to allowing Metis harvesting rights to be exercised respectfully within their territories, while the leadership were more cautious about taking public positions and potentially alienating their constituents.

At the same time, given that most Indigenous nations in BC do not have treaty relationships with the Crown, it is understandable that they may not wish to complicate or potentially to compromise negotiations with Canada or BC by allowing Metis to exercise rights in their territories, or by acknowledging rights that may already exist by tacit agreement. However, it is important for government representatives to recognize that the existence of First Nations rights and title in BC should not be a bar to consulting or conducting good faith negotiations with Metis; rather, this should signal that Metis rights should not be considered in a vacuum. Indeed, there is a positive duty upon the Crown to deal fairly with Aboriginal people when their rights are implicated (e.g. *Haida Nation v BC*, SCC 2004), and the SCC in *Powley* specifically addresses the need to negotiate concerning Metis hunting rights (para. 50). Further, based on principles of Aboriginal rights jurisprudence (e.g. *R v Badger*, SCC 1996), Metis rights must be interpreted with Metis perspectives in mind.

Research Participant Perspectives

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. Many participants who had been 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. For instance, according to former Hunt Captain Ron Nunn, litigant in *Nunn* and witness in *Willison*, "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" (interview with Ron Nunn, 2012).

Elder Lottie McDougall 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, 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. (interview with Elder Lottie McDougall Kozak, 2012)

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.

While some participants 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 BC situation, former provincial Hunt Captain Dan LaFrance, a claimant in the *Howse* 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 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." (interview with Dan LaFrance, 2013)

Skepticism about the usefulness of *Powley* is echoed by Ron Nunn. 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

> 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. (interview with Ron Nunn, 2012)

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 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.
>
> 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 eleven 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. (interview with Ron Nunn, 2012)

One of Mr. Nunn's most interesting insights in his critique of *Powley* is that while Metis rights can only be exercised by individuals, they are dependent on the existence of a localized historic community, which is not a requirement for a First Nations or Inuit person trying to claim rights, for whom the collective unit is larger: the society rather than the band or community (*Tsilhqot'in Nation v BC*, SCC 2014). It is interesting that Mr. LaFrance points out that *Powley* is merely an adaptation of a First Nations case, *R v Van der Peet* (SCC 1996), and the adaptation is inappropriate because it does not recognize the mobility issues that may be more prominent for Metis people (interview with Dan LaFrance, 2013). 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 Indigenous people's rights in Canada.

A foundational critique of the usefulness of *Powley* for Metis claimants is the questioning by some of the research participants of what is meant by "historic" when, for them, history is always being created, and there is no point at which it crystallizes, no sharp demarcation between what is historical and what is not.[64] 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. Of course, the courts' focus on historicity also reflects the Canadian law assumption that the Crown's claim to sovereignty is valid and it is Aboriginal rights rather than Indigenous sovereignty that must be "reconciled" with Crown sovereignty.[65]

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 exercise rights in BC. *Willison* witness Dean Trumbley, a wildlife biologist and one-time 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, only that they had to exist "on the land" (*Willison* appeal, para. 24; interview with Dean Trumbley, 2012).[66]

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

64 Similar observations about the differences between Indigenous and Western approaches to historicity are made by Linda Tuhiwai Smith (2012).

65 While the idea of "effective European control" bolsters the claim to Crown sovereignty (from the Crown's perspective), as one of my anonymous reviewers pointed out, supposed control by the Canadian state has not prevented Metis polities from forming and re-forming—it has not controlled Metis community development and expression.

66 This point is also made by Chris Andersen (2012) in one of the few articles in the entire literature that mentions the BC cases.

of negotiating protection for Metis harvesting rights with the provincial and federal governments. Most people were optimistic to some extent, but many were disappointed that, at the time I conducted my interviews, negotiations between MNBC and BC had stalled. They saw this as a result of the failure of the three harvesting cases. However, as mentioned above, these talks have now resumed.

When I asked the research participants about the potential positive effects of consultation on negotiating a harvesting agreement, 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 did not take their concerns seriously, and adding that providing land-use studies would be like giving away something for nothing. At the same time, some people were concerned that not participating in consultation was like saying that Metis rights were irrelevant, leading to governments being less likely to negotiate with Metis people. They felt the law placed them in a double bind.

