Osgoode Hall Law Journal

Volume 57, Issue 1 (Summer 2020)
Special Issue: A Right without a Rights-Holder Is Hollow
Guest editor: Karen Drake

Article 19

2020

Rethinking the Doctrine of Aboriginal Rights: the Metis cases

Paul Chartrand
pchartrand@ddwestllp.com

Rethinking the Doctrine of Aboriginal Rights: the Metis cases

Abstract

To be added

Rethinking the Doctrine of Aboriginal Rights: The Métis Cases

Paul Chartrand*

Abstract

The 2003 *Powley* judicial discovery and recognition of a new "Métis" community far from the Métis Nation homeland usurped the historic prerogative of the executive to recognize a new Aboriginal people and is not warranted by section 35 of the *Constitution Act, 1982* which contemplates political negotiations. The invention of a distinct test for proof of Métis rights was unnecessary and created doctrinal uncertainty and unfairness. This article reflects on changes to Aboriginal rights doctrine that would limit the judicial role to the determination of the local rights of local communities, while recognizing that the determination of national interests and rights ought to be left to constitutionally-mandated negotiations between Canada and each Aboriginal nation or people. A fair doctrine would adopt one date instead of the current three dates for proof of the various rights of any and all the Aboriginal peoples, without regard to their particular self-naming practices.

Section 35 of the *Constitution Act, 1982* recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.[1] The Aboriginal peoples were listed as including the Indian, Métis, and Inuit peoples. The text of the new constitutional provision raised fundamental questions. What are the constitutional and legal effects of affirmation and recognition? Who are the "Aboriginal peoples"?[2] What are their existing "rights"? Who is to decide: the politicians or the judges?

These questions were meant to be resolved in political negotiations and by constitutional means. It was the politicians who were to decide. A series of national constitutional meetings in the 1980s between federal and provincial leaders and heads of national Aboriginal organizations failed to resolve them.[3] The questions were generally ignored in these conferences.[4] In consequence, there is an emerging doctrine of Aboriginal rights based on the judicial interpretation of section 35.

In 2003, the Supreme Court of Canada decided *R v Powley*, a case in which the judges discovered and recognized a Métis community in Ontario that had not been previously recognized by the Crown.[5] I suggest that the recognition of an "Aboriginal people" or nation is the prerogative of the executive, as it has always been, and is not within judicial authority. I also suggest that the doctrine as being developed in Métis cases following *Powley* is fundamentally flawed. I offer alternative approaches for reflection. I begin by describing two main propositions, which I offer tentatively because they imply fundamental changes to the judicial approach to state–Indigenous relations. I will then provide a general overview of these points.

---

* Paul LAH Chartrand, Professor of Law (retired), counsel to the firm DDWest LLP, formerly commissioner on Canada's Royal Commission on Aboriginal Peoples and Manitoba's Aboriginal Justice Implementation Commission.

[1] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]. Section 35 provides: "(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" (*ibid*). The French language version of section 35 provides: "(1) Les droits existants—ancestraux ou issus de traités—des peuples autochtones du Canada sont reconnus et confirmés." Section 57 of the Act provides that "the English and French versions of this Act are equally authoritative" (*ibid*, s 57).

[2] See Paul LAH Chartrand, ed, *Who Are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction*, (Purich, 2002) [Chartrand, *Recognition*].

[3] Harry W Daniels, "Foreward" in Chartrand, *Recognition*, *supra* note 2 at 11-14.

[4] *Ibid.* I participated in the conferences as an advisor.

[5] 2003 SCC 43 [*Powley*].

First, the recognition of an Aboriginal nation, or the definition of the nation's rights, are not within the subject-matters open to judicial interpretation. Canada as a state is characterized by the presence of historic and recent "nations within"—products of political evolution exemplified by the historic and recent evolution of the Métis Nation and the Québécois Nation, respectively. If judges can decide the rights of the former, then why would they not be able to decide the rights of the latter? The identification of the interests and rights of a nation, whether an Aboriginal nation or otherwise, is the prerogative of the nation to decide, as was contemplated in the constitutional reform meetings of the 1970s–1990s.

The 1992 *Charlottetown Accord* included a *Métis Nation Accord*, the result of political negotiations with political actors.[6] The now spent section 37 of the *Constitution Act, 1982* required negotiations between political representatives to determine the rights and interests of all the Aboriginal peoples in section 35.[7] The recognition of distinct nations—whether foreign nations or domestic Aboriginal nations—has always been an exercise of the royal prerogative exercised by the executive arm of government, not by the judiciary.

This proposition may invite the response that Aboriginal nations need the leverage of court decisions to counter the great imbalance of political power between them and the Canadian governments. In reply, the jurisprudence has established a fundamental constitutional principle that consent is the basis of constitutional legitimacy. Accordingly, Canada has, in certain conditions, a constitutional obligation to negotiate or to implement the terms of an agreement or treaty with an Aboriginal nation.

The second proposition is this. The judicial discovery and recognition of a new "Métis people" that had not previously been recognized by the executive in *Powley* is a seismic constitutional shift that is inappropriate for the judicial branch. The new tests for Aboriginal rights that were developed for this unprecedented judicial discovery are not only unnecessary, but they have also created uncertainty and unfairness in the emerging doctrine of Aboriginal rights that affect all Aboriginal peoples or nations.

