

# **The Métis of the Northwest: Towards a Definition of a Rights-Bearing Community for a Mobile People**

by

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A thesis submitted in conformity with the requirements  
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# The Métis of the Northwest: Towards a Definition of a Rights-Bearing Community for a Mobile People

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Masters of Law

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2008

## Abstract

In *R. v. Powley*, the first Métis harvesting rights case to reach the Supreme Court of Canada, the Métis rights-bearing group was defined as a group of people living together in a stable and continuous community in the same geographic area. This thesis argues that the test is wrong on the facts and in law. On the facts, it is inconsistent with the historic Métis society, which was highly mobile over a very large territory. In law, the test is wrong because it is not necessary to prove occupation in order to prove harvesting rights. Proving the existence of a stable and continuous community requires proof of occupation. The court's test requires Métis to identify fictional communities and prove that they are a historic and continuing fact.

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## Part One: Introduction

The Métis are one of the aboriginal peoples of Canada within the meaning of section 35(2) of the *Constitution Act, 1982*.<sup>1</sup> There is a growing body of law concerning the aboriginal rights and land related claims of the Métis. Research commissioned for a series of Métis harvesting cases has successfully established that the Métis exist in the contemporary context of Canada as rights-bearing aboriginal peoples and that they have existing harvesting rights within the meaning of s. 35(1) of the *Constitution Act, 1982*.

My own involvement with the developing Métis law and research has been fairly extensive. I have been legal counsel for the Métis defendants in many of the harvesting rights cases in Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and the Northwest Territories, including *R. v. Powley*.<sup>2</sup> I am the great-grand niece of Louis Riel and as such have been asked to work by many Métis organizations to help with the development of Métis constitutional law.

This thesis speaks to the definition, for the purpose of proving harvesting rights, of the appropriate rights-bearing Métis group. There is no attempt made in this thesis to address the

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<sup>1</sup> Section 35 of the *Constitution Act, 1982* reads as follows:

s. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

<sup>2</sup> 2003 SCC 43, [2003] 2 S.C.R. 207, 68 O.R. (3d) 255 [*Powley*]. I was also counsel or co-counsel on *R. v. Morin* [1998] 1 C.N.L.R. 182, 1997 CanLII 11328 (SK Q.B.); *R. v. Vermeylen* (Manitoba - charges dismissed by trial judge prior to the constitutional issue of the Métis hunting right being argued at trial); *R. v. Hudson* (NWT - settled before trial); *R. v. Makepeace* (Alberta - settled before trial); *R. v. Laviolette*, 2005 SKPC 70, 3 C.N.L.R. 202 [*Laviolette*], *R. v. Willison*, 2006 BCSC 985; [2006] 4 C.N.L.R. 253 [*Willison*] (appeal only); *R. v. Blais*, 2003 SCC 44; [2003] 2 S.C.R. 236; 230 D.L.R. (4<sup>th</sup>) 22 [*Blais*] (appeals only), *R. v. Laurin, et al.*, 2007 ONCJ 265, 86 O.R. (3d) 700; *R. v. Goodon* (Manitoba – trial complete; no judgment at this time), and *R. v. Bates* (Alberta - currently in trial preparation).

definition of a Métis group claiming aboriginal title. The distinction in law between proprietary rights and user rights is clear. Harvesting rights are user rights and the Supreme Court of Canada held in *R. v. Adams*, that it is not necessary for an aboriginal claimant group to prove occupation in order to prove that it has a right to harvest.

... aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.<sup>3</sup>

In *R. v. Powley*, a harvesting case, the Supreme Court of Canada defined the appropriate Métis rights-bearing group as a Métis community.

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.

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary ... to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right ... The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this

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<sup>3</sup> *R. v. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4<sup>th</sup>) 657 at para. 26 [*Adams*].



community is also a Métis "people", or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.<sup>4</sup>

The Supreme Court of Canada's definition of Métis community has four basic elements. This thesis takes no issue with two of these requirements - that the Métis community must have a distinctive collective identity and that the members of the community must share a common way of life. This thesis does question the applicability of two of the court's requirements: (1) that the Métis community can be identified by evidence that the people have been continuously, and with a sufficient degree of stability, living together in the same geographic area; and (2) that the relationship of these individual communities with a larger people or nation over a wider area is not relevant to the inquiry.

Underlying these requirements is a fundamental question – what is the appropriate rights-bearing group when the people are highly mobile? Does the requirement for a stable and continuous 'community' imply a conclusion that the claimant group must prove occupation *and* use, instead of simple use? Does the use of the term 'community' also imply a small, settled group?

The inquiry before the courts is essentially one of determining the appropriate unit that will be the rights-bearing entity. In the course of this inquiry the court has conflated several concepts such as society, nation, people and community. The Supreme Court of Canada in *Blais*<sup>5</sup> and *Powley* used eleven different terms to describe the Métis rights-bearing group. In *Powley* the court referred to "the Métis community", "the Métis", "various Métis peoples", "a group of

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<sup>4</sup> *Powley*, *supra* note 2 at para. 12.

<sup>5</sup> *Blais*, *supra* note 2.

Métis”, “Métis cultures” and “Métis society”.<sup>6</sup> The term community is used to describe both a Métis regional presence in the Upper Great Lakes and the more localized Métis group in and around Sault Ste Marie.<sup>7</sup> In *Blais* the court referred to “Métis communities,” “Métis Nation,” “Manitoba Métis”, “the Métis”, “Métis peoples”, “Red River Métis”, and the “Manitoba Métis community.”<sup>8</sup> Some of these terms are used in the same paragraph. The terminology in both cases appears to be used inter-changeably.

This confusion of language is not limited to the Métis situation.<sup>9</sup> In *R. v. Sappier; R. v. Gray*<sup>10</sup> the court also conflates the concepts of society and community.

The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a practice that helps to define the distinctive way of life of the community as an aboriginal community.<sup>11</sup>

The Court’s analysis in *Powley* indicates that the Métis rights-bearing group (historic or modern) is not limited to the confines of a specific village, town or city and emphasizes that the continuity of the Métis community is not the main focus in determining the existence of an Aboriginal harvesting right.<sup>12</sup> Despite this direction, governments and the lower courts post-*Powley* are focused solely on determining the existence and continuity of small, individual Métis communities. Since *Powley*, the lower courts have been questioning what the Supreme Court

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<sup>6</sup> *Powley*, *supra* note 2 at paras. 7, 10, 11, 12, 17, 21 and 23.

<sup>7</sup> *Ibid.* at paras. 21 and 23.

<sup>8</sup> *Blais*, *supra* note 2 at paras. 9, 20 and 28.

<sup>9</sup> The modern day treaty process in British Columbia is struggling with the same problem.

<sup>10</sup> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 309 N.B.R. (2d) 199 at para. 72 [*Sappier and Gray*].

<sup>11</sup> *Ibid.* at para. 22.

<sup>12</sup> *Powley*, *supra* note 2, at para. 27.

meant. What is a Métis community? Is it a settlement? Is a community also a society? Is a community the same as a people or a nation? Are community and traditional territory the same?

The Court's theory that a 'community' is the appropriate rights-bearing entity is also having unfortunate repercussions. Because it called for the identification of a local, stable and continuous Métis community, government and the lower courts are now searching for and in some cases creating, these fictional entities.<sup>13</sup> These newly created Métis communities do not reflect the history or culture of the Métis. The creation of arbitrary boundaries has the effect of excluding many Métis from areas they previously used for harvesting. Governments and industry deny that they have an obligation to consult with Métis unless there is a court declaration that the specific geographic area in which they live has been declared to be a Métis community. Finally, the test has twisted the constitutional recognition and affirmation of Métis harvesting rights. Métis no longer go to court to prove that they have harvesting rights. They go to court to prove the existence of a fictional Métis community.

This thesis proposes that the test for community set out by the Supreme Court is inappropriate because it bears no relation to the historic Métis society and because it requires that Métis must prove that a small-scale, geographically bounded, stable and continuous community that never existed in the first place is an historic and contemporary fact.

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<sup>13</sup> *R. v. Belhumeur*, 2007 SKPC 114, 301 Sask. R. 292 [*Belhumeur*]; *Lavolette*, *supra* note 2. On July 5<sup>th</sup> 2007, the Alberta Government made the following unilateral announcement. "At this time, Alberta is prepared to consider for the purposes of Metis harvesting the eight Métis Settlements and the following 17 communities as both historic and contemporary Métis communities: 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", online: Alberta Government Sustainable Resources Development <[http://www.srd.alberta.ca/fishwildlife/fishinghunting/pdf/MetisHarveting\\_July5\\_2007](http://www.srd.alberta.ca/fishwildlife/fishinghunting/pdf/MetisHarveting_July5_2007)>.

The facts show that the historic Métis society was just the opposite. It was a large network that sprawled across thousands of miles. It was not geographically centered around a single fixed settlement. In this, the Métis society is similar to many hunter/gatherer and trader societies. The Métis used, as bases of operations, many widely dispersed settlements. The historic Métis society was characterized by overlapping and multiple bonds especially those of kinship and trade. Their high degree of mobility sustained that economy. It was also largely invisible to those who were not members of the society.

This thesis is an examination of one Métis society - the Métis who lived in, used and occupied the Northwest. Tough described the term “Northwest” as follows:

The Northwest ... would include the west, the western sub-Arctic of the northern plains; it would include the southern area of the Mackenzie District, or the Northwest Territories as we know it today, north of 60, Alberta, Saskatchewan and Manitoba, and northwestern Ontario. Northwest is a perspective, a geographical perspective ... from Montreal or Toronto or Ottawa ... it's a view that comes out of the fur trade, the Montreal fur trade, the voyageurs, that they're heading off to the “Northwest.” So it's that region that's north and west of Central Canada.<sup>14</sup>

This thesis proposes that, for the purposes of harvesting rights, instead of seeking small, local Métis communities, a better analysis would be to accept that the Métis society is the Métis who lived in, used and occupied the Northwest. Any smaller unit is arbitrary and does not reflect the history, culture or perspective of the Northwest Métis. Requiring proof of a stable continuous community also inappropriately becomes the equivalent of a requirement to prove occupation.

As the Supreme Court of Canada noted in *Powley*, there may be other groups in Canada who are Métis within the meaning of s. 35(1) of the *Constitution Act, 1982*. Indeed, there is a

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<sup>14</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Dr. Tough, June 21, 2007 at 33-34.

group in Labrador that claims to be an Inuit, mixed-race culture and now identifies itself as the Labrador Métis Nation.<sup>15</sup> This thesis speaks only to the Métis of the Northwest and does not refer to, deny or support any other Métis groups.

For the purposes of this thesis, I use the terms society and community. I work with these terms not because the Métis are not a nation or a people. Rather, the thesis examines the legal devolution from the expansive term ‘society’ to the more limited term ‘community’. This thesis proposes that using the term ‘community’ as the descriptive term for the rights-bearing entity as adopted by the Supreme Court of Canada in *Powley* is inappropriate, especially when one is dealing with a highly mobile people. It is suggested that the term ‘society’ would better reflect the rights-bearing group known as the Métis of the Northwest.

Identifying the Métis of the Northwest as a society has proved elusive. It is suggested that the difficulty lies in the fact that the essential characteristics of the Métis society are unrecognized by outsiders. This thesis examines some of these elusive characteristics, including the many names of the Métis and their hidden *Michif* language. It attempts to explain why the Métis society has remained invisible, as a society, to outsiders. The concentration is primarily on Métis mobility and its repercussions in law. The thesis shows the vast territory of this highly mobile people and how their extensive mobility has contributed to the difficulty outside observers have in recognizing that they are in fact one rights-bearing group. While other factors have contributed to the difficulty outsiders have experienced in recognizing Métis society, these other factors do not have legal repercussions in the same way that their mobility does.

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<sup>15</sup> *Labrador Métis Nation and Carter Russell v. Canada (Attorney General)* 2005 FC 939, 4 C.N.L.R. 212.

The thesis begins with an examination of the many theories of ‘society’ and ‘community’ and then looks at the historic records to identify the Métis society of the Northwest. The historic records include documents from the Roman Catholic Church, the Hudson’s Bay Company and scrip. Because the full extent of Métis mobility over such a large territory is difficult to grasp, I have attempted to show Métis mobility in a series of maps. In addition, this thesis relies on many interviews done with Métis across the Northwest. In so doing, it presents the Métis perspective. This thesis seeks to provide some understanding of the culture and attributes of the Métis of the Northwest so that their customs, practices and traditions can be more appropriately recognized in the developing body of aboriginal rights law.

## Part Two: Community and Society

What is a community? What is a society? How do we define these terms? It has been noted by many scholars that community has proved highly resistant to any satisfactory definition because all proposed definitions rely on a theory of community that is itself contentious.<sup>16</sup> There are many approaches to understanding these terms – sociological, anthropological, political and legal. Each approach yields a dramatically different understanding.

Any examination of community and society must begin with the Greek idea of the *polis*, which was characterized by Aristotle as a society with a sense of close community that contained direct political, social and economic relationships.<sup>17</sup> For the Greeks, society and community were one and the same.

In 18<sup>th</sup> Century European thought the idea of community captured for the thinkers of the Enlightenment such as Rousseau, the essence of an idealized society based on “bonds of commonality”.<sup>18</sup> Thus, community was seen to be an entity based on close and direct relationships. Society, on the other hand became more and more associated with the state. As the age of the Enlightenment progressed into the 19<sup>th</sup> Century, community became a utopian concept.

The modernist assumption has been that community once existed and has been destroyed by the modern world which has been erected on different foundations ... the nostalgic narrative of loss has given the utopian dream its basic direction ... It has also been the

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<sup>16</sup> A.P. Cohen, *The Symbolic Construction of Community* (London and New York: Routledge, 1985) at 11 [Cohen].

<sup>17</sup> Aristotle, *The Basic Works of Aristotle* (New York: Modern Library Classics, Random House, 2001); *Merriam-Webster Online Dictionary*, (12 July 2008) <http://www.merriam-webster.com/dictionary> s.v. “polis”; Gerard Delanty, *Community* (London and New York: Routledge, 2003) at 7 [Delanty].

<sup>18</sup> Jean-Jacques Rousseau, *The Social Contract*, trans. by Maurice Cranston, (London: Penguin Classics, 1968); Delanty, *supra* note 17 at 8.

source of some of the greatest political dangers, giving rise to the myth of the total community that has fuelled ... ideologies in the twentieth century.<sup>19</sup>

There has been a considerable amount of social science theorizing about the nature of community. Early theorists were concerned with the search for a set of defined attributes that could describe a “structural model of community.”<sup>20</sup> Some proposed that a community could be defined as an integrated economic unit that looked at the group’s division of labour and interdependency.<sup>21</sup> Some proposed that community should be seen as an aggregating device rather than an integrating device.<sup>22</sup> Others saw community as inherited relationships that subsequently evolved into societies founded on legal agreement, usually characterized as one that moves from status to contract.<sup>23</sup> Thus, the community evolution was equated to the diminishing importance of kinship in the community.<sup>24</sup> As Cohen noted, each of these views espouse an evolutionary model that sees community as incompatible or anachronistic with modernity.<sup>25</sup>

Despite the fact that these theories see community as anachronistic, there is little doubt that the concept of community is alive and well in the 21<sup>st</sup> Century. There is also little doubt that the modern and common conception of community is primarily local and in opposition to larger society. The common modern concept of community, perhaps with the notable exception of references to the internet community, is one of immediacy and it is a normative conception.

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<sup>19</sup> Delanty, *supra* note 17 at 11.

<sup>20</sup> Cohen, *supra* note 16 at 9.

<sup>21</sup> Emile Durkheim, *Elementary Forms Of The Religious Life*, trans. by Karen E. Fields, (New York: The Free Press, 1995).

<sup>22</sup> Cohen, *supra* note 16 at 20.

<sup>23</sup> Henry Sumner Maine, *Ancient Law* (Orono: Maine Press, 2007).

<sup>24</sup> Ferdinand Tonnies, *Community and Society: Gemeinschaft und Gesellschaft* trans. and ed. Charles P. Loomis (East Lansing: The Michigan State University Press, 1957).

<sup>25</sup> Cohen, *supra* note 16 at 20.



Historically, community was defined in opposition to the state, but beginning in the 20<sup>th</sup> Century our concepts of society and community evolved. Weber suggests that the Protestant ethic contributed to the polarity that developed between our modern concepts of community and society. Weber's work points to the Protestant idea that meaning and spirituality are reserved for the inner world while the outer world of the social was meaningless and degenerate.<sup>26</sup> Weber suggests that this is mirrored in the 20<sup>th</sup> Century's growing disenchantment with society and its turn to community as a smaller and more meaningful realm. Community according to this understanding becomes the habitat of the individual and the location of tradition, while society becomes a meaningless and alienated entity. Society came to be more and more associated with the state and community became the residue; that "which is left when society becomes more and more rationalized by the state and by economic relations."<sup>27</sup>

In the 1980s, community definition took on new understandings with the work of Anderson, *Imagined Communities*,<sup>28</sup> and Cohen, *The Symbolic Construction of Community*.<sup>29</sup> These authors contributed, as the titles of their work suggest, the idea that communities are more than a set of defined attributes such as geography, shared culture, kinship, etc. Rather, they saw community as an imagined entity, a creative idea, a "system of values, norms, and moral codes which provides a sense of identity within a bounded whole to its members."<sup>30</sup> These authors tried to come to an understanding of community as a relational idea.<sup>31</sup>

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<sup>26</sup> Max Weber, *Social and Economic Organization* (New York: The Free Press, 1947).

<sup>27</sup> Delanty, *supra* note 17 at 29.

<sup>28</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London and New York: Verso, 2006) [*Imagined Communities*];

<sup>29</sup> Cohen, *supra* note 16.

<sup>30</sup> *Ibid.* at 9.

<sup>31</sup> Cohen, *supra* note 16 at 12.

Recently there has been an emphasis on the importance of boundaries or the inherent limitations of a community.<sup>32</sup> Scholars have now proposed that the group's consciousness of itself as a community can be best understood by an examination of its perception of its community's boundaries.<sup>33</sup>

Boundaries can take many forms including language, dress, ritual and a sense of knowing who belongs to the group and who does not. Boundaries may be legal, physical, racial, linguistic or religious. As Haesly noted, the importance of boundaries should not be underestimated despite the fact that they may not be readily apparent to outsiders.<sup>34</sup> Some scholars also note that community boundaries can form in the negative. "A group of people must know ethnically what they *are not* before they know what they are."<sup>35</sup> Cohen proposes the following:

Community is that entity to which one belongs, greater than kinship but more immediately than the abstraction we call 'society'. It is the arena in which people acquire their most fundamental and most substantial experience of social life outside the confines of the home. In it they learn the meaning of kinship through being able to perceive its boundaries – that is, by juxtaposing it to non-kinship; they learn 'friendship'; they acquire the sentiments of close social association and the capacity to express or otherwise manage these in their social relationships. Community, therefore, is where one learns and continues to practice how to 'be social'. At the risk of substituting one indefinable category for another, we could say it is where one acquires 'culture.'<sup>36</sup>

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<sup>32</sup> *Imagined Communities*, *supra* note 28 at 7; Cohen, *supra* note 16 at 12.

<sup>33</sup> Cohen, *supra* note 16 at 13-14.

<sup>34</sup> Richard Haesly, *Making the "Imagined Community" Real: A Critical Reconstruction of Benedict Anderson's Concept of "Imagined Communities"* (Paper presented to the 46<sup>th</sup> Annual International Studies Association Meeting, Honolulu, Hawaii, 1-5 March 2005), at 7 [Haesly]; Cohen, *supra* note 16 at 12-13.

<sup>35</sup> Haesly, *supra* note 34 at 7; and see Thomas Hylland Ericksen, *Ethnicity and Nationalism* (London: Pluto Press, 2002)

<sup>36</sup> Cohen, *supra* note 16 at 15.

This recent scholarly work on community is in stark contrast to the court's attempts to describe the community as an institution that can be objectively defined and described.<sup>37</sup>

### **Defining Community for Mobile Peoples**

Determining whether community is the appropriate term for mobile peoples, usually placed in two groups – migrants and nomads – is complex. A nomad is defined as a wanderer or a member of a people roaming from place to place for food or fresh pasture.<sup>38</sup> There are different kinds of nomadic peoples including pastoralists, hunter-gatherers, and traders.<sup>39</sup> The common conception of nomads is that they are aimless wanderers who do not value possessions or continuity and who are “rootless, transient, unreliable, and unstable.”<sup>40</sup> Their way of life is characterized,

by moving from one place to another, with no fixed residence, *though often temporary centers*. Mobility may be cyclical or periodic, determined by the availability of food supplies, rainfall, weather, employment, etc. Most nomadic people (eg the Bedouin, the Kirghiz) are either hunter-gatherers or pastoralists. Some are described as semi-nomadic (eg the Fulani), as they remain settled in one area for a span of time and cultivate crops.<sup>41</sup>

Migrants, on the other hand, are usually considered to be those who cross an international boundary for a certain minimum period of time. The motives of internal migration may be economic or social and are considered an important factor in the erosion of traditional boundaries between languages, cultures and ethnic groups.<sup>42</sup> For the purposes of this thesis, any discussion

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<sup>37</sup> *Ibid.* at 19-20.

<sup>38</sup> *The Canadian Oxford Dictionary* (Oxford University Press, Don Mills; 1998) at 987.

<sup>39</sup> *The New Internationalist* (Feb 21/08) <http://www.newint.org/issue266/facts.htm>.

<sup>40</sup> William W. Bassett, “The Myth of the Nomad in Property Law” (1986) 4 *Journal of Law and Religion* 1 at 150-151 [Bassett].

<sup>41</sup> *The Cambridge Encyclopedia*, 4<sup>th</sup> ed., s.v. “nomad”.

<sup>42</sup> United Nations Educational, Scientific and Cultural Organization, online: <[http://portal.unesco.org/shs/en/ev.php-URL\\_ID=3020&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/shs/en/ev.php-URL_ID=3020&URL_DO=DO_TOPIC&URL_SECTION=201.html)> s.v. “migrant”.

with respect to migration refers to internal migration, which refers to a move from one area to another within one country.

The historic mobility of the Métis may be rooted in both of these concepts. Many Métis are nomadic and at times could be seen as internal migrants. Whether seen as nomads or migrants or some combination of the two, Métis culture is not unitary, rooted in a single place, or linear. Métis culture is complex and challenges established norms because their mobility transgresses the established political and legal order that is created through the delineation of property and boundaries. As Cresswell notes, “mobility is often the implicit underbelly of the place-roots-authenticity-dwelling lexicon”.<sup>43</sup> Therefore, in order to define a Métis rights-bearing entity, either as a society or as a community, one must take their mobility seriously.

Nomadic and migrant communities are not unitary or rooted. Despite the fact that both groups share the commonality of mobility, the common understanding is that their experiences are very different. The difference is usually expressed as being that the migrant experience of identity revolves around concepts of home and away – a sense of longing for home whether in the past or future.<sup>44</sup> The nomad, on the other hand, was thought by many to have no place in which meaning and identity can rest<sup>45</sup>

It is suggested that this theory misses the central understanding for nomads on two points. First, in finding no resting *place* for meaning and identity it perpetuates the common

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<sup>43</sup> Tim Cresswell, “Imagining the Nomad: Mobility and the Postmodern Primitive” in eds. Georges Benko and Ulf Strohmayer, *Space and Social Theory: Interpreting Modernity and Postmodernity* (Oxford, Blackwell Publishing: 1997) at 361 [Cresswell].

<sup>44</sup> *Ibid.* at 362.

<sup>45</sup> Edward Said, *Culture and Imperialism* (London, Vintage, 1994) at 403.

misconception of nomads as aimless and rootless wanderers.<sup>46</sup> Second, I would argue that it is not that there is no *place* in which the meaning and identity of nomads can be located, rather, it is that for nomads, the *place* in which their meaning and identity rests is very large and cannot be understood in the absence of understanding their mobility.

The theory with respect to migrants also appears to misconceive the reality of mobile peoples who may also be internal migrants. While it may be true that internal migrants who are not also mobile peoples may live with a sense of identity that revolves around concepts of home and away, there is no evidence that the same can be said for mobile peoples who migrate from time to time within what they identify as their homeland.