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 Indigenous nations in the province. Many interviewees thought that negotiations with the BC government should be conducted with the knowledge and consent of other nations in the relevant areas. Participants were generally in favour of direct talks with First Nations, although some people had concerns that while grassroots members might be open to negotiations, leadership might oppose it.

Practice

Regardless of the outcome of litigation, negotiation and consultation, most of the participants informed me that the best way to protect Metis rights was to continue to exercise them. 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. Some people thought hunting and fishing licences should be obtained, at least pending the outcome of negotiation or further litigation, stating that they did not take issue with provincial regulatory regimes as long as they supported conservation and were not unduly restrictive. Others acknowledged that having to buy hunting licences and tags could present a financial hardship. As expected, the three litigants I interviewed were all disappointed that they now had to get licences (although for health reasons one no longer hunts). 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 youth, and many were actively involved in doing this.

An important concern for participants was government or third-party actions that could potentially affect the exercise of their rights. Without state recognition of Metis rights in BC, and therefore without the guarantee of consultation about potential infringements, Metis are at risk of having their rights trammelled. Again, given that many Metis rely on wild food for sustenance, and given that many aspects of Metis culture are rooted in living off the land, participants saw the importance of state recognition, even if they were willing to hunt pursuant to provincial regulation.

All research participants hoped that negotiations with First Nations would continue in the future, but suspected that this would take many years of 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-state 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 participant Mark Carlson, the current MNBC 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. As Dan LaFrance says, "To me, inherent rights isn't what we can get. I already have them" (interview with Dan LaFrance, 2013). 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 we need a licence. We lived off the land. We're not abusing it" (interview with Lois McNary, 2012). 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 in the future.[67] 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 Métis 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.[68] 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. There

67 The question of the nature of portable inherent rights is a large and significant one. While a full theorization of such rights is beyond the scope of this paper, Metis and other Indigenous mobility rights are distinguishable from the mobility rights of all Canadians (Borrows 2016). I have addressed overlapping Indigenous rights in other work (Sloan 2017), and continue to pursue this issue in my research.

68 See Olthuis (2009).

are many divisions among First Nations in BC, many of whom have territorial overlaps, so negotiations could be challenging, but hopefully the process would be productive. BC treaty and Indigenous title issues will also have to be addressed respectfully.

Some Concluding Thoughts

While the research participants told me they supported Metis inherent rights—and some said they would go to court to defend them—people had more faith in negotiations, although the possibility of future litigation was not ruled out. Participants asserted that, with better access to historical research and better understanding of Metis perspectives within the courts it might be possible to win future cases.

Although most participants thought that Metis-provincial government negotiations were important, many felt there were unresolved questions about who represents Metis people that might complicate negotiations and affect negotiation outcomes. At the same time, participants agreed that these potential difficulties should not absolve the province of its duty to negotiate in good faith (see also Teillet 2004). Some participants wondered about the role of the federal government, which many believed had a historic and ongoing relationship with Metis people. All participants were concerned about the need to have ongoing dialogue and negotiations with other Indigenous nations, and all asserted that continuing to practise Metis rights was crucial, regardless of the outcome of either litigation or negotiations.

In fact, it was the ongoing practice of rights and reliance on Metis knowledge that was considered key to creating legal change, not recognition by other governments. Rights practice includes revitalization of Metis laws governing harvesting.

The research participants 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 among ourselves and with our neighbours. None of these tasks will be easy. One last difficult but useful suggestion comes from litigant Greg Willison. He cautions that we should not unwittingly allow the law to change how we view ourselves. While he agrees that Metis people have inherent rights that should be defended, 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. (interview with Greg Willison, 2013)

Practising rights—practising Metis culture—is a way of revitalizing Metis communities and the Metis nation as a whole. Such revitalization will be critical to positive internal

relationships and to more justice-based relationships with provincial, federal, and Indigenous governments. A key to reconciliation will be grappling with the reality that, regardless of the strictures of Canadian law, Metis exist in BC and we continue to practise our rights.

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