"Aboriginal Rights Litigation and Negotiation among the Metis of BC: Community Perspectives on Creating Legal Change"

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Draft Paper for Discussion

In this paper, I present Metis[1] perspectives on Metis rights litigation and negotiation in BC, including suggestions about how to create legal change. There have been three harvesting rights cases in BC, all unsuccessful for the Metis claimants. In terms of negotiation, Metis people and organizations in BC have been involved in ongoing discussions with the provincial government, and with First Nations. The community perspectives on litigation and negotiation I discuss here have been expressed by Metis people in southern BC who agreed to be interviewed for my dissertation project, which is about problems with the application of *R. v. Powley*[2] in BC.

These community perspectives reveal that Metis law and governance are being exercised and are in the process of being revitalized. While community members told me they supported Metis inherent rights and some would go to court to defend them, people had more faith in negotiations. Although most said that Metis-provincial

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[1] I use "Metis" without the *accent aigu* on the "e" to denote all Metis people, regardless of whether they are of French descent. "Métis" is used to denote people of Indigenous/French ancestry; this term is also used where it appears in other works.

[2] *R. v. Powley*, [1999] 1 CNLR 153 (Ont Prov Ct), aff'd [2000] OJ No. 99 (Ont SCJ), aff'd [2001] OJ No. 607 (Ont CA), aff'd (2003) SCC 43 [*Powley*]. SCC decision cited to <www.scc.lexum.umontreal.ca/en/2003/2003scc43/2003scc43.html>.

negotiations were important, many felt that there were unresolved questions of who represents Metis people, and that this might complicate negotiations or interfere with negotiation outcomes. All participants were concerned about the need to have ongoing dialogue and negotiations with First Nations, and all asserted that continuing to practise Metis rights was crucial, regardless of the outcome of either litigation or negotiations. In fact, it was the ongoing practice of rights[3] (including revitalization of Metis laws governing harvesting) and reliance on Metis knowledge that was considered key to creating legal change, not recognition by other governments.

I would like to first talk about the current state of Metis litigation, negotiation and practice in BC, and then present some Metis perspectives on these issues.

The Current Situation

Metis People in BC

When talking about Metis in my home province, I often get the response: "Oh, are there Metis people in BC?" One of the reasons for this is that there has not been much research on Metis history and communities in BC.[4] While there are many primary

[3] The term "rights" does not do justice (pun intended) to Metis harvesting practices; neither does the term "harvesting", which does not encompass the holistic experience of being on and with the land. I have the same difficulty with terms like "resource management", which seems to treat other beings as mere chattels to be used for human benefit, rather than as our relatives. Rights discourse has come under scrutiny for many reasons, one of which is that reliance on rights is equated with the necessity of state recognition, which is disdained by some Indigenous activists. See, for instance, the work of Aaron Mills. I use the term "rights" throughout this paper, although I use it advisedly, because it was the term used most frequently by the research participants, who for the most part do care about state recognition of their rights. However, ongoing practice of rights was seen as ultimately more important.

[4] It was only in 2008 that the first full-length dedicated history of the Metis in BC was published. This is a popular history. See George Goulet & Terry Goulet, *The Métis in British Columbia: From Fur Trade Outposts to Colony* (Vancouver: FabJob, 2008). For a historiography of the Metis in BC see online: <http://www.indigenousinstitute.ca/Summer_Institute_2/MNBC_Research.html> (work in progress as part of a research partnership of the Métis Nation of BC and UBC Okanagan campus); and see Kerry Sloan "Many Tenuous Ties: Toward an Historiography of the Metis of BC" (29 August 2007) [unpublished].

written sources, as well as oral histories, these are only now beginning to be explored.[5] Another reason is that, owing to the colonial situation in BC, there were no legal categories for Metis. People were expected to define themselves as either "white" or "Indian".[6] Of course, even among some Metis people today, the existence of Metis communities outside of the prairies and Ontario is controversial, as members of such communities may be less likely to be descendants of the Red River Metis, who are viewed by some as being the "true" Metis.

In BC, Red River Metis often had families with local mixed blood Indigenous people. Such families are documented in the work of historians Jean Barman and Mike Evans,[7] and the genealogies of many of my interviewees reflect similar ancestries. In the Thompson-Okanagan region, for example, many Metis families, including my own family, married into the Shuswap (Secwepemc) and Okanagan (Syilx) nations.

According to my research, Metis, or proto-Metis, may have been in what is now northeastern BC as early as the mid-1700s, as fur traders and guides for explorers, and at the coast with the maritime fur trade as early as the late 1700s. Communities became centred, for example, around many of the fur trading posts at Fort Langley,

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

[6] See, for example, Jean Barman, "At the Edge of Law's Empire: Interraciality, Citizenship and the Law in British Columbia" (2006) 24 Windsor Yearbook of Access to Justice 1; Renisa Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921* (Vancouver UBC Press, 2009).

[7] Jean Barman & Mike Evans, "Reflections on Being, and Becoming, Métis in British Columbia" (2009) 161 BC Studies 59; Mike Evans, Jean Barman, *et al*, "Métis Networks in British Columbia: Examples from the Central Interior" in Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, eds, *Contours of a People: Metis Family, Mobility and History* (Norman, OK: University of Oklahoma Press, 2012) 331.

Kamloops, Prince George, Quesnel, and Fort St John, among others. Some people stayed, some didn't, although a common pattern was for people to consider Metis settlements as part of a web of Metis territories across North America. These were places that people might inhabit for a time, leave, and then return to, especially because of work opportunities that required high degrees of mobility. This pattern often continued over many generations – it existed in my own family, and among my research participants. However, Metis communities comprised more than mere settlements, and often encompassed large, overlapping territories.

