# THE HARD CASE OF DEFINING "THE MÉTIS PEOPLE" AND THEIR RIGHTS: A COMMENT ON *R.* V. *POWLEY*

Paul L.A.H. Chartrand

## INTRODUCTION

Section 35(2) of the *Constitution Act, 1982* refers to "the Métis people" as one of the Aboriginal peoples of Canada whose existing Aboriginal and treaty rights are guaranteed by section 35(1).[1] The subsequent First Ministers Conference on Aboriginal Constitutional Reform in the 1980s and the Charlottetown Accord in 1992 proved inadequate to the task of addressing the substantive content of these constitutional provisions. The unenviable task of defining a people and their rights has now fallen to the courts. The challenge facing them is the hard case of Canadian Aboriginal law.

In March 2003, the Supreme Court of Canada will hear appeals in two cases in which individuals have asserted Métis identity and membership in a modern Métis Nation: *R.* v. *Blais* and *R.* v. *Powley*.[2] *Blais* involves a claim by a descendant of the Red River Métis Nation to exercise hunting rights pursuant to the *Constitution Act, 1930*. Neither Blais' identity as Métis nor his membership in the modern Métis Nation is truly at issue.

*Powley* is quite different, for here the heart of the issue is whether the two accused individuals are Métis capable of exercising section 35 rights. The Ontario Court of Appeal expressed general views about who the Métis people are, and applied exceptional principles to the task of defining them for the purposes of section 35.

*Powley* illustrates the general case of many of the mixed-blood inhabitants of Canada. In my view, the application of exceptional principles to the general case as the Ontario Court of Appeal has done will lead ultimately to an irrational and unworkable doctrine of Aboriginal and treaty rights and produce inequitable results for all the Aboriginal peoples mentioned in section 35. In addition, applying exceptional principles to the unexceptional presence of mixed-blood individuals and families also risks introducing arguments into the section 35 context that will be based on racial rather than rational grounds.

A better approach would be to apply general principles of constitutional interpretation. Identification of a rights-bearing Aboriginal collectivity or nation rather than the particular genetic makeup of individuals should be of primary importance. Thus, I argue that the term "the Métis people" in section 35, properly construed by applying the general principles applicable to the interpretation of Aboriginal rights in the Constitution, leads to the exceptional case of the descendants of "Riel's people" — the well-known "Métis Nation" of western Canada — rather than to the general case of groups of people distinguished only by their mixed Aboriginal and non-Aboriginal ancestry.

*Powley* is important because it reflects the current contention surrounding the identity of the Métis people in Canada. The etymology of the term "Métis" has associated it with "persons of Aboriginal ancestry," meaning individuals with personal antecedents that include an Aboriginal ancestor, from any group, from coast to coast. This may be called a "pan-Indian" approach, reflecting the wishes of individuals and groups to identify with their Aboriginal, rather than with their non-Aboriginal ancestors.

In many cases, the courts' approach reflects a tendency to identify as "Métis" individuals who are at

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1 Section 35 of the *Constitution Act, 1982* recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." The focus of this note is s. 35(2), which provides that "[i]n this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada": *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

2 *R.* v. *Blais*, [2001] 3 C.N.L.R. 187 (Man. C.A.), leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 294 [hereinafter *Blais*]; *R.* v. *Powley*, [2001] 2 C.N.L.R. 291 (Ont. C.A.), leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 256 [hereinafter *Powley*]. The issue in *Blais* involves the construction of the game laws paragraph to decide whether Métis people are included within the term "Indians," to whom the paragraph guarantees hunting rights in the province.

the definitional boundary of "Indians" as defined in the *Indian Act*.[3] Such persons have been excluded from, or re-included within, the "Indian" definitional fold at the whim of policy-makers and law-makers over the past 125 years. Bill C-31 of 1985 was simply a large-scale boundary shift that included some, but not all, of those mixed ancestry persons with Indian antecedents.

The broadly criticized failure of the federal government to include in the Bill C-31 exercise all those of Indian ancestry who likely ought to have found constitutional shelter as "Indians" highlights the irrationality of federal Indian definition.[4] Moving away from the irrational boundary of Indian definition[5] towards the positive core of Métis identity in western Canadian history not only accords with the approach to the interpretation of Aboriginal rights that the Supreme Court of Canada has taken to date, but also is more likely to produce workable results.

In sum, it is my view that the special constitutional category of "Métis" must be construed in accordance with the purposes of section 35 and constitutional values and principles. While notions based on race may legitimately lie behind the recognition of individuals disadvantaged on account of race or ethnic origin in section 15 of the *Canadian Charter of Rights and Freedoms*,[6] they must not be permitted to inform the construction of section 35. Sections 15 and 35 perform distinctly different constitutional functions that must not be confused.

Importantly, it is also my view that the approach taken by the Ontario Court of Appeal in *Powley*, if taken to its logical conclusion, will infringe on the section 35 rights of Indians by threatening the integrity of their communities. The true construction of section 35 suggests that persons closely associated with "Indians" ought to frame their claims in Indian terms rather than attempt to squeeze themselves into the ill-fitting constitutional clothes worn by the historic Métis Nation and its modern counterpart.