This article will argue that these results could have been avoided by the judicial adoption of one date instead of the current three dates for proof of three categories of Aboriginal rights. That approach would also have made irrelevant the self-naming practices of the various Aboriginal peoples listed in section 35. In other words, it would not matter whether the claimant group identified itself as Inuit, Métis, or Indian. Self-identification is an aspect of the right of self-determination. It is an internal political matter, not an issue for judicial determination. There should be one test for proof of Aboriginal rights for all Aboriginal communities.

Here it is important to distinguish between the local communities that claim Aboriginal rights and the larger national communities or "peoples," the rights of which are not justiciable, as suggested in the first proposition. The current judicial doctrine should be limited to the identification of the rights of small communities, as established by the jurisprudence to date, and leave national rights to be determined in a political process where the judicial role is limited to requiring Canada to negotiate with an Aboriginal nation in good faith. The aggregation of the small local communities into national units is an exercise of self-determination, not a matter for judicial determination.

---

[6] See *Consensus Report on the Constitution: Final Text*, Charlottetown (28 August 1992), online (pdf): <www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document27_en.pdf> [perma.cc/48CX-GCAW] [*Charlottetown Accord*]; *Ibid*, s 56 [*Métis Nation Accord*]. A discussion of the *Métis Nation Accord* will be found on pages 5-6, below.

[7] See *Constitution Act, 1982*, *supra* note 1, ss 35, 37.

Turning to the case of the Métis Nation, both constitutional and political history compel the view that Louis Riel's "Manitoba Treaty," that led to the enactment of section 31 of the *Manitoba Act, 1870*,[8] demands the true reconciliation of Canadian and Métis interests in legitimate negotiations and agreement.[9]

I. The Challenge of Recognizing Aboriginal "Peoples" or "Nations"

In *Powley*, the Court expressly left open the question of defining "the Métis people" in section 35, limiting the application of its decision to the small community identified by the facts pleaded in that case.[10] This approach was based on the established jurisprudence in which Aboriginal rights were described as *sui generis* rights held by relatively small communities because these rights could only be described legally in light of specific facts pertinent to the claimant group:[11]

> Claims to aboriginal title are woven with history, legend, politics and moral obligations. 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.

The emerging doctrine[12] of Aboriginal rights has established the law that section 35 rights are held by the community.[13] Recent case law has demonstrated the challenge of identifying the relevant rights-holding community, particularly in those cases where claimants argued for judicial determination of the rights of larger communities.[14]

It is suggested here that this challenge seems to be beyond the competence and the legitimate authority of the courts to determine. This is a question of justiciability, asking whether the courts ought to decide or whether the decisions are within the exclusive authority of the executive and legislative branches. History and precedent stand against the view that section 35's purpose is to shift state authority to recognize Aboriginal peoples from the executive to the judicial branch.

The view adumbrated here is that the rights of an Aboriginal nation can only be identified by agreement as a result of political negotiations between the legitimate political representatives of the state and of the Aboriginal nation. Both the historic and the modern treaties involve this type of process. Further, the political process of national constitutional talks between Aboriginal and government representatives did reach agreement in the case of the *Métis Nation Accord*, on a

---

[8] *Manitoba Act, 1870*, SC 1870, c 3, reprinted in RSC 1985, Appendix II [*Manitoba Act*]. The *Manitoba Act* is part of the "Constitution of Canada" as provided in *Constitution Act, 1982*, *supra* note 1, s 52(2).

[9] It is beyond the scope of this article to review the very complex and disputed constitutional and legal history of Canada–Métis relations. For interested readers, see Paul LAH Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Native Law Centre, 1991) [Chartrand, *Settlement*]. See also Gerhard J Ens & Joe Sawchuk, *From New Peoples to New Nations: Aspects of Métis History and Identity from the Eighteenth to Twenty-First Centuries* (University of Toronto Press, 2016) (providing a useful review and analysis and contains many references to the large body of literature on the subject).

[10] *Powley*, *supra* note 5 at para 12.

[11] *Kruger v R*, [1978] 1 SCR 104 at 109, Dickson J [*Kruger*]. See also *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *Powley*, *supra* note 5.

[12] For present purposes, I use the term "doctrine" of Aboriginal rights to refer to the principles from the decided cases. See Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can Bar Rev 196 at 198-205 [Slattery, "Making Sense"].

[13] It is an open question whether there are section 35 rights that are held by persons.

[14] See *e.g. Bernard v R*, 2017 NBCA 48 [*Bernard*]. The issue is considered in the text accompanying note 51, below.

defensible distinction between the legal category of "Métis persons" on one hand and the "Métis Nation" on the other hand.

A. Section 35 "Peoples" and "Nations"

For present purposes, and in the absence of judicial or other compelling authority, the term "nation" will, as is commonly done, be used as a synonym for the collective term "people."[15] Canada has a long history of competing nationalisms, particularly involving French and English nationalism. The rise of the Métis Nation in the West and its tumultuous relationship with Canada is well-known history.[16]

I adopt the model of civic nationalism as opposed to the ethnic model that has motivated the courts in the Métis cases. The general purpose of the approach is described by Val Napoleon in an article dealing with First Nations:[17]

> [A]n inclusive civic model of nationhood will enable First Nations to rebuild and maintain their political strength and integrity by moving far beyond establishing their boundaries and internal identity on blood and ethnicity.

B. The Métis Nation in Recent Constitutional History

The civic nationalism model was adopted by the *Métis National Council* from the time of its creation in response to the enactment of section 35:[18]

> [T]he Métis nation has already incorpo-rated people other than direc [*sic*] descendants of the Red River, such as half-breed people and people who have moved and become incorporated; [T]hey have become part of the Métis nation.