According to current oral and documentary history research, some of these historic communities have persisted to the present day, although Metis identities may have gone underground to some extent and Metis people have been and continue to be highly mobile. My dissertation work critiques the assumption in *Powley* that Metis communities must be continually grounded in particular territories.

Litigation

Powley is the leading Metis rights case in Canada. The part of the *Powley* test that is relevant to what I would like to discuss here is referred to as the "historic community connection" test, and creates what I call the "community conundrum". This test requires a claimant to prove, among other things, that 1) the claimant has an ancestral connection to a historic Metis community where the harvesting rights were exercised; and that 2) there is continuity between the historic and the contemporary community.[8]

[8] Jean Teillet asserts that a more correct interpretation is that the test for continuity should refer to the continuity of the practices of the community, rather than to the continuity of the community itself. Teillet, *Métis Law in Canada* (Toronto: Pape Salter Teillet, 2013) at 2-7. Available online:

"Historic" in this context implies continuity from the date of "effective European control"[9] in the relevant region. These requirements are problematic, in part because of the lack of awareness about the Metis of history of BC, and in part because the Canadian law of Metis rights is rooted in colonialist assumptions and does not take into account Metis perspectives on history, territories and communities. These assumptions include the court's imposition of modern, Eurocentric notions of community identity, which are analogous to the criticized "frozen rights" approach to the characterization of Aboriginal rights.[10] Similarly, concepts of Metis territory in *Powley* reflect assumptions based in English property law,[11] which do not reflect the historical realities of Metis communities.

As a consequence of *Powley*, Metis groups across Canada have been launching historical research projects, identifying historic communities in order to defend their

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<www.pstlaw.ca/resources>. Andrea Horton & Christine Mohr also make this point in "*R. v. Powley*: Dodging *Van der Peet* to Recognize Métis Rights" (2005) 30 Queen's Law Journal 72.

[9] *Powley*, SCC, *supra* note 2 at para 18. This test was adapted from the pre-European-contact test outlined in *R. v. Van der Peet*, [1996] 2 SCR 507 for determining which practices, customs and traditions were "integral to the distinctive culture" of Aboriginal rights claimants. For an Indian proving an Aboriginal right, the court in *Van der Peet* held that the impugned practice, tradition or custom must be shown to have been integral to the Indian community prior to "contact" with Europeans. See *R. v. Sparrow*, [1990] 1 SCR 1075 (SCC); *R. v. Van der Peet*, [1996] 4 CNLR 177 (SCC). The test was modified in *Adams*, wherein the court held that "contact" meant "effective control". See *R. v. Adams*, [1996] 4 CNLR 1 (SCC). For a Metis proving an Aboriginal right, the court in *Powley* modified the time period to be "post-contact but pre-control", taking into account that Metis societies necessarily arose after contact: *Powley, supra* note 2 at para 37.

[10] The "frozen rights" approach holds that there must be a connection between the way Aboriginal rights are practised and the way they would have been exercised at the time of contact between Aboriginal and European cultures. This approach, which ignores the fact that cultures change and evolve, has been criticized by many Aboriginal law scholars, as in John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 American Indian Law Review 37, and Brent Olthuis, "Defrosting *Delgamuukw* (or 'How to Reject a Frozen Rights Interpretation of Aboriginal Title in Canada')" (2001) 12 NJCL 385. While more recent cases have moved away from a frozen rights approach, including *Powley*, *Powley* tries to freeze community identities, at least to some extent. Of course the *Powley* decision is based on the facts of that case; the Powleys were from Sault Ste Marie, a historic Metis community with relatively static boundaries.

[11] Teillet, *supra* note 8 at 1-37.

harvesting rights in court.[12] At the same time, negotiations are ongoing between Metis political associations and the provinces to create agreed-upon Metis harvesting laws.[13] These talks are taking place in part due to a healthy skepticism about the usefulness of *Powley* – at least at this stage of its implementation.

Since *Powley* was decided, it has been followed more than 40 times, and in only three cases have the Metis claimants been successful. Significantly, these cases are from the so-called "Metis heartland" of the prairies,[14] an area in which the existence of

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

[13] Prior to the Supreme Court decision in *Powley*, provincial Metis political groups entered into harvesting-related MOUs with Saskatchewan (1995) and Manitoba (2002). Following *Powley*, in September of 2004, the Metis Nation of Alberta ("MNA") entered into an *Interim Métis Harvesting Agreement* ("IMHA") with the Province of Alberta. The Agreement gave eligible Metis the right to harvest for food year-round on all unoccupied Crown lands in Alberta. After the Alberta Queen's Bench decision in *R. v. Kelley,* [2006] No. 353 (APC), [2007] No. 67, which upheld a Metis claimant's right to rely on the IMHA, and after subsequent negotiations between the MNA and the province, Alberta terminated the IMHA on July 1, 2007 and implemented a unilateral harvesting policy that recognizes 17 Metis communities north of Edmonton. According to the new policy, each of these communities may harvest within a 160 km radius only. In response to the termination of the IMHA, the Métis Nation of Alberta launched its "hunt for justice", taking Metis rights claims to court; however, its test case, *R. v. Hirsekorn*, 2011 ABQB 682, leave to appeal granted, 2012 ABCA 21, was not successful. For a critique of *Hirsekorn*, see Karen Drake, "*R v Hirsekorn*: Are Métis Rights a Constitutional Myth?" (2013) 92 Canadian Bar Review/La revue du barreau Canadien 150. In July of 2004, the Metis Nation of Ontario and the Ontario Ministry of Natural Resources entered into an interim agreement. This was litigated successfully by the defendant in *R. v. Laurin,* 2007 ONCJ 265, in which the court held a geographic limitation would not apply. Ontario now recognizes Metis harvesting cards but caps the number of cards, which is contrary to the agreement. In 2012, the Manitoba Metis Federation signed a harvesting agreement with the Manitoba government. Please see below for a description of Metis-provincial negotiations in BC.