The following analysis is based on the view that "the Métis people" in section 35 refers to the historic nation that fought for its rights in western Canada and that was recognized, in military and political terms, in nineteenth-century legislation and policy, and, through the *Manitoba Act, 1870*, in the Canadian Constitution itself.[7]

## *POWLEY* IN THE ONTARIO COURT OF APPEAL

In October 1993, two residents of the City of Sault Ste. Marie, Ontario, were charged under the provincial *Game and Fish Act*[8] with unlawfully killing a bull moose and being in possession of it in their city home. The Powleys admitted to killing and possessing the moose, but asserted that the provincial legislation infringed their section 35 right to hunt for food.

Since the mid-nineteenth century, the Powleys' ancestors had lived on the local Indian reserve as members of the Batchewana Band of Indians. However, as a result of the marriage of a grandmother to a non-Indian in 1918 and by operation of the *Indian Act*, their near ancestors had lost Indian status.[9] The Powleys were therefore non-Indians within the meaning of the *Indian Act*, but not necessarily within the meaning of section 35.[10]

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3 R.S.C. 1985, c. I-5 [hereinafter *Indian Act*].

4 This is concluded in the comprehensive analysis by J. Giokas & P.L.A.H. Chartrand, "Who Are the Métis in Section 35?: A Review of the Law and Policy Relating to Métis and 'Mixed-Blood' People in Canada" in P.L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?: Definition, Recognition, and Jurisdiction* (Saskatoon: Purich, 2002) 83 [hereinafter *Who Are Canada's Aboriginal Peoples?*].

5 Whenever there is a group with rights that are not vested in all members of the public, there is a need for a status definition system. The usual factors that are used for defining human groups through generations, and the various models, are discussed in D.E. Sanders, "The Bill of Rights and Indian Status" (1972) 7 U.B.C. L. Rev. 81 at 83–87. The administration of the *Indian Act* has had an irrational result because it has eliminated the possible application of these factors in defining Indians.

6 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, *supra* note 1 [hereinafter *Charter*].

7 The *Manitoba Act, 1870* is part of the Constitution of Canada by the operation of the *Constitution Act, 1982*, *supra* note 1 at s. 52(1)–(2) and Schedule 2.

8 R.S.O. 1990, c. G-1, ss. 46–47(1).

9 Federally recognized Indians are descendants of members of Indian communities that were politically recognized as Indians by being included in treaties or being provided with lands set aside as reserves for their exclusive occupation. The membership code has developed from the 1876 *Indian Act*, *supra* note 3, which operates so that status Indians today are those persons descended in the male line from the members of those original groups. All the usual factors, including lifestyle, "blood quantum," and kinship, are present in this membership scheme, which seems to have been designed to maintain the nineteenth-century model of the nuclear family. Those related to the male head of a family retain status. By way of example, then, daughters who leave the household to marry a non-Indian according to the *Act*, lose status, or are "enfranchised." The *Act* was substantially revised in 1985, purportedly to comply with the sexual equality guarantees of the *Charter*.

10 The s. 35 category of Indians is broader than the federal legislated definition, which was unilaterally imposed upon Indian people. See P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2002) at 579–80.

Be that as it may, the Powleys did not challenge the constitutional validity of the *Indian Act* in disentitling their grandmother from Indian status and membership in the Batchewana Band, even though it was precisely this disentitlement that made them ineligible to claim treaty rights under the 1850 Robinson Huron Treaty with the Batchewana Band. They nevertheless claimed Indian treaty rights in section 35, but not as section 35 Indians. Instead, they asserted a Métis identity. They argued that they had all along been members of a distinct Métis community, even though their ancestors had been (the defendants never in fact were registered nor could they be under the *Act* as it stands now) until the enfranchisement of their grandmother, legally recognized as Indians, and had lived among Indians on an Indian reserve.

The Powleys, who did not testify on their own behalf at the trial,[11] pinned their hopes for judicial recognition as Métis on their membership in two competing Aboriginal political organizations,[12] and on a remote ancestor, Eustache Lesage, who had left Sault Ste. Marie in the 1850s and joined the Batchewana Band.[13] By this action he gave himself and his descendants the benefits of Ojibway community life and treaty entitlements.

Justice Sharpe, speaking for the court, accepted the conclusion of the trial judge: "On the basis of the historical evidence, he found that the Métis were the 'forgotten people' and that although their community became 'invisible' it did not disappear."[14]

So, by adopting what amounts to a legal fiction in order to recreate history, the judicial imagination would appear to make some Indian bands "harbours" for hitherto invisible Métis identities. The basis for this reasoning appears to have been little more than judicial sympathy for "Métis" people, openly conceived by the Court as members of a disadvantaged racial minority.

## "THE MÉTIS PEOPLE"[15] IN SECTION 35 IS NOT A "RACIAL GROUP"

This view of the purpose of section 35 is ill-founded. Section 35 was not entrenched to protect racial minorities. That is the task of section 15. Section 35 protects the rights of peoples, or historic nations, that have come under Crown sovereignty. Aboriginal peoples, including the Métis people, are social and political entities, not racial groups. Were the ancestors of the Powleys members of such a social and political entity prior to joining the Batchewana Band? On the evidence, it is difficult to conclude that they were.

