Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters | Faculty Scholarship

2017

Métis Action, Canadian Law and Historical Research: Preliminary Thoughts about Strategies for Current Efforts

Signa A. Daum Shanks
Osgoode Hall Law School of York University, sdaumshanks@osgoode.yorku.ca

Source Publication:
Aboriginal Policy Studies Vol. 6, no. 2, 2017, pp. 132-141

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

Part of the Indian and Aboriginal Law Commons

Repository Citation
Daum Shanks, Signa A., "Métis Action, Canadian Law and Historical Research: Preliminary Thoughts about Strategies for Current Efforts" (2017). *Articles & Book Chapters*. 2668.
https://digitalcommons.osgoode.yorku.ca/scholarly_works/2668

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

aboriginal policy studies

Commentary

Métis Action, Canadian Law and Historical Research: Preliminary Thoughts about Strategies for Current Efforts

Signa A. Daum Shanks
York University

aboriginal policy studies Vol. 6, no. 2, 2017, pp. 132-141

This article can be found at:
http://ejournals.library.ualberta.ca/index.php/aps/article/view/28314

ISSN: 1923-3299

Article DOI: https://doi.org/10.5663/aps.v6i2.28314

aboriginal policy studies is an online, peer-reviewed and multidisciplinary journal that publishes original, scholarly, and policy-relevant research on issues relevant to Métis, non-status Indians and urban Aboriginal people in Canada. For more information, please contact us at apsjournal@ualberta.ca or visit our website at www.nativestudies.ualberta.ca/research/aboriginal-policy-studies-aps.

UNIVERSITY OF ALBERTA
FACULTY OF NATIVE STUDIES

Indigenous and Northern Affairs Canada
Affaires autochtones et du Nord Canada

Métis Action, Canadian Law and Historical Research: Preliminary Thoughts about Strategies for Current Efforts

Signa A. Daum Shanks[1]
York University

I. Introduction: Great Purpose, Great Tasks

Given the chatter and more substantive concern about Indigenous peoples as of late, many different people and institutions are both recalling what they have done (or have not done) in the past and what they will do next.[2] While they do so, and evident in comments from everyone from the Prime Minister (Trudeau 2015) to a rally protester, the subject of *how* to move forward is also of issue. Within these conversations, non-Indigenous places and peoples have contributed much to the knowledge used to make more informed decisions (Eberts 2014; Slattery 2007). At the same time, Indigenous researchers and activists also ask themselves to consider what efforts succeeded, what failed, and what (if any) specific strategies should be adopted and encouraged (Andersen 2014). Making allies is always important, and constructing an Indigenous-sourced agenda is fundamental to getting both the amount and quality of Indigenous information to increase and improve. After all, so often a problem is founded on the point that Indigenous voices were not part of a policy's or action's form.

My words here are framed to show my desire that more Indigenous-sourced data and methods be part of all efforts regarding Indigenous issues. But they are also more specifically focused on the interests of Métis parties struggling with how to get Canadian law to recognize those same matters. By recalling a history of Métis experiencing inaccurate or wrong labels, being forgotten or intentionally omitted, or being considered not Indigenous enough—even by other Indigenous peoples—it is clear that massive correction to Canada's basic knowledge about the Métis is imperative. Given the numerous times when the Métis have been referred to as a type of "forgotten peoples" (for example, Lischke and McNab 2007), and as the pattern of labelling them wrongly continues, it might be difficult to decide where to focus one's professional energy (IPHRC 2005, 3). But my reflections can certainly include one place—the courtroom. But even before delving into stories about the past or entering a courtroom, I would like to think about strategies that keep the *what* and the *how* in mind. Given the stakes, I would like to argue that thinking aloud about strategy is a must. It is not for private circles alone—it for others to witness so that they wonder more

1 The author would like to thank Marilyn Poitras and Brenda Macdougall for comments about the presentation for which this effort originates. Jennifer Wong provided very helpful research.

2 One example of a formalized guideline on ethics and responsibilities includes the National Aboriginal Health Organization's *Principles of Ethical Métis Research,* http://www.naho.ca/documents/metiscentre/english/PrinciplesofEthicalMetisResearch-descriptive_002.pdf.