On January 10, 2005, the federal Cabinet adopted its *Federal Interim Guidelines for Métis Harvesting,* which purport to apply to natural resources within federal jurisdiction.

[14] *R. v. Laviolette*, 2005 SKPC 70, [2005] 3 CNLR 202 (Sask Prov Ct); *R. v. Belhumeur,* 2007 SKPC 114 (Sask Prov Ct); *R. v. Goodon*, 2008 MBPC 59 (Man Prov Ct).

historic Metis communities is generally accepted, both by many Metis and by historians and Canadians generally.

In British Columbia, the success rate of Metis rights litigants is even more dismal. Of the three BC harvesting cases decided since the *Powley* case began, all have been decided against the Metis claimants, in great part because the claimants could not meet the historic community connection test. This was because of 1) the perceived lack of reliable historical evidence showing continuous Metis presence in areas at issue; 2) the difficulties courts have had with the complexities of BC Metis history and community identity; and 3) the courts' lack of understanding of Metis perspectives, particularly about history, community and territory. While space does not permit me to explore here the reasons that parts of BC Metis history appear to be "missing", historians (and judges) have argued that although the Metis of BC may have created temporary cultural communities, these either did not last long enough to become "historic", or did not ever cohere politically, and thus should not properly be considered "communities".[15] Further, even if historic communities existed, so the argument goes, they cannot be continuously tied to particular lands. Many Metis people dispute these claims, and also disagree with the validity of the *Powley* criteria for determining a Metis community: "a group of Métis

[15] For some conjectures about Metis communities' supposed lack of cohesiveness in BC, see Barman, "Edge of Law's Empire", *supra* note 6; Olive P. Dickason, "From 'One Nation' in the Northeast to 'New Nation' in the Northwest: A Look at the Emergence of the Métis", in Jacqueline Peterson & Jennifer S.H. Brown, eds, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) at 19-36; Leah Dorion & Darren R. Préfontaine, "Deconstructing Métis Historiography: Giving Voice to the Métis People", in Lawrence J. Barkwell, Leah Dorion & Darren R. Préfontaine, eds, *Métis Legacy: A Métis Historiography and Annotated Bibliograph*y (Winnipeg: Pemmican, 2001).

with a distinctive collective identity, living together in the same geographic area and sharing a common way of life."[16]

The first Metis harvesting case in BC was decided prior to the Supreme Court of Canada decision in *Powley*. This first case was called *R. v. Howse*,[17] and was the result of charges being laid against six Metis hunters who participated in a planned subsistence hunt in the Kootenays in southeastern BC, a traditional Metis harvesting area. At trial, the judge was sympathetic, and accepted that Metis people had persistent, wide-ranging communities, and Aboriginal harvesting rights. As *Powley* was under appeal at the Supreme Court, the claimants based their case on *R. v. Sparrow*, which required proof that the form of harvesting that was carried out was an integral part of a distinctive Aboriginal culture. The claimants called Metis Elders, Hunt Captains and other knowledgeable Metis people to give cultural and historical evidence, but didn't present any written historical evidence, partly because it was difficult to find, and partly because their *Sparrow* analysis created a focus on cultural rather than historical continuity.[18] The trial judge decided in favour of the rights claimants. However, because the *Powley* Supreme Court decision was rendered following the trial decision in *Howse*, the crown in that case appealed, and their appeal was successful. The

[16] *Powley, supra* note 2 at para 12.

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

[18] The appeal decision in *Howse* followed the Ontario Court of Appeal decision in *Powley*, which contained many of the elements of the SCC decision, including the holding that courts should not define Metis communities, but that such communities must have historic continuity; the *Powley* Court of Appeal decision had not yet been rendered at the time of the *Howse* trial.

appeal judge held that there was simply not enough evidence of a continuous historic[19] Metis community in the Kootenays.[20]

There were two more BC cases, one decided just before and one just after the SCC *Powley* decision. The earlier case, *R. v. Nunn,*[21] was a possession of wildlife case from the south Okanagan. The claimant, Ron Nunn, was unrepresented, but presented a binder of his own historical research and called a number of witnesses, including Elders and Hunt Captains. The court decided against Mr Nunn, and he chose not to appeal.

The last of the cases, *R. v. Willison*,[22] was the most significant, as it followed the *Powley* SCC decision, but also because of the volume of historical evidence considered and the complexity of the reasons delivered. The *Willison* case arose out of charges against Greg Willison for hunting without a licence and out of season in Falkland, near his home, which is approximately 30 kilometres from Salmon Arm in south central BC. Falkland is on the historic Fur Brigade Trail from northern BC, through the interior and down into what is now Oregon State.

In *Willison*, the *Howse* scenario repeated: at trial, the judge in *Willison* was sympathetic, and accepted both the oral and written historical evidence presented as

[19] For a discussion of some of the evidence presented in *Willison*, see Bradley S. Bellemare, *La Chaas: The Métis Constitutional Right to Hunt in the Canadian Legal Consciousness* (LL.M. Thesis, 2006, University of Saskatchewan) [unpublished].