Eustache Lesage, the mixed-blood ancestor of the Powleys, is described by Sharpe J.A. as one of many "Métis" who joined the local Indian bands in the 1850s, but who nevertheless retained their distinct individual identity as "Métis."[16] It is difficult to know exactly what this might have meant to Lesage in practice, but some judicial comments suggest that Métis identity is biologically determined. This notion is evident in Sharpe J.A.'s statement that "[u]nions between Scottish

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[11] The comments of the Court on this point include, "it might have been preferable to have direct evidence from the respondents as to their membership in and acceptance by the local Métis community." See *Powley*, *supra* note 2 at paras. 143, 149.

[12] *Ibid*. at para. 12. Both organizations, the Ontario Métis and Aboriginal Association (OMAA) and the Métis Nation of Ontario (MNO) are political organizations that are supported by federal funding under the federal Aboriginal Representative Organizations Program.

[13] *Ibid*. at para. 138. A recent New Brunswick case, also alleging a defence to unlawful possession of moose meat, illustrates the kind of factual background found in cases outside the Western regions — where the Métis people have a well-established history as Métis and do not rely upon descent from Indians. The defendant produced evidence of membership in three Aboriginal political organizations, one called the Acadian Métis-Indian Nation, and claimed both an Indian and, in the alternative, a Métis, identity. Both claims were based on an allegation of an unknown Indian ancestor dating back eight generations. The court rejected the claim, citing lack of any evidence of any "treaty, pact, convention or agreement" in the Maritimes, as is found in the west. See *R.* v. *Chiasson,* [2002] 2 C.N.L.R. 220 (N.B. Prov. Ct.).

[14] *Powley*, *ibid*. at para. 135. The law's reasoning is not always capable of being tested against reality. See *e.g.* F.S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum. L. Rev. 809.

[15] The Court asserted the view, which is clearly incorrect, that the text of s. 35 recognizes "Métis peoples"; *supra* note 2 at para. 74. The assertion is repeated at paras. 94 and 105. On this view, the Court did not feel constrained in assuming that there could be more than one historic nation recognized in the Constitution. Although mixed-blood individuals and families are an unexceptional phenomenon at the boundary of European settlement in the territories of Aboriginal peoples, an examination of constitutional and legislative historical enactments would have shown that only in the west did the federal Crown expressly recognize the existence of a Métis people with Aboriginal rights. On the recognition of the Métis Aboriginal title in s. 31 of the *Manitoba Act*, see P.L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan Native Law Centre, 1991) [hereinafter *Manitoba's Métis Settlement*]. For a comprehensive review of the legislation and orders in council recognizing the Aboriginal title and Aboriginal rights of the Métis in the west, see P.C. Hodges & E.D. Noonan, "Saskatchewan Métis: Brief on Investigation Into the Legal, Equitable and Moral [Claims] of the Métis People of Saskatchewan in Relation to the Extinguishment of the Indian Title" (Regina: Saskatchewan Archives Board, Premier's Office, R-191, Box 1, P-M2, 28 July 1943).

[16] *Powley*, *ibid*. at para. 138.

employees of the Hudson's Bay Company and Native women *produced another strain of Métis children*."[17]

The term "strain" has a definite biological meaning.[18] This idea is based on notions of race and is not viable. The concept of "race" is the archaic and impoverished legacy of earlier times, with little or no scientific basis.[19] It belongs to the history of ideas, not to science, and has largely been abandoned as a credible way of accurately differentiating between members of the human race. Today, it is used to denote groups of persons that have been singled out for political purposes.[20]

The *Charter* itself adopts the concept of "race" to single out persons for the political consideration of benevolent liberal attention. The concept has been used, for example, to attack the legislation authorizing federal administration of the affairs of recognized Indians on reserves.[21] While zoic conceptions of human identity may be a proper judicial foundation for *Charter* interpretation, they are not applicable to the construction of section 35.

On its true construction, section 35 recognizes that Aboriginal peoples are historic groups that have endured for a long time, in specific places. The significance of their collective interests is recognized and affirmed in the form of Aboriginal and treaty rights. The concepts of place and time, and not of biology, are of fundamental significance. Aboriginal peoples are people "from long ago," people whose identity is derived from place or from the land.

Aboriginal peoples, like all peoples, have maintained genetic diversity within their societies. Aboriginal peoples are not united by biological destiny alone. They are historic nations consisting of communities of persons freely united by choice, and characterized by their distinct social and political institutions. Mixed ancestry, far from being the exception, is the norm in many Aboriginal communities and is rarely a bar to membership. None of this should be controversial; it lies at the heart of the analysis and recommendations of the Royal Commission on Aboriginal Peoples.[22] Section 35 must be allowed to fulfill its noble purpose of promoting negotiations between the representatives of these pre-existing nations and those of the modern Canadian state.

The view of Métis identity adopted by the Court of Appeal led it to inquire into the personal antecedents of the defendants. This route of inquiry will lead to a swamp of confusion, out of which there is no return to solid constitutional ground. Genealogical descent may be useful as one objective factor among many to identify contemporary Métis communities that are descended from the historic Métis Nation. Once such communities have been identified, whether by political or judicial process, their membership is to be decided by the laws or social conventions of the section 35 "people."

