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Commentary

The Law of the Community and Community Rights: Implications for the Métis in Canada

Natacha Gagné, *Université Laval*

Claudie Larcher, *Université Laval*

Sébastien Grammond, *Université d'Ottawa*

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La communauté comme sujet et objet du droit: implications pour les Métis du Canada

Résumé: *Cet article se base sur les résultats d'une analyse qualitative de contenu menée à partir des transcriptions du procès Hirsekorn qui eut lieu du 4 mai 2009 au 24 juin 2010 devant la cour provinciale de l'Alberta. L'arrêt Powley de 2003, qui fut la première décision de la Cour suprême portant sur les droits des Métis, sert de référence. En défense, les accusés affirment qu'ils avaient un droit ancestral de chasser protégé par l'article 35 de la Loi constitutionnelle de 1982. Il s'agit donc pour les juges de déterminer l'identité métisse de l'accusé, ainsi que son appartenance à une communauté métisse titulaire de droits. Il s'agit surtout de déterminer l'existence d'une telle communauté. Dans cet article, les auteurs réfléchissent à la "communauté" comme sujet et objet du droit. Ils précisent les contours des définitions qu'en donnent la défense et la Couronne et leurs implications. Cette analyse s'inscrit dans le prolongement de travaux en anthropologie sur la notion de "communauté."*

Natacha Gagné
Université Laval

Claudie Larcher
Université Laval

Sébastien Grammond
Université d'Ottawa

Translated by Helge Dascher

The Law of the Community and Community Rights: Implications for the Métis in Canada[1]

Abstract: *This paper is based on the result of a qualitative content analysis of the transcripts of the Hirsekorn trial, which took place from May 4, 2009 to June 24, 2010 before the Provincial Court of Alberta. The case was based on the framework established in the Powley case, handed down in 2003, the Supreme Court of Canada's first decision on Métis rights. In defence, the accused asserted an Aboriginal right to hunt that was protected by section 35 of the Constitution Act, 1982. Hence, the judges had to render a decision on the Métis identity of the accused and his membership in a rights-holding Métis community. The main question*

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at issue then became the existence of such a community. In this paper, the authors analyze the concept of "community" as a legal category and as a holder of rights. They highlight the various definitions given to that concept by the Crown and the defence, and their implications. This analysis follows the path of anthropological work regarding the concept of "community."

Introduction

In Canada, Aboriginal rights were enshrined in the Constitution in 1982, enabling Indigenous peoples to challenge in court government laws and policies that ignore their rights. This recognition applies not only to individuals possessing "Indian status" as defined by the federal government, but also to other groups whose identity is not clearly defined in the constitutional text, including the "Métis." The resulting ambiguity allowed numerous groups, notably ones associated with the Métis Nation of Western Canada, to use the court system to establish rights that governments had previously refused to recognize.[2]

Invoking the collective nature of the Aboriginal rights protected by the constitution, the courts held that Aboriginal rights do not belong to all individuals with mixed Indian and European heritage; rather, they belong to "Métis communities," whose existence must be proved in court on a case-by-case basis. The problem thus arises: What is a community? What are its characteristics? How can we recognize it? The concept of "community," frequently used in popular discourse and the social sciences, suddenly takes on a normative dimension, making the determination of its borders an important issue. Based on the findings of a qualitative content analysis of the transcriptions of thirty-two days of hearings, this study juxtaposes the endogenous and exogenous conceptions of the Métis community advanced in an Aboriginal rights trial concerning Métis peoples, the *Hirsekorn* case, which was held in Alberta from May 2009 to June 2010. This analysis calls attention to the political ramifications of the process undertaken by the court.

The concept of "community" in the social sciences

For more than thirty years now, the concept of "community" has imposed itself in the contemporary social sciences as a category "both indispensable and indefinable"[3] (Vibert 2007, 1). Indeed, the concept seems indispensable today not only in popular and academic discourse,[4] but also within the machinery of government, overused as it is in myriad contexts and by myriad actors. The concept also seems to elude definition, given its ambiguity and polysemy. In this sense, it has been associated with a "proliferation of unspecified invocations" (Amit 2010, 357).

Vered Amit has suggested that the vagueness around the concept offers "strategic 'spots' of ambiguity" (2010, 358), making it a productive concept for the imagination of the self,

2 On the government's refusal to take action and lack of political will, see Teillet (2012).

3 All translations from the French are by the translator of this article, in consultation with the authors.

4 For a historical overview of the concept of "community" in the social sciences, see Vibert (2004, 2007, 2009, 2011).

but also for analysis. Community thus becomes an imaginative resource in everyday life. The concept has, for instance, been especially fertile as a watchword of citizen activism, and used to embody solidarity and mutual support in a world governed by liberal atomism (see Vibert 2007, 2011 on the community as the "Other" of modernity); rethink the parameters of the "common" (Pandolfi and Rousseau 2010, 370); empower minorities and affirm their difference; and support the imagination of diasporic communities (see Amit 2002). Amit (2010, 358) also suggests the ambiguity around the concept of community may offer an analytical resource, enabling researchers to think about a class or family of interrelated concepts of social relations. This was the specific focus of the exercise we undertook in conducting a qualitative analysis of a trial. The trial made visible a range of conceptions about community and the interrelations among them. The conditions of the trial itself—including the need to reach a decision, the existence of a jurisprudential framework, the relatively short timeframe, the interventions of numerous stakeholders with diverse and contrasting perspectives, and the need to formulate a perspective as explicitly and clearly as possible—yielded a snapshot of the classes of conceptions related to the notion of "community." Likewise, they placed in sharp relief the convergences, but also the divergences, among these perspectives.[5] The trial we analyzed illustrates the deployment of, and intersections among, two dimensions of community identified by Amit (2002, 2010): the ideal—how we imagine or think ourselves as a collectivity; and the concrete—the modalities used to actualize, express, and mobilize actual community or social ties. Moreover, it allows us to consider the spatialization of community as well as the implicit issues of scale—from local to global—and their political repercussions.