How then do we begin to understand nomads or mobile peoples? We might begin by understanding that such mobile peoples historically did not fit into neat divisions and classifications. Their survival tactic was not to settle in one place but rather to use and manipulate place, which de Certeau notes is a form of “tireless but quiet” consumption that is largely invisible because it cannot be identified in products (settlements, buildings, art, etc.) and reveals itself only in its use.<sup>47</sup> Nomads are not defined, identified by, or reliant on a single individual place for identity or power.<sup>48</sup>

As noted above, boundaries and borders are important markers for any group but political and geographic borders are particularly difficult to understand in relation to peoples who may live on and across such borders. The Métis provide several good examples of this because several of their most prominent fixed settlements can be found at geographic boundaries, which

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<sup>46</sup> Bassett, *supra* note 41 at 150-151.

<sup>47</sup> *Ibid.* at 31.

<sup>48</sup> Michele de Certeau, *Practice of Everyday Life* (Berkeley: University of California Press, 1984) 29-34.

were created by continental divides or heights of land across the Northwest. One such location is the Methy Portage in Northwest Saskatchewan. This area is located at the height of land that separates two drainage systems; the Mackenzie from the Hudson Bay. Beginning in 1776, Methy Portage became a vital location that provided access to the Mackenzie and facilitated the fur trade.<sup>49</sup> Since that time it has always been an area where the Métis were a significant part of the population.<sup>50</sup> There is also a strong and continuous Métis presence in Rainy Lake/Rainy River, which is where the voyageurs had to change from the Great Lakes/Boundary Waters into the Prairie watersheds. The strength of their presence was such that during the historic treaty process the Métis of Rainy Lake/Rainy River were the only Métis collective that was permitted to enter into treaty as a group.<sup>51</sup>

This ability to locate and succeed by working borders contributes to the Euro-Canadian concept that the Métis are marginal people. This may be true in one sense, but not in the sense that borders are places that have no value. Rather, for the Métis who live in and work these borders, these are some of their places of power. The logical conclusion is that existing geographic boundaries for others may not be boundaries at all for mobile peoples.

Historically, mobile peoples who were hunter/gatherer/trader societies such as the Métis were often not seen as a larger society by outside observers. If associated with a settlement, such as Red River, they were seen as local residents of that settlement. If they were more mobile, they were thought to be families of hunters who were not connected to any larger entity. Often the

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<sup>49</sup> Frank Tough and Erin McGregor, "The Rights to the Land May be Transferred": Archival Records as Colonial Text – A Narrative of Métis Scrip" in ed. Paul W. DePasquale, *Natives & Settlers Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press, 2007) at 34. [Tough & McGregor]

<sup>50</sup> *Ibid.* at 35.

<sup>51</sup> Addendum to Treaty Three by the Half Breeds of Rainy Lake/Rainy River in *Indian Treaties and Surrenders*, Vol. 1 (Saskatoon: Fifth House Publishers, 1992) at 308-9.

Métis were not seen as connected to a larger society because they appeared to spend very little time in fixed settlements, a choice that removed them from the purview of the settlers.<sup>52</sup>

Mobile peoples avoided spending long periods of time in fixed settlements for good reasons. First, because a fixed settlement is in the center of what Anderson calls a dead zone.<sup>53</sup> These zones typically have no necessities of life accessible to hunter/gatherers – no wood, no clean fresh water and no food. If the settlement is large the dead zone surrounding the settlement is usually correspondingly large. The challenge for mobile hunter/gatherer/trader peoples therefore is not to reside in these dead zones, but rather to learn how to get what they need by way of supplies and then to move in and out of these zones as quickly as possible.

Mobile peoples avoided staying in settlements despite the fact that the settlements were important for their trade. They followed the buffalo herds or the fur-bearers and many only visited settlements when necessary. Often they camped outside these settlements, visiting only to access necessities. Because mobile peoples avoided remaining in the settlements, those who did live there regarded them as not belonging to the settlement. The following quote is a good example of how the Métis were seen from the perspective of a Red River resident.

... not a tenth part of their number really belong to Red River ... Hither, in fact, have flocked the half-breeds from all quarters east of the rocky mountain ridge, making the colony their great rendezvous ...<sup>54</sup>

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<sup>52</sup> John McDougall, *On Western Trails in the Early Seventies: Frontier Pioneer Life in the Canadian North-West* (Toronto: William Briggs, 1911) at 222 – 223; Gwynneth Jones, *Métis Populations of Southern Alberta* (2008) [unpublished] at 73 [Jones 2008].

<sup>53</sup> David Anderson, “Is Siberian Reindeer Herding in Crisis? Living with Reindeer Fifteen Years after the End of State Socialism” (2006) 10 *Nomadic Peoples* 2 at 96.

<sup>54</sup> Alexander Ross, *The Red River Settlement: Its Rise, Progress and Present State, With Some Account of the Native Races and its General History to the Present Day* (Edmonton: Hurtig, 1972) at 83-84 [Ross].

Outsiders view such mobile peoples as having no place of residence. But from the perspective of mobile aboriginal peoples their place of residence is in fact a much larger space. As such, this avoidance of fixed settlements should be understood as part of their complex relationship with the land and its resources. A first-hand description of this lifestyle can be found in the memoirs of Marie Rose Smith (née Delorme).

... in the spring of 1871 my father and his family would go to St. Paul, get his merchandise and come out to winter some places ... to catch and buy furs ...

It took about three months' travelling every day to reach Winnipeg where we would dispose of the buffalo robes and furs. Oh but that was the life! Free life, camping where there was lots of green grass, fine clear water to drink, nothing to worry or bother us. No law to meddle with us. We'd killed ducks, prairie chickens and all kinds of wild game on which we mostly depended for our living. There were times when we camped near lakes ... We would also kill antelope, badgers, skunks, wild cats, in fact all kind of wild animals which were good to eat. This would be some change to pemmican and dried buffalo meat of which we always had lots...

... We always travelled with different families, whenever we would camp it would be like a nice village. All kinds of leather tepees, those days we did not use tents but we carried poles and pegs. At night when we found a suitable camping place, a corral was made with the carts into which the horses were driven ...<sup>55</sup>

As this description shows, these mobile peoples are not aimless in their mobility. They moved with purpose for food, trade or social reasons. Like settled peoples they respect space and time and organize their lives appropriately. The problem for outsiders is in not understanding what space and time these nomads are relating to. For the Métis, mobility centers in their need to be at a particular location at a certain time. For example, the need to be at one of their wintering sites when the worst of the winter weather arrives or the need to find fuel, water and animals. This is

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<sup>55</sup> Marie Rose Smith, *The Adventures of the Wild West of 1870* Undated manuscript in the Glenbow Archives, Mary Rose Smith Papers, M1154, file 3, pages 1 – 6; Jones 2008, *supra* note 52 at 64.



not, as described by Said, having no resting place for meaning.<sup>56</sup> It is simply a large resting place for multi-layered, complex meaning.

Finally, it is clear that community identity for mobile peoples includes historic, symbolic, and emotional ties to many places.<sup>57</sup> As Miller notes this can be seen in the personal narratives that perpetuate the prior importance of the group and its contemporary “loss, exclusion and oppression.”<sup>58</sup> The reverence of the Métis for Riel and the stories surrounding the events of 1870 in Red River and 1885 in Saskatchewan are good examples of this.

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<sup>56</sup> Said, *supra* note 45 at 403.

<sup>57</sup> Bruce Granville Miller, *Invisible Indigenes: The Politics of Nonrecognition* (Lincoln and London: University of Nebraska Press, 2003) at 5 [Miller].

<sup>58</sup> *Ibid.* at 6.

### Part Three: Locating the Métis Rights-Bearing Entity

While Métis individuals, such as Louis Riel, have been well recognized in Canadian history, the Métis collective, community or society has been, since 1885 with the hanging of Louis Riel, largely invisible. The collective features of the Métis of the Northwest have either not been recognized or have been misunderstood by outsiders. Instead of seeing the collective features of the Northwest Métis as indicia of a society, observed cultural markers have been seen as factors that undermine a sense of collectivity. As further explained below, it is suggested that this analysis is wrong.

The boundaries of the Métis society include many symbols and ideas that are not discussed in this thesis. This thesis contains no discussion of Métis art, clothing, music, dance or food. These distinctive characteristics of the Northwest Métis have been discussed elsewhere.<sup>59</sup> The purpose of the following discussion is to look at the boundaries of the Métis society that have been confused in the legal discourse and have led to the misunderstanding that either the Métis society does not exist as a collective, (the prevailing thought pre-*Powley*) or that the collective exists in small, localized communities (the prevailing thought post-*Powley*).

Since 1885, the Métis collective has remained largely invisible to the rest of Canadian society. Their invisibility is the result of several factors: (1) the fact that, for the most part, there were only two identity options in Canada – white or Indian – because no one wanted to

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<sup>59</sup> Lawrence Barkwell, Leah Dorion, and Darren Préfontaine, eds., *Métis Legacy: A Métis Historiography and Annotated Bibliography* (Winnipeg: Pemmican Publications, 2001); Lawrence Barkwell, Leah Dorion, and Audreen Hourie, eds., *Métis Legacy II: Michif Culture, Heritage, and Folkways* (Saskatoon: Gabriel Dumont Institute and Pemmican Publications, 2006).

recognize the existence of a mixed race people;<sup>60</sup> (2) the erasure of historic aboriginal geographic boundaries; (3) the hidden language of the Métis; (4) the fact that the Métis are not phenotypically distinct; (5) the fact that they have many names; (6) a general disinclination to publicly identify following the events of 1870 and 1885; and finally (7) their mobility.

### **(1) No One Wants a Mixed Race People**

The Northwest Métis arise out of two very distinct cultures – Euro-Canadian and Amerindian. They are the children of the fur trade and the marriages between Amerindian women and the voyageurs.<sup>61</sup> As Elliot notes, “these descendants of Amerindians and Euro-Canadians integrated diverse cultural traits into a unique and broadly-based syncretic culture.”<sup>62</sup> Jacqueline Peterson stated that the Métis,

... were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between ... [they] did not represent an extension of French, and later British colonial culture ...”<sup>63</sup>

As people of mixed race, the Métis have never fit comfortably into the cultural landscape in North America. It is difficult for many Amerindians and Euro-Canadians to accept that a new aboriginal people with Euro-Canadian ancestry evolved in Canada. The idea seems to defy deeply held notions about loyalty to one’s ethnic ancestry and the entitlements of the ‘first peoples’. Canadians have never been comfortable with the possibility of individuals or a

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<sup>60</sup> The use of the terms ‘white’ and ‘Indian’ is used here as it was used in the documentary historic records. It is obvious that ‘white’ is inaccurate as a term since there were many Canadians who were not ‘white’. The term ‘Indian’ is equally misleading. Legally it contains over 50 distinct aboriginal nations including the Inuit.

<sup>61</sup> Arthur Ray, *Métis Economic Communities in Settlements in the 19<sup>th</sup> Century* (2005) [unpublished] at 21 [Ray 2005].

<sup>62</sup> Jack Elliott, *Hivernant Archaeology in the Cypress Hills* (Master of Arts Thesis, Department of Archaeology, University of Calgary: 1971) [unpublished] at 53 [Elliott].

<sup>63</sup> Jacqueline Peterson, “Many Roads to Red River: Métis Genesis in the Great Lakes Region 1680-1815” [Peterson] in Jennifer S. H. Brown and Jacqueline Peterson, eds., *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) 37-94 at 41 [*New Peoples*].

collective having multiple identification opportunities, a concept that suggests an unfair advantage or preferential rights.

Mixed race *individuals* have traditionally inspired discomfort in others. As Mahtani has noted, the public imagination surrounding mixed race individuals has been marked by a “relentless negativity” and the very notion of a mixed race identity has been resisted.<sup>64</sup> In line with this theory the Métis have been described as “too French, too Indian and too Catholic”.<sup>65</sup> The following quotes from the literature illustrate some examples of this negativity towards the Métis.

... the French half-breeds were indolent, thoughtless and improvident, unrestrained in their desires, restless, clannish and vain.<sup>66</sup>

Twenty white informants were invited to submit a definition of a Métis or Half-Breed ... [the 6<sup>th</sup> definition was] a person who when he has money lives like a white man and when he is broke lives like an Indian.<sup>67</sup>

A primitive people, the Half-breeds were bound to give way before the march of more progressive people.<sup>68</sup>

‘Métis aboriginal rights’ are a historical mistake ... At this point, the best strategy to minimize the damage caused by the thoughtless elevation of the Métis to the status of a

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<sup>64</sup> Minelle Mahtani, “What’s in a name? Exploring the employment of ‘mixed race’ as an identification” (2002) 4 *Ethnicities* 2 at 470 [Mahtani 2002].

<sup>65</sup> James Morrison, *The Robinson Treaties of 1850: A Case Study* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 195-201.

<sup>66</sup> George F. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1963) at 8-9 [Stanley].

<sup>67</sup> Jean Legasse, *The People of Indian Ancestry of Manitoba: A Social and Economic Study* (Winnipeg: Government of Manitoba, 1958) Vol. 1 at 56-57.

<sup>68</sup> Stanley, *supra* note 66 at 49.

distinct 'aboriginal' people is to emphasize the word 'existing' in section 35 of the *Charter of Rights and Freedoms*.<sup>69</sup>

This negativity can be explained by the fact that mixed race people challenge established racial hierarchies or boundaries.<sup>70</sup>

Theories of race have always reflected beliefs about the sanctity of so-called racial purity, where these powerful social constructions have become fully embedded in social relations, political interactions and economic structures ... The mere presence of 'mixed race' people challenges mainstream racial categories constructed precisely to police boundaries that are already heavy with classed and gendered meanings ... Clearly, 'mixed race' people have been made intelligible in ways that maintain racial hierarchies.<sup>71</sup>

The possibility that the Métis may choose to move between cultures is perhaps what underlies the general population's unease in acknowledging them.<sup>72</sup>

... as understood by the Ancient Greeks: "[Metis means to combine] flair, wisdom, forethought, subtlety of mind, deception, resourcefulness, vigilance, opportunism, various skills and experience acquired over the years. It is applied to situations which are transient, shifting, disconcerting, and ambiguous, situations which do not lend themselves to precise measurement, exact calculation, or rigorous logic."<sup>73</sup>

If this is indeed the perception – that mixed race *individuals* are deceptive and opportunistic - then it is perhaps easier to understand that a mixed race *people* may be viewed the same way. And if individuals of mixed race are seen to occupy a place that is transient, then how much more true is this for an entire people of mixed heritage?

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<sup>69</sup> Thomas Flanagan, "The Case Against Métis Aboriginal Rights" (1983) IX Journal of Canadian Public Policy 3 at 314-325.

<sup>70</sup> Minelle Mahtani, "Mixed metaphors: situating mixed race identity," in J. Lee and J. Lutz, eds., *Situating "Race" and Racisms in Space, Time and Theory* (Montreal: McGill-Queen's University Press, 2005): 77 [Mahtani 2005].

<sup>71</sup> Mahtani 2002, *supra* note 64 at 471.

<sup>72</sup> J.O. Ifekwunigwe, "Diasporas's Daughters, Africa's Orphans? On Lineage, Authenticity and 'Mixed-Race' Identity" in ed. H. Mirza, *Black British Feminism* (London: Routledge, 1997) 127 at 153.

<sup>73</sup> Mahtani 2005, *supra* note 70 at 84, quoting Detienne, M., and Vernant, J.P., *Cunning Intelligence in Greek Culture and Society*, trans. J. Lloyd (Atlantic Highlands: Humanities Press, 1978) at 3-4.

This theory that mixed race peoples are transient is revealed in a number of theories of identity formation<sup>74</sup> and dissolution,<sup>75</sup> which envision the Métis as a people who bridged the primitive and modern worlds. According to Ray, the Métis are generally cast in the middle of those models as "half-savage and half-civilized".<sup>76</sup>

The half-breeds being more numerous and endowed with uncommon health and strength, esteem themselves the lords of the land. Though they hold the middle place between civilized and wild, one can say that, in respect to morality, they are as good as many civilized people.<sup>77</sup>

The assumption is that when the primitive component dissolved - the Métis ceased to exist. Ens noted that much of the literature stereotypes the Métis as "a primitive people unable or unwilling to adjust to civilized life and capitalist society."<sup>78</sup> St-Onge proposes that the Métis 'evolved' from a people or an ethnic group into an underprivileged class within the larger capitalist society.<sup>79</sup>

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<sup>74</sup> Ray 2005, *supra* note 61 at 7-8 citing among others: Jennifer S.H. Brown, "Diverging Identities: The Presbyterian Métis of St. Gabriel Street, Montréal," in *New Peoples*, *supra* note 63 at 195; David V. Burley, Gayel A. Horsfall, and John D. Brandon, *Structural Considerations of Métis Ethnicity: An Archaeological, Architectural, and Historical Study* (Vermillion: University of South Dakota Press, 1992) 3-40; John Foster, "Some Questions and Perspectives on the Problem of Metis Roots," in *New Peoples*, *supra* note 63 at 73-91; and James B. Waldram, "Ethnostatus Distinctions in the Western Subarctic: Implications for Inter-Ethnic and Interpersonal Relations," in Joe Sawchuk, ed., *Readings in Aboriginal Studies, vol. 2: Identities and State Structures*. (Brandon: Bearpaw Publishing, 1992) at 9.

<sup>75</sup> Ray 2005, *supra* note 61 at 7 citing Gerhard Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996) at 169 [Ens]; St-Onge, "The Dissolution of a Métis Community: Pointe à Grouette, 1860-1885," (Autumn 1985) 18 *Studies in Political Economy* 149-172.

<sup>76</sup> *R. v. Goodon* (no judgment) Trial Transcripts, Testimony of Dr. Arthur Ray (October 16, 2006) at 42-43.

<sup>77</sup> Father G.A. Belcourt, "Prince Rupert's Land", trans. by Mrs. Letitia May in J.B. Bond, *Minnesota and Its Resources* (Chicago: Keen and Lee, 1856) at 346 as cited in Ron Rivard and Catherine Littlejohn, *The History of the Métis of Willow Bunch* (Saskatoon: Rivard and Littlejohn, 2003) p. 37 [Willow Bunch].

<sup>78</sup> Ens, *supra* note 75 at 3.

<sup>79</sup> Nicole St-Onge, *Saint-Laurent, Manitoba: Evolving Métis Identities, 1850-1914* (Regina: University of Regina and the Canadian Plains Research Center, 2004) at 96 [St-Onge].

The evidence suggests that no one, not other Amerindians, Euro-Canadians or the state wanted a mixed race people to arise or exist.<sup>80</sup> The very concept of Métis, as a people, challenged the established boundaries of culture in Canada. The Euro-Canadian dominant culture invested its treaty process in non-recognition of the Métis as a people, as a result of which only individual Métis were searched for and found during the scrip process.<sup>81</sup>

In addition, Canada has always focused its legal and policy attention on Indian collectives and to the extent that it has indulged this obsession, it has largely ignored the Métis.<sup>82</sup> This myopia has been both a curse and a blessing for the Métis. The expanding state established a bureaucracy to deal with “Indians and Lands reserved for the Indians”.<sup>83</sup> The bureaucracy created new boundaries designed to enclose the lands and assimilate and immobilize Indian people. Indian lands were dramatically reduced by the surrender of traditional territory, the creation of tiny reserves and the division of the people into officially recognized ‘bands’. In this way the new Canadian state rearranged Indians into different smaller groupings with new boundaries established according to its understandings and convenience.<sup>84</sup> These newly defined small entities and their tiny land holdings in no way conformed to pre-existing Indian societies and traditional territories.<sup>85</sup>

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<sup>80</sup> The author has been present at many aboriginal gatherings where various First Nation individuals state that there are no Métis people. For the opinion of the government as evidenced by a treaty commissioner see Alexander Morris, *Treaties of Canada with the Indians* (Toronto: Coles Publishing, 1971) at 69 [Morris].

<sup>81</sup> *Ibid.* at 69.

<sup>82</sup> The Métis were not alone in being ignored by the state; the Inuit were also neglected.

<sup>83</sup> *The British North America Act*, 1867, 30 & 31 Victoria, c. 3., s. 91(24).

<sup>84</sup> Morris, *supra* note 80 at 10.

<sup>85</sup> For a description of the difference between the extensive lands lived in, used and occupied by the Mik'maq and Maliseet prior to Europeans arriving in Eastern Canada and the much smaller lands they were subsequently relegated to by treaty see Ken Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston: McGill-Queen's University Press, 2000) 21-50.

The Métis were not subjected to the relentless attention of the state in the same manner as Indians. They were not collectively enclosed on reserves and they were not removed or amalgamated or re-defined into small groups. In fact they were only ever defined very loosely and even then usually with respect to how they could, as individuals, fit into either one of the existing Euro-Canadian hegemonies – white or Indian.<sup>86</sup> Any search for a trend in Canada's policy on the Métis reveals only that the policies were consistent in their inconsistency.

With some notable exceptions, Canada treated the Métis as individuals, sometimes understood to be aboriginal, sometimes understood to be 'white', but generally denied that they were an aboriginal people with any collective rights. The treaty commissioners repeatedly informed the Métis that they were not empowered to deal with the collective rights of the Métis and that they could chose to identify individually as Indians.

I am sent here to treat with the Indians. In Red River, where I came from, and where there is a great body of Half-breeds, they must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land".<sup>87</sup>

It is clear from this statement that there was no choice to identify as Métis in the treaty process. Historically, Métis *collectives* were only permitted to take treaty if they agreed to become "Indians." At other times, Métis were told they had to choose. The available choices were to identify as 'Indian' or 'white.' If they chose to identify as Métis collectives, they were generally denied participation in treaty.<sup>88</sup> They were either not 'real' Indians' or were 'degraded

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<sup>86</sup> Morris, *supra* note 80 at 69.

<sup>87</sup> *Ibid.* at 69.

<sup>88</sup> Morris, *supra* note 80 at 20.



whites'.<sup>89</sup> The evidence from the next quote suggests that the Métis were also seen as individuals who had not only crossed over the purity of racial lines but had also crossed a moral line.

James Dreaver ... at Red River ... asked a Catholic priest about a nearby group of boisterous men. They were dark skinned but obviously not Indians. "They are the one-and-a-half men," the priest replied, "half Indian, half white and half devil."<sup>90</sup>

All of this is evidence of the discomfort Euro-Canadians had with the Métis. The treaty process was used not only to contain and define Indians it was also used as a mechanism to eradicate any possibility of the Métis as a people. After 1870, this process was continued when Canada decided to implement a scrip process to extinguish any Indian title individual Métis might possess. This process finally was implemented beginning in 1885. It is notable because even though Canada created no bureaucracy comparable to the Department of Indian Affairs to regulate the Métis as a people, the scrip record contains a thorough record of the Métis who lived in, used and occupied the Northwest.<sup>91</sup> After the scrip process was completed, the Métis virtually disappear from the historic record. In the eyes of the state, the Métis people were henceforth invisible.

## **(2) The Erasure of the Métis Geographies from Official State Maps**

Beginning in the late 18<sup>th</sup> century, British North America expanded its territory. It would eventually grow into a country that went from sea to sea and include many new provincial and territorial boundaries. It is the expansion of British North America after 1770 into the Upper Great Lakes and then gradually over the next one hundred years into the Northwest that erased

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<sup>89</sup> Theodore Binnema, "The Emigrant and the Noble Savage: Sir Francis Bond Head's Romantic Approach to Aboriginal Policy in Upper Canada, 1836-1838", online: (Winter 2005) *Journal of Canadian Studies*, <<http://www.utpjournals.com/jcs/jcs.html>> at 11.

<sup>90</sup> Murray Dobbin, *The One-and-a-Half Men: The Story of Jim Brady & Malcolm Norris, Métis Patriots of the 20<sup>th</sup> Century* (Regina: Gabriel Dumont Institute, 1981) at i.

<sup>91</sup> Scrip was not administered from Ontario east or in British Columbia.

the pre-existing aboriginal geographic boundaries from the map of Canada. The new definition of Canada, with its arbitrary international, provincial and territorial boundaries, was created to facilitate Euro-Canadian settlement and development. In the process of its expansion and mapping Canada buried the old aboriginal geographic boundaries in what Ludden calls a “graveyard of archaic cultural forms.”<sup>92</sup> Thus, the old aboriginal geographic boundaries, including the territories the Métis recognized, lived in, used and occupied, became invisible.

