R. v. Powley: Building a Foundation for the Constitutional Recognition of Métis Aboriginal Rights

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**R. v. Powley:**
Building a Foundation for the Constitutional Recognition of Métis Aboriginal Rights

Lori Sterling and Peter Lemmond*

I. INTRODUCTION

On October 22, 1993, Steve and Roddy Powley shot a bull moose just north of Sault Ste. Marie, Ontario. A week later, provincial conservation officers charged them for hunting moose without a licence and possession of unlawfully hunted moose. In their defence, they asserted that they are Métis¹ and as such, have a constitutional Aboriginal right to hunt for food. Almost fully 10 years later, on September 19, 2003, the Supreme Court of Canada upheld their rights. This decision marked both the end of a long legal process extending across four levels of court, and the beginning of newly-recognized constitutional rights held by Métis under section 35 of the *Constitution Act, 1982*.

The purpose of this paper is three-fold. First, it will sketch out the essential elements of the Supreme Court of Canada’s decision in *R. v. Powley*.² What is conspicuous about the Supreme Court of Canada’s approach is how much it endeavours to follow the existing jurisprudence dealing with First Nations. Next, the paper will highlight other possible approaches to section 35 Métis Aboriginal rights that were before the Court but were not referred to in its reasons. Finally, this paper will

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¹ For the purposes of this article, “Métis” (capitalized) is used to refer to persons or communities that hold Aboriginal rights as Métis under the *Powley* test.

canvas those parts of the test that are most likely to generate future litigation involving the Métis in Ontario.

II. OVERVIEW OF THE POWLEY DECISION

Given its landmark significance as the only final appellate court decision in any common law jurisdiction addressing constitutionally-entrenched Métis Aboriginal rights, the decision of the Supreme Court of Canada in Powley is both concise and surprisingly devoid of academic or jurisprudential references. It is only 55 paragraphs long, applies only one decision and refers to only two others. As a result, this decision might be described as a sound but circumscribed initial step in the development of a test for Métis Aboriginal rights.

Reduced to essentials, Powley transposes the test for addressing Indian assertions of Aboriginal rights laid out in R. v. Van der Peet,3 to the determination of Métis Aboriginal rights by modifying the timing requirement from a time prior to contact with Europeans to a time preceding the establishment of effective European control.4 Thus, while the purpose of section 35 for First Nations is to give recognition of rights held at the time of contact with Europeans, the purpose of the inclusion of Métis is more open-ended. It is:

…based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.5 [Emphasis added.]

Similar to the test for establishing First Nation Aboriginal rights, the establishment of Métis Aboriginal rights requires:

• an accurate description of the alleged Aboriginal right;

• establishment of a historic rights bearing Métis community at a particular point in time which has continued into the modern day;

4 Powley, supra, note 2, at paras. 10, 14, 17-18 and 36-40.
5 Id., at para. 13.
proof of a claimant’s membership in the contemporary Métis community;

evidence that an Aboriginal practice was integral to the claimant’s distinctive historic community culture and has been carried through to the modern day by the community;

no extinguishment of the right by treaty or other government conduct; and

where the right was infringed, no justification of that infringement.

Applying the above approach, the Supreme Court in Powley concluded that “the right being claimed can...be characterized as the right to hunt for food in the environs of Sault Ste. Marie”.6 Importantly, this was not a case about commercial hunting or fishing. The evidence was that the moose was for personal use.

After determining the nature of the Aboriginal right in issue, the Supreme Court then turned its attention to identifying the historic and contemporary rights bearing Métis community. Although this paper will explore in Part III the meaning of “community” in more detail, suffice it to note at this point that the Court held that “demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights”.7 In this case, both sides recognized that there had been a historic Métis community at Sault Ste. Marie that had emerged by the early 19th century.

With respect to a modern day Métis community, the Court required little evidence of its existence. Indeed, it held that the Sault Ste. Marie Métis community’s lack of political or social visibility from the early 1900s onward did not mean that it did not continue to exist. The Court was prepared to accept that the community existed continuously primarily on the basis of the presence of Métis organizations in the area and

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6 Id., at para. 19.
7 Id., at para. 23.
the fact that there were Métis families in the vicinity who had kinship ties.