## THE DEFINITION OF MÉTIS MUST NOT INFRINGE INDIAN RIGHTS

In *Powley*, the Crown argued that the Powleys' ancestors had ruptured their legal continuity with the ancestral "Métis" community by accepting membership in a local Indian band.[23] This argument seems to be supported by the weight of Supreme Court authority. The principle that group rights are enjoyable by members of the group by virtue of their membership in the group, and not on the basis of their personal antecedents, has been applied in Aboriginal rights cases,[24] and to *Indian Act* bands.[25]

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17 *Ibid*. at para. 17 [emphasis added].

18 *The Concise Oxford Dictionary of Current English*, 8th ed., *s.v.* "strain," defines it as a "[b]reed or stock of animals, plants, etc." *The Gage Canadian Dictionary*, *s.v.* "strain," defines it as "a line of descent; race, stock; breed."

19 This is a well-known point. See generally A. Montagu, *Man's Most Dangerous Myth*: *The Fallacy of Race*, 6th ed. (Walnut Creek: Altamira, 1997).

20 See *e.g.* J.R. Feagin & C.B. Faegin, "Racial and Ethnic Relations" in J.F. Perea *et al*., eds., *Race and Races: Cases and Resources for a Diverse America* (St. Paul: West Group, 2000) at 57.

21 *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. The court and scholars have described the category of "Indians" in s. 91(24) and the people defined by the *Indian Act* in racial terms, but this view can not apply to the Aboriginal peoples in s. 35, who are historic "peoples" on homelands, and are in their nature social and political communities. For a discussion of the former view, see Hogg, *supra* note 10 at 582–83, and compare the explanation of the Royal Commission on Aboriginal Peoples that the Aboriginal peoples in s. 35 are political groups and not racial minorities: Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 176.

22 *Ibid*. at 177.

23 *Powley*, *supra* note 2 at para. 139.

24 *R*. v. *Sparrow*, [1990] 1 S.C.R. 1075.

25 See *Blueberry River Indian Band* v. *Canada*, [1999] F.C.J. No. 452 at paras. 25–26 (T.D.), online: QL (FCJ), where Hugessen J., referring to lands belonging to Indian bands said, "since those rights were collective and not individual rights, they could neither be exercised by nor transmitted to individuals. … It is membership and not ancestry which determines entitlement to reserve lands." In an appeal of a separate order concerning the same case, the Federal Court of Appeal stated, "The entitlement to the judgment … arising from the breach of the Crown's fiduciary duty in respect of [the Indian reserve lands] belongs to the two collectivities that are successors to the

Nonetheless, in delivering the judgment of the Court, Sharpe J.A. rejected the Crown's argument, stating that "it was legally open to the Métis to accept treaty benefits without thereby surrendering their Aboriginal rights."[26] With respect, that is beside the point. Métis rights under section 35 are vested in the Métis community and enjoyed by Métis community members as a function of that membership. Similarly, Indian rights under section 35 are vested in the Indian community, and enjoyed by Indian members as a function of that membership.

While actual descent from the historic Métis people may well be an important feature of the contemporary Métis community, it may or may not be a factor in determining individual membership in that community. That decision belongs to the community. Thus, the response to such a question warrants an inquiry less into the personal antecedents of the claimants than into the continuity of their community with the historic "Métis people."

If the Powleys had, in fact, abandoned their Indian links and acquired membership in a Métis community that is part of the Métis people, they would be able to enjoy the benefits of Métis group rights. But this entitlement would not flow from their personal genealogical descent from a remote mixed-blood ancestor: it would derive from their current membership in the Métis community. In short, one starts with the fact of membership in a relevant community, not by looking into the bloodlines of the individual claimants.

This can be illustrated further by reference to Eustace Lesage's acquisition of an Indian identity and entitlement to Indian treaty benefits. It was through acceptance as members of the Batchewana Band of the Ojibway people, not by virtue of their personal antecedents, that his descendants acquired entitlements to treaty benefits. In fact, according to their own argument, their ancestors were not Indians. Rather, they were mixed-blood people or self-styled "Métis" at the time of joining the Batchewana Band.

The Court's reasoning on the membership issue has the clear potential to rupture the communal bonds of many Indian bands by making them incubators of nascent Métis identities. At their election, or by virtue of fluctuating federal Indian definitional criteria, newly reborn Métis persons may then abandon the Indian community and insist on their "Métis" rights. The potential impact on present Indian bands is highlighted by reference to statistics from the 1996 census, in which over 25,000 registered Indians identified themselves as "Métis."[27] Until more precise figures are available, it is impossible to say how many Indian bands could be disrupted by "mixed-blood" members opting to identify themselves as Métis.[28]

Judicial interpretation of Métis rights ought not to undermine the integrity of Indian communities or whittle down Indian rights. If section 35 is not to become another source of Aboriginal grievances regarding actions by the Canadian state, it must be interpreted by Canadian judges in a manner that yields equitable results for all Aboriginal peoples. In an earlier case, the Ontario Court of Appeal showed its awareness of this issue: "Although it is not possible to remedy all of what we now perceive as past wrongs…it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of past events, new grievances."[29]

Fundamental fairness for all Aboriginal peoples is more likely to be achieved if Métis rights are construed as being collectively vested in the descendants of historical Métis communities. Similarly, Indian rights should be seen as being collectively vested in the descendants of historical Indian communities. Ancestral rights devolve upon descendants of a distinct group, society, or nation; they do not leap sideways for the benefit of other distinct groups.