[20] John Grant Howse, one of the claimants in the case, was a descendant of Jasper Howse (or Haws), one of the earliest Metis people in BC, who spent a great deal of time in the Kootenays, and for whom the trading post Jasper House was named (now the modern town of Jasper). I am also a descendant of Jasper Howse.

[21] *R. v. Nunn*, 14 April 2004, unreported, Penticton Registry 30689H, Grannary J. (BC Prov. Ct.) [*Nunn*].

[22] *R.* v. *Willison*, [2005] BCJ No. 924, rev'd (2006) BCSC 985 [*Willison,* or *Willison BCSC*]. Trial decision cited to <www.provincialcourt.bc.ca/judgments/pc/20005/01/p05_0131.htm>; appeal decision cited to <www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc985/2006bcsc985.pdf>.

proving the existence of a continuous historic Metis presence in the area. However, on appeal, the appeal judge held that the trial judge had erred by importing a 21st century perspective of community into his analysis of whether there was a historic community in the area. Rather than a group of people meeting the *Powley* definition of community, he found a "loosely affiliated group of people of mixed ancestry living in a wide geographic area,"[23] and therefore not a group that fit the "proper" description of a historic Metis community.[24]

Because of the failure of the claimants in the three Metis harvesting rights cases, the provincial crown in the past has taken the position that there are no historic Metis communities in BC and, thus, the principles of *Powley* do not apply in the province. However, in practice, BC has been talking intermittently with the Metis Nation of British Columbia (MNBC), whose leaders in BC decided to pursue harvesting rights negotiations with the provincial government. Meanwhile, MNBC has asked its members to obtain hunting licences and tags.

Negotiations

Attempts by MNBC to negotiate harvesting agreements with the provincial government follow signing of the *Métis Nation Relationship Accord* by MNBC and the province of BC: http://www.mnbc.ca/pdf/metis_accord.pdf. While according to my interview in 2012 with Mark Carlson, Hunt Captain for MNBC Region 3 (Kootenays) these negotiations

[23] *Willison BCSC*, *ibid* at paras 46-48.

[24] Greg Willison's ancestors were in BC as early as the 1840s and this was found as a fact by the trial judge, and not disturbed on appeal. Mr Willison himself moved to BC from Saskatchewan as a young child.

were stalled,[25] they have since been resumed, in part because of the possibility that the Supreme Court in *Daniels*[26] will find that the federal government has jurisdiction with respect to Metis people. Another reason may be the province's recent grudging recognition that the Metis communities of the Peace River area in northeastern BC are "historic". This is in part because there is written evidence of this community dating to the 1920s,[27] and because a recent land-use study conducted by MNBC has triggered a medium degree of consultation in connection with the BC Hydro Site C Dam project proposal.[28]

One of the difficulties of conducting negotiations with the government is the question of who speaks for the more than 70,000 Metis people in BC. MNBC has existed for about 12 years, and grew out of earlier Metis political organizations, the most recent being the Métis Provincial Council of BC. MNBC is probably the largest Metis political organization in BC, with a citizenship of over 11,500.[29] MNBC also has charter communities, whose members may or may not be members of MNBC itself. While MNBC has done the most work in terms of negotiating with the provincial government on many fronts, including harvesting rights, it is not the only organization that represents Metis people in BC. The BC Metis Federation split off from MNBC in 2011. Now with

[25] Interview with Mark Carlson, July 27, 2012, Trail, BC.

[26] *Daniels v. Canada (Minister of Indian Affairs and Northern Development)* (2013) FC 6, [2013] 2 FCR 268, varied 2014 FCA 101. For a critique of *Daniels*, see Larry Chartrand, "The Failure of the *Daniels* Case: Blindly Entrenching a Colonial Legacy" (2013) 51:1 Alberta Law Review 181.

[27] For two years in the 1920s, schoolteacher Gerald Smedley Andrews lived in Kelly Lake, the site of a traditional Metis community in the Peace Country. He wrote about the community in *Metis Outpost* (Victoria, 1985).

[28] Personal communication with Rob Humpherville, MNBC Region 1 (Vancouver Island) Hunt Captain.

[29] Figures from MNBC website: <www.mnbc.ca/contacts>.

over 6,300 members,[30] it has also begun to negotiate various matters with the province. Both groups participate in consultation with the province and third parties. There are independent groups that represent Metis people, but these tend to not be recognized by the provincial government.

This leads to one of the conundrums of negotiation, which is that the province prefers to deal with province-wide political groups because these are more easily recognizable and less bureaucratically challenging than smaller, more local groups. However, according to *Powley*, Metis rights belong to people who are from historic Metis communities, not to people who have membership in modern political organizations.[31] Of course, these things are not necessarily inconsistent, but the court in *Powley* specifically states that membership in a modern Metis political organization is not sufficient to ground Metis rights.[32]

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

[30] Figures according BC Metis Federation. Online: <www.bcmetis.com>.

[31] Kelly L. Saunders makes a similar point in "No Other Weapon: Métis Political Governance and Organization in Canada" in Christopher Adams, Greg Dahl & Ian Peach, *Métis in Canada: History, Identity, Law & Politics* (Edmonton: University of Alberta Press, 2013) 339 at 367-68.

[32] *Powley, supra* note 2 at paras 32-33.

project. For instance, after the MNBC-Enbridge deal was signed, some local charter community councillors resigned.[33] For those communities that are trying to ally themselves with their First Nations neighbours who may oppose pipelines and other developments, MNBC's actions can be seen as undermining these efforts. These problems point to a need to develop better communication between provincial-level Metis governments and local Metis governments, including internal consultation mechanisms.