Researchers involved in the study of community have shown that the vagueness around the concept also allows its use for ideological ends, given "its exponential capacity for instrumentalization" (Vibert 2007, 10). This would be especially true in the modern world, in which identity—along with difference—"has become a more or less explicit component, or weapon, of political action" (Saillant 2004, 36; on the politics of identity, see also Amit and Rapport 2002). And it is particularly the case in a country like Canada, where the idea of "community" underlies the policy of multiculturalism and is part of "a veritable quest for *reasonable* accommodation" (Pandolfi and Rousseau 2010, 372; emphasis in original). Community is likewise the basis for policies aimed at decolonization in a (post)colonial Canada still in the process of defining itself. First and foremost, these policies concern the Indigenous peoples of Canada.

In the context of liberal democracies, community is crucial for other reasons. Saillant has called attention to the state's use of the concept of community to "manage and administer those who are seen as problematic" (2004, 19). In the case of "vulnerable communities" (for instance, groups of individuals suffering a disability, an illness, or exposure to risk or stigmatization based on their ethnic, sexual, or racial identity), community is often considered "the therapeutic ideal for vulnerabilities; it is a means for natural healing, a reservoir of autonomous solutions" (Saillant 2004, 37). Communities

5 The trial context, however, is generally less conducive to the expression of divergent or even conflicting viewpoints and experiences within a given party.

are thus instrumentalized by the state as the foundation for a variety of public policies, or even as intermediaries for a welfare state in crisis (Vibert 2007, 2008). Olwig (2010, 365) notes that communities are sometimes targeted as presenting a threat to the state, notably when they are associated not with solutions to shortcomings in the social safety net, but with problems such as criminality and terrorism. In both instances, the community is essentialized and reduced: sometimes to face-to-face relationships, affective ties, or primary relationships, as per the model described in paradigmatic terms by Ferdinand Tönnies in the late 1800s and by Durkheim, following his lead (for details, see Vibert 2004, 2007); sometimes to a few identity-based criteria, cultural practices, or stereotypes. It is interesting to note that historically, "Indigenous communities" have been associated with one or the other of these registers by public authorities, but also by the public in general, depending on context. In the case we consider in this article, the threat, if any, is a political one, with the state seeking to limit the scope of constitutional rights and thus the number of rights-holders. Important social and economic issues are also at stake. The need to define community and limit its scope thus arises from a public administration perspective as well, making this a critical issue.

Methodology

In the following, we analyze historical and contemporary conceptions of community, as well as their articulation by the various parties to the trial: the defence, the Crown, the community witnesses, and the expert witnesses. The *Hirsekorn* case was selected because it was, at the time of writing, the most recent in a long line of cases dealing with Métis identity and rights since the *Powley* decision in 2003.[6] Moreover, in this matter, the defence sought to advance a novel conception of community and its relationship to the territory, one that differed in certain respects from the interpretation of the *Powley* decision in subsequent jurisprudence.

We carried out a qualitative content analysis of the transcripts of the thirty-two days of hearings comprising the trial, identifying all occurrences of the term "community" and the contexts in which they were used. This allowed us to determine the many meanings assigned to the term, but also the manner in which it was employed as a basis for the legal arguments of the parties to the trial and the conceptions they rejected.

The various meanings we extracted converge with those identified by Vibert (2007) in a study of Québec public policy statements on healthcare and the conceptualization of "community" in Québec in the period from 1970 to 2003. He identified four ideal types of community, which he summarized as follows:

1. "Community" as a *local community*, "living environment," "natural habitat," close to the sociological definition proposed by Tönnies (based on neighbourhood, friendship, and kinship ties, implying face-to-face contact).

6 In British Columbia, *Howse* (2003) and *Willison* (2005); in Alberta, *Kelley* (2006); in Saskatchewan, *Laviolette* (2005), *Norton* (2005), *Belhumeur* (2007), and *Langan* (2011, 2013); in Manitoba, *Goodon* (2008) and *Beer* (2011); in Ontario, *Beaudry* (2006) and *Laurin* (2007); in New Brunswick, *Hopper* (2004), *Chiasson* (2004), *Brideau* (2008), *Castonguay and Faucher* (2003), *Lavigne* (2005), *Acker* (2004), *Vautour* (2010, 2015), and *Caissie* (2012); in Nova Scotia, *Hatfield* (2015); in Quebec, *Corneau* (2015). For a partial synthesis, see Teillet (2012).

2. "Community" as a *community organization* with institutional structures, an association or an advocacy group mobilized around a problem, a social situation, common interests, or a shared framework, offering services and mutual support, asserting rights.
3. "Community" as a *collective identity*, focused on a prioritized distinguishing trait used to characterize and bring together diverse individuals (ethnic origin, religion, language, mental or physical disability, sexual orientation).
4. "Community" as an *all-encompassing collectivity*, generally associated with a territory and having both political dimensions (under the authority of the nation-state) and cultural dimensions (such as "dominant" or "majority" customs and traditions) (Vibert 2007, 13–14).