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[bands]. The present descendants who are not members of either Band have no right to share in the proceeds of the judgment." *Blueberry River Indian Band* v. *Canada*, [2001] F.C.J. No. 457 (C.A.), online: QL (FCJ), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 272.

26 *Powley*, *supra* note 2 at para. 139.

27 A. Siggner *et al.*, "Understanding Aboriginal Definitions: Implications for Counts and Socio-Economic Characteristics" (Paper presented at the Canadian Population Society Annual Meetings at Laval University, Quebec City, Quebec, Canada) (1 June 2001) [unpublished].

28 Membership in a s. 35 Aboriginal community is subject to the application of some fundamental constitutional principles, including the principle that the law ought not to foist Aboriginal status upon an unwilling person. The current *Indian Act*, *supra* note 3, appears to run afoul of the constitutional guarantee of the fundamental freedom of association because it does not include an opting-out provision, and it forces all status Indians to remain so without regard to their individual choice. Furthermore, given the great weight that Aboriginal societies generally place upon personal autonomy, it may be that s. 35 protects liberties vested in individual members of rights-bearing communities, including the liberty to leave the group, particularly if that is part of the social values of their community.

29 *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 at para. 5 (C.A.), online: QL (OJ).

## THE HISTORY OF CROWN-ABORIGINAL POLITICAL RELATIONS IS THE SOURCE OF ABORIGINAL RIGHTS

Emerging case law and academic opinion support the view that Aboriginal rights are derived from the contemporary judicial recognition of interests that were the subject of historical political relations between Aboriginal peoples and the Crown.[30] In *Powley*, the Court approved a novel basis for the judicial recognition of new Aboriginal communities that had not been recognized by the Crown:[31] "The trial judge was entitled to conclude that the Sault Ste. Marie Métis community had suffered as a result of what was at best governmental indifference, and to take the historically disadvantaged situation of the Métis into account when assessing the continuity of their community."[32]

This approach, which appears to be based on notions of morality rather than general principles, seems bound to lead to doctrinal confusion. In theory, legal rights arise from the identification of interests that, for reasons of law and justice, the courts will recognize as deserving of legal protection.[33] Aboriginal rights are based in history. Their present purpose is to protect the interests of Aboriginal peoples that were at stake upon the assertion of Crown sovereignty.[34]

Unlike ordinary statutes, the Constitution represents the culmination of a long history of political struggles and compromises, and the process of judicial interpretation "ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded."[35] The Constitution legitimizes the exercise of sovereignty over the Aboriginal peoples and ought to be interpreted in light of domestic historical experience and of constitutional principles that recognize that Aboriginal peoples enjoyed a particular kind of relationship with the Crown at the time that sovereignty was asserted.

The task of section 35 is to permit that particular relationship to flourish in a contemporary context. Through section 35 it should be possible to restore Aboriginal peoples to a position in which they will be able to maintain those aspects of that relationship that are appropriate to the modern Canadian state. This means more than protecting racial minorities made up of individuals linked mainly by their genetic make-up and the fact that they may have lived in physical proximity to one another at one time. It also means leaving tests based on the historical disadvantage suffered by racial minorities to the more appropriate forum offered by section 15. Furthermore, as between Aboriginal peoples, section 35 must be construed in accordance with the principle of constitutional equality of all historic peoples whose collective interests were at stake in creating the constitutional foundations of Canada.

The recognition and affirmation of the rights of Aboriginal peoples in section 35 is a matter of national significance. This supports the idea that the Métis people in section 35 must be identified by reference to a history of Crown-Métis relations that was relevant to national interests when the Crown asserted sovereignty.

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30 See especially *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 177 at 545–46 [hereinafter *Van der Peet* cited to S.C.R.]; *Kruger and Manuel* v. *The Queen* (1977), 75 D.L.R. (3d) 434 at 437 (S.C.C.); and B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall L.J. 101 at 111–12.

31 *Powley*, *supra* note 2 at para. 136.

32 This view hardly seems to fit the facts in the case. The Powleys' ancestors were enjoying the treaty and other rights of the local Ojibway from the 1850s into the twentieth century because the Crown had deferred to Ojibway decisions on the question of who would be part of the treaty group. The mixed-bloods of the region who did not associate with the Ojibway community were recognized in their possessory interests in their individual lands, and compensated with settler pre-emption rights. Those who were Ojibway by Ojibway standards were recognized as Ojibway, and others who lived apart from the Ojibway were compensated for their individual occupation of lands with pre-emption rights. Compare the situation of the Métis people in Manitoba in 1870, who were compensated in respect of their individual land holdings, as well as for their Indian title arising from their group use and occupation of the common spaces of the western regions. See *Manitoba's Métis Settlement*, *supra* note 15.