Turning to the issue of verifying the claimants’ membership in the contemporary Sault Ste. Marie Métis community, the Court sought to ensure that only Métis having ancestral connections to the historic Métis community could lay claim to section 35 Aboriginal rights. It held that it would look “to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection and community acceptance”. Each of these criteria must be met before membership can be established. The Court also noted that evidence of longstanding identification and adoption of community culture, customs and tradition are required to demonstrate membership. In Powley, there was solid genealogical evidence that the Powleys descended directly from the Lesage family, one of the early Sault Ste. Marie Métis families. It was therefore not necessary to discuss non-hereditary ways in which membership could be established.

Because the Powleys’ ancestors were members of the Batchewana Band from the 1850s to around 1918 and received benefits under the Robinson-Huron Treaty, the Supreme Court of Canada was called upon to address the effect of this history on the Powleys’ ability to enjoy Métis Aboriginal rights. The Court held that the “fact that the Powleys’ ancestors lived on an Indian reserve for a period of time does not negate the Powleys’ Métis identity…. [w]e emphasize that the individual decision by a Métis person’s ancestors to take treaty benefits does not necessarily extinguish that person’s claim to Métis rights. It will depend, in part, on whether there was a collective adhesion by the Métis community to the treaty”. In this case, because there had been no collective adhesion, it could not be said that the historic community had relinquished its rights.

This point has interesting potential consequences for First Nations. For example, in the Sault Ste. Marie area there are First Nations members that have Métis origins. The Court left open the possibility that these First Nation members may be able to assert Métis Aboriginal rights in addition to or instead of treaty rights.

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8 Id., at para. 30.
9 Id., at para. 35.
The heart of the *Powley* decision is found in the discussion of the relevant time frame for assessing when a Métis community must come into existence before it can lay claim to section 35 rights. All parties before the Court recognized that the point of contact test applicable to First Nations would not provide for Aboriginal rights for the Métis as it would not allow for the ethno-genesis of a Métis community. The question then became how far forward should the “clock” move to allow for Métis community rights. At one extreme, it was suggested that the mere existence of a modern day Métis community would suffice. At the other extreme, it was suggested that section 35 was never intended to create Métis Aboriginal rights and was limited to assertions of Métis treaty rights. In the middle ground were two possible options for the time by which the community must have existed: at the point of the assertion of British sovereignty and the point of effective European control. The Court chose the latter:

…the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community’s distinctive existence and relationship to the land. 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.10 [Emphasis added.]

With respect to the Sault Ste. Marie area, the Supreme Court found the relevant date of effective European control to be approximately 1850. There was no dispute that the point of European assertion of sovereignty had been around 1763, prior to the emergence of a distinct Sault Ste. Marie Métis community. As discussed in the following section of this paper, the legal test of assertion of sovereignty had been referred to by members of the Court in earlier Aboriginal cases but it was not mentioned by the Court in *Powley*. By 1850, however, there was no dispute that a Métis community had formed in Sault Ste. Marie. In fact, it was at its peak in terms of population and cultural develop-

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10 *Id.*, at para. 37.
ment. Shortly after 1850, the community dispersed, with many members moving onto the nearby reserves.

The Supreme Court also upheld the trial judge’s finding that hunting for food was integral to the historic Métis way of life at Sault Ste. Marie in the period just prior to 1850. This is an interesting finding since moose were on the verge of extinction at that time. The Métis hunting that did occur then involved mostly rabbits and other small animals. Moose hunting did not start in earnest until much later, once the population had recovered. This aspect of the decision would appear to confirm that subsistence harvesting activities are to be assessed in general rather than specific terms (e.g., hunting or fishing generally rather than hunting or fishing for particular species).

Having concluded that the Powleys enjoy an Aboriginal right as Métis to hunt for food, the Court found that Ontario’s regulatory scheme infringed this right and that this infringement was not justified. The Court concluded that there had been a blanket denial of a Métis right to hunt for food that could not be justified.