Another problem with negotiations is they may not take First Nations' rights into account. For instance, when Alberta signed the *Metis Harvesting Accord* with the Metis Nation of Alberta, many First Nations people and governments were upset, alleging that this agreement had been signed without consultation with them.

In BC, consultations with First Nations at the provincial level regarding negotiations with BC or third parties have not taken place, at least not to my knowledge.[34] Nevertheless, many individual Metis harvesters may seek permission to hunt within particular First Nations territories, and many local Metis communities work hard to foster good relations with First Nations. While governments and third parties may enter into some form of consultation process with MNBC, or with the BC Metis Federation, these consultations are unfortunately conducted in a vacuum, and overlaps with claimed rights of First Nations are not considered. For instance, while the Metis land use study in the proposed BC Hydro Site C Dam area triggered a medium degree of consultation, which is the closest BC has ever come to acknowledging the existence of Metis harvesting

[33] "Enbridge Deal Divides Metis", *Terrace Standard* (19 June 2012).

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

rights in the province, this acknowledgement does not address the Aboriginal and treaty rights of First Nations in the area.

Practice

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

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

Many Metis people practice some form of the traditional laws of the hunt, including abiding by those laws relating to conservation and sharing, and practising other ethics such as respect for the animal and its carcass, and the giving of offerings. The traditional law of the hunt also includes obtaining permission to harvest in First Nations or Inuit territories. Sometimes requests may have been made in connection with particular planned hunts, but when hunting carried on year after year in particular areas, treaties were often negotiated. Some territories were already seen as Metis or as shared territories, such recognition being the product of many years of use, occupation and negotiation. Sometimes conflicts did arise, and fighting ensued. A famous treaty that granted Metis people hunting rights in Dakota territory in the southern prairies was negotiated for the Metis in 1862 by Jean-Baptiste Wilkie, who had family ties with the Dakota.[35]

While this tradition of negotiating harvesting access may be carried out on a smaller scale among individuals or small groups of Metis today, it has not been pursued at the provincial level by Metis provincial organizations. This may have as much to do with the internal politics of various First Nations as it does with Metis politics. It is not an exaggeration to say that the Metis harvesting cases in BC have caused great division between Metis and First Nations people. For instance, the Okanagan Indian Band strongly objected to the Metis claiming rights in what it considered to be their territory. This territory, near Falkland, was also claimed by the Shuswap, but the Metis and the Shuswap had been working steadily at improving relations over the years. Falkland is in a border region between Okanagan and Shuswap territory, and this apparent overlap

[35] For an account, see St. Ann's Centennial Book, (1985) at 231-31.

has caused problems between the two nations. However, the main complainants about rights infringements were the Okanagan, who eventually applied to be intervenors at the appeal level in the *Willison* case; this was an unusual move, but the Okanagan alleged they hadn't known about the case in time to intervene at the trial level. Although the intervention application was not granted, Okanagan leaders attended the appeal hearing. I looked at online comments during this time, and some were highly critical of the Metis, but civil, others vitriolic and derogatory. Some of the Metis people who were involved with the *Willison* case claimed to have received death threats. At the same time, it was said that this kind of behaviour was coming from the leadership, or was being promoted by the leadership, and was not truly a grassroots response. In fact, in practice, many First Nations and Metis people hunt together, and may be related to one another, and agreements are reached that may not go through official leadership channels. I was told by two interviewees of a fairly regular shared group hunt conducted by Metis and Shuswap people. According to the Metis participants, the Shuswap actually invited the Metis to organize the hunt, although it was hosted by Shuswap elders on their territory, and the location was chosen by them. I was shown photos from this hunt, including a picture of Metis and Shuswap people drying moose meat together. I discussed this when speaking about Metis harvesting law at a national Aboriginal law conference, and was afterwards approached by a prominent Shuswap person, who questioned where I got my information, and told me with great consternation that this hunt had never been approved by Chief and Council, that in fact they did not know about it. The research participants in my study were of the view that many individual First Nation members, at least privately, were not averse to allowing

Metis harvesting rights to be respectfully exercised within their territories, while the leadership were more cautious about taking public positions and potentially alienating their constituents.

Community Perspectives

In this section, I will present community perspectives about rights litigation and negotiation among the Metis of BC. First, let me briefly tell you about the people who generously agreed to participate in my study. My PhD dissertation focuses on Metis perspectives on the three harvesting cases in BC. For this study, I interviewed 23 Metis adults from the three regions connected to the cases: the Thompson-Okanagan, the Kootenays and the south Okanagan. My interviews were carried out in the summer of 2012 and in the spring of 2013. I interviewed at least one litigant and one Elder in each region, along with other Elders, witnesses and community members. I discovered that one of the Elders, Lottie McDougall Kozak, was my cousin, and our relative John McDougall had set up the trading post at Kelowna back in the mid-1800s. I also discovered many other historic connections, including that my family and Greg Willison's family crossed paths many times, including at Rocky Mountain House in the 1820s, then on the Sinclair expedition from Red River through BC to the Oregon Territory in the mid-1850s, and then more recently in "the environs of Falkland". My grandparents lived in Salmon Arm, and I have relatives all over southern BC, including at Westwold, about 15 kilometres down the Brigade Trail from Falkland. I am also

related to Dan LaFrance, one of the claimants from the *Howse* case, and to John Grant Howse.

The participants in my study had various Metis political affiliations, and some had none. Most were of Red River ancestry, but some were the descendants of fur traders and local Indigenous women. Many had both Red River and local Indigenous ancestry.