This model fits the historical and contemporary facts where significant distinctions in language as well as historical and contemporary experience exist between the various communities that have identified historically, and that identify today, as Métis communities in the West. Salient examples include the Francophone descendants of the original Métis families in southern Manitoba, the Cree-speaking communities of northern Manitoba, Saskatchewan, and Alberta, and the relatively isolated communities in Manitoba whose historical tradition is more closely associated with the Ojibwa and the Nehiyapwat Confederacy. All of them demonstrate an attachment to a common history of suffering at the hands of the Canadian state, and focus on symbolic historical events

---

[15] See Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed by Ciaran Cronin & Pablo De Greiff (MIT Press, 1998) at 107.

[16] See *e.g.* Marcel Giraud, *The Métis in the Canadian West*, translated by George Woodcock (University of Alberta Press, 1986); WL Morton, *Manitoba: The Birth of a Province* (DW Friesen & Sons, 1965); Ens & Sawchuk, *supra* note 9; WL Morton, *Manitoba: A History* (University of Toronto Press, 1967); Jacqueline Peterson & Jennifer SH Brown, eds, *The New Peoples: Being and Becoming Métis in North America* (University of Manitoba Press, 1985); John E Foster, "Wintering, the Outsider Adult Male and the Ethnogenesis of the Western Plains Métis" in Theodore Binnema, Gerhard J Ens, & RC Macleod, eds, *From Rupert's Land to Canada* (University of Alberta Press, 2001), 179; DN Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims, 1870–1887" (1980) 10 Man LJ 415; DN Sprague, *Canada and the Métis, 1869–1885* (Wilfred Laurier University Press, 1988).

[17] "Extinction by Number: Colonialism Made Easy" (2001) 16 CJLS 113 at 114 (it is beyond the scope of this article to review the ethnic nationalist views about Métis people and other Aboriginal nations). See also Ernest Renan, *What Is a Nation? and Other Political Writings*, translated by MFN Giglioli (Columbia University Press, 2018).

[18] Canada, Senate, Standing Committee on Legal and Constitutional Affairs, "Second proceedings on the subject-matter of the Constitution Amendment Proclamation, 1983," 32-1, No 70 (8 September 1983) at 84.

such as the early antagonisms with British settlers of the early nineteenth century, the events out of which the province of Manitoba was created, and the Battle at Batoche on the South Saskatchewan River in 1885. The key historical characters include Louis Riel, "the Father of Manitoba," and Gabriel Dumont, the legend whose life has inspired Canadians beyond the Métis community.

These factors are often used to construct an ethnic model of Métis nationalism. The ethnic model, however, faces the challenge that, as a matter of legal history, Canada unilaterally imposed its own understanding and definition of "Half-breed"[19] or "Métis" persons in implementing the *Manitoba Act* land settlement scheme in section 31, as well as the "Half-breed" lands and scrip distribution under the *Dominion Lands Act* (DLA).[20] This occurred across the Northwest Territory, out of which the provinces of Saskatchewan and Alberta were subsequently established, as well as parts of the present Northwest Territories and northeastern British Columbia. These special constitutional and legislative provisions were designed to extinguish any Aboriginal title that may be possessed by what the racist conceptions of the times viewed as "mixed-blood" persons. Any "mixed-blood" person, not any mixture of European nationalities, but only of an Aboriginal parent and a European parent, was considered eligible, without regard to ethnic or cultural affiliation.

In the result, the records show that numerous Indian treaty annuitants and members of various First Nation communities took a legal "Half-breed" or "Métis" identity. The federal *Indian Act* excluded such persons from membership in the federally-created "Indian bands" and created a very large population of "non-status Indians." The historically recent "Métis" political movement involved many "non-status Indians."[21] Parenthetically, that category of persons remains largely overlooked in Aboriginal policy and also constitutes one of the complexities that attempts at defining Métis people for various purposes.

The distinction between the historical legal category of "mixed-blood persons" and the Métis Nation was evident in the results of the discussions at the *First Ministers Conferences on Aboriginal Constitutional Reform* (FMCs) of the 1980s, and in the terms of the *Métis Nation Accord* in the *Charlottetown Accord* 1992:[22]

> 1. Definitions
> For the purposes of the Métis Nation and this Accord,
> (a) "Métis" means an Aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit and is a descendant of those Métis who received or were entitled to receive land grants and/or scrip under the provisions of the Manitoba Act, 1870, or the Dominion Lands Act, as enacted from time to time.
> (b) "Métis Nation" means the community of Métis persons in subsection a) and persons of Aboriginal descent *who are accepted by* that community.

[19] The author considers that the term "Half-breed" is a racist term that is applied only to persons with an Aboriginal ancestry and not applied to other persons of "mixed heritage" such as English-Scot for example. It should be capitalized unless a direct quote, and particularly when used to designate a self-naming group or persons in Western Canada.

[20] *Manitoba Act*, *supra* note 8, s 31.

[21] See generally Ens & Sawchuk, *supra* note 9.

[22] *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol 4 (Supply and Services Canada, 1996) at 215; *Ibid* at Appendix 5D at 252-53 [emphasis added] [*RCAP*].

First, the FMCs established that negotiations and consent are the legitimate processes to legitimize Canada's constitution and to make section 35 effective, a proposition supported by subsequent jurisprudence, most of which dealt with the relations between provinces and Canada.