The typology put forward by Vibert (2007) proves very useful for distinguishing between endogenous and exogenous conceptions of community, embodied in the trial by the conceptions advanced respectively by the defence and Crown. While the endogenous concept drew on the four facets mentioned by Vibert, the exogenous concept was doubly reductive.[7] First, it disputed the territorialization of the community as a living environment. The Crown refused to accept a conception of community as a network based on economic activity and frequent interaction. As such, it required that the community be constrained to a substantially reduced territory, that of a settlement. Second, although the Crown recognized the Métis Nation of Alberta (MNA) as a community organization, it limited its political scope to that of an organization dedicated to the promotion of Métis culture and the delivery of community services. In so doing, the Crown denied the community any political dimension.

The legal and political context of the Hirsekorn case

In 1982, the rights of the Métis were enshrined in the Canadian constitution. Section 35 of the *Constitution Act, 1982* reads at paragraph 1: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"; and at paragraph 2: "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada." The effective recognition of these rights by the federal and provincial governments was, however, largely delayed, primarily due to the absence of an official definition of the Métis (Chartrand 2001; Chartrand and Giokas 2002; Grammond and Groulx 2012). The lack of political will on the part of governments and the absence of any legislative or administrative implementation of this constitutional provision led a number of individuals and groups to turn to the courts "as part of the Métis struggle for the recognition of their aboriginal rights" (Rousseau and Rivard 2007b, 3). In recent years, we have thus seen a proliferation of court cases involving individuals self-identified as Indigenous who are caught hunting or fishing without a licence, are charged with offences against wildlife protection laws, and defend themselves by asserting their constitutionally protected rights.

7 On the concept of "reduction" in relation to Indigenous peoples, see Simard (2003).

The 2003 *Powley* case[8] was the first Supreme Court decision on the rights of the Métis, and it serves as a benchmark for courts today. The decision established an interpretive framework that courts must apply in deciding such claims. The first step is to demonstrate the existence of a rights-holding Aboriginal community. According to the Supreme Court, "a Métis community can be defined as a group of Métis with a distinctive collective identity living together in the same geographic area and sharing a common way of life" (*R. v. Powley,* [2003] 2 S.C.R. 207, § 12). Next, claimants must demonstrate that they belong to this community, in accordance with the criteria set out by the Supreme Court: "In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance" (*R. v. Powley,* [2003] 2 S.C.R. 207, § 30). Once these obstacles are overcome, the analysis can turn to the proof of an Aboriginal right and an evaluation of whether any limitations on the exercise of the right are reasonable.

At this stage, it is important to note an aspect of the legal framework established by the Supreme Court that underscores the relevance of distinguishing among the various ideal types of community. In this interpretive framework, the proof of the existence of a community and the proof of an Aboriginal right constitute two distinct questions. However, both have a territorial aspect: a community exists on a given territory, while an Aboriginal right (for example, a hunting right) is exercised in a specific place (the term "site-specific" is often used in this context). In both instances, the *Powley* decision requires the demonstration of the existence of a community or the exercise of an activity in a time period prior to "the establishment of effective control by the Crown."[9] However, the *Powley* decision does not clarify the links between these two issues. Most subsequent court decisions have taken for granted that, since Aboriginal rights must be proved in connection with a specific site, the same applies for the community. It is this interpretation that was challenged by the defence in *Hirsekorn*.

The facts of the case are as follows. In August 2007, the Métis Nation of Alberta held an assembly in St. Paul to establish a plan of action aimed at asserting Métis Aboriginal rights. Among other actions, a group hunt was planned, with the intention of provoking the hunters' arrest by wildlife conservation officers and thus bringing their claims before the courts. In parallel, a concerted political action would be undertaken by political representatives of the Métis Nation. Garry Hirsekorn and Ronald Jones attended this

8 In 1993, Steve and Roddy Powley of Sault Sainte-Marie, Ontario, were charged with violating Ontario's *Game and Fish Act* after killing a moose. In their defence, the two accused claimed that the *Constitution Act, 1982* protects the right of the Métis to hunt for food. The case was brought before the Supreme Court of Canada, which decided in favour of the Powleys in 2003. For additional information on *R. v. Powley*, see Grammond and Groulx (2012); on its ramifications, see, for instance, Rivard (2007), and Grammond, Lantagne, and Gagné (2012). On the process of the ethnogenesis of the Métis in Canada, see, for instance, the special issue of the journal *Recherches amérindiennes au Québec* entitled "Métissitude" (Rousseau and Rivard 2007a), Gagnon and Giguère (2012) and St-Onge, Podruchny, and Macdougall (2012).

9 For a discussion of the criterion of effective control, see Motard (2007).

assembly and voted in favour of the action plan. In the days that followed, numerous meetings were held to plan the hunt, including some with Fish and Wildlife enforcement officers and the media. Journalists from the *Edmonton Journal Newspaper* were briefed and invited to the communal hunt in Suffield, southern Alberta.

On October 20, 2007, Garry Hirsekorn shot a mule deer near Elkwater; on January 26, 2008, Ronald Jones shot an antelope near Suffield. During this second communal hunt, Jones, who was the leader of the hunt, notified officers Etherington and Lurpyczuk by phone, providing directions to the kill site as well as a description of the hunters' vehicle. Six individuals were at the site: four who self-identified as Métis and two journalists. Jones showed his Métis Nation of Alberta card to officer Etherington and informed him that he was hunting legally, by virtue of his constitutional rights. The two officers thus presumed that the Métis were hunting for food and asked Jones whether he was recognized by the province of Alberta as a Métis fisher.[10] He replied in the negative. Jones testified that he had no choice but to shoot the antelope since in his capacity as leader of the hunt, he could not let the other participants be arrested on their own. The enforcement officers charged Ronald Jones and seized the field-dressed carcass of the antelope. In an article in the *Edmonton Journal Newspaper* that appeared on February 16, 2008, Audrey Poitras, President of the Métis Nation of Alberta, was quoted as saying that the aim of the hunt was the recognition of Métis rights: "It is more than just about hunting. It's about the recognition of the rights of a people."[11]