33 Jeremy Webber discusses the function of common law Aboriginal rights in protecting the interests of indigenous peoples in D. Ivison, P. Patton & W. Sanders, eds., *Political Theory and The Rights of Indigenous Peoples* (Cambridge: Cambridge University, 2000) 60.

34 *Van der Peet*, *supra* note 30 at 548, 550. In *Oyekan v. Adele,* [1957] 2 All E.R. 785 at 788, Denning M.R. stated that "the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, [but] it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law."

35 *Re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at 70 (J.C.P.C.), rev'g [1930] S.C.R. 663. The Royal Commission on Aboriginal Peoples relied on this judicial authority in its interpretation of s. 35. See *supra* note 21 at 194.

## "RIEL'S PEOPLE" AND EMERGING CASE LAW

The Supreme Court of Canada has held that section 35 represents "the culmination of a long and difficult struggle."[36] This is an accurate description of the well-known history of "the Métis people" in western Canada. The emerging case law on section 35 suggests that the meaning of "the Métis people" in section 35 is to be found in this history.[37]

What this history reveals is the emergence of a small indigenous nation in western Canada in the unique circumstances of the imperial fur trade system of the nineteenth century.[38] The people making up this nation were forced by circumstances to be fighters.

They fought the first Europeans brought by Lord Selkirk to the Red River area in the early 1800s.[39] They also skirmished with Indian people[40] with whom they shared the "western commons"[41] and its resources. Two famous fights waged by this nation in the nineteenth century stand out in Canadian history books. The third, waged more recently, was an attempt to vindicate the historical meaning and continuing significance of the first two.

The first of these fights, in 1869–1870, led to the negotiations by which the province of Manitoba was created in 1870.[42] In the *Manitoba Language Reference*, the Supreme Court interpreted the *Manitoba Act* as "the culmination of many years of co-existence and struggle between the English, the French and the Métis in Red River Colony."[43] In an earlier case, the Métis in Red River during this period were described by the court as "apprehensive about the transfer of their homeland to Canada, and [they] viewed the prospects of massive immigration from Ontario as a threat to their culture and way of life ... indeed to their very survival as a people."[44] This early struggle under the leadership of Louis Riel established the important place of the Métis people in Canada's history and wove the strand of their collective rights into the Canadian constitutional fabric.

The creation of Manitoba was based on negotiations that led to a "basic compact of Confederation"[45] that Riel called "the Manitoba Treaty." It contained the terms under which the people agreed to join Canada. The bargain, containing land guarantees for the Métis people,[46] did not withstand the pressures of Canadian western agricultural expansion. Within a decade, the Métis had lost all effective political power in Manitoba, land speculators were reaping riches in the market for their alienated lands, and many had moved west.[47]

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[36] *Sparrow*, *supra* note 24 at 1105.

[37] The law is reviewed in P.L.A.H. Chartrand & J. Giokas, "Defining 'The Métis People': The Hard Case of Canadian Aboriginal Law," in *Who Are Canada's Aboriginal Peoples?*, *supra* note 4 at 268.

[38] Historians have concluded that, although the rise of communities of "mixed-blood" families at the frontier of European settlement was an unexceptional feature of Canadian history in the eighteenth and nineteenth centuries, only in the west were the conditions appropriate for the rise of a new national consciousness, a new "people" distinct from the ancient Indian nations and from the Europeans who did not establish their own communities and institutions into which to absorb mixed-blood individuals for a very long time following European settlement of eastern colonies. See J. Peterson & J.S. Brown, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1984); T. Binnema, G.J. Ens & R.C. Macleod, *From Rupert's Land to Canada* (Edmonton: University of Alberta Press, 2001). See also D. Sanders, "Métis Rights in the Prairie Provinces and the Northwest Territories: A Legal Perspective" in H.W. Daniels, ed., *The Forgotten People: Métis and Non-Status Indian Land Claims* (Ottawa: Native Council of Canada, 1979) 3. Generally, individuals join and identify with one or the other of their parents' communities. "Mestizos" in the Spanish-speaking colonial regions are not regarded as part of the indigenous peoples. See J. Brown & T. Schenck, "Métis, Mestizo and Mixed-Blood" in P.J. Deloria & N. Salisbury, eds., *A Companion to American Indian History* (Malden: Blackwell, 2002) at 57.

[39] The many sources on the early relations between the British intruders and the Métis include A. Ross, *The Red River Settlement: Its Rise, Progress and Present State* (London: Smith, Elder, 1856).

[40] See *e.g.* W.L. Morton, "The Battle at the Grand Coteau" in A.S. Lussier & D.B. Sealey, eds., *The Other Natives: the Métis* (Winnipeg: Métis Federation, 1978) 47.

[41] I.M. Spry, "The Tragedy of the Loss of the Commons in Western Canada" in I.A.L.Getty & A.S.Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 203.

[42] W.L. Morton, ed., *Manitoba: The Birth of a Province*, (Winnipeg: Manitoba Record Society, 1965); *Manitoba's Métis Settlement*, *supra* note 15.

[43] *Reference re Language Rights Under the Manitoba Act, 1870*, [1985] 1 S.C.R. 721 at 731.