Second, the *Métis Nation Accord* proposed two essential elements for rationalizing the meaning of the reference to "the Métis people" in section 35. The first element is the legal identification of the "Métis" persons who are the descendants of those persons identified as grantees under section 31 of the *Manitoba Act, 1870* and of the DLA in 1879 as amended.[23] By way of emphasis, the point is that the distinct culture test favoured by the courts is far removed from the reality that the Métis "enfranchisement" or extinguishment of Indian title process involved several cultural communities including Nehiyawuk, Dene, Anishinaabe, and others. The second element is the Métis "nation," a "people" entitled to self-determination under international law and to negotiate their contemporary constitutional status and rights with Canada.[24]

As the late Métis leader, Harry Daniels, commented, "Our dreams to promote the rights of Aboriginal peoples as 'nations' within Canada were dimmed by the failure of the Charlottetown Accord."[25]

C. Is a Nation a Legal Entity?

My initial and tentative proposition is that the concept of a "nation" is too uncertain and shifting a body to be subject to legal recognition. An Aboriginal "nation," whether Indian, Métis, or Inuit, is an inchoate entity that has constitutional status by virtue of the constitutional evolution of Canada. According to the federal *Royal Commission on Aboriginal Peoples* (RCAP), the Aboriginal "nations" are inchoate bodies that must organize themselves in order to participate effectively and democratically in a process leading to the establishment of defensible state–Indigenous relations that respect the international norm of self-determination.

II. The Recognition of Aboriginal Nations Is an Executive Function

The *Royal Proclamation* of 1763, which acknowledged the existence and the rights of the Aboriginal peoples in British North America, refers to "nations."[26] The Proclamation was an executive act which had the force of law in British colonies at the time it was proclaimed.[27]

The historic treaty relationship with the "Indian tribes" of the colonies that became Canada were conducted and entered into by representatives of the executive branch of government. This practice was continued by Canada after 1867. The negotiation of treaties is an exercise of the royal prerogative that has crystallized into a constitutional convention that ought not be usurped by appointed judges.

Modern treaties are negotiated between the executive and First Nation representatives before execution by the executive and Treaty Nation political representatives. The agreements are then ratified by the legislative arm of government and by the people of the Aboriginal nation. The role of the executive in recognizing the Treaty Nations with which the state will enter into official relations is akin to its role in the recognition of foreign governments. In each case the state is

---

[23] *Ibid* at 253 (Appendix 5D).
[24] *Ibid*. The limitation of the definition of Métis Nation to persons "of Aboriginal descent" may import an illegitimate racial test. A discussion of the issue is beyond the scope of this article.
[25] Daniels, *supra* note 3 at 14.
[26] *Royal Proclamation, 1763* (issued by George III), reprinted in RSC 1970, Appendix II.
[27] Today a Royal Proclamation has no legal effect.

dealing with a distinct social and political entity that is not an enemy alien. The courts take judicial notice of the sovereign nations that have been recognized by the executive branch of government.[28]

Recognition of Aboriginal "nations" has been suggested as being part of the constitutional role of the executive branch. The appointed judges cannot legitimately dictate the nature and scope of the public interest of an Aboriginal nation under the guise of interpreting the text of the Constitution. At the end of the final FMC in 1987, the Prime Minister expressed disappointment that a constitutional amendment on behalf of the Aboriginal peoples had not been supported but also resolved that one day constitutionally entrenched guarantees should be obtained.[29]

The view that the recognition of "nations" for the purposes of negotiating self-government agreements is the proper role of the executive is also supported by the RCAP analysis and recommendations: "[T]he only satisfactory resolution of contentious Aboriginal issues can be one that is negotiated between the representatives of appropriate Aboriginal and non-Aboriginal governments."[30]

Under the RCAP model, an Aboriginal Lands and Treaties Tribunal would recommend to the federal Cabinet the identity of the particular "nations" with which Canada ought to enter into constitutional negotiations.[31]

A. The Constitutional Obligation of Canada to Negotiate with Aboriginal Nations

Riel's "Manitoba Treaty" of 1870 was a bargain of confederation that has been fundamentally breached by Canada's failure to fulfill its promises. The de facto rule of Canada must be legitimized by the consent of the Métis Nation. Similarly, the consent of all the Aboriginal nations is necessary to legitimize Canada's exercise of constitutional authority. The treaties have been the process of reconciling the distinct "public interests" of Canada and of each Aboriginal nation. In *MMF*, the Court stated that:[32]

> [T]he honour of the Crown is engaged by constitutional obligations to Aboriginal groups. Section 31 of the *Manitoba Act* is just such a constitutional obligation. Section 31 conferred land rights on yet-to-be-identified individuals—the Métis children.[33] *Yet the record leaves no doubt that it was a promise made to the Métis people collectively, in recognition of their distinct community*. The honour of the Crown is thus engaged here.

On the facts of the case, the reference to "the Métis people collectively" refers to the Métis families in the Red River region whose members were entitled to the benefits of section 31.

The promise of Canada in response to the 1869–1870 Resistance was made to the Métis Nation in a political bargain that was negotiated by political representatives. It was a bargain of

---

[28] *Duff Development Company Limited v Government of Kelantan*, [1924] 1 AC 797 (HL (Eng)).

[29] First Ministers' Conference on Aboriginal Constitutional Matters, *Verbatim Transcript*, Doc 800-23/004 (Ottawa: 27 March 1987) at 189-90.