Ludden suggests that the dominant culture makes its geography in keeping with its own concepts of space and time.<sup>93</sup> The new maps put the old mobility into its proper place. Thus, Métis mobility came to be seen as border crossing, although their mobility came first and the borders afterwards. Mobile peoples, such as the Métis who continue to travel and describe themselves according to these old cultural geographies are invisible to those whose vision is bounded by the new geographies.

### **(3) Michif, the Hidden Language of the Métis**

The Métis have a story about the creation of themselves as a people, their language and their place in the aboriginal world.

The Michif people they were created, you know, a long time ago by God ... And same as other, other nations ... the Sioux were given their language, the Ojibwa are given a language ... it's like the world was created in a circle ... you look at the sun, you look at the world, it's all round. And ... when God created the world ... it was our turn. It's like we finished that hoop. It was like we were the last nation to be created. And we're the

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<sup>92</sup> David Ludden, “Nameless Asia and Territorial Angst” online: (2003) HIMAL South Asian Magazine <<http://www.himalmag.com/2003/june/essay.html>> at 3.

<sup>93</sup> *Ibid.* at 1-2.

Michif people, and God gave us a language, and that's Michif ... a language of the land. So it was given to us by the creator.<sup>94</sup>

The very creation of a new ethnic group – the Métis – is an indication of their independence, an independence that is also reflected in their language. The Métis formed a separate identity from their Indian (mostly Cree, Ojibway or Dene) mothers and also separate from their Euro-Canadian (mostly French) fathers. As a group they were marginalized by both of their parent's nations. They created an *otipêyimisowak* (independent) identity. The mixture of cultures and the independence from the cultures of their parents became the basis of their group identity and also their name. The same names - *Michif* and Métis - are used to describe the people and *Michif* is the name of their language. Their language, *Michif*, is spoken only among themselves and until the late 20<sup>th</sup> century was not known to outsiders at all.<sup>95</sup>

The Métis language, *Michif*, is described as “peculiar” and a “problem” for language classification and “unusual, if not unique.”<sup>96</sup> The language uses the grammatical system of the local language (Cree) and imports vocabulary from the non-local language (French).<sup>97</sup> It draws its nouns from French and its verbs from Cree. It breaks most of the rules that linguists have established and it is thought that there is no other language like it anywhere in the world.

Bakker proposes that *Michif* carries some of the features of mixed-race languages that arise in nomadic or trading cultures.<sup>98</sup> While *Michif* is clearly a mixed language that is associated with the fur trade (because the Métis are the children of the fur trade), the language

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<sup>94</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Norman Fleury, May 11, 2006 at 65-66, recounting the Métis origin story told to him by his maternal grandmother (Leclerc née Lepine).

<sup>95</sup> Bakker, Peter. *A Language of Our Own: The Genesis of Michif, the Mixed Cree-French Language of the Canadian Métis* (New York: Oxford University Press, 1997) at 3. [Bakker]

<sup>96</sup> *Ibid.* at 3.

<sup>97</sup> Bakker, *supra* note 95 at 206.

<sup>98</sup> *Ibid.* at 204.

itself is not a trade language. Cree was the *lingua franca* of trade on the Prairies. *Michif* is an 'in-group' language: it was spoken by the Métis only among themselves and not generally spoken in front of strangers.<sup>99</sup>

My grandparents who lived on the other side of the river, they lived on the road allowance. That's my, my father's mother and dad, my grandma and grandpa Vivier ... but grandma would tell grandpa when we would go to Portage [Portage la Prairie, Manitoba] to do ... the shopping ... she would say ... don't you talk that Half-breed language when we go to Portage. So we wouldn't ... talk the Half-breed language when we went to Portage.<sup>100</sup>

... our grandpa and grandma and aunties ... they were laughing and they were joking and ... they were speaking Michif ... not once did I ever hear them speak it outside of those walls ... even to this day they won't speak it. Even although I have heard them in private speaking it, they, they just won't do it [in public] because of the stigmatism ...<sup>101</sup>

I went to school for Grade One only. I liked school, but we had nothing to eat for lunch. And it was hard because at school they spoke English and we didn't speak no English at home. All our family, all our relatives spoke Michif ... At home we spoke Michif/Cree. That's what we spoke. If an Indian speaks Cree I can understand a few words. I can also understand a few French words because Michif has some few French words in it too. I still speak Michif today with my brothers and sisters.<sup>102</sup>

I am a Michif. I think of myself as Michif ... At home we ... spoke Michif. My husband also spoke Michif. He could talk Cree and Saulteaux too.<sup>103</sup>

Mom spoke Chip and French ... Dad talked bad Cree. We spoke Michif French at home.<sup>104</sup>

Language is one of the most readily identifiable boundaries of a community. However, few communities keep their language secret. As Bakker has noted, this is a feature of nomadic

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<sup>99</sup> Bakker, *supra* note 95 at 206.

<sup>100</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Rita (Vivier) Cullen, May 11, 2006 at 105.

<sup>101</sup> *R. v. Goodon*, Trial transcripts, Testimony of Steve Racine, May 10, 2006, Vol. 3(b) at 44-45.

<sup>102</sup> Affidavit of Clara Langan, sworn October 1998, paras. 4-5.

<sup>103</sup> Affidavit of Annie Jerome Branconnier, sworn October 1998, paras. 3-6.

<sup>104</sup> Interview of Maggie Kurzewski (née Mercredi) (July 7, 2000).

traders.<sup>105</sup> The Roma (Gypsies) are perhaps the only other people besides the Métis who are known to have kept their language inaccessible to outsiders.

In short, these are secret languages, spoken with people who understand them in the presence of others who do not understand them, in order to remain unintelligible to outsiders. When people speak Angloromani, outsiders may not even notice that a secret language is being used. They may think that those Gypsies speak “bad English” or that they do not articulate well. This language is obviously not used to solve a communication gap in contacts between people who speak different languages. It is an in-group language, the utmost language of solidarity for the group members and a distancing language for nongroup members.<sup>106</sup>

While *Michif* served to bind the Métis together as a group, the fact that it was kept secret has contributed to the difficulties outsiders have had in recognizing that the Métis are a collective.

#### **(4) Métis are not Phenotypically Distinct**

Another factor that has contributed to the difficulties in recognizing the Métis as a collective is the fact that the Métis are not phenotypically distinct. Any individual Métis can be seen as either Indian or non-aboriginal. Knowledgeable observers have been unable to distinguish between Métis and Indians.<sup>107</sup> The inability to distinguish between them physically has had significant implications. For example, at the time of the negotiation of the treaties in the Northwest, the Treaty Commissioners had no sure means of differentiating between Indian and Métis peoples.<sup>108</sup> This contributed to the stance taken by the Government that the Métis were dealt with as individuals and were not dealt with as a collective.

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<sup>105</sup> Bakker, *supra* note 95 at p. 204.

<sup>106</sup> *Ibid.* at 206.

<sup>107</sup> David Leonard and Beverly Whalen, eds., *On the North Trail: The Treaty 8 Diary of O. C. Edwards* (Calgary: Alberta Records Publication Board and Historical Society of Alberta, 1998) 53; Richard Slobodin, *Metis of the Mackenzie District* (Ottawa: Canadian Research Centre for Anthropology Saint-Paul University, 1966) at p. 19.

<sup>108</sup> Tough, *Maurice Affidavit*, par. 34.

The inability to distinguish physically between Métis and Indians has also affected the external relations of the Métis community, which has often been forced to deal with non-Métis through the institutions of other societies.

To oversimplify a little, when Métis have dealt with Indians, it has been as Indians; with Whites, as Whites. Since Métis by definition are neither Indians nor Whites, Métis ... have been marginal Indians and marginal Whites.<sup>109</sup>

It has always been difficult for outsiders to identify the Métis because they appear, to outsiders, to have been assimilated socially, culturally and economically into either the Amerindian or Euro-Canadian culture.<sup>110</sup> The lack of a distinct phenotype has contributed significantly to the invisibility of the Métis as a collective.

#### **(5) A People of Many Names**

Another invisibility factor is that the Métis are a people of many names and as such are difficult to identify in the documentary record. At the *Powley* trial, Dr. Ray testified that historians have often called the Métis the “forgotten people” and he spoke of the difficulty in reconstructing a history of the Métis:

... Metis people tend to be invisible or unidentifiable in official records in other primary sources upon which historians rely to reconstruct the history of Aboriginal groups in Canada. As such, it is very difficult to provide a continuous, well documented and authoritative history of their communities.

... “Mixed bloods” in the employ of Government administration were referred to by their proper names with little mention of their racial or ethnic background ... That is one of the problems of Metis history. And basically, let me qualify that, it's one of the problems of

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<sup>109</sup> Slobodin, *supra* note 107 at 144.

<sup>110</sup> Victor P. Lytwyn, *Historical Report on the Métis Community at Sault Ste. Marie* (March 27, 1998) [unpublished] at 18.

doing a documentary Metis history because ... it means doing a history of a people largely written by people other than themselves.<sup>111</sup>

For example, the census records at Sault Ste Marie reveal that individual Métis often carried more than one name – an Indian name, a French name and often a nickname.<sup>112</sup> Without a genealogical cross-reference it is difficult to trace an individual Métis as he or she would appear to blend at times into the Amerindian world or the Euro-Canadian world.

The Métis, as a collective, are a people of many names. Many of these names come from the attempts of outsiders to label the Métis either in their own language or according to their own understandings. These labels often say more about the labeler than about those to whom the label is attached. Because the Métis traveled widely over a vast area, they had relationships with many different peoples who spoke many different languages. Each of these groups had their own names for the Métis. The names reflect a variety of emotions and opinions – from the pejorative to claims of kinship.

The Métis have many descriptive names, both self and other-ascribed.<sup>113</sup> French language names include the terms *michif*, *metis*, *gens libre*, *hommes libre*, *bois brûlé* and *chicot*. English language names include freemen, half-breed, country-born and mixed blood.<sup>114</sup> The Sioux

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<sup>111</sup> *R. v. Powley*, Trial Transcripts, Testimony of Dr. Ray, Vol. 2, at 144-145; *Miller*, *supra* note 57 at 29.

<sup>112</sup> See Binnema, *supra* note 89 at 11 where he notes that Kahkewaquonaby, a prominent Mississauga leader of the 1830s, was also known as Sacred Feathers and as Reverend Peter Jones.

<sup>113</sup> Names that are self-ascribed are also referred to in the literature as either auto-ethnonyms or endo-ethnonyms. Names that are other-ascribed are referred to in the literature as exo-ethnonyms or hetero-ethnonyms. See Tove Skutnabb-Kangas, *Linguist Genocide in Education or World Diversity and Human Rights* (Philadelphia: Lawrence Earlbaum Associates, 2000) 177-178; The references in this part of the paper to Cree, Ojibway and Métis language terms all come from Bakker, *supra* note 95.

<sup>114</sup> The term 'freemen' is not always an indication that the individual is Métis. Although it appears that many 'freemen' were of mixed heritage, prior to 1821, the term 'freemen' was used to describe men not engaged under contract to the Hudson's Bay Company or its rival traders. See Ray 2005, *supra* note 61 at 4; Trudy Nicks, "Iroquois and the Fur Trade in Western Canada," in eds., C.M. Judd and Arthur J. Ray, *Old Trails and New Directions: Papers from the Third North American Fur Trade Conference* (Toronto, University of Toronto Press:

describe the Métis as the “flower bead work people.”<sup>115</sup> There is also a Plains Indian sign language term for the Métis that combines the sign for cart and man.<sup>116</sup> As Bakker has noted, most of the terms for the Métis reflect one of four concepts: (1) that the Métis belong to one of the existing hegemonies – Amerindian or Euro-Canadian; (2) refer to their skin color; (3) refer to their ‘mixed ancestry’; or (4) stress their independence.<sup>117</sup>

There are several terms by Amerindians and by Euro-Canadians that claim the Métis as part of their respective hegemonies. For example, one of the terms the Cree used for the Métis was *âpihtawikosisân*. The root word, *kosisân*, means ‘of the people’.<sup>118</sup> The term seems to indicate that the Cree saw the Métis as part of their own constituency and not as a separate people. The English term ‘half-breed’ could be understood in the same way: as a claim that the Métis belong (at least half) to the Euro-Canadian hegemony.

In the second category of terms, names that reflect skin colour, the early records in Red River, circa 1810, contain many references to the Métis as *Bois Brûlé* meaning ‘burnt wood,’ which may be an observation that the Métis are of lighter complexion than Indians or darker than ‘whites’.<sup>119</sup> The Chippewa had a similar term and referred to the Métis as *wisahkotewan niniwak* meaning ‘men partially burned’.<sup>120</sup> Sometimes individual Métis were called simply *Brûlé*, a term

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1980) 85-101; and *The Canadian Encyclopedia*, (February 11, 2008), online:

<<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0005259>> s.v. “freemen”.

<sup>115</sup> Ted J. Brasser, “In search of métis art” in *New Peoples*, *supra* note 63 at 225.

<sup>116</sup> Bakker, *supra* note 95 at 65. The cart is likely a reference to the famous horse drawn Red River carts that the Métis used as their means of travel across the Prairies throughout the 19<sup>th</sup> century.

<sup>117</sup> *Ibid.* at 65

<sup>118</sup> Bakker, *supra* note 95 at 65

<sup>119</sup> *Ibid.* at 64 where he notes that *Bois Brûlé* may be a translation of an Ojibway term *wi:ssakkote:w'inini* meaning ‘half-burnt woodmen’; Ray 2005, *supra* note 61 at 4.

<sup>120</sup> Elliott, *supra* note 62 at 53.



used by Métis and outsiders.<sup>121</sup> Another name that refers to colour is *chicot*, which is originally a French word that means the stump of a tree.<sup>122</sup> Again, this term appears to be both self-ascribed and other-ascribed.<sup>123</sup>

There are many names for the Métis that refer to their mixed race ancestry. As noted above, the Cree term for the Métis is *âpihtawikosisân*. The word *âpihtaw* means ‘half.’ In the Odawa dialect of Ojibway the term for the Métis is *aayaabtaawzid* or *aya:pittawisit* meaning ‘one who is half’.<sup>124</sup> In English, there is repeated use of the terms ‘half-breed’ and ‘mixed blood’.<sup>125</sup> The French language equivalent is ‘métis.’<sup>126</sup> The French word *métif* and the old Canadian French term *mitif* are related to métis and *mestizo*, all of which mean ‘mixed’ and refer to the mixed ancestry of the Métis.<sup>127</sup>

The term Métis was historically pronounced as *Michif*, in addition to being the self-ascribed name for the people, is also the name for the Métis language. This pronunciation, *Michif*, is common among the Métis but is not used with or by outsiders. Since the 1960s it is used concurrently alongside the anglicized pronunciation ‘*maytee*’.<sup>128</sup> Norman Fleury, a Métis from Manitoba and a Michif language teacher commented on the fact that the name for the Métis differed in term and pronunciation according to the speaker.

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<sup>121</sup> Gwynneth C.D. Jones, *The Métis of Southern Manitoba in the Nineteenth Century: A Historical Report* (2005) [unpublished] at 24 [Jones 2005]; Pierre Falcon, “The Battle of Seven Oaks” in ed., Margaret Arnett MacLeod, *Songs of Old Manitoba* (Toronto: Ryerson Press, 1959) at 5-9.

<sup>122</sup> Ray 2005, *supra* note 61 at 4, where Dr. Ray notes that *bois brûlés* also referred to the “slash-and-burn agriculture that Métis practiced at their summer settlements in the Great Lakes area”; Bakker, *supra* note 95 at 65.

<sup>123</sup> J. G. Kohl, *Kitchi-Gami, Wanderings Round Lake Superior* (Minneapolis: Ross and Haines, 1956) 259 [Kohl].

<sup>124</sup> Bakker, *supra* note 95 at 65.

<sup>125</sup> Elliott, *supra* note 62 at 53 where he notes that “the term mixed-blood is too vaguely comprehensive.”

<sup>126</sup> Ray 2005, *supra* note 61 at 7.

<sup>127</sup> Bakker, *supra* note 95 at 65.

<sup>128</sup> This is the experience of the author. The older generations of my family (the Riels) always used the pronunciation Michif until the late 1960s.

... we called ourselves Michif ... I heard Metis [maytee] more when we were organized in 1967 ... Métis [Metiss] was what the French used, but we always called ourselves Michif. So there was a difference in who said it.<sup>129</sup>

It is the stability of the self-ascribed name that is relevant here. The Métis community has existed under one self-ascribed name of their own for several generations; this is one of the central indicators of a community.<sup>130</sup>

The English term has long been 'half-breed', a term that did not have pejorative connotations in the early 19<sup>th</sup> century and was often self-ascribed, especially by Métis with some British heritage.<sup>131</sup> Dr. Ray notes that the term 'half-breed' did not come into general usage until after 1821 and did not take on pejorative connotations until after 1870.<sup>132</sup> St-Onge notes that this coincides with the importation of racist ideology into the Northwest.<sup>133</sup> It also coincides with the profound change in the society at Red River. After 1869-70 and the incorporation of Manitoba into Canada, the attitude towards the Métis by the incoming Ontarians was one of bigotry and open contempt for papists, French and half-breeds.<sup>134</sup> The Métis of course were usually all three. The newcomers brought with them new lifestyles, new power structures and a great deal of animosity. They wanted revenge for the execution of Thomas Scott. The Métis in Red River were subjected to daily threats, rapes, beatings and death. It is small wonder the newcomers' name for the people – half-breed - took on a pejorative connotation.

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<sup>129</sup> R. v. Goodon, Trial Transcripts, Testimony of Norman Fleury, May 11, 2006 at 96-98.

<sup>130</sup> Yu Bromley, *Theoretical Ethnography* (Moscow: Nauka Publishers, 1984) at 10.

<sup>131</sup> Ray 2005, *supra* note 61 at 7.

<sup>132</sup> *Ibid.* at 6.

<sup>133</sup> St-Onge, *supra* note 79 at 91.

<sup>134</sup> D. Bruce Sealey, and Antoine S. Lussier, *The Métis: Canada's Forgotten People* (Winnipeg: Pemmican Publications, 1975) at 92-95.

The use of the term half-breed was originally outside naming by English speaking historians and settlers,<sup>135</sup> but was later absorbed by the people themselves. It continues to this day,

I am a Métis. When I was a kid at school they used to call us Indians, but we aren't Indians. Indians are different from Métis. Indians talk different and I don't think they have the same religion as us. Most Métis are Catholic. When I was young we called ourselves Michif. Other people also called us half-breeds and I figure that's what we are too.<sup>136</sup>

... other people had names for us, yes. They'd call us half-breeds and made it sound like a derogatory word, you know.<sup>137</sup>

Several historians and commentators have sought to divide the Métis by proposing that the 'half-breeds' (described as largely English speaking, Protestant and the descendents of Scottish Hudson's Bay Company men) are a separate and distinct group from the 'Métis' (described as largely Francophones, Catholic and the descendents of the North West Company men).<sup>138</sup> It is a distinction that the Métis people themselves have never embraced and their collective political actions and inter-marriages show that it is a distinction they have largely ignored.

Bakker's fourth category of Métis names notes the several terms that emphasize their independence - *gens libres*, *hommes libres* and freemen.<sup>139</sup> The Cree coined another term for the Métis - *otipêyimisowak* - meaning 'the people who command themselves' or 'the independent

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<sup>135</sup> Paul L.A.H. Chartrand, "Terms of Division: Problems of Outside Naming for Aboriginal People in Canada" (1991) 2 Journal of Indigenous Studies 2 at 1.

<sup>136</sup> Affidavit of Clara Langan, sworn, October 1998, para. 3.

<sup>137</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Will Goodon, May 9, 2006 at 100.

<sup>138</sup> *Canadian Encyclopedia* (July 16, 2008) online: <<http://www.thecanadianencyclopedia.com>> s.v. "Western Métis".

<sup>139</sup> Jones 2005, *supra* note 121 at 7-15 wherein she notes that these terms as they were used in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries were not exclusively applied to the Métis and could also include French Canadians.

people.”<sup>140</sup> To the Cree, the Métis were known as *otipêyimisowak* because their settlements and lifestyles were distinct from both settlers and Indians and because the Métis made it known to the Cree that they did not agree with the idea of being confined to a reserve. This they believed would result in lost independence and of their highly prized mobility.<sup>141</sup> The Métis still proudly assert that they are *otipêyimisowak*.<sup>142</sup>

Modern historians note that whichever term is used to describe the Métis, the collective of people is essentially the same.<sup>143</sup> The preference of the people themselves is to use ‘Michif’ or ‘Métis.’<sup>144</sup> Louis Riel himself described his preference for the term Métis, which he would have pronounced as *Michif*.

The Métis have as paternal ancestors the former employees of the Hudson’s Bay and North-West Companies and as maternal ancestors Indian women belonging to various tribes. The French word *Métis* is derived from the Latin participle *mixtus*, which means “mixed”; it expresses well the idea it represents. Quite appropriate also, was the corresponding English term “Half-Breed” in the first generation of blood mixing, but now that European blood and Indian blood are mingled to varying degrees, it is no longer generally applicable. The French word *Métis* expresses the idea of this mixture in as satisfactory a way as possible and becomes, by that fact, a suitable name for our race.<sup>145</sup>

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<sup>140</sup> *Report of the Royal Commission on Aboriginal Peoples* (Ottawa; Canada Communication Group, 1996) Vol. 4, Ch. 5 at 500 [RCAP Report].

<sup>141</sup> *R. v. Powley*, Trial Transcripts, Testimony of A. Belcourt, April 27-29, 1998, vol. 2 at 68-69, online: <[http://www.metisnation.org/harvesting/Powley\\_Case/court.html](http://www.metisnation.org/harvesting/Powley_Case/court.html)>.

<sup>142</sup> For example, the magazine of the Métis Nation of Alberta is called *Otipemisiwak: The Voice of the Métis Nation of Alberta* (Edmonton, Métis Nation of Alberta and Canadian Heritage).

<sup>143</sup> Arthur Ray, *An Economic History of the Robinson Treaties Area Before 1860* (1998) [unpublished] [Ray 1998]. Note also the discussion in *R. v. Blais*, *supra* note 2 at 125-128 and Appendix “A” regarding whether the term Métis as used in the 19<sup>th</sup> Century includes English half-breeds.

<sup>144</sup> A spelling of ‘mitchif’, ‘métiss’ or ‘michiss’ comes closer to the pronunciation used by the people themselves until the 1960s when the term Métis generally came to be pronounced as ‘maytee’.

<sup>145</sup> Louis Riel, “The Métis, Louis Riel’s Last Memoir,” in A. H. de Tremaudan, *Hold High Your Heads: A History of the Métis Nation in Western Canada*, trans. by E. Maguet, (Winnipeg: Pemmican Publications, 1982) at 200.

The fact that we have a record indicating exactly what a well-known Métis leader thinks about the name ascribed by and to his people is unique and lends significant authenticity to the self-ascription.

The many names of the Métis have contributed to their invisibility in two ways. First, the names have been used to divide the Métis into groups, which they themselves do not distinguish. Interestingly the Métis themselves have never been troubled by these divisive names and in fact have embraced them as part of their relationship with the centers of power located in other groups. While some outsiders have sought to place a boundary between ‘half-breeds’ and Métis, no such boundary has ever been acknowledged by the Métis themselves.

I am a Michif. I think of myself as Michif. When I was a little girl, when we came across from North Dakota they asked us our nationality and we said we were halfbreeds. In French we say Métis or Michif. But halfbreed, Michif, Métis – it’s all the same. I know the kids at school too, when the teacher ask us our nationality we say we’re halfbreeds. Teacher says, “why you say halfbreed?” We say to her, “well that’s what we are!”<sup>146</sup>

Both language groups lived and hunted together and inter-married. They took political action together in 1816, 1870 and again in 1885. They joined together to create the Métis Settlements in Alberta in the early 1930s and later formed what are now the modern day Métis organizations. While the many names of the Métis could raise an inference that they were in fact different groups of people, this would be an externally imposed boundary that did not reflect the Métis perception or reality.