ISSN: 1923-3299

about why we are giving so much time and thought to our cultural, legal, and political place in Canada. Given the attention paid to some concepts such as “reconciliation” and “land claim,” for example, the potential impact of what we do is significant. We have a responsibility to make things easier for those we are concerned about today, and we must make the future less difficult for those who are to follow our paths.

I would like to introduce here the inspiration for my set of concerns. That inspiration is specific to one location, but I hope to suggest that it resonates beyond its place. It shows the importance of history, the interest in modern recognition, and the pride of cultural ways that can continue over time. Like many things that inspire us, it is a place that we might take for granted—a display put up outside a small village in Canada’s northwest. I hope that what I saw there will not be taken as exhaustive or exclusive, but rather as a way to help gather thoughts about planning what comes next.

II. Seeing Signs, Imagining Tasks

What does an image tell us? The picture above, taken in northwestern Saskatchewan, displays two signs, each with its own purpose. One is about conservation, one is about acknowledging the tradition of Métis territory. Neither one is a surprise, and each one inspires thoughts about history, protection and pride. The signs are in a region integral to Métis histories. They are also located in an area that is historically treatied. So not only do the signs’ notions introduce Métis concerns, they also rub up close to First Nations’ roles

in law and trigger questions about inter-Indigenous existence—including the legal roles Indigenous nations exclusively have.

Besides reminding those who pass by about a matter often labeled an "overlap" (which is vital to acknowledge, but is left for evaluation elsewhere) (Daum Shanks 2006), the signs can remind us that people in the community consider their messages a justified pairing. An obvious question arises: What is necessary to do in order for both signs' purposes happen at the same time?

Perhaps using the law is not necessarily the way to get respect for conservation and traditional land use. But it is always possible that some parties will decide that there are benefits to getting legal recognition for the pursuit of land renewal and cultural self-protection. Given that some people living close to these signs have indeed filed a "land claim,"[3] and the issue of an "overlap" will invariably be debated as a result, the matter of citing historic roles and Canadian legal standards is part and parcel of how these signs are understood by whoever sees them. Difficulties could arise in how "conservation" and "traditional lands" are defined by various interested parties. But whatever an individual's opinion, precedents, statutes, and policy ideas will be used repeatedly. Thinking about the past, imagining the future, and doing so with various analytical tools will be tasks those interested in Métis cultural integrity will and must take on. Sometimes, the topic of conservation will reveal its "shared role" aspect that illustrates how more than one social group must achieve cooperation with each other to ensure their own separate survival (Anguelovski and Martinez Alier 2014, 169, 171–74). Just as frequently, any pursuit of Indigenous title will contain an assumption of "exclusivity." In that way, the assertion of these two signs has the potential to trigger social, political, and legal complication. Although there are, of course, many activities all of us could do to become more prepared for, and therefore more acutely aware of, the conversations/debates/litigation that the signs inspire. Below are some of the topics I have thought about and hope will have some application to whatever understandings about the past and modern legal views develop in and around Île-à-la-Crosse. But I'm hoping they also reflect another concern with finding ways in which all of us who are focused on Métis peoples can be alert wherever we are—and whatever signs or signals we observe.

First, regardless of whatever positive views history circles have of the progress they have shown in finding and then presenting Métis histories, professional historians are still slow to include Métis stories as fully as might be the case (Kearns and Anuik 2013, 8–9). As a result, *the amount of historical effort needs to increase exponentially, and people contributing to those efforts must continue to remind their colleagues of the significant shortage here.* All of us, regardless of what type of academic department we live in, must write and say more about the past. Notably, those who have had little exposure to Métis culture's past have sometimes considered efforts that analyse Indigenous peoples as examples of "presentism" (Clark 2003, 4–20). So we need to be prepared for that critique to arise as we produce presentations

3 Morin et al v. Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Province of Saskatchewan. [1994] Q.B. No. 619 of A.D. (Statement of Claim).