Because I interviewed 23 people and space does not permit the use of extensive quotations, for the most part I will summarize and interpret what the research participants said, only quoting occasionally.

Litigation

One of the questions I asked research participants was whether they had any hope that litigation might be an effective way of protecting Metis rights in BC. Some said that they thought litigation might be helpful, but only if there were a "perfect" test case. This would involve an individual or individuals hunting in their "home" community, thus avoiding *Powley's* inadequate consideration of mobility issues. A test case would also have to involve a community that could be previously established through research as being "historic". The harvesters would have to have ancestral ties to this historic community. Many participants who had been involved with the Willison case thought that the case could have been won if more historical evidence had been presented, or if it had been better presented. One of the problems was that the records of the Oblate Fathers in Kamloops were only unsealed a couple of weeks after the case was concluded, and these records contained a great deal of information about Metis families in the Kamloops area. Many who followed the *Willison* case felt sure there would have

been a positive result for Greg Willison if this evidence had been presented. For instance, *Nunn* litigant and former Hunt Captain Ron Nunn said, "Well, the Hudson Bay keeps records, and they kept good records. But the records we never had access to were the records of the Oblate missionaries. And the Oblates kept accurate records of all Metis and who they ministered to, who were their flock, how many came and went. And if we had accessed them in the *Willison* case, we would have met that thing."[36]

Elder Lottie Kozak, who was a witness for Greg Willison at his trial, thought that compiling oral histories would also be important to the success of any future litigation,

> If they don't believe that there's enough Metis for Metis communities, why don't they get together with somebody like me and I can give them all the information they want, and years and times, and how many Metis people are here, and then other groups do the same thing, put them all together? Then you've got a big group of Metis. If it comes down to that, that's what should be done. You see, they can't prove ... how many Metis are here just by counting Eldon's group [Salmon Arm local]. There's way more people than that. Then there's Osoyoos, Penticton, Peachland, Kelowna, Westbank, all that whole group into Kamloops, Merritt. That's the only thing they can do is to put out there proof of how much Metis there is ... I wish I could speak to people who would listen. I'm not educated, but I can speak my mind.[37]

However, some participants pointed out that even if there were more oral and documentary research that could be submitted as evidence in a future BC Metis rights case, a favourable judgment in such a case would only be applicable to other similar cases. The rights of a hunter from Falkland such as Ms Kozak, who hunts as far away as Chetwynd and Atlin, who grew up in the bush near Merritt, who has lived all over BC, and whose Metis ancestors settled throughout the province, might have difficultly in defending her Aboriginal hunting rights before the court. In fact, as Ms Kozak has

[36] Interview with Ron Nunn, August 4, 2012, Oliver, BC.

[37] Interview with Elder Lottie Kozak, June 15, 2012, Falkland, BC.

Shuswap, Okanagan and Interior Salish (Nlaka'pamux) ancestry, as well as Red River ancestry, she might have more success in defending her rights as a First Nations person.

While some interviewees thought litigation could be a helpful tool in the right circumstances, or as long as better historical research became available, others thought that *Powley* could never accommodate Metis perspectives about history, community and territory. When asked about the possibility of creating a better interpretation of *Powley* to apply to the complexities of the BC situation, former Hunt Captain Dan LaFrance, a claimant in the *Howse* case, described a conversation he had with Metis leaders about *Powley*:

> DLF ... I said that *Powley*'s going to be a hindrance to us. And it is.
>
> KS I think there's something like three out of 40 cases went in favour of Aboriginal claimants.
>
> DLF Exactly.
>
> KS I mean, they've expanded things a little bit; so now the geographic areas are wider, but I still feel like they're not getting it.
>
> DLF No, they're not.
>
> KS And I don't know … Do you think they're ever going to get it?
>
> DLF No, I don't.
>
> KS Do you think it's possible?
>
> DLF Nope. Not with the *Powley.* And how are they going to change that? Now, the only way I might eventually say they could be changed is to have a [test] case go through, like I mentioned earlier ... but like I said to them, 'Why would you want a perfect case? They're not all going to fit that.'[38]

[38] Interview with Dan LaFrance, May 7, 2013, Whitley Lake, BC.

Skepticism about the usefulness of *Powley* is echoed by litigant Ron Nunn, who was also a witness in the *Willison* case. Mr Nunn thinks *Powley* is problematic because it doesn't allow for mobility and Metis ideas of territory, and partly because it takes an unreasonably narrow view of what is required to establish a Metis community. On the first point, Mr Nunn says

> One thing about Metis people – we always bring our culture with us because our culture is portable. It's not established to a land base, since we never had a land base like Indians did [in BC]. We used the land, but this was not viewed as 'this was our land', you know, since time immemorial ... Not that we didn't have a tie to the land, culturally and spiritually, but we had more of a mobile history, a mobile culture. The mobility factor is that Metis moved where the best opportunities were for them. They lived along the road allowances because they were not wanted any other place.[39]

On the second point, he says

> I think [the judge] was looking again for that whitewashed house, little picket fences, and rosebushes by the door, that prove without a doubt that a Metis lived here, either in the south Okanagan or in Fort Kamloops, or anywhere else. That's what they decided they wanted to see ...
>
> On the *Howse* case it was ruled we didn't show enough of a community and we didn't show enough existing rights. They weren't applicable to us. I don't know how the judge worded it, but it was kind of a shock, after one judge on the bench saying, 'Yeah, this is the way it is' and the other one saying, 'No, it's not', you know. This is the dichotomy of legalism in adjudicating Metis rights. You're really at the mercy of judges who take two different views: either a long view of things, an open view of things, that rights do exist, they're within the constitution of our country, and this is how they look like – they look like that we harvest for cultural, ceremonial and sustenance purposes, and those rights specifically grant that. Then you have the narrow view, that says 'No, no, no', they haven't defined the community, they haven't defined the Metis community enough, rendered it down to who were the progenitors of it ... and how many Metis were at, for instance, in the *Willison* case, how many Metis lived at Fort Kamloops, where basically he uses a yardstick to determine rights. And this is where the judge

[39] Interview with Ron Nunn, August 4, 2012, Oliver, BC.