Second, names such as ‘half-breed’ conjure up individuals and not collectives. The implicit reference is that an individual half-breed belongs to other groups. Such individuals are

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<sup>146</sup> Affidavit of Annie Jerome Branconnier, sworn October 1998, paras. 3-6.

imbued with no political power and cannot be seen socially, politically or legally to be a rights-bearing collective of aboriginal peoples.

Outsiders have used the many names of the Métis to artificially divide them into groups or to infer that they are individuals and not a collective. As such, these names have been a contributing factor in the invisibility of the Métis.

#### **(6) Danger in Publicly Identifying as Métis after 1870**

Another element that contributes to the invisibility of the Métis is that following the events at Red River in 1870 and in Saskatchewan in 1885 it became impolitic and sometimes dangerous for Métis to self-identify publicly. In 1872, the Ontario legislature passed a \$5,000 bounty on the head of Louis Riel.<sup>147</sup> The atmosphere in Winnipeg after 1870 has been called a “reign of terror” which was designed to discourage public identification as Métis.<sup>148</sup> This disinclination to publicly identify as Métis only increased following the events of 1885.

Testimony by contemporary Métis shows that many Métis grew ashamed to identify in public.

Both my parents and my mother’s parents were half-breeds or Michif. But we were kind of ashamed of it before. It was just like we were lower than the other people because we were poor half-breeds. They didn’t talk too much about being Michif. They just were that.<sup>149</sup>

It is clear from such statements that the problems relating to public identification did not mean that the people were assimilating into either the Amerindian or Euro-Canadian cultures. These kinds of statements show that the people still considered themselves to be Métis.

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<sup>147</sup> Maggie Siggins, *Riel: A Life of Revolution* (Toronto: Harper Collins, 1994) at 210 [Siggins].

<sup>148</sup> *Ibid.* at 193; and see Fred J. Shore, *The Canadians and the Métis: The Re-creation of Manitoba, 1858-1872* (PhD Thesis, University of Manitoba, 1991) [unpublished].

<sup>149</sup> Affidavit of Clara Vermeulen (née Langan), sworn October 1998, para. 8.

The difficulties in identification had severe results. The fact that the Métis were disinclined to publicly identify meant that they were vulnerable to institutional authority. The following quote from Olaf Bjornaa, a Métis from Sault Ste Marie who testified in *Powley*, shows that Métis children were caught in between the Indian and 'white' worlds of Canada.

When I first started there was two schools within Batchewana Bay. There was ... for the Natives at the village and down the Bay was for the non-Natives. When me and my sister first started, we started down the Bay at the white school. We were told we were Natives, we couldn't ... we didn't belong there. Then we went up to the other school and we were told we were non-Natives, we didn't belong there and my mother said this is the problem with being a Metis. You're almost a displaced person in your own homeland.<sup>150</sup>

This is particularly disturbing when one realizes that this incident is not ancient history but rather occurred in the 1950s in Ontario. Mr. Bjornaa, as a result, never attended school. It is also a dramatic illustration of the consequences of maintaining a quiet Métis identity. In this way, the Métis survived like other beings in nature, by being invisible.

In India there are butterflies whose folded wings look just like dry leaves. In South Africa there is a plant that's indistinguishable from the stones among which it grows: the stone-copying plant. There are caterpillars that look like branches, moths that look like bark. To remain invisible, the plaice changes colour as it moves through sunlit water.<sup>151</sup>

This survival mechanism served the Métis until the 1960s, when the Métis, along with other aboriginal peoples in North America began to reclaim their identity and rights in an increasingly public manner.

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<sup>150</sup> *R. v. Powley*, Trial Transcripts, Vol. 4, Testimony of Olaf Bjornaa at 212.

<sup>151</sup> Anne Michaels, *Fugitive Pieces* (Toronto: McLelland & Stewart, 1996) at 48.

## (7) Mobility

### Historic Mobility

Historians are in agreement that the Métis were highly mobile, that they transacted routinely with settlers and Indians, and that they used fixed settlements as bases.<sup>152</sup> Ray, Tough and Jones made this observation about Métis locales such as Green Lake, Sault Ste Marie, Turtle Mountain, Pembina and Red River.

... you do have ... some coalescing of people together into small communities taking place but it would be also wrong to suppose that that is the only place the Metis live ... Sault Ste. Marie ... was the home base for some of these families, but members of the family could be spread across the country for years and years before they came back ... there are periods of the year when there's nobody there because they're in the interior hunting or they're off on a raiding party or they're off on trading expeditions or doing various things, so these are bases of operations.<sup>153</sup>

Where a fixed settlement was a base of operations for the Métis and their numbers were high, their movement in and out of the settlement was a notable event. *Le Métis*, the French language newspaper at Red River, frequently reported on the arrivals and departures of the Métis hunters.<sup>154</sup> There were several accounts of Métis comings and goings in Red River.

The two great events of the year at Red River are the Spring and Fall Hunt. The buffalo still forms one of the principal sources from which provisions are obtained. Pemmican and dried meat, like bacon with us, are staple articles of food in every establishment. At these seasons the whole able-bodied half-breed population set out for the plains in a

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<sup>152</sup> Brenda McDougall, *Report to the Northwest Saskatchewan Claims Committee* (2004) at 4 [unpublished]. McDougall notes that the approximately forty-three Métis families in northwest Saskatchewan use Île-à-la-Crosse as “a base” or “centre.” In the report she notes that the Laliberte, Morin, Girard, Lariviere, Bouvier, Mirasty, Desjarlais and Lafleur families are core to the region.

<sup>153</sup> *R. v. Powley*, Trial Transcripts Vol. 2, Testimony of Dr. Ray at 201-204; Jones 2005, *supra* note 84 at p. 35-36.

<sup>154</sup> “Arrivée des hivernants”, *Le Métis* Vol. 1, no. 48 (15 May 1872); Jones 2005, *supra* note 121 at 57 and footnote 189.



body, with their carts. Many of the farmers who do not go themselves engage half-breeds to hunt for them ...<sup>155</sup>

However, as others began to settle in these bases or fixed settlements in larger numbers, the movement in and out by the Métis became less noticeable. Over time it became possible for those who permanently resided in the fixed settlement to believe that the Métis were gone.

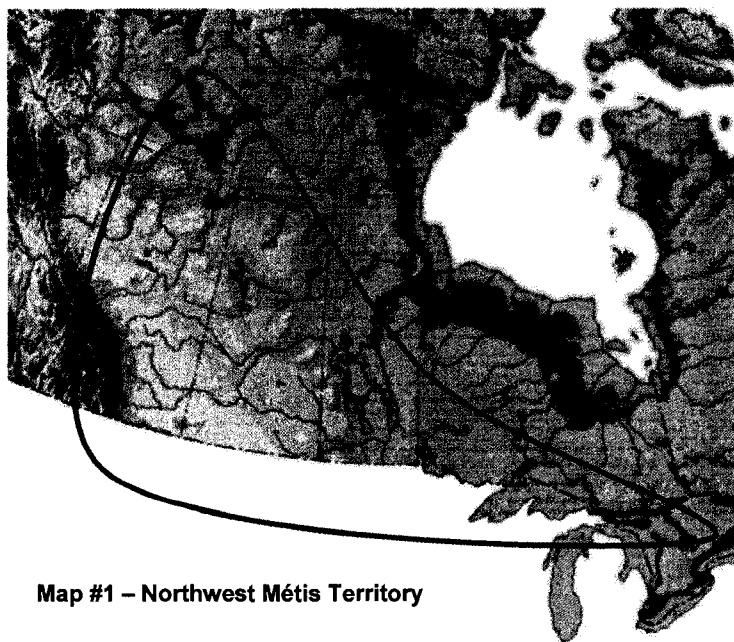
The Métis have long asserted, and observers confirm, that they lived in, used and occupied a vast area - east to west from Ontario to British Columbia and north to south from the Northwest Territories to the central northwest plains of the United States.

... we may here bestow a few words upon the frequenters of the plains, commonly called the half-breeds of Red River ... not a tenth part of their number really belong to Red River, although they have from choice made it the land of their adoption. Hither, in fact, have flocked the half-breeds from all quarters east of the rocky mountain ridge, making the colony their great rendezvous and nursing place; while their restless habits lead them from place to place, from camp to camp, from the colony to the plains, and from the plains to the colony, like wandering Arabs, or the more restless Mamelukes, wherever hunting or fishing hold out to them a precarious subsistence ... the chief dependence of all is upon buffalo hunting or fishing. The boundless prairies, therefore, have attractions for them, which the settled habits and domestic comforts of the industrious farmer can never hope to rival in their estimation ...<sup>156</sup>

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<sup>155</sup> Viscount Milton and W. B. Cheadle, *The North-West Passage by Land* (Toronto: Coles, 1970) at 44-45; Jones 2005, *supra* note 84 at 37 and footnote 120.

<sup>156</sup> Ross, *supra* note 54 at 83-84.



**Map #1 – Northwest Métis Territory**

Map #1 depicts the large territory that formed the historic Métis of the Northwest.

The evidence used to formulate Map #1<sup>157</sup> and which will be discussed in detail below suggests that the Métis who lived in, used and occupied this vast area, the Northwest, were

connected and formed one large historic society founded on kinship, a shared economy and a common way of life. Mobility, one of the primary characteristics of this Métis community, was the glue that kept the people connected throughout this vast territory.

Mobile peoples do not tread heavily on the earth and the Métis are one of these peoples. They left few markings, built few monuments or permanent buildings, and their constant movement meant they could be overlooked by other cultures that invested more heavily in values of settlement, infrastructure and possessions.<sup>158</sup> Métis culture prized freedom first. The theme of independence has been a self-ascribed attribute of the Métis since their ethnogenesis; an attribute they continue to this day with their term *otipêyimisowak*.<sup>159</sup> The cry of freedom from restraint

<sup>157</sup> The base map used in this thesis is reproduced with the permission of Natural Resources Canada 2008, courtesy of the *Atlas of Canada*. Additional information overlaid on the base map by Jean Teillet.

<sup>158</sup> Interestingly, the evidence in *R. v. Goodon* included aerial photos of southern Manitoba that show that the Red River Cart trails from the 1800s are still visible from the air.

<sup>159</sup> Bakker, *supra* note 95, proposes that *otipêyimisowak* is a simple Cree translation of the term freeman, a term which originally described the men who were no longer engaged by one of the fur trade companies. However, *otipêyimisowak* has never been ascribed only to Métis men and Bakker's explanation does not account for independence as one of the most consistent descriptors of the Métis.

echoes throughout Métis history. Alexander Ross noted that the half-breeds were “quiet and orderly” if “left to themselves” but,

... they are marvelously tenacious of their own original habits. They cherish freedom as they cherish life.<sup>160</sup>

Their possessions of value were those that permitted and enhanced their mobility – their guns, tools, horses and their carts. Such mobile peoples do not invest their time and energy in building permanent homes or cities. To other more material cultures, this kind of mobile culture is largely invisible. Louis Goulet described the Métis culture as follows.

We usually left [Red River] for the prairie early in spring, as soon as the grass was long enough for grazing – nippable, as we used to say. We would come back around the month of July, stay at the house one, two or three weeks and leave again, not to return this time until late in the autumn. Sometimes we even spent the winter on the prairies. That’s what we used to call wintering-over, in a tent, a cabin or a makeshift house on the plain. Normally we went to Wood Mountain, but when the buffalo drew back into the area of the Cypress Hills, we followed them. Finally, later on when they took refuge in the rough country on Montana, Wyoming, Nebraska and Colorado, it was along the Missouri River we went to find the few remaining herds. Now that was a great life! *Cré mardi gras!*<sup>161</sup>

The extent of Goulet’s travel seems fairly typical of the Métis community at the time, as is the simple fact that the life revolved around following the buffalo. They lived in temporary shelters, returned repeatedly to particular spots such as Wood Mountain and returned to Red River each year but only stayed for short periods of time. Goulet’s account also shows clearly that the Métis quite simply loved their lifestyle.

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<sup>160</sup> Ross, *supra* note 54 at 252; Letter from Sir George Simpson to Committee of Hudson’s Bay Company (26 June 1856) Winnipeg, Hudson Bay Company Archives (D.4/76a, pages 734 verso – 733).

<sup>161</sup> Guillaume Charette, *Vanishing Spaces: Memoirs of Louis Goulet* trans. by Ray Ellenwood (Winnipeg: Editions Bois-Brûlés, 1976) at 15-17.

The historians and experts also all agree that the mobility of the Métis, based on spatially extensive family networks and economies, was the foundation of their culture. This mobility can be traced by looking at different kinds of historic records including the records of the Roman Catholic missionaries, the fur trade records and the scrip commission records. The following two sections attempt to map the information from these records to give a visual representation of the historic mobility of the Métis.

#### The Fur Trade Records

Initially the English fur traders penetrated into North America through Hudson's Bay. A Royal Charter was granted to the Hudson's Bay Company for Rupert's Land in 1670. The land included the Hudson's Bay watershed. Beginning in 1775, the fur trade expanded into the interior along a southern route. French traders moved up into the Great Lakes and across the Prairies as far as the Slave River by 1786 and the Missouri by 1818.

According to Ray, the expansion of the fur trade in the late 1770s led to the diversification of the Métis in three ways. First, the Métis came into contact with a variety of Indian cultures. As a result the voyageurs intermarried with women who were Algonquin, Ojibway, Cree, Saultaux and Dene. Second, the expansion into new ecological areas such as the boreal forest, the parklands and the grasslands led to a diversification of their economies. Third, the expansive territory led to the establishment of a vast network of relationships connected by a transportation system.<sup>162</sup>

The expansion into different cultural/ecological/subsistence zones led to the development of four distinct regional Métis economies, which Ray identifies as the Great Lakes-Boundary

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<sup>162</sup> Ray 2005, *supra* note 61 at 23.

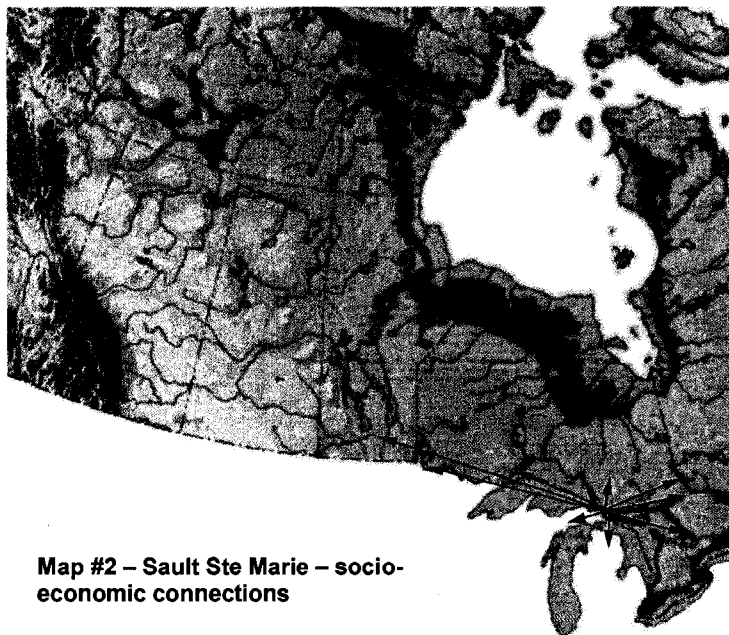
Waters zone; the boreal forest-parkland, the boreal forest; and the parkland-grassland zone.

Ray's work is revealing because it shows that the Métis in these regional economies are connected and mobile both within and between the four regional economic zones.

In looking at the Métis economy in the Great Lakes-Boundary Waters region, Dr. Ray noted that,

... although the Métis anchored their lives on the small family farms that reached back from the riverfront, they roamed over a vast area. For this reason, the Métis socioeconomic community was not limited to the boundaries of the built-up area and cleared fields of the settlement, but rather, it included its sprawling hinterland.<sup>163</sup>

Map #2 shows the area used by the Métis at Sault Ste Marie, which is just one settlement in the Great Lakes-Boundary Waters region.<sup>164</sup> The arrows indicate the socio-economic range



**Map #2 – Sault Ste Marie – socio-economic connections**

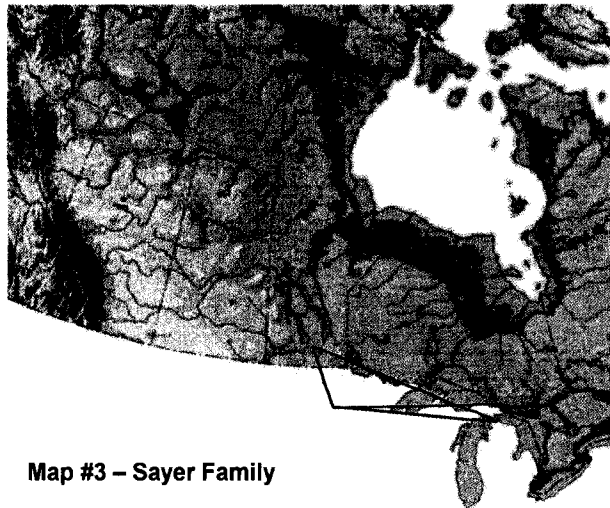
including the kinship network from the evidence presented at the *Powley* trial.

The evidence suggests that if the economic range, kinship connections and vital event locations could be mapped for the entire Great Lakes - Boundary Waters region, it would support a

<sup>163</sup> *Ibid.* at 45.

<sup>164</sup> Ray 2005, *supra* note 61 at 46. This map takes information from Dr. Ray's map, which showed the economic range of the Sault Ste Marie Métis community and adds kinship connections from evidence at the *Powley* trial.

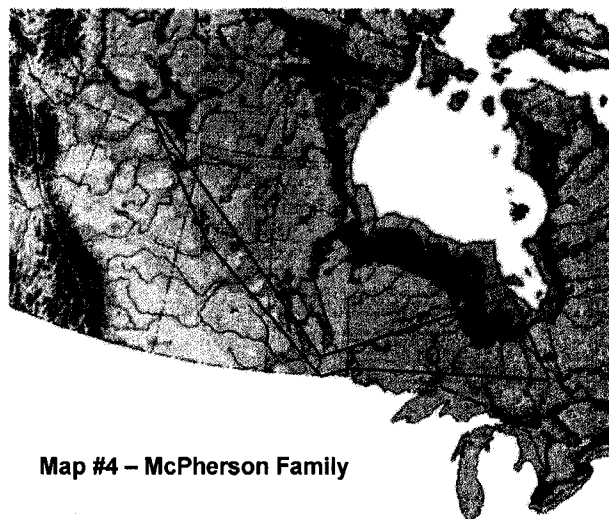
conclusion that the Métis lived in, used and occupied this entire region. They were not fixed in settlements and did not limit their harvesting to the immediate vicinity of any one settlement.



**Map #3 – Sayer Family**

The evidence also suggests continuous connections between Ray's identified regional economies. The evidence from the *Powley* trial showed several kinship connections between the Métis at Sault Ste Marie and Red River. Tracing the Métis names over the geographic area of the Northwest also contributes to our understanding of how extensive the Métis

kinship network is. For example, Sayer was a name that appeared in the Sault Ste Marie historic records. The son of that Sayer subsequently stood trial in Red River in 1849, charged by the Hudson's Bay Company with violating its trading monopoly.<sup>165</sup> The Sayer name also appears in scrip documents.<sup>166</sup> At the *Powley* trial, a Sayer from Sault Ste Marie offered to testify as a witness for the Métis defendant.

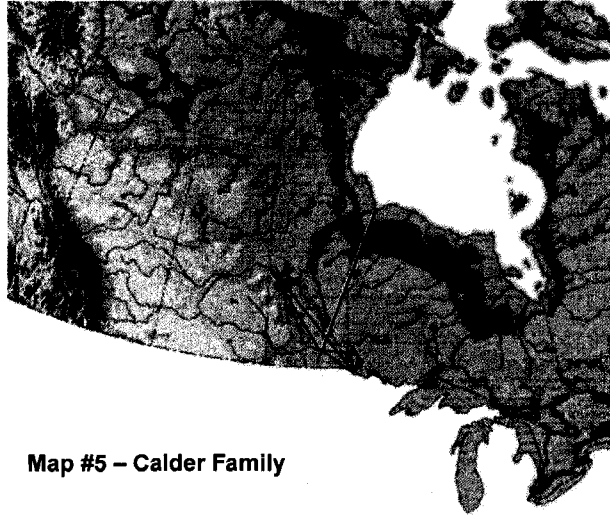


**Map #4 – McPherson Family**

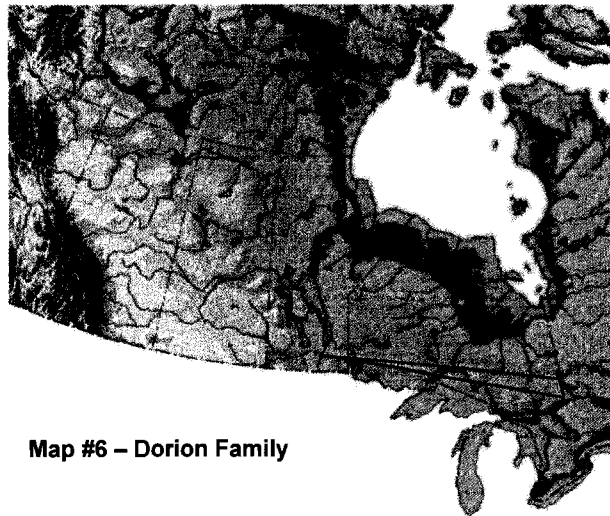
Map #3 shows some of the movement of the Sayer family. The Sayers are married into the McPhersons (see Map #4).

<sup>165</sup> For an account of the Sayer trial see *The Canadian Encyclopedia* online: (July 19, 2008) <<http://www.thecanadianencyclopedia.com>> s.v. "Sayer Trial".

<sup>166</sup> Ray 2005, *supra* note 61 at 41-44. The data for the Sayer, McPherson, Calder and Dorion families comes from genealogical information provided by the Registrar of the Métis Nation of Ontario.

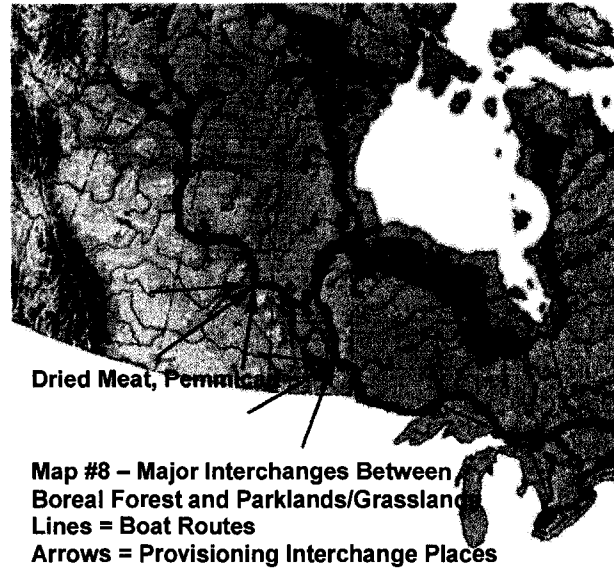
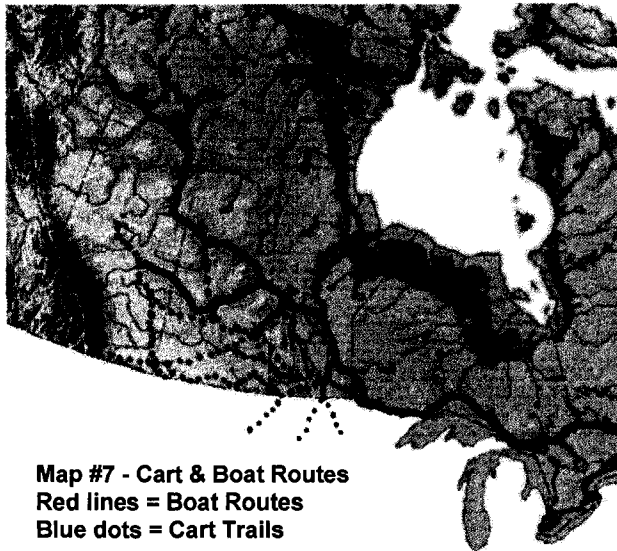


**Map #5 – Calder Family**



**Map #6 – Dorion Family**

Maps #3, #4, #5 and #6 show only some of the known locations of the Sayer, McPherson, Calder, and Dorion families. They suggest that the mobility of the Métis of the Northwest was not confined to the Prairies.