[44] *R.* v. *Forest*, [1977] 1 W.W.R. 363 at 374–75, (Man. Co. Ct.).

[45] *Manitoba's Métis Settlement*, *supra* note 15 at 5, and authorities cited in n. 18.

[46] Section 31 recognized the group rights of the Métis derived from their collective use of the "western commons," principally in the buffalo hunt. This Aboriginal title, recognized at common law, is called "the Indian title" of the Métis in s. 31, the term used prior to the introduction of the modern term "Aboriginal" in the *Constitution Act, 1982*. Another provision, s. 32, recognized and provided for the possessory interests of all settlers, whether Métis or not, who occupied river lots in the area of Red River settlement, which had been established by Selkirk and the Hudson's Bay Company following the initial early resistance of the Métis. See *Manitoba's Métis Settlement*, *ibid*.

[47] P.L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 Osgoode Hall L.J. 457.

Louis Riel also led a second famous fight in May 1885, at Batoche on the banks of the South Saskatchewan River near present-day Saskatoon. The defeat of the Métis and their Indian allies marked the end of Aboriginal political and military authority in the west, and the triumph of westward Canadian political and economic ambition, symbolized by the completion in the same year of the trans-Canada railroad.[48]

The third famous fight was waged in the political arena. It was led by Harry W. Daniels who, as president of the Native Council of Canada, ensured that the term "the Métis people" was included among the Aboriginal peoples whose rights were guaranteed in the patriation amendment of 1982.[49]

These fights, although separated in time and reflected in different constitutional instruments, are linked and cannot be viewed in isolation from each other. The Constitution of Canada, although made up of different documents created at different times and in response to different pressures and aspirations, is to be read as a whole. Thus, the recognition of the Métis people in section 35 of the *Constitution Act, 1982* is linked to the earlier recognition in the *Manitoba Act, 1870*, the history of which informs the meaning of section 35.[50]

In short, the emerging case law suggests that the source of Aboriginal rights lies in the history of Crown-Aboriginal relations, no better example of which can be found than in the struggles described above. The history of Riel's people leads the move away from the boundary of Indian definition to the positive core of Métis identity in western Canada.

## THE MÉTIS AS AN "ABORIGINAL" PEOPLE

Some commentators have criticized the express inclusion of the Métis people as an Aboriginal people within the meaning of section 35. They argue that the Métis people emerged from Indian ancestors and newly arrived non-Indians and were therefore not here from the very beginning, that is, the "aboriginal" time that might be judicially adopted to define Indians.[51] However, it is obvious that the Métis people are indigenous to Canada: the emergence of the Métis Nation happened on the northern half of this continent before there was a Dominion of Canada.

Thus, the interpretive framework for section 35 rights must be based on a date that establishes a relevant "aboriginal" beginning that includes the Métis people.[52] On the basis of ordinary principles of constitutional interpretation, the "original date" ought to be adopted as the date for proof of all Métis Aboriginal rights. Unfortunately, the identification of a relevant date for proof of Métis rights is complicated by the results of the *Van der Peet* decision, where the Court asserted there are two different dates for proof of different kinds of Aboriginal rights. Aboriginal rights generally must be proved to have existed at the date of first contact with Europeans. Aboriginal title, however, a subset of Aboriginal rights, must be proved to have existed at the date the Crown asserted sovereignty.

Scholars have criticized the conclusion of the Court on this point, showing that it is supported by neither precedent nor principle.[53] In *Van der Peet*, the Court recognized that the date it proposed for proof of Aboriginal rights would deny Aboriginal rights to Métis people. It therefore took pains to leave open the question whether the rights of the Métis people in section 35 could be defined by applying the "pre-contact" date for proof of Aboriginal rights that the Court adopted in that case.[54] In *Powley*, the parties agreed that the date established for proof of Aboriginal rights in Indian cases, that is, the date of first European contact, had to be modified to accommodate the later emergence of the Métis people.[55]

It will be interesting to see how the Supreme Court deals with this issue when it decides the appeal. The "transition date" proposed by Slattery as the common

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48 J.K. Howard, *Strange Empire: Louis Riel and the Métis People* (Toronto: Lewis & Samuel, 1952); G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960).

49 See H.W. Daniels, "Foreword," in *Who Are Canada's Aboriginal Peoples?*, *supra* note 4 at 11.

50 See *supra* note 7.

51 For example, Bryan Schwartz states that "[t]he Métis are certainly indigenous to North America — they came into being as a distinct people on this continent. But they are not Aboriginal in the same sense as the Indian and Inuit; they were not here from the beginning." B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982–1984* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985) 188 at 228. See also C. Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev. 180.

52 In the French version, which is equally authoritative to the English, the term "ancestral" rights is used to characterize the s. 35 rights. The French version does not carry the connotation relied upon by the critics cited *ibid*.

53 See especially B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at 215–20.

54 *Van der Peet*, *supra* note 30 at 207 [cited to C.N.L.R].

55 *Powley*, *supra* note 2 at para. 31.

date for proof of Aboriginal title and Aboriginal rights, if adopted, would contribute to a rational and principled development of the law of Aboriginal rights generally, and as it pertains to the Métis people in particular.[56] Here, the "transition" date is called the "original date" to emphasize the function of the word in defining the Métis as an "Aboriginal" people.