[30] *RCAP*, *supra* note 22 at 187.

[31] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Supply and Services Canada, 1996) at 566-87.

[32] *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 91 [emphasis added] [*MMF*]. My view is that the meanings of the Métis lands provision and that of the courts are irreconcilable, as is the argument of the plaintiff organization that section 31 had the object of creating a permanent land base.

[33] *Contra* Chartand, *Settlement*, *supra* note 9. The lands were intended for the benefit of the families, which includes the parents or heads of families. Reason does not support the idea of recognizing the collective Indian title and at the same time failing to provide compensation for some but not all members of the families constituting the community that holds the title.

Confederation. The details of the bargain included the land promises, the educational and language guarantees in sections 22–23 of the *Manitoba Act, 1870* as well as an amnesty for all those who had participated in the defence of the Métis homelands.[34] In the *MMF* case, the Court said this: [35]

> An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both. … Moreover, both types of promises are made for the overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty. *Constitutional obligations may even be arrived at after a course of consultation similar to treaty negotiation.*

The bargain in the *Manitoba Treaty* was broken by Canada. There was no amnesty. The lands were not given according to the terms of section 31 of the *Manitoba Act, 1870*.[36] The political resources of the Métis Nation were weakened and scattered and nearly destroyed.[37]

The *Manitoba Treaty* has constitutional status. This status is based upon its place in the historic Crown–Métis relations. The *Manitoba Treaty* encapsulates a positive obligation of the governments of Canada and Manitoba to negotiate the terms of the Constitution under which the members of the Métis Nation are prepared to live. The basic principle of the constitution at issue is consent: Consent is the foundation for constitutional legitimacy.[38] The duty to negotiate the terms of the *Manitoba Treaty* can be the subject of a judicial declaration, but the final result of negotiations is not justiciable, on the basis of the principles in the *Reference re Secession of Quebec*.[39]

Section 35 of the *Constitution Act, 1982* demands negotiations towards reconciliation of the conflicting public interests of the Métis Nation at Red River in 1869–1870.[40] The outstanding obligation of Canada to negotiate the unique *Manitoba Treaty* (the only Métis treaty) arises from a national referendum in which the nation expresses by democratic means its wish to negotiate and identify its representative democratic procedures.[41] Like the provinces, Aboriginal "nations" are constituent parts of Canada. Their consent is required to legitimize the de facto rule of Canada and to achieve de jure constitutional status. What is good for the provincial goose is good for the Aboriginal gander.

Canada must create an Aboriginal Lands and Treaties Tribunal, as recommended in Volume 2 of RCAP's final report of 1996. The specially-constituted tribunal should make recommendations to Canada and the relevant provinces on the terms of the Métis Nation Constitution and the process for its ratification.

---

[34] For accounts of the negotiations, see Chartrand, *Settlement*, *supra* note 9 at 18, n 87.
[35] *MMF*, *supra* note 32 at para 71, McLachlin CJ [emphasis added].
[36] See Chartrand, *Settlement*, *supra* note 9 at 138-44; DN Sprague, "The Manitoba Land Question, 1870–1882" (1980) 15 J Can Stud 74.
[37] According to Gerald Friesen, the political power of the Métis in Manitoba had weakened by the end of the decade. Gerald Friesen, "Homeland to Hinterland: Political Transition in Manitoba, 1870–1879" (1979) 14 Hist Papers 33.
[38] For an outline of the constitutional argument, see Paul LAH Chartrand, "Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada" (2011) 19 Waikato L Rev 14.
[39] [1998] 2 SCR 217.
[40] *Ibid* at paras 16-22.
[41] *Ibid* at para 25.

III. The *Powley* Decision: A Seismic Shift in Canada–Aboriginal Relations

The mischief starts with the fact that *Powley* purported to usurp the historic British-Canadian role of the executive, to recognize not only foreign governments but also sovereign Aboriginal peoples found in their homelands by the intruding foreigners. There had been no executive or legislative recognition of a people distinct from the Treaty Nations in the local region at issue in the case.

The *Powley* test involved facts in the area of Sault Ste. Marie in Ontario, a place far removed from the historic legislative and constitutional recognition of Métis people in Western Canada.[42] In my commentary following the decision of the Court of Appeal for Ontario, I wrote:[43]

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

Powley has been followed uncritically in subsequent cases by both lower courts and the Court itself.

Powley was a case involving a defence to a prosecution for an offence against a provincial statute. Neither the Métis Nation nor a Métis community were parties in the case. Nothing said by a Canadian court in such circumstances can have an effect on the unrepresented rights of the nation or the people. The law that was decided in the case cannot apply to the rights of parties that were not represented in court.

Powley is at best a precedent limited to small Aboriginal communities making section 35 Aboriginal rights claims, subject to the criticism below. The case has no authoritative weight in respect to the constitutional status of the Métis Nation or indeed to any other Aboriginal nation. The better view is that *Powley* was decided *per incuriam* or alternatively that it was wrongly decided.

The current judicial approach, founded upon the *Powley* decision, is bound to produce injustice, confusion, and uncertainty in the law. This contrasts sharply with the judicial role of creating certainty in the law as demanded by the precept of the rule of law. My analysis applies to all the Aboriginal peoples in the Constitution and seeks to do equal justice to all of them.