The *R v. Hirsekorn* trial was held from May 4, 2009 to June 24, 2010 before the Honourable Judge Fisher of the Alberta Provincial Court in Medicine Hat. Ron Jones and Garry Hirsekorn were charged with having violated sections 25(1) and 55(1) of the Alberta *Wildlife Act* by shooting wildlife out of season without a valid permit. Ronald Jones died prematurely, before the decision was rendered. A third defendant, Bruce Bates, pleaded guilty without invoking his constitutional rights, after his son suffered harassment by colleagues due to the trial. The defendants were represented by Jean Teillet and Jason Madden; the Crown was represented by Ramona Robin for elements of the proceedings directly concerning hunting violations, and by Thomas Rothwell and Angela Edgington with regard to Aboriginal rights issues. Testifying as witnesses were the historians Arthur Ray (see Ray 2011), Frank Tough, Gwyneth Jones, and Clint Evans; the statistician Mary Jane Norris; and the genealogist Laura Hanowski.

10 This recognition is the result of a provincial policy, *Metis Harvesting in Alberta 2007*, that authorizes the issuance of fishing licences specifically for the Métis. However, to obtain sucn a licence, applicants must meet the criteria developed in the *Powley* test and must reside in one of the seventeen recognized Métis communities in Alberta: Fort Chipewyan; Fort McKay; Fort Vermilion; Peace River; Cadotte Lake; Grouard, Wabasca; Trout Lake; Conklin; Lac La Biche; Smoky Lake; St. Paul; Bonnyville; Wolf Lake; Cold Lake; Lac Ste. Anne; and Slave Lake. None of the communities is located in southern Alberta. Moreover, fishing is restricted to lakes contiguous to the territory of the community. This information is taken from the testimony of officer Etherington on January 18, 2010, *R v. Hirsekorn*, 2010 ABPC 385. These communities should not, however, be confused with the Métis settlements created by legislation in Alberta. Accordingly, it would seem that the policy is more generous than the legislation.

11 *R v. Hirsekorn*, 2010 ABPC 385.

The endogenous conception of the Métis community

An endogenous conception is one constructed and expressed by the community itself. In the context of the trial, the spokespeople for this conception were respectively the community witnesses, the expert witnesses, and the defence counsels. We will analyze the discourse of each of these groups.

Community witnesses

Individuals who self-identify as members of Alberta's Métis community were called to testify about their way of life, culture, and Métis identity. In their testimony, these community witnesses emphasized cultural elements, along with kinship and a sense of territorial belonging. Here is how defence counsel Jean Teillet described it: "They're going to talk a lot about hunting, and they're going to tell you what their lives were like, just generally, so that the Court gets a sense of Metis culture and the Metis community" (Jean Teillet, defence counsel, May 4, 2009).[12] For instance, Ephram Damas Bouvier, in his testimony of May 6, 2009, stated that "we all lived and talked and understood the Michif language and the dancing and stuff like this." This suggests that he conceived of the community as possessing certain distinguishing traits (ideal type 3),[13] in this case, language and dance. He went on to say, "it's people gathering, telling stories and stuff like this" and "I guess it was just a Metis community that we lived in." As such, he also considered the community as a living environment (ideal type 1), within which gatherings played an important role.

Marie Jeanette Hansen was of the same opinion: the community to which she belonged, Willow Bunch, came together through group activities and outings, and these frequent gatherings appear to have created a living environment. The elders, it seems, were at the heart of the community as a living environment. The following excerpt from her testimony illustrates these facets of the community:

> [I]t was just the whole community that just came out and did things. And wherever we went, like we went to visit grandma Gladwa, and it was all these kids that were around grandma Gladwa at her place. There just seemed to be lots of gatherings and whoever's home you went into, I noticed that there was all these instruments. Everybody was so musical.
>
> *-Marie Jeanette Hansen, defence witness, May 7, 2009*

These two community witnesses also emphasized Métis cultural traits specific to the community: language, music, dancing, and storytelling. These traits would appear to constitute the Métis "We" (ideal type 3), along with neighbourhood and kinship ties (ideal type 1).

Another witness, Daisy Legere, defined her community in terms of kinship ties combined with the local dimension (ideal type 1). Thus, in her testimony of May 8, 2009,

12 Quotations have been slightly edited for readability.

13 See the typology proposed by Vibert (2007), outlined above.

she stated that her community, Saratoga Park, "was like a community where all of us lived, like, all families," and she went on to enumerate the various members of her family and identify other families, noting where each resided.

The frequent references to places of residence, for instance a city or town, and their description through the mention of geographic elements such as streets, parks, a theatre, or a stream, reveal a rootedness in specific places, that is to say, in a territory. In the case of Karen Collins, the local community is a "metis settlement" recognized by the *Métis Settlements Act*, legislation enacted by the government of Alberta to establish exclusive settlement lands for certain local Métis communities and grant them self-government. She described the geography and administration of her settlement as follows:

> In both of our communities. I guess I'll speak about Elizabeth 'cause it's very similar at Fishing Lake. We do have a hamlet area that has our administration, and our school, and our church, and the surveyed area of the townsite. We still call it the townsite. And so when we go down into *our community, our Settlements*, like Elizabeth, there's a tier application for the land. And I do know that while I was the administrator, there were some applications for Metis title that weren't granted because in some instances those members did not stay in the community. *They came into the community*, got a piece of land and perhaps sold their trailer and moved back—moved somewhere else. And so if it was in provisional Metis title and they moved and left away and abandoned *their land, it reverted back to the Settlement*.
>
> *-Karen Collins, defence witness, May 5, 2009; emphasis added*