about the past. Certainly, it could be that in our enthusiasm to tell others about the impact of our findings, we have been too quick to link them to modern circumstances in an effort to translate the consequences of our analysis. But hearing criticism regarding this will, in my view, also be par for the course because our audience's basic knowledge about Métis history is so low. Did Métis possess one of the most profound practices of conservation in Canada's history? As an effect of finding what I did, I believe so wholeheartedly. As a result, I must be prepared to respond to questions about my techniques of persuasion as much as my results. When we produce more, we will be backdating some themes in Canada's past as well. But if an Indigenous community is considering modern legal action, backdating and support from others is especially imperative. It is heartening to see how those who are not necessarily part of history departments have included exemplary historical analysis in what they do (Gaudry 2014, 137–39; Macdougall 2014; Chartrand 2016). Those works are particularly helpful when trying to challenge works that currently perpetuate the myth of Métis being a "in-between" stage, rather than a culture of its own or not ultimately Aboriginal.[4] Wherever we are located, we simply must get better at writing more about the past to help colleagues, our Métis circles, and ourselves.

Second, those working on Métis matters within the Canadian legal regime must learn more about how the words "historic" (significant) and "historical" are different. An event in the past is told to us historically; an event can also be of historic importance. Getting this distinction right means, in practical terms, learning that describing the past properly includes appreciation for the description's evolution, and detailing any context that lets shifts, distinctive views, and trends in emphasis be understood as well. Just as one judicial decision is part of or a response to a trend, the same can be said of any book, article, or expert testimony. Perhaps not every source that evaluates an issue can be mentioned when providing analysis of that topic. But the very idea that a judge or lawyer might argue that s/he does not have the time or the responsibility to appreciate historical debate is short-sighted and flaws the litigation's larger goals due to what they do not include. Indigenous rights cases will necessarily make use of historical data,[5] so the idea of using one source and not explaining its context means taking a risk that a decision will be read and rejected rather than being considered helpful—especially when dealing with a situation involving a Métis party.[6]

Similar to how a topic in law emerges from a set of cases, legislation, and policy debates, interpretations about the past are just that—interpretations—and our impressions develop after a number of views are layered together. As a result, the legal community must learn

---

4 For an example that has been challenged for its reinforcement of an "in-between" role, see John Ralston Saul, *A Fair Country* (Canada: Viking Canada, 2008).

5 *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 at para 53. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do.

6 Consider the use of a source by Justice Abella in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 17, [2016] SCJ No. 12. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do.

what "historiography" means, and consider its role in the construction of cases about Indigenous peoples.[7] It is not just a matter of creating a better backdrop for a Métis (or any) land claim during an oral argument's introduction or creating a picturesque first page in a statement of claim; it is about ensuring the best possible evidence is used to evaluate an argument. That means realizing that just as being an "amateur lawyer" would be an inappropriate strategy, not considering historiography is a way to ensure some party is acting like an "amateur historian" during litigation and judicial writing.

Third, lawyers (and judges) have another task to improve upon. In appreciating their roles as translators, and in getting a better appreciation for history and historical interpretation, they will find that advising clients will hopefully be less difficult to justify if, as early as they can, they admit that the scenario in front of them is not easy to comprehend and is therefore risky to predict. Of course, it is difficult to imagine any lawyer admitting that s/he has not been candid with a client about a circumstance's probability for success. After all, that is what our profession demands we do. But given a social understanding of Indigenous peoples' nervousness about the policing, judicial, and government systems they experience, surely we must also admit that too many people must have many experiences of feeling excluded/misled during litigation. And some of that exclusion has been created by lawyers making it sound like a circumstance can be easily understood by the legal and judicial profession. Too often, legal and judicial writing fails to admit the complicatedness of a matter up front. Learning more about history is one way to improve trust, and it also is a way to get a better lay of the argumentative land. And that surely improves the chances of knowing a scenario's odds in court as well. Whether it makes negotiation, litigation, or political manoeuvres stronger, knowing the past can make the task of breaking bad news about viability less arduous. The Federation of Law Societies has paid some attention to the consideration of cultural backgrounds when devising educational mechanisms and better client service (FLSC 2011, 13–14, 48, 66; 2009). But representing a client whose issue pertains to "Indigenous" rights means more than simply dealing with a client who happens to be Indigenous. S/he is part of a different regulatory scheme, and different treatment socially, and deserves honest and supportive guidance within the judicial system.[8] So not only do lawyers need to become deeply acquainted with historiography, they also must admit that arguing about Indigenous property rights is more complicated than a typical argument about land title (Kleer et al. 2012). And learning more history is one way to give stronger and more respectful advice to their Indigenous clients. Law Societies, individual lawyers, and especially those claiming to focus on Indigenous matters must be called on