A. *Powley* Adopts a Racist Meaning of "Métis"

The experts and the judges both took the view that a racist conception of community identity was defensible and appropriate. The notion that a "mixed-blood" community is a "Métis" community appears to be based upon the nineteenth-century, racist view that resulted in the "Half-breed" policy for extinguishing Indian title. The policy was incoherent and never worked. Many "Indians" recognized by the federal *Indian Act* that administers Indian reserves are "mixed-blood" people. At the time the treaties were executed, "mixed-blood" people were accepted by the government of

---

[42] *Powley*, *supra* note 5.

[43] Paul LAH Chartrand, "The Hard Case of Defining 'The Métis People' and Their Rights: A Comment on *R. v. Powley*" (2003) 12 Const Forum 84.

Canada as "Indians" if they belonged to a community that entered into a treaty.[44] First Nations have always included members who have various ancestral identities.

In the following paragraphs, the Court in *Powley* clearly asserts that there exists in fact or in theory a large racial group of "mixed-blood" people, without explaining why that matters. Implicitly the Court is stating that some Métis communities will have emerged out of a larger pool of "mixed-blood" populations:[45]

> The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.
>
> The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of "the Métis".

Further, the Court did not consider the law that "blood" or "race" is too uncertain a criterion to have legal meaning.[46]

In *obiter*, the Court then stated that many have encouraged the explosion of self-identifying "Métis" persons and communities in central and eastern Canada where history had not recorded stories of Crown–Métis relations:[47]

> However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis "peoples", a possibility left open by the language of s. 35(2), which speaks of the "Indian, Inuit and Métis peoples of Canada."

What does the Court mean? What facts are contemplated? Whatever the intended meaning, it is the ordinary rules of grammar which require the plural "peoples" after the last element of the list. Thus was invented the notion that there exist "mixed-blood" communities across Canada within the meaning of section 35. In the Court's view, which is not part of the reasons for the decision, any previously unrecognized community of "mixed-blood" people, but only of mixed Aboriginal and non-Aboriginal "blood," may claim Métis rights. This racist view is unequivocally rejected.

The Court continued:[48]

> 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 for our purposes 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*. 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

---

[44] See Ens & Sawchuk, *supra* note 9, ch 8; Canada, Privy Council Office, *Report of Mr. Justice WA Macdonald Following an Enquiry Directed Under Section 18 of the Indian Act* (King's Printer, 1944) (Chair: William Alexander MacDonald).
[45] *Powley*, *supra* note 5 at paras 10-11.
[46] *Noble et al v Alley*, [1951] SCR 64 at 70.
[47] *Powley*, *supra* note 5 at para 11.
[48] *Ibid* at para 12 [emphasis added].

> common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie.

As I predicted, the creation of distinct tests for proof of "Métis" rights give rise to new challenges for First Nation claimants. For example, in New Brunswick, the distinction between the Micmac "nation" and smaller Micmac communities seems to reflect the *Powley* approach, presaged by the approach in *Kruger,* that was previously used to identify section 35 rights-bearing communities as small local communities, on the facts of particular cases.

In previous cases, the courts had decided that the relevant practice, custom, or tradition had to be shown to have historical continuity in a contemporary rights-bearing community. In *Bernard*, the New Brunswick Court of Appeal decided that, as in *Powley*, continuity between the historic community and the present cultural and geographical community itself had to be proved—a much more onerous test, particularly where it is necessary to know the movements of specific communities over the past several centuries.[49]

B. Purporting to Alter Aboriginal Rights Doctrine

As previously mentioned, in a number of cases the courts had begun to create tests to describe or define the existing Aboriginal rights that are recognized and affirmed by section 35. In these cases the issue whether the parties were members of an "Aboriginal people" for the purposes of section 35 did not arise since they were usually brought by persons or communities who had been historically recognized by the executive government and had their Aboriginal identity affirmed in legislation.

According to the Court in *Powley*, there existed a Métis community around the city of Sault Ste. Marie which had not been noticed by the local residents and had no history of Crown–Aboriginal relations. This Métis community was not the object of the historic constitutional and legislative provisions that had been designed for the "mixed-blood" people in the West. Nevertheless, according to the Court, this was a "Métis" community whose rights were affirmed and recognized in section 35.

Furthermore, the Court decided that a special test was needed to affirm and recognize this judicially-discovered community. The Court developed, without citing any authoritative sources, a new and unprecedented ten-point test for proof of a section 35 right by a Métis claimant:[50]

> For the reasons elaborated below, we uphold the basic elements of the *Van der Peet* test … and apply these to the respondents' claim. However, we modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims.

Based upon the belief, inspired presumably by the opinions of the experts, that the Métis people were "mixed-blood" people who could not have existed before European contact, the judges decided to create a new date for proof of section 35 Aboriginal rights. The new date based on "administrative control" has created a test that gives a significant advantage over the more rigorous

---

[49] *Bernard*, *supra* note 14 at paras 42-64.
[50] *Powley*, *supra* note 5 at para 14.

test of "contact" which applies to First Nations. This is not fair. It is not warranted by the constitution, nor by law, nor by reason.[51]

IV. Doctrinal Change Towards Reason, Fairness and Simplicity

This part briefly explains two basic problems exposed by *Powley*. First is the unfair later date adopted for proof of Métis rights compared to Indian and Inuit rights, and second is the unwarranted requirement that an Aboriginal rights claimant community plead its internal political identity as part of a judicial test for proof of constitutional rights. Both problems result from the failure to adopt one date for proof of all categories of Aboriginal rights.