The fact that certain Métis lived in settlements, established under Alberta legislation and restricted to Métis, may have helped to strengthen their identity. For Irena Chichak, the cultural and territorial homogeneity of the settlements made the existence of the community self-evident:

> Q. Did you always use the word "Metis"?
>
> A. No, as I mentioned earlier, we always referred to ourselves as [other language spoken][14] which you literally translate to half-breed and I really never had to translate the word until I went to high school. The first time that I encountered having to translate the word [other language spoken] was [when] I going to school on the Metis settlement, *we were all Metis settlement children, we were all Metis children, we were not mixed with anyone, so we were all of our same community*.
>
> *-Irena Chichak, defence witness, October 30, 2009; emphasis added*

Reflecting an endogenous conception of community, these witnesses described community as a living environment, while also emphasizing its political dimension. This

14 The transcripts of the trial proceedings include no specification with regard to the speaking of languages other than English. Reference here is likely to Michif, the spoken language of the Métis in Canada and the US.

suggests a community as an "all-encompassing collectivity," recalling the fourth ideal type defined by Vibert (2007, 13). They called attention as well to the existence of organizations in the community that provide services to its members, a dimension that overlaps with the second ideal type. While these two aspects are mutually reinforcing in the endogenous conception, we will see later how the Crown dissociated them from one another.

Marie Jeanette Hansen, for instance, associated the community of Medicine Hat with kinship ties (ideal type 1), but also with the "local"[15] as a political organization providing multiple services to the population: "We're an amazing community, because we have *the local that's organized us politically and collectively*" (May 7, 2009; emphasis added).

She also cited the example of a youth protection centre established by the community in 1995 with the support of the Métis Nation of Alberta. In her view, the implementation of these services helped draw the community closer together: "That's been the work of a community that's developed services." It was an opportunity for the community to identify its own needs and make its own choices. Her testimony shows the connections between the second and fourth conceptions identified by Vibert (2007). Thus, although the local's function was to organize the community politically, it promoted numerous programs intended for the community of Medicine Hat via the Miywasin Centre, which in turn managed services such as the food bank and the Métis housing program.

Q. And what does the local do in the community?

A. The local, we're the driving force behind the Miywasin Centre, and we provide support. Like there's four agencies in the centre. So there's the local, and the local has its resource office there. *And Miywasin Society, and we deliver the programs.* And there's the Metis Trading Company, and that supports the food for the youth program and the elder's lounge. And then we have Metis Urban Housing, Medicine Hat branch. So they look after the Metis houses in the community.

-Marie Jeanette Hansen, defence witness, May 7, 2009; emphasis added

As a community and political organization, the local thus seems to have had the function of connecting the local sites of interaction with the larger concerns and issues of the MNA. This is what the lawyer Jason Madden implied when he pointed out that for Marie Jeanette Hansen and Ephram Bouvier, the Métis community came together at the regional level via the locals.

In fact, what the evidence shows from Marie Jeanette Hansen and Ephram Bouvier and the president of the Metis local in Pincher Creek is that *the Metis continue to come together through locals at the regional level and share and work together and we want—we want to just point out this*.

-Jason Madden, defence counsel, June 23, 2010; emphasis added

The fact that the locals in turn came together under the umbrella of the MNA allowed the community witnesses to affirm the political unity of the Métis of Alberta, as well as

15 The term "local" refers to the local chapters of the Métis Nation of Alberta.

their presence throughout the entire territory of the province. As evidence of this, the witness Irena Chichak cited the implementation of a single, province-wide system to register MNA members and issue their membership cards. Thus, "it's always been known that the community of Metis people in the Province of Alberta is the entire province" (Irena Chichak, defence witness, October 30, 2009).

For the community witnesses, the MNA and its locals clearly constituted a community and political organization, defending rights based on a collective identity and offering public services and mutual help programs. However, the use of terms such as "people," "provincial council," "Minister of Child and Family Services," and "Metis Nation" suggests that they saw the MNA as more than just a community organization, and that the community at times presented the face of an all-encompassing collectivity, helping to affirm the Métis nation and identity.

The living environment according to the expert witnesses

The endogenous conception of the Métis community was also reflected in the testimony of the expert witnesses. They drew on their specialized knowledge, notably of history, to corroborate the testimony of the community witnesses and present additional elements outside their personal knowledge. From the court's perspective, expert witnesses contribute to the legitimacy of the accounts of community witnesses by giving them the credibility associated with academic expertise (Grammond, Lantagne, and Gagné, 2012).

Arthur Ray, the only expert witness to define his use of the term *community*, assigned to it what he described as a sociological significance, whereby the community understands itself as a living environment, that is to say, a collectivity of people who are related, interact on a daily basis, and perceive themselves as a community.

> I use the term *community* to refer to a group of people who were interdependent, interacted socially on a regular basis, and usually were close kin; rather than using the problematic term *settlement*, I have chosen to apply the expression *habitation site*.
>
> *-Arthur Ray, expert historian for the defence, October 27, 2009*

Since the interpretive framework established by the Supreme Court in the *Powley* decision requires not only proving the existence of a contemporary community but also establishing its ties to a historical community, the expert witnesses were called on to explain the historic emergence of the Métis community, its dimensions, the relationships among its components, and its territorial scope. Thus, the central thesis defended by the expert witnesses was the unity of the Métis Nation at the provincial level, if not across the entire region of the Prairies, well beyond the local communities that comprise it.