---

7 Justice Binnie responds to the call to appreciate historiography in *R. v. Marshall [*1999] 3 SCR 456 at para 37. http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1739/index.do.

8 "Law Group Wants a Stop To Preying On Residential School Victims: Resolution At Annual Meeting," *Canadian Press NewsWire*, Aug. 20, 2000, http://ezproxy.library.yorku.ca/login?url=http://search.proquest.com/docview/359568052?accountid=15182; Leslie Perreaux, "Merchant Accused of Misleading Client Over Potential Rewards: Man Details Lawyer's Pitch To School Abuse Victims," *Saskatoon StarPhoenix,* Saskatoon, SK, Sep. 6, 2000, http://ezproxy.library.yorku.ca/loginurl=http://search.proquest.com/docview/348597254?accountid=15182.

what exactly they are doing to justify any claim that they know more than others about proper interaction with Indigenous clients regarding strictly Indigenous concerns.

The next two matters can apply to both academics and those who work within the legal community. Both sectors can, first, provide greater details to explain their respective understanding of what an "economic" role actually is. In broadening where we see economic activities, we can increase our knowledge of Métis peoples. But we also remind the academy and society that economic conditions are not merely about monetary worth. In thinking about economic stability, we can consider financial arrangements, profit, and corporate matters. But kinship ties, land use practices, and even oral histories contain data about what seems impossible to replace and what individuals consider less relevant. Given the role the Métis had in Canada's fur trade, this action of expanding our normative understanding of economics is particularly vital. While earlier histories and economic analyses contributed to the reinforcement of a narrower understanding, efforts by researchers such as Arthur Ray (2010) and Ann Harper-Fender (1981) illustrate economic relationships over a period of time, and place less focus on currency and greater emphasis on the role of trust between negotiating parties. Elongating and deepening the process of observing economic roles means Indigenous parties become more active agents in Canada's economic history, and the impact of Métis ways upon those histories becomes even more profound. When understanding expands, the number of activities Indigenous parties can argue as fundamental to their culture grows as well. The idea of Métis culture, trade, and constitutional protection of that trade between Métis and non-Indigenous peoples remains underexplored academically and in litigation. Not only can this area be researched more, the contents of that research, explaining the history of trade and its implications, can be expanded.

The next thing both researchers and litigators can do is contend that an increase in the quantity and quality of Métis histories will also help to demonstrate why Métis matters are relevant to more than just arguing about s.35 rights. Besides affecting the interpretation of Aboriginal and treaty rights, Métis histories help the courts and Canada (re)discover the evolution of business trends, environmentalism, municipal law, and various forms of dispute resolution. Given the Métis role with fur trade companies, how families determined a region's natural geographic functions, and the use of mechanisms to reinforce territoriality, family law, and even crime, Métis perspectives are crucial to changing what we think about many related topics. Consider the interest in the area of dispute resolution. The contribution more Métis histories could make to this topical subject is significant (Bell 2013, 249). The potential for Métis perspectives to influence numerous topics in law is high, especially considering the low level of knowledge regarding Métis history / histories. Thinking about the Métis means thinking about creativity, stability, and process. Any subject pertaining to Canada's regulations and social norms will benefit from someone asking: What was the Métis history of that topic, and what do the Métis do about that matter today?