A. Date for Proof of Aboriginal Rights

The current jurisprudence in Canada includes three different dates for proof of three different categories of Aboriginal rights that are recognized and affirmed in section 35.

The date for proof of Aboriginal rights that flow from historic practices, customs, or traditions is the date of first European contact. The date for proof of Aboriginal title, a second category of Aboriginal rights, is the date of the assertion of European sovereignty.

These dates are difficult to rationalize if the view is taken that Aboriginal rights must arise upon the imposition of a new legal order upon Aboriginal territories. It is suggested that this particular date represents also the crystallization of the fiduciary relationship between the Crown and Aboriginal peoples. If "ab-original" people have been here since "the beginning," as the term tells us, then Aboriginal rights must arise at the imposition of the new constitutional order.

In *Powley*, the Court invented a third date for Métis people in section 35, on the mistaken view that Métis people are essentially communities of persons who have mixed Aboriginal and non-Aboriginal ancestry, the so-called "mixed-blood" racial myth. The Court called this new date the date of "effective control":[52]

> This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under *the effective control of European laws and customs*. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.

If Aboriginal rights recognize and affirm the rules of social or property relations in an Aboriginal society in Canadian law, then those Aboriginal rights cannot arise at a date prior to the imposition of the English or Canadian legal system.[53] There are two distinct legal orders which organize social relations within each society. The recognition of Aboriginal rights involves the transformation of social relations and their governing rules or laws from the Aboriginal society into legal relations

---

[51] In some circumstances, a Treaty Nation community has a right to determine who belongs to the community for the purpose of exercising its treaty rights. See *e.g. R v Meshake*, 2007 ONCA 337; *R v Shipman*, 2007 ONCA 338.

[52] *Powley*, *supra* note 5 at para 37 [emphasis added].

[53] For the classic discussion of this issue, see JC Smith, "The Concept of Native Title" (1974) 24 UTLJ 1; see also Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 SCLR (2d) 595 [Slattery, "Generative Structure"].

that are recognized in the English-Canadian constitutional and legal system.[54] This view seems to accord with the view of the 7–2 majority decision in *Van der Peet* where it was stated:[55]

> To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, *to base that title in the pre-existing societies of aboriginal peoples*. This is the same basis as that asserted here for aboriginal rights.

The current three different dates for proof of different types of Aboriginal rights must be replaced by one date for all. The correct date is the date of the imposition of the English system on the Aboriginal societies, the exchange of protection for allegiance,[56] and the date at which the fiduciary relationship crystallized.[57]

As emphasized by then Chief Justice Lamer in *Delgamuukw*, the Aboriginal peoples included under section 35 are the communities that existed and lived in the Aboriginal territories at the time that the English-Canadian system was imposed upon a particular region.[58] The existence of the Métis people in the West is the result of the fact that British-Canadian imperialism was established a very long time after its initial introduction by the French and English regimes in regions further east. Naturally, by that time, many Aboriginal persons were "mixed-blood." And naturally, that fact did contribute to the emergence of a nationalism amongst some communities united by geography, economics, and kinship that was distinguishable from both the particular Aboriginal and European ancestors. It is not helpful to reduce this complexity to a racist "mixed-blood" myth.[59] It is noteworthy that although the Court left open the matter of identifying "the Métis people" in section 35, nevertheless, subsequent decisions have, without explanation, presumed to apply the *Powley* test uncritically to other facts and other places.

An unfair result of *Powley*'s new date for proof is that "mixed-blood" communities would have a significant advantage over Treaty Nation communities to prove Aboriginal rights. The advantage arises from a much later date for proof. Brian Slattery provides the following example:[60]

> Take the case of two modern Aboriginal groups—one Metis, the other Indian—that live side by side in a certain area. The groups have common ancestors on the indigenous side; they are both the descendants of an Indian nation that occupied the area when Europeans first arrived. By the time the Crown gained effective control over the area, a Metis[61] community had grown up alongside the Indian one, and both groups had become heavily involved in the commercial fur trade – something absent from the culture of their Indian forefathers at the time of contact. Under the *Powley* test the Metis group would gain an aboriginal right to trade in furs, while under the *Van der Peet* test the

---

[54] See generally Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011).

[55] *Van der Peet*, *supra* note 11 at para 40 [emphasis added].

[56] Albert Peeling & Paul LAH Chartrand, "Sovereignty, Liberty, and the Legal Order of the 'Freemen' (Otipahemsu'uk): Towards a Constitutional Theory of Métis Self-Government" (2004) 67 Sask L Rev 339 (see the discussion and references to the case law therein and see especially page 343).

[57] See Slattery, "Making Sense," *supra* note 12 at 218; Slattery, "Generative Structure," *supra* note 53. See also *Van der Peet*, *supra* note 11 (see the separate dissenting reasons of McLachlin CJ and L'Heureux-Dubé J).

[58] See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 144 [*Delgamuukw*].

[59] The debate about the significance of "race" is also a significant aspect of American jurisprudence and debate on the identification of Indian tribes which are regarded as distinct political entities. See *e.g.* Gregory Ablavsky, "'With the Indian Tribes': Race, Citizenship and Original Constitutional Meanings" (2018) 70 Stan L Rev 1025; Carole Goldberg-Ambrose, "Not 'Strictly' Racial: A Response to 'Indians as Peoples'" (1991) 39 UCLA L Rev 169.