The two key elements of the evidence were the existence of kinship ties among members of the Métis Nation throughout the Prairies and the mobility inherent to the fur trade and the buffalo hunt, which were the traditional economic activities of the Métis. The historians Tough and Ragy highlighted the involvement of the Métis in these

economic activities, which required constant travel over vast regions, even on the part of families that had declared residence in a specific place (Frank Tough, expert historian for the defence, January 11, 2010; Arthur Ray, expert historian for the defence, October 27, 2009). According to Ray, interaction among the various communities was maintained in part through the extensive travelling required by the fur trade throughout the 1800s: "I mean, to me, it's very important, because it's through that travelling, which is an economic part of the community. It's also how the Metis spread and maintain connections with other Metis communities and settlements" (Arthur Ray, expert historian for the defence, October 29, 2009). The economic mobility that articulated itself around a large kinship network contributed to the development of a shared identity, according to historian Gwyneth Jones. It would be difficult, she suggested, to separate into distinct groups the people from Red River[16] and those from Edmonton, for example.

> They're clearly related to each other in terms of kinship. They are sharing a similar way of life whether that be in the fur trade or as buffalo hunters and, later on, freighters and wage labourers, small farmers. You can identify that certain families arise in different parts of the territory. I think as the century goes on there become so many interrelationships between these areas and between the families as they travel and use different areas that it would be almost impossible, in my view, to disaggregate the people from Red River to the Edmonton region down into Montana and North Dakota around the Red River.
>
> *-Gwyneth Jones, expert historian for the defence, December 1, 2009*

Noteworthy, too, is Jones's observation that a shared way of life was maintained despite changes in the community's economic activities.

According to the genealogist Laura Hanowski, ancestral connections clearly demonstrate a large kinship network that, through to the 1890s, was shaped by extensive travel between the plains and the Red River. She suggested that the available archives

> show that they have moved throughout the area between St. Francis Xavier and over to the Cypress Hills. And at the beginning of the 1890s is when we start to see them settling in permanent communities, but before that they are really coming back to Qu'Appelle to baptise children and to be married, or back to St. Francis Xavier, or Baie St. Paul, but they don't indicate a residence at that place.
>
> *-Laura Hanowski, genealogy expert for the defence, December 3, 2009*

It appears, then, that the rituals marking community life were perceived as significant moments, and incited people to gather in specific places even if they did not reside there. This idea emerges clearly from a number of trials held in western Canada following the *Powley* decision.

16 The Red River colony was located near today's Winnipeg. The Red River region is generally considered the cradle of the Métis nation.

Overall, the historical proof thus tended to demonstrate the invalidity of a conception of community that is constrained to specific places, villages, or settlements.

The defence counsels' argument

Lawyers cannot introduce new evidence in their closing arguments, but they can underscore aspects of the expert and community witness testimony that they consider relevant. They can also draw elements from the various testimonies together into a coherent whole. As such, the defence counsels in *Hirsekorn* participated in the construction and presentation of the endogenous conception of community—all the more so since the lawyers themselves were members of the community.

In doing so, the defence counsels did not hesitate to combine elements that related to the various ideal types of community described by Vibert (2007). For Jason Madden, kinship and culture are the overarching concepts that connect how today's Métis community sees itself. The sharing of a common language and history (ideal type 3) confirms the community as a living environment (ideal type 1), with its territory extending throughout the province of Alberta. He explained to the judge:

> So, we say that you put all of these things together from a distinctive collective identity to living together in the same geographic area to sharing a common way of life and that it comes back to the Metis of central and southern Alberta and we say that the community has shifted and it is distributed throughout. *What binds them or what is the overarching umbrella that hooks them all together is this shared language, shared history, kinship connections, and culture*, and that they aren't disconnected communities or disconnected local settlements and that they continue to see themselves as a larger community.
>
> *-Jason Madden, defence counsel, June 23, 2010; emphasis added*

Regarding the historic community, the defence counsels underscored the interconnected nature of the Métis community at the level of the Prairies, as well as their occupation of the entire territory. For instance, Jason Madden called the Court's attention to the genealogy of a community witness, Joan Soloway. One of Soloway's ancestors had lived in various places on the Canadian Prairies and in Montana. He concluded: "They are related. They are connected throughout central and southern Alberta ... [T]hey are interconnected through kinship" (Jason Madden, defence counsel, June 23, 2010). These elements obviously provided crucial support for their legal argument, which aimed to decouple proof of community from the requirement that proof of an Aboriginal right be site-specific, as we saw above.

Economy and kinship thus seem to form the basis of community conceptualized as a living environment (ideal type 1), extending over a vast territory encompassing not only numerous sites of habitation or settlements, but also the areas between these sites. The sustained use of these large spaces came about through the fur trade. These elements together have helped forge a collective identity (ideal type 3). Jean Teillet summarized the

testimony regarding these elements as follows: "We think the evidence supports completely the fact that the community is a larger community, that they are highly mobile and that this community encompasses a lot of different settlements and wintering sites and vast areas of the plains" (Jean Teillet, defence counsel, June 22, 2010). Interestingly, she also referred the court to a decision handed down in a similar case in Saskatchewan,[17] in which the judge agreed to define community on a regional, not local, basis.