III. Conclusion: Can Two Messages Create a Third Sign?

The five concerns I outline above developed out of an interest in how history and law

intersect for the Métis in general, but with special recall of how the matters of "conservation" and "traditional lands" can coexist in particular. Canada has what I consider a case of social "cataracts" about our role—it is aware the Métis are here, it thinks there might be a link to its own situation, but it does not feel capable of eliminating a type of haze between us and the rest of the country. I can suggest some subjects worthy of note to work on immediately and in the long run. But is there any other possibility that my contribution here could also help ensure that Métis roles gain more prominence?

I would like to conclude by noting that another possibility becomes visible when the above ideas gain momentum. In increasing the amount of data about history, working hard to understand the process of gathering history, thinking about being more supportive about Métis stories in the court system, and seeing economic conditions and Métis roles more often than we do now, we will see that the historic theme of the cultural relevance of Métis trade becomes even more evident and more relevant to imagining s.35 argumentation. As an activity, and as one that must not conflict with precedents, Métis trade as a constitutional prerogative gains its own strength (O'Toole 2015, 677, 682, 685). But just as notably, the issue of trade within the history of Métis ways around Ile-a-la-Crosse illustrates what I consider a historic form of sustainable development. Vital to the culture, but not reinforced in a way that ultimately harmed the region social's relationships or ecosystem, the village's modern concern with conservation is partly energized by villagers' memory of the place as having demonstrated conservation so well in the past. Perhaps one of the most notable examples of how the Bruntland Commission defined sustainable development—as a matter of social stability in which economic roles are not imagined as merely financial in nature— can be done by encouraging the constitutionalizing of the village's interest in conservation (World Commission 1987, 16–17). In other words, s.35 and a Métis community's history become the open window through which sustainable development can be made into a required legal norm rather than a social pursuit.

Here is where I would like to conclude that some arguments in law *can* be significant for the effects they have—even if they represent only partial wins. In arguing for territoriality, one of the activities the Métis will detail from ILX is the act of conservation. The amount of evidence in the community will speak to the strong role of trade, while perpetuating land conditions at the same time. Non-Indigenous parties documented those efforts, and other outsiders reinforced them as well. The long period of post-contact interaction without typical forms of arrangements used today to denote Crown sovereignty (such as scrip or treaty) means that the village's space is one of the strongest examples of this type of social equipoise that reinforced economic pursuits by letting the space renew itself. In other words, an s.35 argument about title just might be the way to trigger a conversation about sustainable development being an Aboriginal right. The two signs, then, intertwine together to make a new image: an Indigenous party's efforts made the goal of sustainable development constitutionally necessary.

Most of the time, law is considered slower than social norms in ensuring progress. Sometimes, however, society can be engrossed in so many pursuits that another matter

becomes knotted deep within an overall existence. When considering the matter of Métis peoples and treaties, and how to breathe analytical life into the history of formal agreements between Métis and other parties, we should think about how to do so most successfully. My words here are meant as a preliminary way to offer an example of how assembling a set of tasks might allow a type of solution to show itself. An interest in history, the question of that history within law, and then the effort required to perform those tasks have made me confident in what a ditch's signs can inspire us to consider about sustainable development, and the leadership a Métis argument can provide for all of Canada. As in the past, some ditches were considered only a place of remnants and forgotten ways, and were ultimately less important than the more popular road beside them. Here, I hope that thinking about the signs' fullest impact can reveal some creativity about how we move forward in the future with all the knowledge we are committed to gathering (Campbell 2011).

Rather than unimportant "road allowance people," the Métis were and are the ultimate sustainable developers, and Canadian law can be used to reinforce that point. Too often considered by others to exist in a type of "wasteland,"[9] we are instead in a place of prominence and potential. It is up to us, as researchers of the past, as lawyers, and as Métis, to make the most of that position (Scott 1998, 309–41). We must reconcile that we have that responsibility to move forward proudly, carefully, and kindly. Seeing some tasks I can do that pertain to conservation, I find that tradition—and my sense of wonder at the constitutional possibility when the two are intertwined together—is my way of contributing to such a pursuit.

9 *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 14, [2016] SCJ No. 12. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do.

Bibliography

Andersen, Chris. *Metis: Race, Recognition and the Struggle for Indigenous Peoplehood.* Vancouver: UBC Press, 2014.