*Prima facie*, the selection of one "original date" as one common date for proof of all Aboriginal rights may be linked with the doctrine of the fiduciary relationship that the Crown undertakes with Aboriginal peoples upon the assertion of sovereignty. This date is that which the law establishes as the time when the Crown assumed governmental responsibility for the particular Aboriginal people in question, and a fiduciary relationship was established.[57] On this view, the Crown assumed a fiduciary duty to protect the group interests of the Aboriginal people, that is, those group interests that the self-governing Aboriginal nation had previously protected by itself.[58] On this view, the Métis people are an "ab-original" people because they are descended from a distinct indigenous people that existed at the "original date." The Métis people at Red River and in western Canada existed when Indian treaties were signed in western Canada. Métis Aboriginal rights can be identified at the time that the Crown-Aboriginal fiduciary relationship was established, with the Crown undertaking to protect the interests of all the Aboriginal peoples in a particular geographic region. There is therefore no reason to twist the logic of Indian cases to suit a "later arrival," as the court thought fit in *Powley*.[59] In fact, the Métis were expressly recognized and dealt with separately in respect to their Indian title from 1870 until the 1920s as the Crown negotiated treaties with Indians and recognized the rights of the Métis,[60] so it is not necessary to look for a reason to establish a different date for proof of Métis rights.

Thus, the history of the Métis of western Canada not only identifies the group that struggled for its rights in the context of Crown-Métis relations, which were quite distinct from Crown-Indian relations, but also suggests how the doctrine of Métis rights might fit within the broader conceptual framework of Aboriginal and treaty rights.

## CONCLUSION

In March 2003, the Supreme Court of Canada is scheduled to hear the appeal in *Powley*, the first case to come before it alleging Métis Aboriginal rights within the meaning of section 35 of the *Constitution Act, 1982*.[61] The reasoning that the Court will adopt in the *Powley* case has the potential of setting the judicial approach in subsequent Métis cases. The facts in the case would seem to support a non-status Indian claim based in a small place in Ontario far removed from the regions where the Métis nation made its mark in western Canadian history. That makes it a particularly difficult case that is, at best, at the periphery rather than at the core of Métis history and experience.

In this comment, I have suggested that the reasoning in the Ontario Court of Appeal contains pitfalls that may infringe on Indian rights. Some of this is a result of the conception of the term "Métis" as denoting, not a distinct historic nation, but rather communities of individuals identified as racial groups existing at the boundary of official Indian definition in the *Indian Act*.

An alternative approach has been proposed. It is based upon general constitutional principles and values. This approach espouses the application of general principles to the exceptional case of the Métis people of western Canada. It eschews the more common notion, which seeks to apply exceptional principles to the unexceptional case of mixed-blood individuals and communities found at the boundary of Indian communities. The recognition of a category of Aboriginal peoples distinct from Indians requires an explanation based upon applicable constitutional values and principles. Such an explanation has been explored, and it suggests that the rights of the Métis people have their source in Crown-Métis political relations that are quite distinct from Crown-Indian relations.

The values that the courts adopt to interpret the meaning of section 15 of the *Charter* are not applicable to the interpretation of the rights and the identity of the historic Aboriginal nations that have now been recognized, in section 35.1, as having a distinct political role in the future development of the fundamental laws of Canada.[62] Accordingly, the true construction of

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[56] *Supra* note 53.

[57] *Ibid*. at 218.

[58] *Ibid*. Those group interests are judicially recognized as Aboriginal rights for Aboriginal peoples. Individual rights as Canadian citizens are in a different category: Aboriginal persons have citizenship rights as individual Canadians, and they enjoy Aboriginal rights by virtue of their membership in an Aboriginal group with Aboriginal rights. Citizenship rights and Aboriginal rights are distinct.

[59] *Powley*, *supra* note 2.

[60] Hodges & Noonan, *supra* note 15.

[61] See also *Blais*, *supra* note 1.

[62] Section 35.1: "The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the

section 35 can only be discerned in the history of political struggles and compromises that lie behind the crafting of constitutional history and meaning.

Métis Aboriginal rights are vested in communities descended from the unique, historic Métis nation that fought for its rights and its identity. Indian rights are vested in communities descended from historic Indian communities in their homelands across Canada. *Powley* illustrates some of the difficulties that might emerge if Métis rights and identities are judicially recognized within Indian bands and upon Indian ancestral lands across Canada. The interpretation of section 35 must be based upon general principles selected to do equal justice to all the Aboriginal peoples of Canada. This can be done by moving away from the irrational boundary of federal Indian definition, and towards the positive core of Métis identity. Hard cases make bad law, and it is better to start at the core of certainty than at the boundaries of uncertainty.

**Paul L.A.H. Chartrand**
College of Law, University of Saskatchewan

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*Constitution Act, 1982*, to section 25 of this Act or to this Part,

a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."

Section 35.1 was added by the *Constitution Amendment Proclamation*, 1983 SI/84-102, which also substituted new s. 25(b), adding new ss. 35.1, 37.1, 54.1, and 62 of the *Constitution Act, 1982*.