> was totally in error, totally in error, because no other court case has ever said there weren't enough Indians around to have rights.
>
> I mean, Native people in their history have lived in vast, vast untamed wildernesses, and they were dispersed widely, dispersed in those vast tracts. Your community may be only 11 people in that family group, or that clan, that travels to the various harvesting areas, various areas for fish, medicine plants, that sort of thing. And not in a large sense, where the whole nation got together and all harvested fish at the same bank, the same stream. And this is the way the judge saw it in appeal, a very narrow view of it, that there was not enough ... Metis progenitors at Fort Kamloops, because the area was counted as part of the Fort Kamloops area in the *Willison* case. And there was not enough documented members, you know, like names, dates, how old they were, how many children they had, that sort of thing.[40]

Mr Nunn raises an interesting critique of *Powley* in the above quotation, which is that while Metis rights can only be exercised by individuals, they are dependent on the existence of a historic community, which is not a requirement for a First Nations or Inuit person trying to claim rights. It is interesting that Mr LaFrance points out that *Powley* is merely an adaptation of what is essentially a First Nations case, *Van der Peet*, and the adaptation is inappropriate because it does not recognize the mobility issues that may be more prominent for Metis people. Combining Mr Nunn's and Mr LaFrance's critiques, one might say that the Metis are getting the worst of all possible worlds in *Powley*, at least with respect to the protection of Metis rights as compared to the protection of other Aboriginal people's rights.

One final critique of the possibility of using *Powley* is the questioning by some of the interviewees of what is meant by "historic". For instance, two Elders stated that history is always being created, and there is no point at which it crystallizes, no sharp demarcation between what is historical and what is not.[41] What some of the participants

[40] *Ibid*.

[41] Interview with Elder Eldon Clairmont, June 13, 2012, Salmon Arm, BC; interview with Elder Goldie McDougall, July 27, 2012, Trail, BC. Similar observations about the differences between Indigenous and

suggested was that the courts' fixation on historicity reflects the expectation that Metis people need to authenticate themselves and their communities, to prove that they are "really" Metis.

On a more positive note, some research participants were happy with the outcome of the three harvesting cases, because they felt that at least some aspects of Metis history and culture had been recognized by the courts, including on appeal, and that the cases had at least raised awareness among members of the public that Metis people exist and are exercising rights in BC. One community member, a wildlife biologist, and now the president of the local Vernon MNBC charter community, said that he thought that at least the court in *Willison* had expanded the definition of Metis communities somewhat by holding that they were not necessarily rigidly bounded by geography, only that they had to exist "on the land".[42] This victory rang hollow for Mr Willison, though, when the appeal judge held that while there might have been a community in the Falkland area at one time, it lacked sufficient continuity to support site-specific rights.

Negotiation

Since many of the research participants thought the benefits of *Powley*, at least in BC, were questionable, I asked whether people were more hopeful about the possibilities of negotiating protection for Metis harvesting rights with the provincial government. Most people were optimistic to some extent, but many were disappointed that, at the time I

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western approaches to historicity are made by Linda Tuhiwai Smith in *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed (London: Zed Books, 2012).

[42] *Willison, supra* note 22 at para 24. Interview with Dean Trumbley, June 19, 2012, Falkland, BC. This point is also made by Chris Andersen in one of the few articles in the entire literature that mentions the BC cases, "Settling for Community? Juridical Visions of Historical Metis Collectivity in and after *R. v. Powley*" in St-Onge, Podruchny & Macdougall, *supra* note 7, 392 at 407-09.

conducted my interviews, negotiations between MNBC and the province had stalled. They saw this as a result of the failure of the three harvesting cases. However, as mentioned above, these talks have now resumed.

When I asked the research participants about the potential positive effects of consultation on negotiations, some people thought that future land use studies showing the extent of Metis people's reliance on harvesting might produce helpful results. Others were cautious about revealing land use information, either because they thought harvesting was about more than just how many animals were taken and where, or because they wondered whether they could trust the crown or third parties with such sensitive information. Others were skeptical about the consultation process generally, stating that proponents and governments didn't take their concerns seriously, and stated that providing land use studies would be like giving away something for nothing.

On the other hand, some people were concerned that not participating in consultation was like saying that Metis rights didn't matter, and thus might lead to the province being less likely to negotiate with Metis people. Some people were angry that MNBC had signed agreements with third-party proponents even before consultation processes had been completed. This was seen as giving away Metis rights, and as potentially compromising relationships with First Nations who might be opposed to MNBC-supported projects. Others were in favour of Metis signing on to certain projects, usually out of support for what they thought would be good-paying jobs for Metis people in northern BC, but were still concerned that prior discussions with First Nations hadn't taken place.

In fact, one of the biggest concerns among many research participants was the effect attempts to protect Metis rights through litigation, negotiations and consultation might have on Metis relationships with First Nations in the province. Many people thought that negotiations with the BC government should be conducted with the knowledge and consent of First Nations in the relevant areas. Participants were generally in favour of direct talks with First Nations groups, although some people had concerns that while grassroots members might be open to negotiations, leadership might oppose it.