Map #7 shows the major transportation routes that connected the historic Métis society. These routes connected Ontario and the Prairies and the boreal forest economic zone (fur trade) to the parklands/grasslands zone (buffalo hunter).<sup>167</sup> It is no coincidence that the major Métis settlements were all located at strategic locations along these routes and in the wintering sites. The largest populations of Métis continue to be located in and around these historic areas.

The Métis economic network on the Prairies can be seen in Map #8, which shows visually the economic relationship between the boreal forest (fur trading area) and the

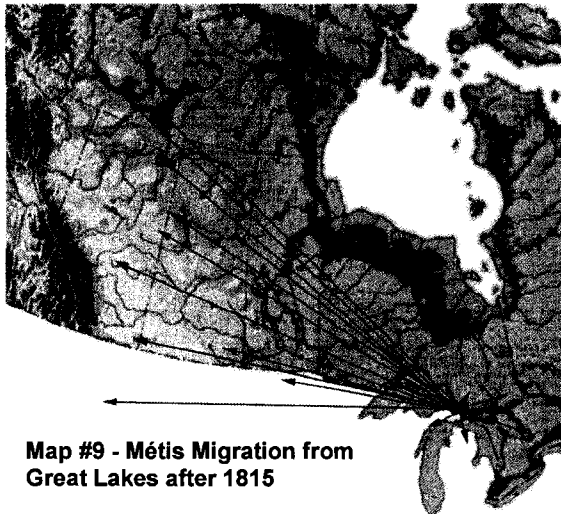
<sup>167</sup> Ray 2005, *supra* note 61 at 28, figure 3. Map #7 replicates some of the major cart and boat routes Dr. Tough depicted in a similar map that was entered as an exhibit at the *Goodon* trial.

<sup>173</sup> Ray 2005, *supra* note 61 at 32. Map #8 replicates the provisioning network Dr. Ray depicted in a similar map that was entered as an exhibit at the *Goodon* trial.

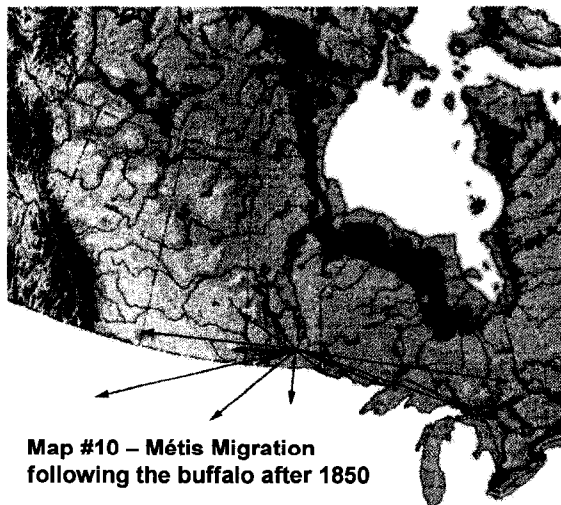


parklands/grasslands (buffalo hunting area).<sup>173</sup> The Métis kinship relationships between these economic zones are also supported in the scrip and fur trade records.

### Motivation for Métis Mobility



Métis mobility appears to be of two different kinds – migration and by engaging in a nomadic life-style based on trading and hunting. The fur trade records show both of these kinds of mobility. I have attempted to show this mobility in a series of impressionistic maps. They are meant to provide an impression of the general direction of mobility. They do not purport to identify the routes the people traveled by.

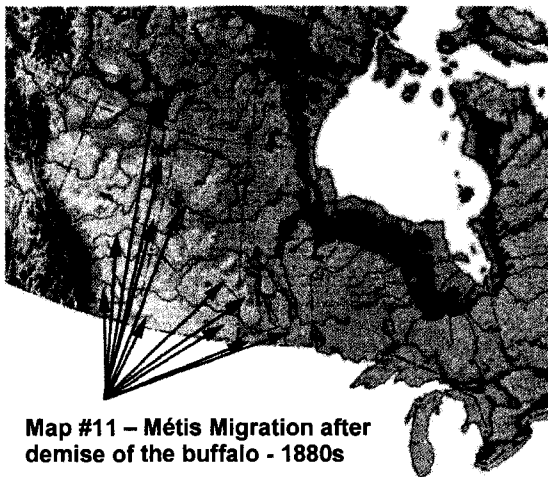


Migrations have occurred for three basic reasons. First, the Métis were economic migrants. They migrated in order to access animals on which they relied for their economy. With respect to the fur trade, as it shifted away from the Great Lakes after 1815 and moved further west in the northern boreal forest in the Northwest, the Métis followed. As they moved

west they also diversified their economy to include the buffalo, an activity that expanded their range out of the boreal forest and into the parklands and grasslands. (see Map #9) In the mid

1800s as the buffalo moved further west and south, the Métis migrated out of Red River to points further west. (See Map # 10)

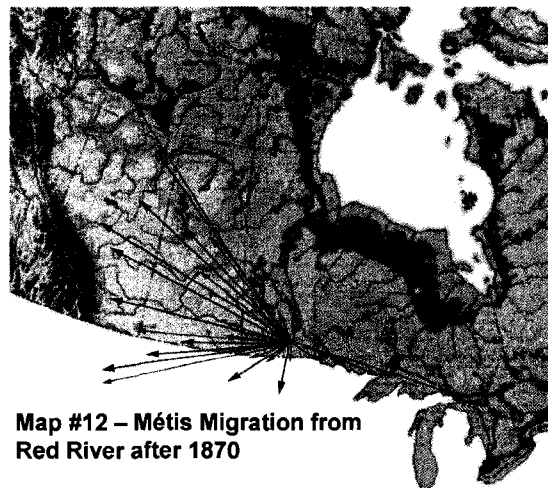
In 1882 the United States army began to restrict the easy access the Canadian Métis had formerly enjoyed in Montana and North Dakota. For at least a century the Métis had been traveling to the Missouri and Milk Rivers to hunt the buffalo. However, Father St. Germain



**Map #11 – Métis Migration after demise of the buffalo - 1880s**

reported that,

... in the beginning of 1883, they were pursued by the Sheriff of Fort Benton, who claimed the right to levy duties on the robes they took into Canadian territory. When they refused to pay his claims, he seized a great part of their booty. More than 200 families then quitted this territory, hitherto so abundant, and returned to the Canadian prairie.<sup>174</sup>



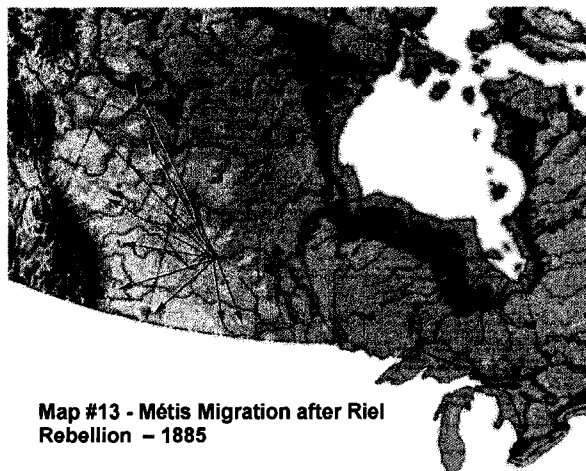
**Map #12 – Métis Migration from Red River after 1870**

Subsequently the Americans maintained a watch on the border and restricted Canadian Métis and Indians from entering the USA to hunt. After the demise of the buffalo, the Métis migrated back into Canada from Montana, generally returning to their wintering sites. (see Map #11)

Second, the Métis migrated for political reasons. For example, after 1870 and the events at Red River many Métis migrated west to evade the ‘reign of terror’ and in the hopes of maintaining their lifestyle (See Map #12).

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<sup>174</sup> Father St. Germain, as cited in Willow Bunch, *supra* note 77 at 197.

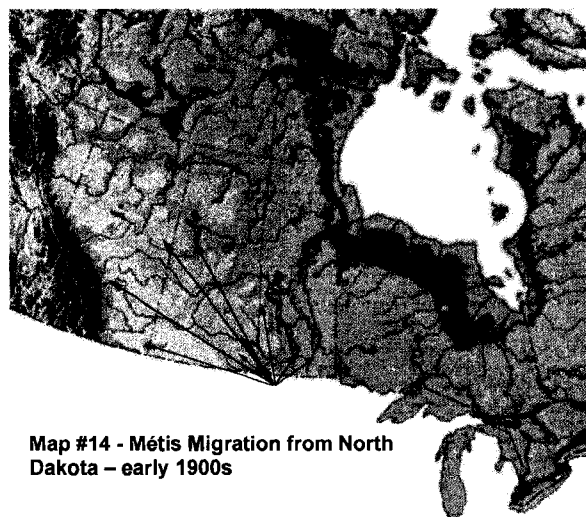


**Map #13 - Métis Migration after Riel Rebellion - 1885**

After 1885, they migrated again, away from central Saskatchewan after the Riel Rebellion. (See Map #13)

The historic treaty process in the United States also affected the Métis. In the early 1900s, Canadian Métis were expelled from the Turtle Mountain Reservation in North Dakota.

Again, the record shows that they simply moved back to the wintering sites that they had always used and occupied. (see Map #14).



**Map #14 - Métis Migration from North Dakota - early 1900s**

Finally, Métis migrated in response to natural events such as floods and fires. There were large prairie fires in 1846, 1848, 1852, and again in 1879-80.<sup>175</sup> For example, in 1879-80 devastating fires consumed the forests and grasses in and around Wood Mountain, which was a well-established Métis wintering site.<sup>176</sup>

After the Wood Mountain fire the Métis moved to *Talle L'sól*, which later became known in English as Willow Bunch, Saskatchewan.

<sup>175</sup> Marcel Giraud, *The Metis in the Canadian West*, trans. by G. Woodcock (Edmonton: University of Alberta Press, 1986) at 22 and 29-30.

<sup>176</sup> Some records attribute the fires to the Americans claiming they set them deliberately to redirect the buffalo herds and prevent Indians and Métis from crossing the border. See Willow Bunch, *supra* note 77 at 194.

It should be emphasized that when these migrations occurred, the entire Métis population did not vacate any of these areas. For example, the evidence in *Powley* showed that after 1815 and the migration from the Great Lakes to the Prairies, a significant Métis population remained in the Great Lakes-Boundary Waters region of Ontario.<sup>177</sup> The evidence at the *Goodon* and *Vermeulen* trials showed that while many Métis were forced to move out of North Dakota in the early 1900s, they did not all leave the Turtle Mountain area. Similarly, not all Métis left Red River after 1870<sup>178</sup> and not all Métis left Saskatchewan after 1885.

Further, the migrations were not all east to west. The evidence of the migrations and the economic territorial use, taken together, show consistent use of the same large geographic area that stretches east to west from the Great Lakes to the Rocky Mountains and north to south from Great Slave Lake and the Mackenzie District to Montana and North Dakota.<sup>179</sup>

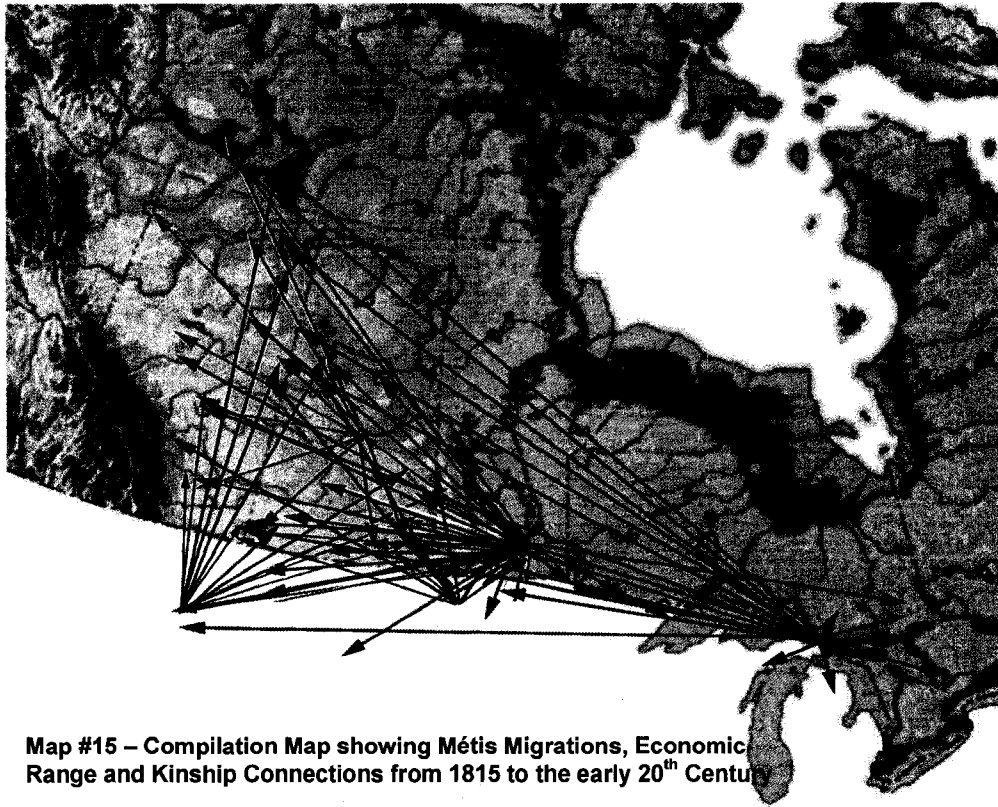
Map #15 compiles all of the data and shows an impressionistic picture of the economic range, kinship connections and migrations of the Métis of the Northwest.

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<sup>177</sup> *R. v. Powley*, 2000 CanLII 22327 (ON. S.C.); (2000), 47 O.R. (3d) 30 at paras. 33-40

<sup>178</sup> The author's family – the Riels – continue to live in Red River.

<sup>179</sup> There is a contemporary Métis presence in British Columbia and there are scrip and other documentary references to Métis traveling there in the 1800s. The *Willison* trial presented intriguing data about Métis who lived in an area between Fort Kamloops and Fort Okanagan. However, the court held that the data was insufficient to prove that these Métis had persisted in the area long enough to prove harvesting rights. *Willison*, *supra* note 2.



The many migrations of the Métis are one of the facts that have contributed to the invisibility of the Métis community. In fact, the migrations have led some historians to erroneously conclude that the Métis community itself disappeared from various areas.<sup>180</sup> The evidence does not support this. It is suggested that a more nuanced examination supports a conclusion that the migrations of an already mobile people, far from acting to break up a collective identity, simply serve to embed their pre-existing identity as a mobile people with a network of relationships that exists over a vast landscape. Further, the migrations are internal in the sense that they are not migrating to unknown lands. They are migrating to known areas within the lands they lived in, used and occupied. The evidence does show that the people

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<sup>180</sup> *Many Roads*, *supra* note 63 at 64.

migrate from time to time. However, they do not leave their home and migrate to a new home. Their migrations simply serve to center their activities in another part of their home(land).<sup>181</sup>

#### The Scrip Records<sup>182</sup>

Scrip was the means by which the government of Canada distributed lands to groups of people it wished to reward or pacify. They gave scrip to both sides of the North West Rebellion of 1885: to the Métis and the soldiers who put down the Rebellion. For the government, scrip purported to accomplish one other important purpose – the extinguishment of Métis claims to Aboriginal title.

Scrip is now virtually an obsolete concept. It was a voucher that promised the recipient payment in the form of cash or land. From the 1870s until the early 1950s the term was in current use in all of Western Canada. There were two types of scrip – land scrip and money scrip. Money scrip was usually issued in the amount of \$80, \$160 or \$240. Land scrip was generally issued for 80, 160 or 240 acres. Land scrip could be redeemed for a certain amount of land or money from the government. In the early days of scrip distribution \$160 scrip entitled the bearer to 160 acres of land at \$1 per acre. As land values increased, scrip values decreased. Scrip was issued pursuant to the *Dominion Lands Act*. Land grants were also issued pursuant to the *Manitoba Act, 1870*. Scrip was distributed by Scrip Commissions, which traveled across the Prairies and into the Northwest Territories. The Commissions situated themselves in proximity to significant numbers of Métis.

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<sup>181</sup> In this sense I am rejecting Ens theory (Ens, *supra* note 75) that the Métis moved away from their homeland. Instead, I propose that the evidence shows that the Métis were always moving within their homeland.

<sup>182</sup> For a full description of the scrip process see Tough & McGregor, *supra*, note 49.

The scrip documents themselves are a large repository of information about the Métis. The scrip commissioners recorded the answers given by the Métis to several questions. Some of the scrip information tells us about the Métis life on the plains. For example, questions such as ‘where were you born’ or ‘when did you marry’ or ‘where did he die’ often elicited responses such as she was born “on the plains”<sup>183</sup> or she was married “in 1864, on the plains”<sup>184</sup> or “he died in the plains”<sup>185</sup> or was “born somewhere in the NWT.”<sup>186</sup> Sometimes the information is more specific. For example, there are notations that a child “died of small pox on the road between Carlton and Lac La Biche”<sup>187</sup> or, on a happier note, “mother married ... in the plains near Battle River.”<sup>188</sup>

The scrip documents are also revealing in the responses to questions such as ‘where have you lived’ and ‘where do you reside.’ These questions elicit a broad range of responses from a long list of locations to simple statements such as “I have no permanent place of residence”<sup>189</sup> or “my parents were plains hunters [and] resided both in Manitoba and the North-West Territories ... having no permanent domicile in either previous to the transfer.”<sup>190</sup>

When looking for common cultural or political events that tie a people together, the scrip records are useful. The scrip documents show that the Riel Rebellion in 1885 was an important event for the Métis. Their responses frequently use “the Rebellion” as a marker. For example,

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<sup>183</sup> Scrip application of Nancy Bird (b: 1845).

<sup>184</sup> Scrip application of Marie Desjarlais (b: 1840).

<sup>185</sup> Scrip application of Felix Bruneau (b: 1866).

<sup>186</sup> Scrip application of Baptiste Fosseneuve (b: 1834).

<sup>187</sup> Scrip application of Baptiste Cardinal (b: 1846).

<sup>188</sup> Scrip application of Elizabeth Boucher (b: 1874).

<sup>189</sup> Scrip application of Marie Desjarlais (b: 1834).

<sup>190</sup> Scrip application of René Pagé (b: 1860).

born in “the year of the Rebellion”<sup>191</sup> or “she died at Calgary about five years after the Rebellion”<sup>192</sup> or “born ... the spring of the year of the rebellion. The rebellion was just about starting at the time.”<sup>193</sup>

The scrip documents set out the specific locations of vital events such as marriages, births, baptisms and deaths and there is a witness declaration for each scrip application. These witness declarations give additional information. For example, one witness declaration notes that, “They lived a migratory existence. I never knew them to have a house.”<sup>194</sup> Most scrip applications show the constant mobility of the Métis. For example a 1900 application from Thérèse Davis states that she was living in 1900 at Grand Clariere and that her daughter Josephine was born in St. Michel, North Dakota “in the year of the rebellion.”

... we lived on the northwest prairie and were at Batoche during the rebellion. We left Batoche in May and went to Dakota, but not with the intention of residing there. We remained until Josephine was born, and shortly afterwards returned to Canada.<sup>195</sup>

Another example of the mobility of the Métis can be seen in the scrip application of Métis hunter, Charles Pagé. The application is from 1885 and he gives his current address as Turtle Mountain, but indicates that he was born at St. François-Xavier in 1835 and married there

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<sup>191</sup> Scrip application of Eliza Anassi (b: 1885).

<sup>192</sup> Scrip application of Suzanne Brennan (b: 1877).

<sup>193</sup> Scrip application of Mary Rose Dumont (b: 1885).

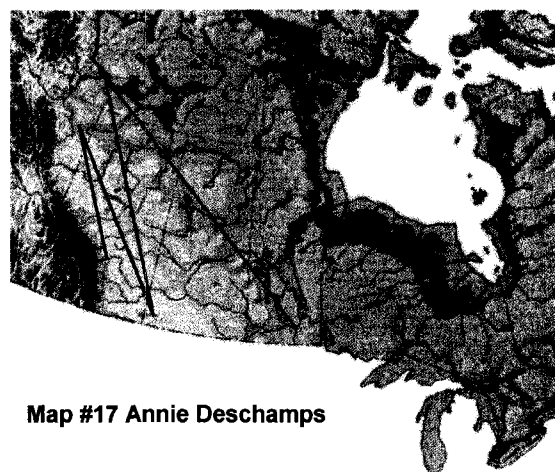
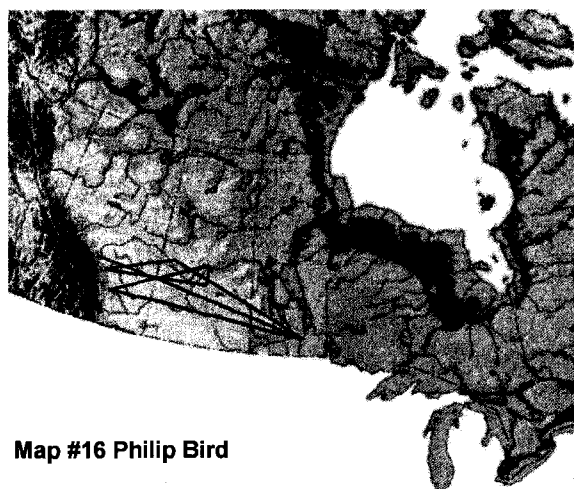
<sup>194</sup> Witness Declaration of Alexandre Bryan to scrip application of Mary Rose and Angelica Laverdure (taken at Macleod, Alberta, 1900).

<sup>195</sup> Scrip Application of Thérèse Davis, *R. v. Goodon*, Trial Transcripts, Testimony of Gwynneth Jones, March 5, 2007 at 41.



in 1863. He states that he lived in Manitoba up to the beginning of 1870, and then lived at various places in the Northwest including Qu'Appelle, Cypress Hills and Wood Mountain.<sup>196</sup>

In my examination of the scrip documents I looked to see whether these documents could provide us with information about the mobility of the Métis. We know that many followed the buffalo hunts and that others were fur traders or freighters. I have not attempted to examine all of the scrip record.<sup>197</sup> My data and maps are taken from five scrip searches compiled for five separate court cases. Two of these cases were in Manitoba, two were in Saskatchewan and one is in the process of trial preparation for Alberta.<sup>198</sup> The maps show mobility in a variety of ways. For example, Maps #16-#19 take four individuals and show where their scrip records locate them at various points in their lives.



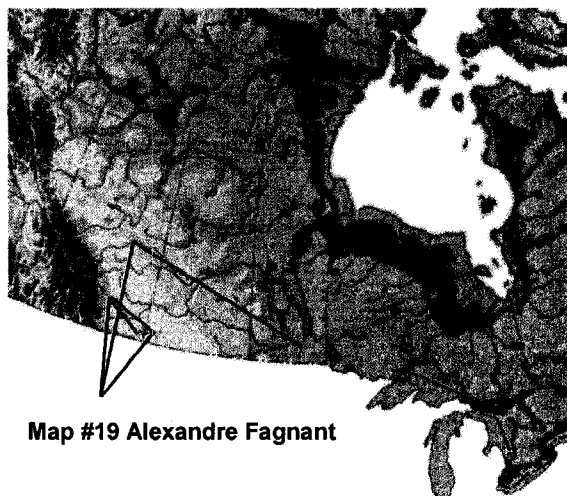
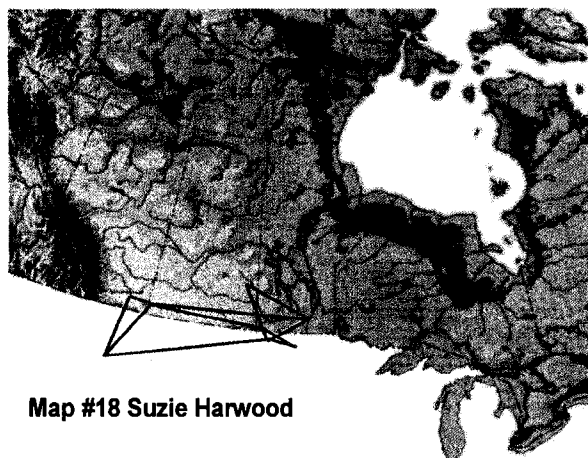
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<sup>196</sup> Scrip Application of Charles Pagé, *R. v. Goodon*, Trial Transcripts, Testimony of Gwynneth Jones, March 5, 2007 at 48-49.