Anguelovski, Isabelle, and Joan Martinez Alier. "The 'Environmentalism of the Poor' Revisited: Territory and Place in Disconnected Global Struggles." *Ecological Economics* 102 (2014): 167–176.

Bell, Catherine. "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks." In *Intercultural Dispute Resolution in Aboriginal Contexts,* edited by Catherine Bell and David Kahane, 241-279. Vancouver: UBC Press, 2013.

Campbell, Maria. *Stories of the Road Allowance People: The Revised Edition*. Saskatoon: Gabriel Dumont Books, 2011.

Chartrand, Larry. "Indigenous Peoples: Caught in a Perpetual Human Rights Prison." *University of New Brunswick Law Journal* 67 (2016): 167–186.

Clark, Jonathan. *Our Shadowed Present: Modernism, Postmodernism, and History.* Stanford: Stanford University Press, 2003.

Daum Shanks, Signa. "Who's the Best Aboriginal? An 'Overlap' and Canadian Constitutionalism." In *The "Place" of Justice*, edited by the Law Commission of Canada, 148–176. Black Point, NS: Fernwood Publishing, 2006.

Eberts, Mary. "Knowing and Unknowing: Settler Reflections on Missing and Murdered Indigenous Women." *Saskatchewan Law Review* 77 (2014): 69–104.

Federation of Law Societies of Canada. *Task Force on the Canadian Common Law Degree: Final Report.* October 2009.

———. Common Law Degree Implementation Committee: Final Report. August 2011.

Gaudry, Adam James Patrick. "Kaa-tipeyimishoyaahk—'We Are Those Who Own Ourselves': A Political History of Métis Self-Determination in the North-West, 1830–1870." PhD diss, University of Victoria, 2014.

Harper-Fender, Ann. "Discouraging the Use of a Common Resource: The Crees of Saskatchewan." Journal of Economic History 41.1 (March 1981): 163–170.

Indigenous Peoples' Health Research Centre. Final Report- Knowledge Translation and Indigenous Knowledge Symposium and Consultation Sessions. Saskatoon: IPHRC, 2005.

Kearns, Laura-Lee, and Jonathan Anuik. "Metis Curricular Challenges and Possibilities: A Discussion Initiated by First Nations, Metis, and Inuit Education Policy in Ontario." Canadian Association for Curriculum Studies 12.2 (2015): 6–36.

Kleer, Nancy, et al. Preface to Aboriginal Law Handbook, 4th ed., iii–v. Canada: Thomson Reuters, 2012.

Lischke, Ute, and David T. McNab, eds. The Long Journey of a Forgotten People: Metis Identities and Family Histories. Waterloo: Wilfred Laurier University Press, 2007.

Macdougall, Brenda. "Speaking of Metis: Reading Family Life into Colonial Records." Ethnohistory 61.1 (2014): 27–56.

National Aboriginal Health Organization. Principles of Ethical Métis Research. http://www.naho.ca/documents/metiscentre/english/PrinciplesofEthicalMetisResearch-descriptive_002.pdf.

O'Toole, Darren. "Manitoba Metis Federation Inc. v. Canada (Attorney General): Breathing New Life into the 'Empty Box' Doctrine of 'Indian Title.'" Alberta Law Review 52.3 (2015): 669–88.

Ray, Arthur J. "Ethnohistorical Geography and Aboriginal Rights Litigation in Canada: Memoir of an Expert Witness." Canadian Geographer 55.4 (2010): 397–406.

Scott, James C. Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed. New York: Yale University Press, 1998.Slattery, Brian. "The Generative Structure of Aboriginal Rights." Supreme Court Law Review 38.2 (2007): 595–628.

Trudeau, Justin. "Prime Minister Justin Trudeau Delivers a Speech to the Assembly of First Nations Special Chiefs Assembly." December 8, 2015. http://pm.gc.ca/eng/news/2015/12/08/prime-minister-justin-trudeau-delivers-speech-assembly-first-nations-special-chiefs.

World Commission on Environment and Development. Report of the World Commission on Environment and Development: Our Common Future. 1987.