All the litigants stated they had tried to seek permission from First Nations in whose territories they planned to hunt, either in an official or unofficial capacity. Mr Willison, Mr LaFrance (along with the other hunters on their planned hunt) and Mr Nunn all asked permission, but were refused. However, Mr LaFrance stated he had been more successful in getting permission from the local First Nations to live on his trapline near Vanderhoof.

Practice

Regardless of the outcome of litigation, negotiation and consultation, most of the participants informed me that the most important thing in protecting Metis rights was to continue to exercise them. While all participants said they believed Metis have a right to harvest without licences, or even without harvesting cards issued by MNBC or other Metis organizations, most did not see any ideological problem with getting hunting licences and tags, although for some people this did present a financial hardship. Many participants did not take issue with provincial regulatory regimes, stating that as long as they supported conservation, they were in line with Metis values. Some people thought

hunting and fishing licences should be obtained, at least pending the outcome of negotiation or further litigation.[43] As expected, the three litigants I interviewed were all disappointed that they now had to get licences (although one no longer hunts, for health reasons). They did so, they said, because they thought it was better to practise their rights in this way than not at all.

Most of the research participants said that it was important for them to pass their harvesting and wilderness skills on to the youth, and many were actively involved in doing this. Some participants had been involved with an Aboriginal skills camp that was attended by Metis and First Nations youth.

Regarding trying to obtain permission from First Nations to harvest in their territories, the litigants stated they tried to be respectful by asking first, but when denied they decided to exercise what they viewed as their rights, particularly in the face of some confusion about First Nations territorial boundaries and overlaps. However, this was not viewed as being the end of the story. All interviewees hoped that negotiations with First Nations would continue into the future, but that this would take many years of intercultural dialogue. While it is possible some Metis may not respect First Nations rights or may worry that the complications of multi-party negotiations might hinder Metis-provincial talks, most of the people I interviewed said they recognized the importance of ongoing talks with First Nations. This was viewed as being especially important in light of Metis claims to mobility rights.

[43] One hunter did mention he had occasionally hunted without a licence, and that wildlife officers were aware of this, but didn't charge him. They knew who he was, and that he had a Metis harvesting card. Another harvester said he cut timber on crown land without a permit.

According to Mark Carlson, the current Kootenay region Hunt Captain, and according to the evidence given at trial in *Howse*, Metis people have been hunting in the Flathead region in the Kootenays for over 150 years. While this is not the same as exercising rights since time immemorial, and the Metis harvesters I talked to recognize this, they believe they have inherent rights, and that these rights are portable, and do not necessarily attach to particular territories. According to many of the research participants, these rights do not stem from *Powley*, or from the Canadian state, nor do they exist by virtue of permissions from First Nations groups. As Dan LaFrance says, "To me, inherent rights isn't what we can get. I already have them."[44] Community member Lois McNary of Tappen, whose two sons hunt for her, says "We've always hunted. We never had licences before. Whether that was legal or not, I don't know, because that's just the way it was ... In my family, we always hunted. And I don't think we need a licence. We lived off the land. We're not abusing it."[45] Given support for the idea of portable, inherent rights, and for the idea of Metis mobility, conducting negotiations with First Nations will become more important into the future. This possibility has already been anticipated to some extent by the drafters of the MNBC *Natural Resources Act*, which in s. 7.2 provides a mechanism for entering into wildlife management agreements with First Nations.

An example that could be followed in BC is that of the Metis Nation of Ontario (MNO), whose members always had the support of the Anishinabe of the region. The MNO welcomed the Anishinabek Grand Council, whose members insisted they participate in

[44] Interview with Dan LaFrance, May 7, 2013, Whitley Lake, BC.

[45] Interview with Lois McNary, June 17, 2012, Tappen, BC.

talks between the MNO and the government of Ontario.[46] I would hope Metis collectivities in BC might go further, and invite First Nations to speak with them in preparation for continued talks with the provincial government. Eventually, tripartite negotiations could take place. As there are many ethnic divisions among First Nations in BC, many of whom have territorial overlaps, negotiations could be challenging, but hopefully the process will be productive.

Some Concluding Thoughts

The participants in my research project have suggested that to create legal change for Metis people in BC we can research our history, develop our laws and self-government, practise our rights, educate our youth, and establish good communication between ourselves and with our neighbours. None of these tasks will be easy. One last difficult but useful suggestion comes from litigant Greg Willison. He cautions that we should not allow the law to unwittingly change how we view ourselves. While he agrees that Metis people have inherent rights, he worries that people are trying to fit themselves within the *Powley* criteria, when those criteria may not apply. Mr Willison suggests there is a danger in too much reliance on state recognition, when the real source of change is Metis wisdom,

> The Metis community, in my view, was stronger before we were recognized constitutionally in 1982. ... We were closer to the source, then, with all those older people that are almost all gone now ... Even when they started to put together the governing bodies, it just didn't seem to be the same. And today, in fact, it's very weak, the Metis community. That's why our hunting rights, it was

[46] Brent Olthuis makes this point, and refers to the possibility of Metis hunting in face of Anishinabe non-agreement, in "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act*, 1982" (2009) 54 McGill Law Journal 1 at 22.

> vital that something be done ... It was about putting back aspects of our community that were being lost.[47]

Let us not lose our communities in the process of defending our harvesting rights.

[47] Interview with Greg Willison, May 6, 2013, Salmon River, BC.