<sup>197</sup> However, I am greatly indebted for any insights I have gleaned about scrip to Dr. Frank Tough who has engaged in an in-depth study of scrip and is compiling what is already an invaluable database from the records. Parts of the database are available online at <<http://tomcat.sunsite.ualberta.ca/MNC/NWScrip>>.

<sup>198</sup> *R. v. Vermeylen*; *R. v. Goodon*; *R. v. Laviolette*, *supra* note 2; *Belhumeur*, *supra* note 13; and *R. v. Bates*.

I wish to emphasize that these maps are impressionistic. The maps reflect locations given for vital events such as births, deaths and marriages, include the location of various residences, and indicate where the applicant took scrip. I would suggest that these records likely under-



represent the mobility of the Métis as the applicants were not asked to list every place they had ever been. Further, with the information provided in the scrip record it is not possible to replicate the routes the people traveled. We could guess based on the knowledge we have of the land and water routes (see Map #7), but the scrip records simply ask where the individual has resided. The record does not provide information as to where they visited, how they traveled or whether they even fully comprehended what the residence question meant in terms of how long it took to establish a residence in one location. The evidence indicates that the residence question was intended to show whether the individual qualified for scrip. In other words, was he or she a Canadian Métis. The scrip commissioners were trying to eliminate those who they considered Americans.

The maps suggest that mobility for the Northwest Métis was the norm and not an anomaly. Of the 167 applications examined only 14 listed one location and of these, 13 were applications for children who had died shortly after childbirth. Over 75% listed three or more

locations for vital events or residences. Some of the data reflects mobility within a particular area of the Northwest. (see Map #23 depicting Métis mobility centered in and around Alberta)

Some of the data reflects mobility over much of the Northwest. (see Map #22)

The scrip records also show repeated reference as residences to the same sites, known in the literature as “wintering sites” including Turtle Mountain, Moose Mountain, Wood Mountain, Touchwood Hills, Qu’Appelle, and the Cypress Hills.<sup>199</sup> Ray described the wintering sites as river valleys and micro-woodland habitats.

They tended to be heavily wooded ... to have a safe wintering site, you needed water, you needed shelter, and you needed firewood ... and wood for building things ... all of those places are quite big ... The other place[s], of course, were some of the river valleys. Once you go west of the Manitoba escarpment ... the valleys get deeper and deeper, and if you're on the leeward side of the valleys, they're often heavily wooded, and they would serve a similar kind of purpose. So what all those places had in common was shelter from the winter winds, wood, and access to water.<sup>200</sup>

The historical records are full of descriptions of these favorite Métis locations. Father Lestanc who traveled with the Métis described Wood Mountain as follows:

There were, in a two-mile radius [around Wood Mountain], sixty families. They were all French-Canadian Métis, with the majority coming from Pembina and the others from White Horse Plain (St. Francois Xavier). I think that there were 200 Métis who at the time lived on the prairie, hunting buffalo in the summer and in the winter. All throughout the nice weather they lived in ordinary tents in a big camp. Towards the end of October, they chose as a good place to live in the winter, a valley where they could find wood, lots of fresh water and not far away, buffalo.<sup>201</sup>

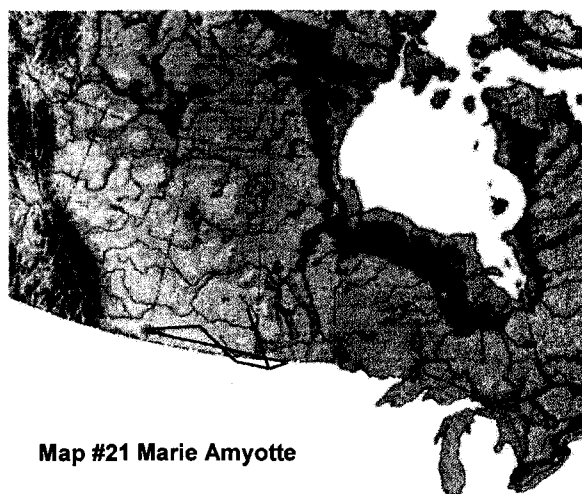
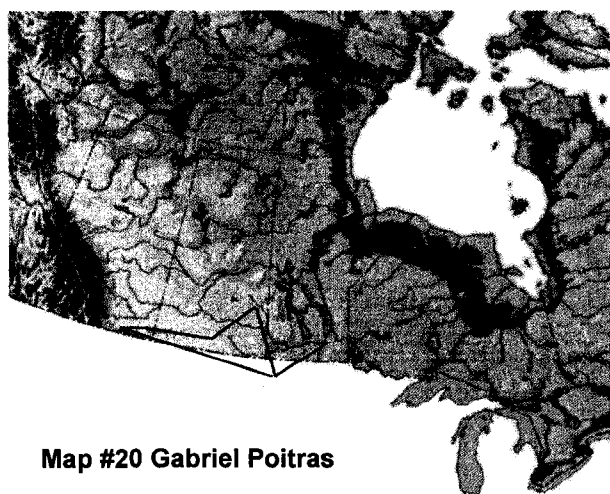
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<sup>199</sup> For one map of Métis wintering sites, 1840s-1870s see Ens, *supra* note 75 at 79.

<sup>200</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Dr. Arthur Ray, October 16, 2006 at 113-114.

<sup>201</sup> *Souvenirs 1860-80*, Father J.M. Lestanc, OMI, trans. by Darren Préfontaine, Public Archives of Alberta.

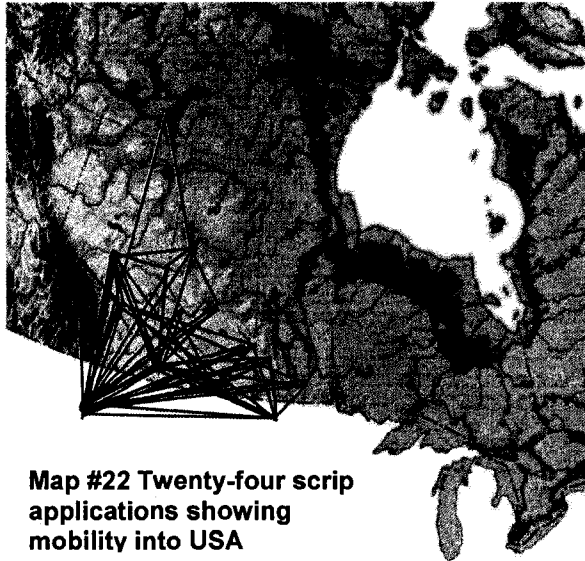
It is also clear from the record that each of these wintering sites contained more than one camp. For example we know that there were at least four major Métis camps by the late 1870s in Cypress Hills. One camp was located at East End near the present day community of Eastend. Another was located along Battle Creek near the site of what would later become Fort Walsh. Two more were located at what was known as the 'Head of the Mountain.' These were the larger camps. There were also a number of smaller camps located in various coulees throughout the Cypress Hills.<sup>202</sup>



Maps #20 and #21 are indicative of the typical movement between these wintering sites. Again, these maps do not reflect how long the applicant may have stayed in each location or how often they may have returned to that wintering site. There is also no indication of which camp the applicant may have resided in within the wintering site.

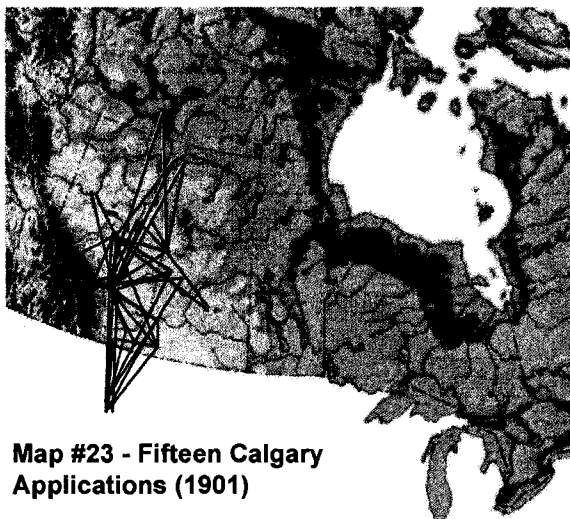
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<sup>202</sup> D. A. Loveridge and Barry Potyondi, *From Wood Mountain to the Whitemud* (Ottawa: National Historic Parks and Sites Branch, Parks Canada and Environment Canada, 1983) at 65.



The scrip data also shows that the Northwest Métis did not restrict their territory to Canada. The records show that they traveled into the northern United States, especially North Dakota and Montana, (Map #22). This is borne out in many of the historical reports and reflects the reliance on the buffalo that were largely located in the USA. I should note that I have made no attempt to identify specific locations in Montana and that while the maps

show movement into Montana a more detailed study would likely show that the use of Montana goes farther south than the map indicates.



A search of some scrip records taken at Calgary in 1901 shows that Métis had long been using Alberta as their base of operations.<sup>203</sup> (see Map #23) These records indicate extensive travel within Alberta and also show that the Métis at this time are still traveling to Montana, Cypress Hills and into

Saskatchewan and the Northwest Territories. This western emphasis may be the results of the westward migration of the Métis in their pursuit of the buffalo after the mid 1800s.

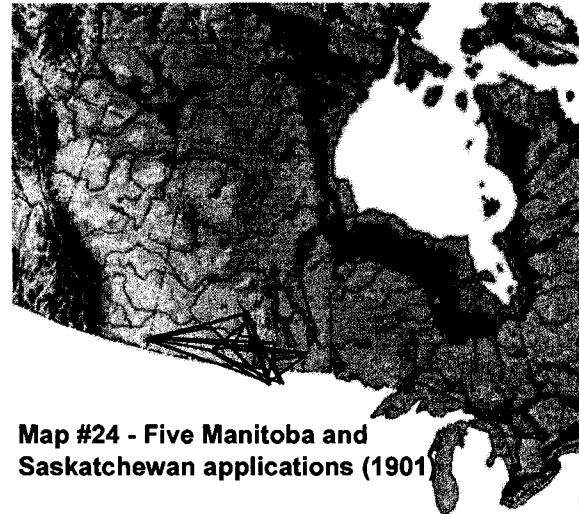
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<sup>203</sup> Until 1905, Alberta was a district of the Northwest Territories.

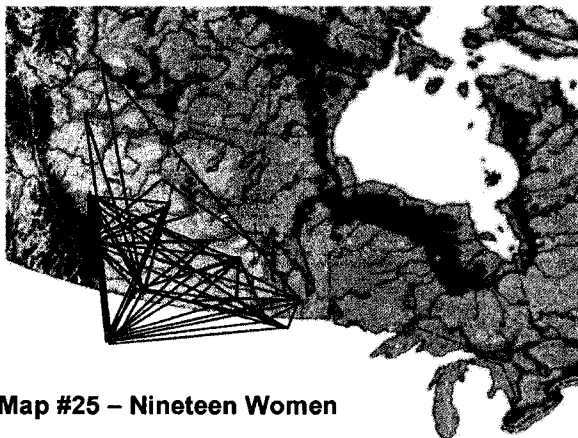
Map #24, which is a compilation of scrip records taken in 1901 in southern Manitoba, shows that not all Métis moved out to Alberta after 1870 and that many Métis continued to live in, use and occupy parts of southern Manitoba and Saskatchewan.

The scrip records also show that the Métis women were just as mobile as the Métis men. In other words, the records do not show that the men traveled and the women stayed at home.

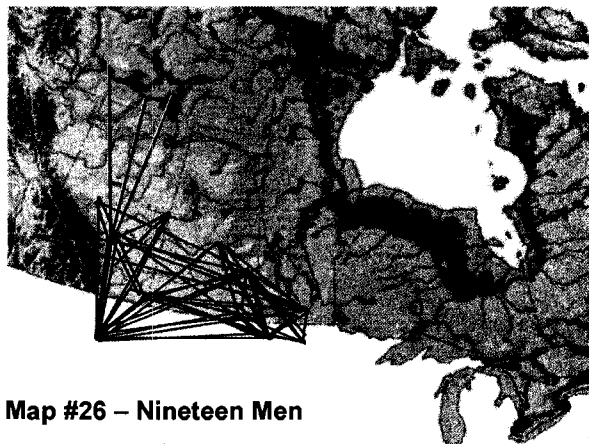
Maps #25 and #26 suggest that both men and women were highly mobile and that with some anomalies, they generally traveled in and around the same area. There does not appear to be any



**Map #24 - Five Manitoba and Saskatchewan applications (1901)**



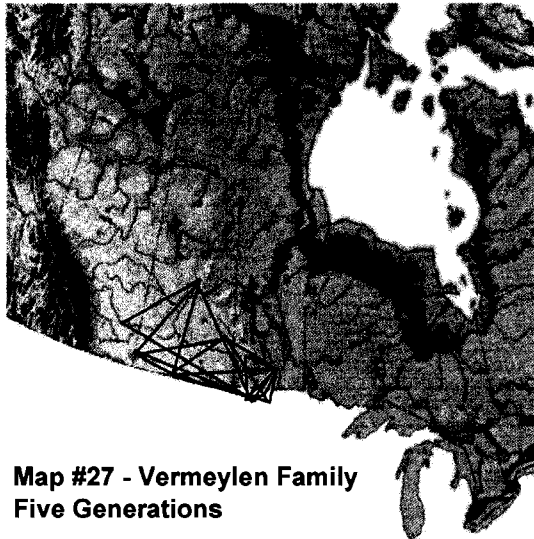
**Map #25 - Nineteen Women**



**Map #26 - Nineteen Men**

obvious difference in the distances or locations based on gender. This suggests that the Métis traveled as family units.

Map #27 suggests that the Métis families continued their mobility over the generations. In the *Belhumeur* and *Goodon* trials, Dr. Tough entered into evidence maps that showed similar movement for three Métis families (Desjarlais, Amyot and Grant) over several generations.

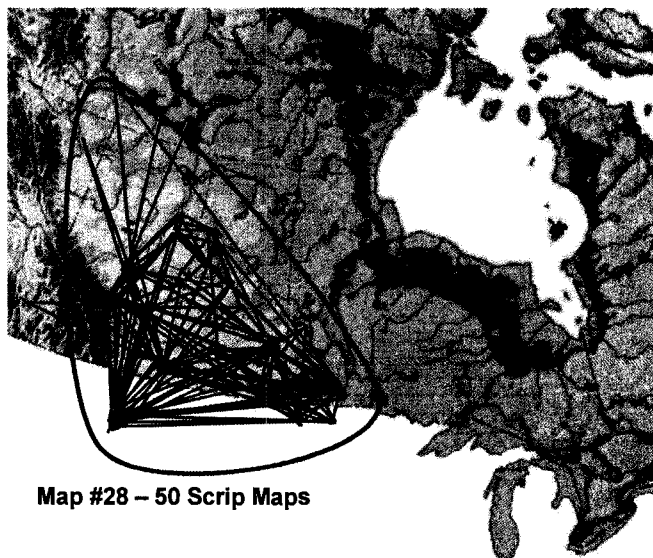


**Map #27 Vermeylen Family – Five Generations**

St. Francois Xavier – 1839, 1854, 1858, 1875, 1877-1881  
 Ft. Ellice – 1882  
 Qu'Appelle/Lebret – 1866-1870, 1872-1881, 1877-1884, 1900  
 Turtle Mountain – 1881-1917, 1882, 1890, 1892, 1895, 1902-1917, 1905  
 Dunseith, ND – 1900-1905  
 Belcourt, ND – 1886, 1905  
 Killarney, Manitoba – 1901  
 San Clara, Manitoba – 1920  
 Calgary – 1885  
 Yorkton – 1964  
 Batoche – 1885, 1884-1893  
 Cypress Hills – 1880, 1889-1893  
 Wood Mountain – 1878, 1882, 1889-1893

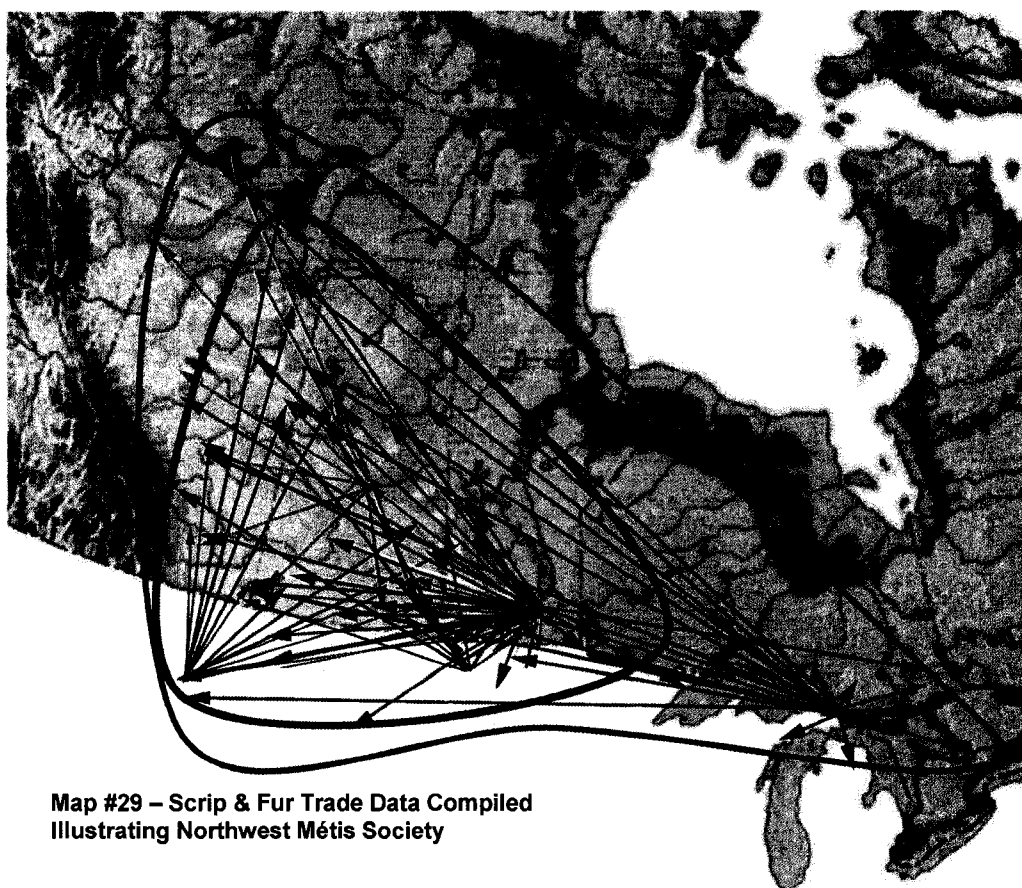
**Map #27 - Vermeylen Family  
Five Generations**

Map #28 is a compilation map. It shows the mobility of 50 scrip applicants. It is suggested that the compilation map is an indication of the Northwest Métis community in prairie/parkland/boreal forest region. It should be noted that the sample does not include scrip taken north of the 60<sup>th</sup> parallel. It also does not include the parts of the Northwest Métis community in Ontario or British Columbia because scrip was not issued there. As a result, the scrip records do not show the entirety of Métis community of the Northwest. The scrip data should be understood



**Map #28 – 50 Scrip Maps**

together with the fur trade data. This can be seen below in Map #29, which is a map that compiles the fur trade data and the scrip data shown in the previous maps. If the mapping is roughly accurate, it suggests that, from the late 1700s, the Métis have consistently lived in, used and occupied a vast area. It also shows that they were highly mobile in their use and occupation of this territory.<sup>204</sup>



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<sup>204</sup> The research for this thesis has not considered data that may show mobility of Métis who live in the northeastern watersheds of Manitoba and Saskatchewan. This research also contains no data from northern Ontario or British Columbia. It is suggested that additional research may add additional mobility data to the territory set out above or perhaps add territory. It is unlikely that the territory would be diminished in size by additional data.



## **Contemporary Mobility**

Data with respect to the contemporary mobility of the Métis is limited. There is not contemporary data that is the equivalent of the Hudson's Bay Company records or scrip records. Because Métis have not, for the most part, been involved in the modern land claims processes there has been no source of funding to do land use mapping or traditional use studies. Most of the funds being provided for the Northwest Saskatchewan Métis land claim litigation are being funneled into necessary historical research. Although some preliminary land use mapping has begun in Ontario, Saskatchewan and Manitoba, to date only the Manitoba data has been analyzed.

The evidence from the Manitoba study was prepared for an environmental hearing into a Manitoba Hydro project in 2003. According to that study, the mobility of the Métis in Manitoba appears to have two motivations.

... the Métis people are a highly mobile people for many reasons. First because it's one of their cultural markers. It's one of the things that identify the Métis, as Métis is their mobility. And second, because there's a long history in this country and in this province in particular [Manitoba] of the destruction of their communities which forces their mobility.<sup>205</sup>

The reference to the destruction of Métis communities refers to several incidents of the 20<sup>th</sup> century. The Royal Commission on Aboriginal Peoples relates one such story about the destruction of the Métis community of Ste. Madeleine, Manitoba in the late 1930s. All of the people who lived in Ste. Madeleine were to be relocated and were entitled to full compensation provided their tax payments on their land were up to date. Paid up tax however, was a problem for many Métis people who were seen in law as squatters on their land. They were forced to

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<sup>205</sup> Clean Environment Commission, Wuskwatim Hydro Projects, (2003) Testimony of John Morriseau, Hearing Transcripts at 5886.

move without compensation. Their houses were burned, their church was dismantled and by 1938 the once vital community of Ste. Madeleine had virtually vanished.<sup>206</sup>

There are many other stories of the forced relocation of the Métis. In the early 1950s, negotiations between the government of Canada and the governments of Saskatchewan and Alberta, led to the establishment of the Primrose Lake Air Weapons Range in northern Saskatchewan and Alberta. The Weapons Range takes up an area comprised of 4,490 square miles and is devoted exclusively to the purpose of testing air warfare weapons. Prior to the establishment of the Weapons Range, the area had been used for logging, hunting, fishing, trapping and gathering by Aboriginal persons. Some used the area year-round; others used it and resided there on a seasonal basis. Some of those Aboriginal persons were Treaty Indians registered under the *Indian Act*,<sup>207</sup> while others were Métis.

E.B. Armstrong, Deputy Minister of National Defence, recognized that the Métis “were the greatest in number in this area and ... were largely dependent upon those natural resources.”<sup>208</sup> The Range took up the best hunting and fishing areas. The Métis and Indians who were relocated suffered a significant economic loss as a result. There were now more people hunting and fishing in lower quality areas.

In the late 1930s, the Saskatchewan government relocated Métis from southern Saskatchewan to Green Lake. They were moved in carts from their lands and as they moved away their homes were set on fire. Also in the 1930s, the Alberta government took notice of the

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<sup>206</sup> *RCAP Report*, *supra* note 140 at Vol. 1, Part II, Ch. 11, 3.3.

<sup>207</sup> *Indian Act*, S.C. 1951, c. 29.

<sup>208</sup> Letter from E.B. Armstrong, Deputy Minister of National Defence, to the Secretary of the Treasury Board, (29 June 1961) as quoted in Affidavit of Dr. Frank Tough, *Maurice* at para. 102(b).

impoverished conditions of the Métis and established 12 Métis settlements. Later five of the settlements were re-claimed by the government and those Métis were forced to leave.

Métis mobility in the 20<sup>th</sup> Century has been documented in a study by Victor Valentine, which provided a detailed view of northern Saskatchewan Métis life from data collected in 1952, 1953 and 1954.

Hunting, fishing and trapping are still the main sources of food and income ... The Metis, like their Indian ancestors, have remained semi-nomadic hunters, trappers and fishermen. Migration movements occur between settlement and hunting grounds at least four times a year, in accordance with the following seasons of economic activity: winter trapping or fishing, spring trapping, summer leisure or fishing, and fall trapping.<sup>209</sup>

The mobility of the Métis in the 21<sup>st</sup> Century is also borne out by a 2005 Métis land use study in Manitoba.