[60] Slattery, "Generative Structure," *supra* note 53 at 621-22.

[61] I understand this reference to be to a "mixed-blood" community, in accordance with the view adopted by the court.

> Indian group would not. For the rights of the Metis would be ascertained by reference to their practices at the time of effective control, while the rights of their Indian neighbours would be determined by their practices at the time of contact. The result, needless to say, is paradoxical. The group of mixed aboriginal-European descent is credited with an Aboriginal right that is denied to their Indian neighbours,[62] despite the fact that both groups were engaged in the fur trade at the time of effective control, and both are descendants of an Indian nation that did not trade in furs at the time of contact.

These results alone ought to be sufficient to doubt the "reasonableness," the foundation of common law analysis, of the *Powley* decision.[63]

B. The "Ab-original Date" or the "Date of Reconciliation"

The *Van der Peet* test must be modified in respect to the date for proof of the rights of all Aboriginal peoples, but not for the *Powley* reasons.

Aboriginal rights originate at the time and the place the British-Canadian legal system is imposed. The "Ab-original" peoples are the peoples who were there at "the Aboriginal time" and whose allegiance was exchanged for protection. The Aboriginal date is the date at which the fiduciary relationship crystallized. The date is determined by the historical time at which the British legal order was established, that is, the date at which the Crown's protection was made available in exchange for the new allegiance to the Crown. As then Chief Justice Cockburn stated in *R v Keyn*, "protection and allegiance are correlative: it is only where protection is afforded by the law that the obligation of allegiances arises."[64]

The Aboriginal date may also be thought of as the "date of reconciliation" for the reason that it is at the date of the imposition of the new legal order that conflicting public interests have to be reconciled.

It is suggested that the "Métis" persons that the Court conceived as a particular community of the "mixed-blood" persons that were presumed to exist across Canada may be members of Aboriginal rights-bearing communities identified by the *Van der Peet* test as modified by the argument in this article, which argues for one date for proof of any and all section 35 "Aboriginal rights."

C. Self-Naming Practices Are Irrelevant for Purposes of Proving Aboriginal Rights

If there is one test and one date for proof of Aboriginal rights, then any supposed reason to identify a claimant community as falling within the concept of an "Indian" or "Métis" or "Inuit" group disappears.

A section 35 Aboriginal community with Aboriginal rights is any community that existed in a particular place at the "Aboriginal date." As was said by the Court in *Daniels*: They are all

---

[62] In the usual case they are also their relatives.

[63] It is outside the scope of this article to demonstrate that the tests for proof of Aboriginal rights are also unfair in comparison with the tests developed by the common law courts for proof of local customary law in Britain and in its colonial Empire. For further discussion, see Paul LAH Chartrand, "Defining the Métis of Canada: A Principled Approach to Crown-Aboriginal Relations" in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Irwin Law, 2008) 27.

[64] *R v Keyn* (1876), 2 Ex D 63 at 236, citing *Calvin's Case* (1608), 7 Co Rep 1.

section 91(24) "Indians."[65] They are also all Aboriginal communities within section 35 because they lived in a specific place at the relevant time: The "Aboriginal date."

In recent cases, judges have been deciding that the choice of political representatives of an Aboriginal rights-bearing community is a matter for the exercise of internal decision making by the community. It is not a subject-matter within judicial authority to determine. This judicial development is an important recognition that not all matters relating to social and political aspects of a section 35 Aboriginal community are justiciable.

Self-naming practices fall into the same category of political and social matters that are purely internal to the section 35 Aboriginal community. The name by which a community wishes to be known is not a part of the test for proof of Aboriginal rights. An Aboriginal community claiming an Aboriginal right in court is not required to tell the judges about its self-naming preferences chosen from Canada's illustrative list of named groups, Inuit, Indian, or Métis. Furthermore, the norm of self-determination requires respect and acknowledgement by the courts for the proposition that a people is free to call itself by its preferred name.

In effect, the addition of the term "Métis" to the open-ended list in section 35 does not alter the point that section 35 recognizes and affirms the rights of all the Aboriginal peoples, regardless of self-naming practices and regardless of the labels attached to them by outsiders.[66]

The same result would apply if section 35 made no reference to the Métis people. Harry Daniels convinced Prime Minister Chrétien to insert the term for greater certainty to deal with the concern that persons and communities that were not recognized in the federal *Indian Act* would be included. Daniels also took the view that the Native Council of Canada included all "non-status Indians" who were its constituents at that time in its understanding of the term "Métis." This view is another example of the political adoption of a model of civic nationalism amongst Aboriginal organisations, as previously noted in the case of the Métis National Council.

It does not matter whether persons or communities are characterized as Métis or as "non-status Indians" for section 35 purposes. They are all "non-status Indians" because they do not have the legal status conferred by the *Indian Act*. But they are Aboriginal people within the meaning of section 35 if they meet the tests established for proof of Aboriginal rights.

---

[65] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 46 [*Daniels*]. The "Indian" is a fiction invented by the intruders to North America. The term acquired constitutional status in the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5. It acquired legal status in the *Indian Act*, RSC 1985, c I-5. The "Indian" fiction has been adopted for various purposes by some of the Ab-original inhabitants, which is their prerogative. In the United States, there are federally recognized "Indian tribes." In Canada the term "First Nations" has recently replaced the term "Indians" in general references.

[66] For an example of an analysis involving outsider-labeling of Aboriginal peoples, see *Reference as to whether "Indians" includes in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] SCR 104.