The defence was also interested in community as an all-encompassing collectivity, and paid particular attention to its political boundaries. In this regard, Teillet indicated that the community is today organized along provincial lines that did not exist prior to the establishment of effective control in the area by Canadian authorities:

> So it's really that the effective control has taken effect, right, and it's having an effect on the community, and so the modern community simply doesn't look like it did. I think you see it today in the organization of the community. They're organized around provincial lines now. Well, clearly, provinces didn't even exist before. That wasn't even a thought in anyone's mind, but the modern community is different.
>
> *-Jean Teillet, defence counsel, June 24, 2010*

According to the defence, the MNA, which represents all local chapters in Alberta, was perceived as not only a community organization (ideal type 2), but also a political organization (ideal type 4). Indeed, it was recognized by the government as the political representative of the Métis, and thus as an intermediary between the Métis population and the provincial government:

> And I think at paragraph 202 we also see that the contemporary Metis community is organized and we say this is important because the Metis Nation of Alberta is not a Johnny-come-lately onto the province or onto the scene in the Province of Alberta. Its roots trace back almost nearly as much as the Province of Alberta itself and the *Metis Nation of Alberta at various points in time at various stages of their relationship with the Government of Alberta has been recognized as representative of Metis in Alberta* and also plays an important role for Metis in Alberta.
>
> *-Jason Madden, defence counsel, June 23, 2010; emphasis added*

Jason Madden repeatedly referred to the MNA and its local chapters as well-established and functional "government structures." He affirmed that these "government structures" reflect how the Métis community perceives itself and operates, namely as an all-encompassing collectivity (ideal type 4):

> And in our situation, if you sub in local, Metis local, they do not identify themselves as a part of a Metis local or a localized community, they identify themselves as

17 The case was *R. v. Laviolette*, [2005] 3 C.N.L.R. 202 (Sask. Prov. Ct.). Jean Teillet and Jason Madden served as defence counsels in this case as well. It should be noted that the region at issue was more circumscribed than the region at issue in the *Hirsekorn* case. It also seems that the evidence for territorial occupation presented in the *Laviolette* case was more conclusive than that in the *Hirsekorn* case.

> a part of the larger community first, and they may live in Medicine Hat, or they may live in Pincher Creek or Tail Creek. They aren't disconnected communities or disconnected local settlements in that they continue to see themselves as a larger community. *They have put into place government structures that reflect that*, but also continue to operate as a larger community.
>
> *-Jason Madden, defence counsel, June 23, 2010; emphasis added*

This governing structure is not new, and it represents the Métis of the province as a whole:

> *This governing structure has been well-established and functioned and operational and put in place by the Metis themselves for generations* and it reflects the fact that they do move throughout the province and that they don't think that that negates the fact that they're still Metis.
>
> *-Jason Madden, defence counsel, June 23, 2010; emphasis added*

Teillet emphasized that the community included all 46,000 members listed in the MNA Registry.

> This, as I said earlier, this case is not about the defendants really, because it's a collective right. So it's about them, but it's also about the Metis people. And we can't bring the whole community into the courtroom. I mean, we could, but we'd be here for several years just going through the 46,000 people registered.
>
> *-Jean Teillet, defence counsel, May 4, 2009*

Moreover, the defence wanted to conceptualize the Métis population not only as a local community, but as a society, since the term suggests a larger entity, a global community: "I think when we all talk about 'community,' I think we tend to think about a more localized concept, but a society, just by its nature, seems to suggest a larger being" (Jean Teillet, defence counsel, June 22, 2010).

This political and inclusive conception of community enabled Jean Teillet to support one of the key elements of her legal argument, namely that the Aboriginal rights protected by the constitution belong not to local communities, but to the Métis Nation as a whole: "We say that the right belongs to the larger body; that the right does not only belong to the little local settlement. So, again, we've changed from what was before the court in *Powley*" (Jean Teillet, defence counsel, May 4, 2009).

The exogenous vision of community: A living environment can only be local

The Crown presented a radically different conception of the rights-bearing Métis community. According to the Crown, represented by lawyers Thomas Rothwell and Angela Edgington, the only relevant community is one that occupies a defined territory, town, or settlement. This conception corresponds to the first ideal type proposed by Vibert (2007).

The Crown therefore searched for evidence of a Métis community in 1870 in the area in which the offences were committed in 2007 and 2008. Its findings were succinct: "So in this situation our submission is there was no Metis community in southern Alberta that was flourishing and subsisting" (Angela Edgington, Crown counsel, June 24, 2010).

The Crown rejected the defence counsel's strategy, which consisted of demonstrating the existence of a broader community. According to the Crown, a habitation site remains the distinctive sign of a community, since it establishes both occupation of the territory and the activities practiced there. That is why the expert historian for the Crown, Clint Evans, attempted to find a settlement site in southern Alberta prior to effective control of the province.

> I want to emphasize that yes, he [Clint Evans] was looking for settlements, but he's clear in his evidence that he was also looking for activity and occupation of Metis people in southern Alberta ... So he was looking not for only settlements, he was looking for activities and use ... Now clearly if you have a settlement in [an] area it makes it a lot easier to document Metis use and occupation in an area. You have that foundational concept of, well, we have a settlement here, now we can look and see where were the people using the area around it.
>
> *-Thomas Rothwell, Crown counsel, June 24, 2010*

Moreover, the Crown emphasized that the absence of fur trading posts in southern Alberta demonstrated the absence of a settlement site and thus of a community (Thomas Rothwell, Crown counsel, June 24, 2010). The low birth rate in the territory was also cited as evidence of this absence: "In our submission, isolated births of mixed ancestry people in the Treaty 7 area don't equate with the definition of a community" (Angela Edgington, Crown counsel, June 24, 2010).

The Crown thus concluded that despite the Métis' repeated and sustained travel in southern Alberta, no community was established there before the arrival of the Royal Canadian Mounted Police in the 1870s, when Canadian authorities established effective control in the area. In this regard, the Crown advanced the hypothesis that southern Alberta would have been the exclusive territory of the Blackfoot Nation, which would not have allowed the Métis to settle there (Angela Edgington, Crown counsel, June 24, 2010).