The idea that movement remains a central feature of Métis culture is suggested by our map biography research. The sociocultural environment of the contemporary Métis points to a high degree of mobility, linkages to other areas, and large harvest areas ... the concept of Métis mobility and linkages found in the widespread use patterns in our map biographies. Though this research is still ongoing, research to date suggests that Métis mobility appears to be an important Métis cultural marker today much as it has been in the past.<sup>210</sup>

The Canadian census may be of limited use in understanding Métis mobility. Contemporary Métis mobility may not show up in census data for several reasons. First, because Métis often have more than one name – an English or French name, and an aboriginal name.<sup>211</sup> Statistical data that does not co-relate addresses with names over several censuses will miss this information. Second, as revealed by the Manitoba land use studies, many contemporary Métis do

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<sup>209</sup> Victor F. Valentine, *The Metis of Northern Saskatchewan* (1955) [unpublished] at 5 and 12.

<sup>210</sup> Bret Nickels, *Métis Land Use and Occupancy Report: Southern Manitoba*, (December 2005) at 12-13 [Nickels].

<sup>211</sup> Bakker, *supra* note 95 at 70.

not readily know how to respond to simplistic census questions such as “where do you reside?” Oral interviews indicate that the census data does not reflect the Métis perspective on this issue. Upon further questioning, it became clear that the Métis respondents did not consider themselves to ‘reside’ in any one particular settlement or home.<sup>212</sup>

In the course of preparing for the *Goodon* trial, Dr. Bret Nickels conducted a land use and occupancy mapping study of the Métis in Southern Manitoba. His report, *Métis Land Use and Occupancy Report: Southern Manitoba* (2005) was entered as an exhibit at the *Goodon* trial. A composite map was also entered into evidence that contained the aggregate land use and occupancy information of 34 contemporary Métis from south-western Manitoba.<sup>213</sup>

The maps show land use “within living memory” of community members including Elders and are designed to capture Métis patterns of use and occupancy. They record the informant’s use of “recalled involvement with the land and water and the harvest of its resources.” The map shows continuing Métis use, habitation, naming and knowledge of their territory.<sup>214</sup>

Dr. Nickels noted that the mapping had inherent limitations because it represents only a “minimal picture” of the activity of the Métis. Not every resource user can be interviewed and such studies typically use only 2% of the community. This study interviewed approximately 3% of the Métis in southern Manitoba. The study also did not speak to frequency or intensity of use.

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<sup>212</sup> Interviews with Métis respondents conducted by Dr. Bret Nickels, 2005, Nickels, *supra* note 210.

<sup>213</sup> The study team conducted 41 interviews during 2004 and 2005 at three separate locations – Boissevain, Brandon, Portage la Prairie, 34 of which involved a map biography. Because some families were grouped together only 24 actual maps were produced.

<sup>214</sup> Ray 2005, *supra* note 61; Jones 2005, *supra* note 121; Nickels, *supra* note 210; and Ray 1998, *supra* note 143.

The study showed that contemporary Métis land use is spatially extensive over the grasslands, parklands and woodlands of Saskatchewan and Manitoba. The study also showed that some usage continues on the historic Métis trade routes that radiated from Southern Manitoba to the Qu'Appelle Valley, Wood Mountain, the Cypress Hills area, the North Saskatchewan, and Battleford areas. The study confirms that movement, a central feature of the historic Métis culture, remains a central feature of the contemporary Métis who are now living in, using and occupying Manitoba.<sup>215</sup>

Hokari, in his study of the Gurindji people of Australia, noted that contemporary analysis of mobile peoples must be approached differently from historic approaches.

It is of no doubt that Gurindji people were and, in many aspects still are, nomadic. But do we know why? Anthropologists used to explain Aboriginal mobility by economic necessity. A hunting and gathering economy is possible only by constantly moving your camping sites. However, such an explanation is meaningless to the contemporary Aboriginal mobility because today, you can access enough food within the community.<sup>216</sup>

The data on contemporary Métis mobility must also be understood in this context. The data in the Manitoba study show that Métis travel much farther than economic necessity would account for. Métis will travel hundreds of miles for meat that is available much closer. When queried, the respondents were simply puzzled by the question – “why not go there?” Or “that’s where we’ve always gone” - were typical responses. As Frank Godon’s quote below shows, the Métis do not only value the land and their mobility for economic reasons.

I’m in the land ... sky to give comfort. Get up in the morning rain - soaking wet – that’s the life! Snow on top of you. Have to make a fire. It was fun! ... I’m a Métis trapper. I

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<sup>215</sup> Nickels, *supra* note 210 at 10-11.

<sup>216</sup> Minoru Hokari, *Gurindji Perspectives on History: Body, Place, Memory, and Mobility*, online: (July 16, 2008) <[www.aiatsis.gov.au/\\_data/assets/pdf\\_file/5715/HOKARI.pdf](http://www.aiatsis.gov.au/_data/assets/pdf_file/5715/HOKARI.pdf)> at 4 [Hokari].

just love it. It's in you – the land ... draws you closer. Love to be out there - stars for sky.<sup>217</sup>

The Métis simply love the land and moving on the land and that is what they value above everything else.

It seems obvious that there are sociological reasons for contemporary Métis mobility and that economic necessity is not the most important factor. Further, the interviews showed that these contemporary Métis do not see this as traveling outside their community. They are puzzled by questions that seek to locate them in one residence or to pinpoint their community as one settlement. The inability of outsiders to understand the Métis perspective may be a question of size. 'Home' and 'community' for the Métis seem to equate to their entire notion of their landscape. Concepts of 'home' that are packaged as 'your address' or 'your house' and concepts of 'community' that package it as a 'town/city/village' are too small for them to comprehend.

Throughout their history outside forces worked unsuccessfully but diligently to settle the Métis. The Hudson's Bay Company tried to integrate them into settlements and the priests also encouraged the Métis to settle.<sup>218</sup> The Church wanted regular access to the Métis so that they could be indoctrinated with the fundamentals of religion. Both are reflections of the general cultural preference to see people settled on plots of land rather than moving around hunting.<sup>219</sup> Despite the inherent biases, the Métis are uniformly described as mobile.

... through the whole year they lived a nomadic existence, becoming a veritable floating element which, unlike those whose life was divided between hunting and farming, had

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<sup>217</sup> Interview with Frank Godon, September 5, 2006.

<sup>218</sup> M. A., MacLeod and W. L. Morton, *Cuthbert Grant of Grantown*. (Toronto: McClelland and Stewart Ltd., 1963) 87-88; Jones 2005, *supra*, note 121 at 27-33.

<sup>219</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Gwynneth Jones, November 15, 2006 at 6.

virtually broken all lasting ties with the colony. The families that reappeared in the parishes of the Red River only at the end of May or the beginning of June would arrange for the marriages they had contracted during the winter to be blessed and for the children who had been born during their wanderings to be baptized; some of them would even bring back, so that they could have Christian burial, the bodies of their relatives who had died in the prairie four or five months before and whom they had temporarily interred there. At the end of a few days, they would leave again and not return for another year.<sup>220</sup>

... there were some who had never had any occupation other than hunting bison. Departing from St. François Xavier or Red River, they passed long years on the prairies in the winterers' villages, and only went occasionally to the nearest fort or to the colony of Assiniboia to trade their robes or their provisions of meat.<sup>221</sup>

These observations make it clear that a portion of the Métis population lived a nomadic existence, with a base in Red River. Others were more rooted in the settlements, particularly those of British heritage.<sup>222</sup> However, despite their occupational level, the data shows that the Métis were hunters, fishers and gatherers. While they did engage in some agricultural pursuits, they did not rely on them. The Métis continued to pursue their mobile lifestyle at all seasons of the year.

In those wintering were to be found not only the humblest and poorest of the Métis, those who obstinately refuse to make the least concession to the sedentary life. The representatives of the Métis bourgeoisie, who were notable for the activity of their enterprises or who participated in the political life of the colony, also took part, obeying the allure of the buffalo hunt rather than any real need.<sup>223</sup>

The Métis were not only described by observers as mobile, they also saw and described themselves as mobile.

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<sup>220</sup> *Ibid.* at 83-84.

<sup>221</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Gwynneth Jones, November 15, 2006 at 71.

<sup>222</sup> A. Taché, *Sketch of the North-West of America* (translation by D. R. Cameron) (Montréal: John Lovell, 1870) at 106.

<sup>223</sup> *R. v. Goodon*, Trial Transcripts, Testimony of Gwynneth Jones, November 15, 2006 at 74.

Ou je reste? Je ne peux pas te le dire. Je suis Voyageur – je suis chicot, Monsieur. Je reste partout. Mon grand-père était Voyageur: il est mort on voyage. Mon père était Voyageur: il est mort en voyage. Je mourrai aussi en voyage, et un autre chicot prendra ma place. Such is our course of life.<sup>224</sup>

The Manitoba land use mapping appears to confirm that this has not changed. The Métis are still mobile. In fact, Statistics Canada data from 2001 also supports this conclusion.

23% of the population that identified themselves as Métis changed residences in the year prior to the census, compared with only 14% of the non-Aboriginal population<sup>225</sup>

While, as noted above, the census data must be approached cautiously. When combined with the contemporary land use mapping in Manitoba, it does seem to indicate that the contemporary Métis remain highly mobile.

## Conclusion

Hokari suggests that mobile aboriginal peoples see their ‘home’ as equating to their entire land. In this way ‘home’ has many parts. Fishing and hunting spots could equate to rooms in a large house – so the Métis, in continuing to exercise their traditional practices, visit their fishing room or their berry picking room or their hunting room. Hokari also suggests that constant visiting on the land continually renews the relationship between the people and the land.<sup>226</sup>

This suggests that these mobile aboriginal peoples see themselves with a larger vision. To their understanding there is no individual town or discrete community that is their residence or home. To suggest to the Métis that they are not connected to the greater ‘people’ is a

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<sup>224</sup> Kohl, *supra* note 123 at 98.

<sup>225</sup> Statistics Canada 2001 census, online:

<<http://www12.statcan.ca/english/census01/products/analytic/companion/abor/groups2.cfm>>. Comparable Canada-wide data from the 2006 Census was not available at the time this thesis was completed.

<sup>226</sup> Hokari, *supra* note 216 at 5.



meaningless concept. Constant mobility is their way of renewing the relationship to their friends, family, land and to the various sites that are rooms in their large house. In this way there is little distinction between terms such as residence, home and community; terms that are heavy with meaning for outsiders. For the historic Métis of the Northwest, these terms all appeared to equate to the entire Northwest; they were one and the same. Mobility is the glue that kept and continues to keep the land, the people and their culture together.

Historically, the Métis did not fit Euro-Canadian concepts of an aboriginal people. They were not organized as a tribal society and did not live in discrete communities. In other words they were not characterized by “small scale, preindustrialized societies with limited centralized authority” located in a discrete location.<sup>227</sup> The Métis are not alone among aboriginal peoples in not conforming to this concept. As noted by Miller, not all indigenous peoples are organized as tribes and most indigenous peoples did not live solely in discrete locations.<sup>228</sup> However, despite the fact that the Métis did not conform to the general European concept of how Indians lived and looked, they were manifestly not white settlers and they were not Indians.

Because of their mobility over a vast area; because they did not live in isolation from others; because they could speak other languages and kept their own hidden; because for decades they could not publicly identify; because they look like others; and because their existence

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<sup>227</sup> Miller, *supra* note 57 at 37.

<sup>228</sup> *Ibid.* at 37.

threatened the boundaries of the Euro-Canadian and Amerindian hegemonies, the Métis were acknowledged as aboriginal individuals but not as a distinct aboriginal people.<sup>229</sup>

All of which raises a question as to why these people persist in their insistence that they are Métis; that they are a distinct aboriginal people. After all, until the Supreme Court of Canada recognized their hunting rights in 2003, there was little benefit to be attained by such persistence. There was only non-recognition or denial by the state and by some First Nations. Further, since some individual Métis are clearly also eligible to join Indian bands, they were passing up opportunities and entitlements to federal programs and services by insisting on identification as Métis rather than Indian. Why? As Miller notes “membership and identity are not always compatible with careful calculation of economic benefit.”<sup>230</sup> The only answer can be a collective understanding of their identity as Métis.

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<sup>229</sup> Even official government acknowledgements such as the *Manitoba Act, 1870* did not consider the Métis to be a collective, a fact that is supported by the entire scheme of scrip which purported to extinguish any Indian title an individual Métis might have held.

<sup>230</sup> Miller, *supra* note 57 at 3.

## Part Four: The Law & Mobility

A review of the case law reveals five issues that together create a legal environment in which Métis are being forced to recreate themselves as small fictional communities in order to claim and exercise their harvesting rights.

First, there has been a continuing change in language in the Supreme Court of Canada. This language change, from society to community, implies smaller polities with less land and diminished rights.

Second, the court has developed a theory that aboriginal rights claims must be dealt with on a 'case-by-case' basis, an analysis that has resulted in a search for a Métis community that can be packaged in a small enough container to be understood as a case. Under this analysis two concepts are diminished because provincial courts dealing with the facts at first instance cannot deal with issues that cross provincial or territorial boundaries. The case-by-case approach diminishes the people into smaller polities and their territories into smaller areas that fit within provincial and territorial boundaries. In addition, the idea that aboriginal rights inhere in the larger people or nation is abandoned. All of these are circumstances that encourage litigation.

Third, there is a requirement that aboriginal rights must somehow be recognizable in the common law. This requirement acts to diminish aboriginal rights into rights that ultimately look exactly the same as common law property rights. With respect to the issue of defining a Métis community, the search becomes a search for a stable, continuous, small community that is recognizable to Euro-Canadian culture and law, but unrecognizable to the Métis.

Fourth, is the *Powley* requirement that the Métis must prove a stable, continuous community does not reflect their perspective or their historic society.

All of these legal requirements act together to undermine recognition of the rights of mobile peoples. Despite the fact that mobility is a recognized characteristic of many aboriginal peoples in Canada, their rights are being defined, by virtue of these legal tests, into small parcels that are determined without consideration of their mobility.

### **(1) From “Societies” to “Communities”: How the Language in the Jurisprudence has Diminished the Claimant Aboriginal Groups**

Some of the earliest jurisprudence on the issue of aboriginal (“Indian”) title comes from the American case of *Johnson v. M’Intosh*.<sup>231</sup> The ratio of this case is that Indian lands could only be alienated to government, not by the Indians themselves to private individuals. The defendants argued that:

... the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals ... the nature of the Indian title to lands; [is] a mere right of usufruct and habitation, without power of alienation. By the law of nature, they had not acquired a fixed property capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them ... Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use ... is not exclusive. According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle.<sup>232</sup>

Chief Justice Marshall rejected this analysis.

In the establishment of these relations [between the European arrivals and the original inhabitants], the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were

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<sup>231</sup> *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) [*Johnson v. M’Intosh*].

<sup>232</sup> *Ibid.* at 567-570 (footnotes excluded).

admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>233</sup> [emphasis added]

Throughout the reasons for judgment, Marshall C.J. used many different terms to refer to the Indians, including “tribes” and “nations” and “society”. He takes note of the fact that at least one “nation” is composed of “three several tribes united into one.”<sup>234</sup> Note the language here. The Chief Justice does not use the term “community.” He affirms that the Indian right is a legal one. It is also of interest to note that the American court repeatedly confirms that the rights of the Indians arise from use and occupation. There is no search for fixed settlements that would then anchor the title and rights of the Indians to their lands.

In *Calder* the Supreme Court held that,

... the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries ... What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.<sup>235</sup> [emphasis added]

Again there is in *Calder* no requirement for fixed settlements or use of the term “community”. The language and proof revolve around pre-existing societies that existed prior to “settlers” arriving.

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<sup>233</sup> *Johnson v. M'Intosh*, *supra* note 231 at 574.

<sup>234</sup> *Ibid.* at 548 and 563 (footnotes excluded).

<sup>235</sup> *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 at 328 [*Calder*].

In *Baker Lake*, there was a discussion of Inuit society, its organization and its relationship to land.<sup>236</sup> The trial judge noted that the Inuit were a nomadic society of caribou hunters. The Inuit were few; the barrens were huge.<sup>237</sup> The Inuit witnesses at trial acknowledged that their parents came from different geographic areas within the barren lands and spoke different dialects of their language, but,

... to them, Inuit were Inuit and they plainly had no conception that the people who lived in a particular area and spoke the dialect associated with it constituted any sort of a tribe or political subdivision within the larger body of Inuit, "the people".<sup>238</sup>

Dr. Freeman, an expert at trial, described the Inuit as a society that had no chieftains, states or nations. He noted that although the people hunted in small units over a vast area, those small units were part,

... of a much larger coherent organized society and very much interacting, interdependent, mutually dependent on interaction with other units within the society.

... The people there, for a number of reasons -- common language, dialect, having a common ideology or value system, having commonality in terms of the land they use and a degree of interaction which would be more frequent with people within ... than people outside ... -- this all constitutes a very coherent society which anthropologists have no problem in identifying any more than the people have a problem knowing where the boundaries are.<sup>239</sup>

It is of particular importance to note that the expert here is recognizing the existence of a large, coherent society that encompasses a variety of smaller groups within it.

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<sup>236</sup> *Baker Lake (Hamlet) v. Canada (Min Of Indian Affairs & Northern Dev)* [1979] F.C.J. No. 184, para. 34 [*Baker Lake*]

<sup>237</sup> *Ibid.* at para. 34.

<sup>238</sup> *Baker Lake*, *supra* note 236 at para. 36.

<sup>239</sup> *Ibid.* at para. 67.

The trial judge determined that the Inuit of Baker Lake had to prove, among other things, that they and their ancestors were members of an organized society and that the organized society occupied the specific territory over which they asserted the aboriginal title.<sup>240</sup> In requiring an “organized society”, Mahoney J relied on *Calder*, where Mr. Justice Hall in turn relied on a passage from *Worcester v. Georgia*, which required that claimants prove “institutions of their own” and that they were “governing themselves by their own laws”.<sup>241</sup>

While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law necessarily deprives aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before.<sup>242</sup> [emphasis added]

The facts showed that the Inuit had an organized society without elaborate institutions. It was a society that did not require such institutions. It was a society organized to exploit the resources on their land. It is suggested that this analysis should be applied to the Northwest Métis. The evidence presented earlier in this thesis shows that the Northwest Métis had a similarly large society without elaborate institutions that was organized to exploit the resources in the Northwest. Their rights asserted to date - harvesting rights - should not require that they prove a more organized society than is necessary to demonstrate that they recognized the claimed rights.<sup>243</sup>

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<sup>240</sup> *Baker Lake*, *supra* note 236 at para. 80. See also *Calder*, *supra* note 235; *Johnson v. M'Intosh*, *supra* note 231.

<sup>241</sup> *Ibid.* at para. 81.

<sup>242</sup> *Baker Lake*, *supra* note 236 at para. 82.

<sup>243</sup> *Ibid.* at para. 82.

A similar point has been made by the American courts,

... possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals ... The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee simple of the whites.<sup>244</sup>

The New Zealand courts emphasized that aboriginal rights and title, however conceived, are entitled to be respected.

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.<sup>245</sup>

In fact, it is only in *Van der Peet* that we begin to see references to communities. It is here that Lamer, C.J (as he then was) re-states, and in so doing, diminishes aboriginal rights from the larger societal theory that underpins aboriginal title from *Calder*.

Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder*, supra, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries." (p. 328)<sup>246</sup>

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<sup>244</sup> *Mitchel v. The United States*, 34 U.S. 711, 9 Pet. 711, 9 L.Ed. 283 (1835) at 746.

<sup>245</sup> *The Queen v. Symonds* (1847), N.Z.P.C.C. 387, Chapman J. at 390; *Tamaki v. Baker* [1901] A.C. 561 at 579.

<sup>246</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4<sup>th</sup>) 289 at para. 33 [*Van der Peet*].



The use of the term “community” continues in subsequent case law, including *Delgamuukw*<sup>247</sup> and more recently in *Tsilhqot'in Nation v. British Columbia*.<sup>248</sup> The court in *Tsilhqot'in* began by recognizing that Aboriginal rights are communal rights that arise out of the existence and practices of a contemporary community with historical roots and that the court must identify which present group holds those rights. In that case the plaintiff and Canada asserted that the proper rights holder was the “community of Tsilhqot'in people.” British Columbia argued that the proper rights holder was a much smaller entity which they called the “community of Xeni Gwet'in people.”<sup>249</sup>

The court in *Tsilhqot'in* noted that in the case law the historic community relevant to the inquiry has been the larger First Nation that existed at the time of contact or sovereignty.<sup>250</sup> The court noted that identification may shift from band to band and that political structures may shift over time. Therefore, the court held that the important issue was to identify the common threads of language, customs, traditions and a shared history. The Tsilhqot'in Nation was identified as the appropriate rights-bearing entity, an entity the court defined as “the community with whom Tsilhqot'in people are connected by those four threads.”<sup>251</sup>

Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right to harvest resources. The evidence is that, as between Tsilhqot'in people, any person in the group can hunt or fish anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community. Individual community members identify as Tsilhqot'in people first, rather than as band members.

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<sup>247</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4<sup>th</sup>) 193 at para. 155 [*Delgamuukw*] “Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title.”

<sup>248</sup> 2007 BCSC 1700 (CanLII) [*Tsilhqot'in*].

<sup>249</sup> *Ibid.* at para. 437.

<sup>250</sup> *Tsilhqot'in*, *supra* note 248 at para. 445.

<sup>251</sup> *Ibid.* at para. 457.

I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other sub-group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.<sup>252</sup>

It is suggested that the court in this case comes to the correct conclusion that the appropriate rights bearing entity is the larger nation or people. However, it is unfortunate that the court seems to feel obligated to merge those concepts into the term 'community'. Despite the court's acknowledgement that the rights reside in the larger nation or people, it seems counter-intuitive to conclude that the term community contains the nation or people. The term community generally invokes a much smaller unit and polity than society or nation or people. It particularly diminishes any self-government concept. Generally we do not see a community as a self-governing nation. We see it as small, localized and subject to larger polities. It remains to be seen if the language in *Tsilhqot'in* will be adopted by other courts or will simply add to the already confused terminology.

It is my suggestion that the reduction of terminology from society to community has been detrimental to all aboriginal claimants – whether for title or harvesting rights. When the term community is accompanied by the requirements for a structural definition, devoid of the aboriginal perspective and limited to a small geographic area, it acts as a method of redefining the historic aboriginal community into a small, local entity – a fiction.

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<sup>252</sup> *Tsilhqot'in*, *supra* note 248 at paras. 469-470.

## (2) The 'Case by Case' Requirement Creates Artificial Boundaries

In *Kruger*, the court gave a clear signal as to its future approach to aboriginal rights claims. Mr. Justice Dickson, for the Court, held that:

If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis ...<sup>253</sup>

This case-by-case approach was re-affirmed in *Van der Peet*. It is here that the court sets out its notion that harvesting rights adhere to “one group of aboriginal people” or an “aboriginal community claiming the right”.

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.<sup>254</sup> [emphasis added]

The court has emphasized in several cases that a harvesting right may be limited to the specific geographical region in which it is alleged to have been exercised.<sup>255</sup> However, in

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<sup>253</sup> *Kruger et al. v. The Queen*, [1978] 1 S.C.R. 104 per Dickson CJC, at 108(ff) [*Kruger*].

<sup>254</sup> *Van der Peet*, *supra* note 246 at para. 69

<sup>255</sup> *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4<sup>th</sup>) 385 at para. 39, 41-78 [*Côté*]; *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911, 199 D.L.R. (4<sup>th</sup>) 385 at para. 55 [*Mitchell*]; *Adams*, *supra* note 3 at paras. 37 and 45.

*Mitchell*, the court noted that geographical considerations would only be relevant where the activity at issue is intrinsically linked to specific tracts of land.<sup>256</sup>

By contrast, geographical considerations were irrelevant to the framing of the claimed trading right in the aboriginal rights trilogy, and were therefore equally irrelevant to whether the claimed trade constituted a defining feature of the cultures in question and the scope of the right if successfully established. In this manner, the *Van der Peet* approach to characterizing the claimed right will generally determine when - and to what extent - geographical considerations are relevant to the claim.<sup>257</sup>

This requirement, that harvesting rights are generally attached to a specific territory has also contributed to the case-by-case approach and the proliferation of Métis litigation. This appears to be the basis of the position taken by government, post-*Powley*, that the aboriginal harvesting rights of the Métis inhere in individual communities that have localized harvesting rights. As a result harvesting rights must be proven case-by-case or community by community – by which is meant a fixed settlement and its surrounding environs.