The Crown's thesis did, however, have to take account of an important reality: Alberta recognizes and funds Métis organizations, supports the development of Métis culture, and is the only province to have established a system of Métis settlements, though these are located primarily in central and northern Alberta. How, then, could the Crown claim that the Métis community does not exist? The Crown sidestepped this contradiction by affirming that, from a constitutional perspective, only the site-specific conception of community is relevant. It was thus possible for the Crown to present itself as a champion of Métis culture while simultaneously denying the existence of Aboriginal rights:

> It's not about an attack on Metis culture. Alberta is unique and it's the only province that's recognized Metis settlements. Notwithstanding this difference of

> legal opinion that we're in court today to have a case about, Alberta has strived and has successfully forged a strong relationship with both the Metis settlements and the Metis Nation of Alberta, provides financial support to both of those organizations, and notwithstanding differences of opinions such as this, there is a strong relationship there and Alberta is a strong proponent of Aboriginal culture, whether it be Metis or First Nation.
>
> *-Thomas Rothwell, Crown counsel, May 4, 2009*

The Crown thus stated that membership in an organization does not confer Aboriginal rights. From its perspective, the community of rights-holders is site-specific: "Membership in a rights-bearing community is not synonymous with membership in the Metis nation of Alberta. A third point is that Aboriginal rights are site-specific and contextual" (Thomas Rothwell, Crown counsel, May 4, 2009). Further grounds for the denial of recognition on the basis of organization membership was the fact that the MNA grants its members recognition throughout the entire territory of Alberta and with no requirement of local involvement.

> As you've heard the word [sic] "site-specific" in the last couple of days, sir, it has been noted harvesting rights are site-specific and the MNA provides membership on a province-wide basis. Members are not required to take part in more localized or regional community. And I think Ms. Chickak's evidence was that in fact most members do not participate in the locals. And in Alberta's view this is not consistent with the site-specific nature of hunting rights. We're not aware of any cases where Metis rights have been established on a province-wide basis.
>
> *-Angela Edgington, Crown counsel, June 24, 2010*

Relying on previous cases, Edgington concluded that rights could not be recognized on the basis of membership in a contemporary community association and Métis ancestry, given the absence of a community as a living environment (ideal type 1).

> And it was also clear that the defendants were members of modern Metis associations. *But what the defendants had failed to establish was a modern community in the area that had also historic—a continuity with a historic community in the area*. And in all those cases the court specifically noted that establishing Aboriginal ancestry, mixed Aboriginal ancestry and membership in a modern organization does not meet Powley.
>
> *-Angela Edgington, Crown counsel, June 24, 2010; emphasis added*

Conclusion

Our analysis shows that the Crown's conception of community entails a twofold reduction of that expressed in the testimony and pleadings of the defence. The defence relied on conceptions of community that cover the four ideal types of community identified by Vibert

(2007): a living environment, a community organization offering services, a collective identity, and a political community. However, in a first reduction, the Crown considered only the first of these dimensions. A second reduction concerned the territorial dimension of this living environment. While the defence presented a community united by kinship ties, gatherings, and social activities, as well as a culture shared throughout the Prairie provinces, the Crown insisted on proof of the existence of site-specific communities.

To date, the decisions handed down in this matter do not allow a clear determination of who is right in legal terms. The trial judge accepted the existence of a contemporary Métis community in the Medicine Hat region, but not its connection to a historic community, since, in his opinion, the Métis did not penetrate into southern Alberta until after 1870. He therefore concluded that Mr. Hirsekorn had not proved that he was the holder of an Aboriginal right, and thus found him guilty. The judge of the Court of Queen's Bench (first level of appeal) refused to determine the existence and the size of a historic Métis community. He confined himself to observing that the Métis did not engage in hunting in southern Alberta prior to 1870, which operated as a bar to their Aboriginal rights claim. Mr. Hirsekorn thus lost his case for the second time. Nonetheless, the judge's comments suggested that he was willing to consider the existence of a unified Métis community in western Canada. The matter was brought before the Alberta Court of Appeal, which rendered its decision in July 2013. Like the Court of Queen's Bench, it dismissed Mr. Hirsekorn's appeal, concluding only that the Métis community, whatever its size, did not hunt in southern Alberta in 1870. On January 23, 2014, the Supreme Court of Canada refused leave to appeal in this matter.

Drawing on Vibert's typology (2007), our analysis demonstrates the various ways in which the concept of community is used in the context of Indigenous claims. In particular, we note that the Métis expressed their identity as a function of a number of interrelated facets of the concept of "community." However, government lawyers and judges were reluctant to accept such a broad conception of the Aboriginal community. The essentialization and reduction that flow from this can be linked to the fact that "the notion of community is not innocent, but may be associated with powerful interests" (Olwig 2010, 365). This is especially evident in the case analyzed here: significant political interests were in play, since the issue was the identification of Aboriginal rights holders. While the dispute initially involved a matter of hunting rights, it is clear that the implications of the trial are much broader and liable to have significant repercussions for the future of the Métis in Alberta and, more generally, in Canada. The impacts of classification and the power of determining identity should not be underestimated, since the concept of community is prescriptive, as noted by Gordon (2012, 254). Its prescriptive power is all the greater in contexts such as this, since the conception of community adopted by the Court has the effect of limiting options, not only for the individuals, but also for the groups invoking it; indeed, that is precisely what was at stake in this trial. The effects are many. Notably, they could reduce the range of conceptions the Métis themselves hold of their community, limiting the power of imagination of the "We." Actual social ties could be affected as well, since a community

is the product of interactions. As such, it experiences, thinks, and deploys itself in the dialectic between exogenous and endogenous conceptions, and between "external context and internal consciousness" (Rapport 2002, 171). The courts are not external to these collective dynamics.

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