While, it seems clear that the court in *Kruger* and *Van der Peet* is cautioning against generic harvesting rights, the application should be understood in its proper context. The caution is that the existence of a right in “one group of aboriginal people” may not apply to another people. For example, the fact that the Maliseet may have a right to harvest logs for domestic use may not be transferable to the Inuit who live on the barren lands where there are no trees. It should *not* mean that *within one aboriginal people*, the rights must be proven community by community throughout their traditional territory. For example, if Ronald Sparrow proves that as

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<sup>256</sup> *Mitchell*, *supra* note 255 at para. 56.

<sup>257</sup> *Ibid.* at para. 59.

a member of the Musqueam Band, has a right to fish for food, that right should apply to the Coast Salish peoples, because the Musqueam are part of the Coast Salish peoples.<sup>258</sup>

The evidence shows that the Métis in the Northwest are one society. Much like the Inuit in *Baker Lake*, the Métis have a large traditional territory that contains several fixed settlements and regional economies. There is no legal requirement for any other aboriginal people to prove distinct aboriginal rights in each of their settlements on a case-by-case basis. For example, there is no suggestion that each Sto:lo band (there are approximately 29 Sto:lo Bands living and using the lower Fraser River in British Columbia) has to prove that it has fishing rights. Yet this is precisely the distinction that is being made for the Métis. It is inappropriate to use a “case-by-case” approach under these circumstances.

### **(3) The Métis Community Should Not Have to be Cognizable in Canadian Law**

The Supreme Court of Canada has held that the right claimed must “be framed in terms cognizable to the Canadian legal and constitutional structure.”<sup>259</sup> This seems to indicate that aboriginal and treaty rights must now be redefined and translated into common law property rights. If so, this is a dramatic turn-around from a long line of case law that cautions against this very concept.

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.<sup>260</sup>

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<sup>258</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4<sup>th</sup>) 385 [*Sparrow*] at 1094.

<sup>259</sup> *Van der Peet*, *supra* note 246 at para. 49.

<sup>260</sup> *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399 at 402 to 404.

In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected ... even though those interests are of a kind unknown to English law.<sup>261</sup>

These quotes represent a principle of law that has guided all aboriginal rights law in Canada. The principle is founded on the recognition that aboriginal land use and the rights that are intended to protect that use are unique and are not to be modified into English common law property rights. Despite this long line of common law, the Supreme Court of Canada has started to insist that aboriginal claims to land must be translated into a right that is recognizable in the common law. Thus, in *Marshall & Bernard* we find the following:

The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right?<sup>262</sup>

This appears to be a complete reversal of the previous law. There is no legal reference provided to support the assertion. It is simply a bold statement that reverses almost a century of aboriginal rights law. Further, the court in *Marshall and Bernard* also changes the previous law with respect to how aboriginal perspectives must be incorporated.

This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on

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<sup>261</sup> *Oyekan v. Adele* [1957] 2 All E.R. 785 at 788.

<sup>262</sup> *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 287 N.B.R. (2d) 206 at para. 48 [*Marshall & Bernard*].

exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.<sup>263</sup>

Again, this seems to contradict even the Supreme Court's own statements just 10 years earlier in *Delgamuukw*, where Lamer CJC proposed that the common law should develop to recognize aboriginal rights and title as they were recognized "by either *de facto* practice or by the aboriginal system of governance."<sup>264</sup> It is suggested that LeBel J's judgment in *Marshall and Bernard* raises appropriate concerns about how this new more restricted test will be applied, in particular to nomadic or semi-nomadic peoples.

Aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.<sup>265</sup>

*Marshall & Bernard* appears to stand for the proposal that aboriginal title and rights are only *sui generis* with respect to inherent limitations to which aboriginal title lands can be put and the fact that it can only be alienated to the Crown. In all other respects it appears that aboriginal title must now correspond to the common law concept of fee simple. This is a very troubling change in the law. Never before has it been a requirement that an aboriginal right must correspond to a common law right, which will then determine the nature and extent of the modern aboriginal right. While it is easy to see how such a process reconciles the European

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<sup>263</sup> *Ibid.* para. 48.

<sup>264</sup> *Delgamuukw*, *supra* note 247 at para. 159.

<sup>265</sup> *Marshall & Bernard*, *supra* note 262 at par. 126.

perspective, it is difficult to see how such a process can in any way reconcile the aboriginal perspective.<sup>266</sup>

The requirement that the claimed right must translate into a modern common law right is especially troubling with respect to harvesting rights, which have no corresponding common law right. There is no user right of access to harvest Crown lands for non-aboriginal people. The Crown may consent to license, lease or issue permits for non-aboriginal people to harvest on Crown lands and waters, but there is no common law equivalent to an aboriginal harvesting right.

With respect to the community claiming the harvesting right, this analysis raises the troubling concept that the Métis society must be translated into the European concept of a discrete bounded community so that its members can exercise their rights. This is despite the admonitions of earlier courts that,

... there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory.<sup>267</sup>

Indeed, this new requirement for conformity with Euro-Canadian law may be the basis for the Supreme Court's definition of a structural, bounded community in *Powley*. This kind of exercise can only result in fictional Métis communities created solely for the purpose of

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<sup>266</sup> For a case comment on *Marshall and Bernard* and the issue of how it deals with the aboriginal perspective see: Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Saskatchewan Law Review, 281.

<sup>267</sup> *Baker Lake*, *supra* note 236 at para. 82.



conforming to the court's requirements. Such communities would not conform to the historic or contemporary facts.

#### **(4) Requiring Proof of an Historic Bounded Community; Ignoring Mobility**

Since *Powley*, identification of the rights-bearing Métis community has become the major issue. The Supreme Court of Canada, in *Powley*, said that it was necessary to determine if a Métis community existed. For the purposes of any given case the court said that it was not necessary to determine the outer parameters of a larger Métis community.

In *Powley*, the court held that it was not necessary to determine whether the Métis community at Sault Ste Marie formed part of a larger Métis people that extended over a wider area such as the Great Lakes because the Powley/LaSage family had strong connections in the environs of Sault Ste Marie and because Steve Powley shot his moose within minutes of Sault Ste Marie. In addition, Sault Ste Marie was a fixed settlement and well known historically as a Métis settlement. Nevertheless, the Supreme Court of Canada did not limit the right to the settlement of Sault Ste Marie. Instead, it referred to "the environs of Sault Ste Marie," a territory that was left undefined.

What are the "environs of Sault Ste Marie"? In order to ascertain this, one must look at the trial judgment, in which Mr. Justice Vaillancourt stated as follows:

The Crown has gone to great pains to narrow the issues in this trial to Sault Ste Marie proper. I find that such a limited regional focus does not provide a reasonable frame of reference when considering the concept of a Metis community at Sault Ste Marie. A more realistic interpretation of Sault Ste Marie for the purposes of considering the Metis

identity and existence should encompass the surrounding environs of the town site proper.<sup>268</sup>

The trial judge made reference to communities and areas surrounding Sault Ste Marie including Batchawana, Goulais Bay, Garden River, Bruce Mines, Desbarates, Bar River, St. Joseph's Island, Sugar Island and into Northern Michigan. The area appears to be approximately a 100 kilometer radius around Sault Ste Marie. This is the area that the Supreme Court of Canada described as the Sault Ste Marie Métis and environs community.

Clearly, based on the evidence and the trial judge's findings of fact, the Métis 'community' was not limited to a single settlement, such as a single city, town or village. However, the court accepted the evidence showing the mobility of the Métis and that they used Sault Ste Marie as a base of operations only to expand the community from a single settlement to the settlement plus its immediate environs.<sup>269</sup>

Following *Powley*, three courts have dealt with the question of defining the Métis community. In *Willison*, despite reversing the trial judge on the merits, the British Columbia Supreme Court held that a Métis community does not require the finding of a Métis settlement. In finding that the evidence was insufficient to prove the existence of a Métis community in the area in question in British Columbia, the appeal judge held that,

I am persuaded, as submitted by Mr. Willison, that the finding of a Métis community does not require evidence of a "settlement" in the given area. However, there must be evidence of a community "on the land".

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<sup>268</sup> *R. v. Powley* [1998] O.J. No. 5310 (P.Ct.) at para. 68-70.

<sup>269</sup> *R. v. Powley*, Trial Transcripts Vol. 2, Testimony of Dr. Ray at 201-204.

In considering this question, [how to determine whether the evidence shows the existence of a historic Métis community in the relevant area] one must be conscious of the compelling argument made by counsel for Mr. Willison that it is essential to be careful when defining “community” as it pertains to a people who, as she put it, are “mobile”. Indeed, she submitted that mobility is one of the key characteristics of a Métis community.

Section 35 must be interpreted in light of its purpose. If the Métis are characterized by mobility, a requirement that one find a Métis settlement before an aboriginal right to hunt can be established is to put a significant obstacle in the way of any finding of a Métis right. It is difficult to conclude that the framers of the Constitution intended that mobility, which is a key characteristic of Métis people, should at the same time be a bar to them exercising their s. 35 rights.<sup>270</sup>

It can be seen from this quote that Williamson J appears to be considering the appropriate questions. He takes into consideration the mobility of the Métis and refuses to require proof of a specific settlement. He also takes important note of the fact that a formative characteristic of an aboriginal people cannot be used as a means of denying them the exercise of their rights.

In *Lavolette*, the Crown proposed that the Métis community should be defined according to the common understanding of the word: as a specific village, town or city. The trial judge disagreed and held that a Métis community did not necessarily equate to a single fixed settlement. He agreed with the experts who testified at trial that the Métis had a regional consciousness based on trade, family connections and a high degree of mobility. He identified the community in this case as Northwest Saskatchewan, generally as the triangle of fixed communities of Green Lake, Île-à-la Crosse and Lac la Biche, including Meadow Lake and all of the settlements within and around the triangle.

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<sup>270</sup> Willison, *supra* note 2 at paras. 24, 27-28.

In *R. v. Belhumeur*, the court found that there was sufficient evidence to show that there is a regional historic rights-bearing community within the Qu'Appelle Valley and environs.<sup>271</sup> The Defendant argued that the regional community at issue was the historic parklands/grasslands Métis community. The Crown argued that defense took too broad an approach to defining community and that the Supreme Court of Canada in *Powley* clearly contemplated that Métis rights are possessed by individual Métis communities that make up the Métis Nation or the Métis people; not the whole Nation. In the result, the court held that according to *Powley* individual communities are the rights holding entities. The Court stated that it was not prepared to declare that the parklands/grasslands area constituted a Métis community. The Court, however, was prepared to adopt the regional approach in defining community that the trial judge took in *Laviolette* and declared itself satisfied that the evidence showed that the regional community was the Qu'Appelle Valley and environs, which the court held included the City of Regina.

These court-defined Métis communities bear little resemblance to the historic Métis society. More importantly, this kind of analysis leads to a proliferation of Métis litigation whereby Métis are being forced to litigate their existence community by community throughout the Métis Nation homeland. It also has strange and illogical results.

For example, the court in *Belhumeur* determined that Regina, 70 km southwest of Qu'Appelle, was within the Métis community of "Qu'Appelle Valley and environs". Unfortunately since *Belhumeur*, the Province of Saskatchewan has unilaterally decided that Métis who live in Yorkton (111 km northeast of Qu'Appelle) are not part of the "Qu'Appelle

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<sup>271</sup> *Belhumeur*, *supra* note 13 at para. 167.

Valley and environs” Métis community. This is the unfortunate result of creating fictional Métis communities. Such fictions encourage the Crown to establish arbitrary lines.

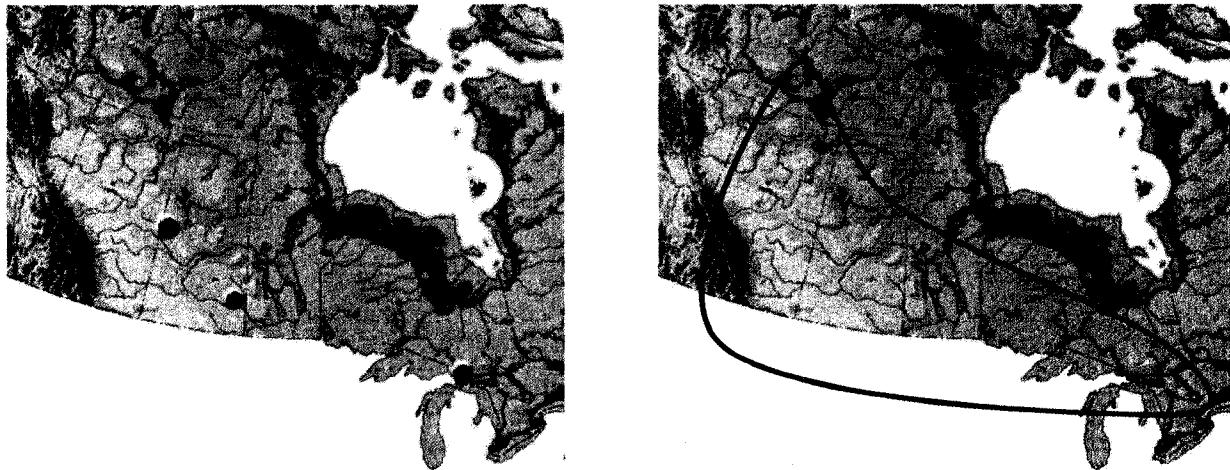
This pattern has been well established since *R. v. Morin*.<sup>272</sup> In that case the Court of Queen’s Bench affirmed that Métis in Northwest Saskatchewan had a right to fish for food. The trial judge had found that the right encompassed a territory similar in size to Treaty Ten. After the decision, the Saskatchewan government arbitrarily decided that Métis who lived in their Northern Administration District could harvest for food, social and ceremonial purposes. In arbitrarily choosing the Northern Administration District, the Crown expanded the application of the Métis harvesting right eastward, apparently deciding that if Métis could prove a right in the Buffalo Narrows area, they would be able to prove a similar right at Cumberland House. However, the Northern Administration District is not an area that reflects the Métis community.

The result of this arbitrary distinction became apparent when Ron Laviolette was charged for fishing on Green Lake, which was within the Northern Administration District. After months of trial and great expense the court held that Ron Laviolette had a Métis right to fish in Green Lake. As a result the Saskatchewan government extended its recognition of the Métis right by a mere 55 kilometers.

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<sup>272</sup> *Morin*, *supra* note 2.

If “the aboriginal perspective grounds the analysis and imbues its every step” and “must be considered in evaluating the practice at issue,” and remembering that this is a user right to harvest not a proprietary right – it begs the question – why are the court-defined Métis communities today so different from the historic Northwest Métis community?<sup>273</sup> (See Map #30)



**Map #30 – Post-Powley Court Defined Métis Communities v. Historic Northwest Métis Society**

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<sup>273</sup> *Marshall & Bernard, supra* note 262 at para. 50.

## Part Five: Conclusion

Since 1982, when aboriginal and treaty rights were given constitutional protection, the Supreme Court of Canada has heard more than forty aboriginal and treaty rights cases. With the exception of *Powley* and *Blais* most of these cases concern the aboriginal and treaty rights of First Nations. For First Nations in these many court cases, defining the rights-bearing entity has largely been a non-issue. The cases were, by and large, brought by an individual status Indian as a representative of a band within the meaning of the *Indian Act*. The evidence called in those cases was largely concerned with proving the historic practices. The rights-bearing entity was assumed. While the court routinely acknowledged the existence of an aboriginal people, as noted above in *Sappier and Grey*, the final determination was restricted in its application to the band.<sup>274</sup>

In applying these Supreme Court of Canada decisions, for the most part, governments across this country have recognized that, for Indians, the rights reside in the larger group. Thus, when Ronald Sparrow won a food fishing right for the Musqueam in *R. v. Sparrow*, it was recognized by government that the right was applicable to the Coast Salish peoples.<sup>275</sup> In fact, the principles were generally applied throughout Canada to all Indians recognized under the *Indian Act*. Whether or not their bands had treaty rights was irrelevant. The decision was widely applied in policy and on the ground.

One might have expected the same application for the Métis following *Powley*. However, a liberal application of the *Powley* principles has been resisted. Instead, most

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<sup>274</sup> *Sappier and Gray*, *supra* note 10 at para. 72.

<sup>275</sup> *Sparrow*, *supra* note 258.

provinces have insisted that the Métis must prove the existence of an individual Métis rights-bearing community in court before they will apply *Powley*.

The Supreme Court's definition of a local, stable and continuous community as the applicable rights-bearing entity is at odds with the historic reality of almost all aboriginal peoples in Canada. The courts have described many of the approximately forty-seven<sup>276</sup> separate and distinct aboriginal peoples in Canada today as mobile, wandering, wide ranging, nomadic, moderately nomadic or semi-nomadic.<sup>277</sup> The courts have also noted the extremely large territory occupied or ceded in treaty by these mobile peoples including the Dene, Beaver, Chipewyan, Saulteaux, Blackfoot, Ojibway and Cree peoples.

While many Indian reserves have been created, most aboriginal peoples who are members of those communities do not live on reserve.<sup>278</sup> Therefore, if a community is to be the rights-bearing entity, how is one to define it in a meaningful way that reflects both the aboriginal and the Canadian perspective? Certainly bands living on reserves do not reflect the historic Indian perspective. The question is particularly pertinent now for the Northwest Métis, one of the aboriginal peoples of Canada that are not bands, do not live on reserves and who are highly mobile over a vast territory.

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<sup>276</sup> *RCAP Report*, *supra* note 140 at Vol. 1, Ch. 2, Table 2.3, which lists 45 distinct aboriginal peoples by language groupings. I am subscribing to the theory set out in the *RCAP Report* that a "band" within the meaning of the *Indian Act* does not equate to an aboriginal peoples or an aboriginal nation. I have added the Métis Nation and the Inuit to this number.

<sup>277</sup> This includes the Inuit, Cree, Mi'kmaq, Maliseet, Algonquins, Mohawks and the Métis. See *NTI v. Canada (Attorney General)*, 2003 NUCJ 01 at para. 4; *Marshall and Bernard*, *supra* note 262 at para. 79(a); *Sappier & Gray*, *supra* note 10 at para. 24; *Côté*, *supra* note 255 at para. 67; *Mitchell*, *supra* note 255 at para. 98; *Manitoba Metis Federation Inc. et al. v. Attorney General of Canada et al.*, 2007 MBQB 293 at para. 1023, *R. v. Laviolette*, *supra* note 2 at para. 28.

<sup>278</sup> According to Statistics Canada only 40% of those who identify as First Nations live on reserve. Statistics Canada, "Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census: First Nations People" (July 16, 2008) online: <<http://www12.statcan.ca/english/census06/analysis/aboriginal/fewer.cfm>>.



The Supreme Court's decision in *Powley* appears to be based on the false assumption that the Métis lived in stable, continuous communities and hunted in the immediate environs of that community.<sup>279</sup> It is a test that reflects non-Métis concepts about the nature of the Métis society and does not reference any of the past twenty-five years of social science thinking about how to define community. The Supreme Court of Canada's test for community requires a "coherent, stable, solitary society with distinct political institutions and more or less uniform ancestry."<sup>280</sup>

Instead, it is suggested that the Northwest Métis society requires a more nuanced understanding because it is a social organization consisting of a changing social network of relations based on marriage, political influence and dependence on mobile, economic resources. In the end it is suggested that the court in *Baker Lake* got it right when it acknowledged that despite the fact that smaller units organized for various purposes might have been established from time to time, the rights-bearing entity is the larger society. Any sub-units that interact are interdependent and mutually dependent upon the larger community.<sup>281</sup> As such, it would be artificial to identify any smaller units as individual rights-bearing entities when the people did not perceive themselves to be identified with those small units.

As Suttles has noted, although in a different context, the Supreme Court has set out a legal test that requires the Métis to "produce evidence that the ... false assumptions about them are true."<sup>282</sup> In particular the Métis must now prove the prior existence and continuity of individual communities. Suttles notes that this requirement really reflects the romantic

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<sup>279</sup> *Powley*, *supra* note 2 at para. 19.

<sup>280</sup> Miller, *supra* note 57 at 81.

<sup>281</sup> *Baker Lake*, *supra* note 236 at para. 36.

<sup>282</sup> Wayne Suttles, *Coast Salish Essays* (Seattle: University of Washington Press, 1988) at 1; Miller, *supra* note 57 at 80-81.

imaginings of Euro-Canadians who found, and still find inspiring, the image of a discrete, bounded tribe ruled by a powerful, mystical chief. It is suggested that this romantic notion has led to the attempt to create categories such as bands, tribes and individual Métis communities that are “largely independent of any connection to indigenous life.”<sup>283</sup> The fictional court-created Métis communities are incompatible with the nature of the Métis community.

Where then does the court’s theory find its legal base? It is suggested that the foundation of this theory lies in the idea that the community must have a “precise attachment to a determinate piece of land.”<sup>284</sup> With deep roots in English property law concepts, this theory appears to attach user rights to lands within an identifiable radius of a settlement. It is akin to taking individual property rights and attaching them to a settlement.

The Supreme Court of Canada in *Calder* and *Delgamuukw* has held that proof of use and occupation can establish aboriginal title.<sup>285</sup> The court has also clearly stated that aboriginal groups seeking to establish harvesting rights do not need to meet the standard of proof required to prove title.

Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to

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<sup>283</sup> Miller, *supra* note 57 at p. 82.

<sup>284</sup> McCarthy, Kate. “Agrarian Discourse in Imperial Context: landed property, Scottish stadial theory and indigenes in early colonial Australia,” [2005] ANZLH E-Journal at 4, citing Home (Lord Kames), *Historical Law Tracts* (4 ed, 1792) 104.

<sup>285</sup> *Calder*, *supra* note 235; *Delgamuukw*, *supra* note 247.

the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.<sup>286</sup>

It must be regarded as a peculiar and most unwelcome twist of logic if a highly mobile hunter/gatherer/trader society that never lived in small, stable, continuous, localized communities is now required to prove the existence of just such an entity in order to exercise harvesting rights in the near vicinity. It is suggested that this confounds the concept that harvesting rights are user rights and requires sufficiency of proof that is more appropriate to the proprietary test for aboriginal title. Instead of identifying "a practice that helps to define the distinctive way of life of the community as an aboriginal community", the Métis must now invent a community that helps define the practice.<sup>287</sup>

In a critique of *Van der Peet*, Henderson and Barsh note that the requirements of "specificity" and "distinctive culture" have led to an analysis that aboriginal culture is a "fixed inventory of traits or characteristics".<sup>288</sup> The same critique could be made of the results from *Powley* where the concept of "community" has led to a requirement for individual communities identified by fixed characteristics that do not reflect Métis perspectives or historic fact and do not protect their harvesting rights.

Prior to *Powley* the prevailing legal theory did not acknowledge that the Métis were an aboriginal collective with existing aboriginal rights. *Powley* is important because it establishes

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<sup>286</sup> *Adams*, *supra* note 3 at para. 26.

<sup>287</sup> *Sappier and Gray*, *supra* note 10 at para. 22.

<sup>288</sup> Russell Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 McGill L.J. 993, at 1002; C. C. Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997), 55 U.T. Fac. L. Rev. 419, at 434.

the legal recognition that the Métis are indeed a rights-bearing collective. Since *Powley*, the courts have minimized the Métis rights-bearing collective. This thesis has proposed that the search for stable, small, continuous Métis communities is misguided and is yielding unfortunate results. Specifically, it has resulted in a proliferation of litigation as government tries to identify individual Métis communities.

The structural test established by the Supreme Court of Canada, the use of the term community to imply a small bounded entity, the case-by-case approach and the requirement that aboriginal rights must be translated into common law concepts, together act to force Métis to recreate themselves into fictional communities that never existed in the past and do not exist in the contemporary world either. Instead of embarking on a futile search for individual Métis communities, the courts should recognize the mobile Métis society in the Northwest and that it has existing harvesting rights throughout that territory.

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Base map reproduced with the permission of Natural Resources Canada 2008, courtesy of the Atlas of Canada. Additional information added to base maps by Jean Teillet.

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