III. ALTERNATIVE APPROACHES TO MÉTIS RIGHTS NOT DISCUSSED BY THE COURT

As noted above, one of the central findings of the Supreme Court of Canada in Powley is that the time frame relevant to identify Métis Aboriginal rights protected under section 35 is “the period after a particular Métis community arose and before it came under the effective control of European laws and custom”. Despite the critical importance of this aspect of the Powley test, the Court provides little explanation of why, as a matter of law, it is the appropriate measure of Métis Aboriginal rights, and more particularly, why it is more appropriate than the assertion of sovereignty approach.

The Court explains the relevant time frame for identifying Métis Aboriginal rights as being a necessary consequence of the purpose of

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11 *Id.*, at paras. 19-20, 41 and 43.
12 This approach may have ramifications for First Nations who have, at times, had their activities assessed in more specific terms, e.g., herring spawn on kelp in *R. v. Gladstone*, [1996] 2 S.C.R. 723.
13 *Id.*, at paras. 47-50.
14 *Id.*, at para. 37.
section 35 as it pertains to the Métis, stating that “[t]he constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control”. It further found that:

Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

Why it is that section 35 “requires” the recognition and protection of the historically important features of Métis communities prior to the time of effective European control is not clearly stated. Although the Court’s conclusion is neither surprising (it had been recommended by the respondent from trial) nor unreasonable (there was a reference to the concept of the imposition of European laws and customs in McLachlin J.’s dissenting reasons in Van der Peet), it is curious that such an important conclusion was reached without much in the way of an examination or explanation of its juridical foundations. The main problems with the absence of any detailed discussion of the jurisprudential underpinning to the decision are that it could diminish the ability to predict how unanswered questions will be resolved in the future and to ensure the consistency that has informed much traditional common law judicial reasoning.

Prior to this decision, the Court had moored the common law of Aboriginal title to the assertion of British sovereignty. Thus, in Delgamuukw v. British Columbia, the date of the assertion of British sovereignty was used for First Nations claims. This could easily have been transposed to the context of Métis Aboriginal rights. As Ontario, Canada and other governments argued at the Supreme Court of Canada in Powley, the assertion of sovereignty is also recognized in the wider body of common law dealing with Aboriginal interests and the Supreme Court’s

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15 Id., at para. 17.
16 Id., at para. 18.
17 Van der Peet, supra, note 3, at paras. 247-48.
own decisions\(^{19}\) as being significant when ascertaining the Aboriginal rights and title. Further, in *R. v. Morin*, the lower court had looked to the assertion of sovereignty as the relevant time frame in recognizing a Métis Aboriginal harvesting right.\(^{20}\)

In the absence of express reasoning, it is left to inference to explain why it is that the Supreme Court of Canada chose effective European control as the relevant date for identifying Métis Aboriginal rights. One possible rationale is that an underlying objective of section 35 is to provide as wide as possible an opportunity for a Métis community to come into existence and assert section 35 rights. Having accepted that the inclusion of the Métis in section 35 must mean that Métis enjoy protected Aboriginal rights, the Court appears to have wished to avoid treating potential Métis communities in eastern and central Canada, where the assertion of British sovereignty arguably occurred earlier, differently than Métis communities further west, and adopted a test that would attain this end.

On the facts of *Powley* itself, choosing the date of assertion of sovereignty may well have meant that there were no section 35 Métis community rights because the Sault Ste. Marie community likely did not come into existence until after 1763, the date of assertion of sovereignty. In 1763, the Treaty of Paris ceded jurisdiction over an area including Sault Ste. Marie to the British Crown. In contrast, effective control was held to be tied to the signing of treaties between the British Crown and First Nations and large scale European immigration which occurred much later, soon after 1850. By looking to effective control, the Court was able to recognize the existence of section 35 Métis Aboriginal rights in the vicinity of Sault Ste. Marie.

The consequence of this approach is that the Aboriginal rights of the earliest Aboriginal peoples of Canada may encompass a considerably narrower range of practices and may be significantly harder to establish than those of the Métis. First Nation societies at the point of European contact were far less likely to have engaged in activities reflecting a

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European influence, such as commercial trading, than when effective control was ultimately established. For example, in the case of Sault Ste. Marie, over 200 years separate the point of European contact from that of effective control, during which time trading networks became more extensive, sophisticated and commercial. Similarly, the oral evidence and historical records from the time frame of when effective control was established are far more voluminous than those available from the point of European contact.

This then raises the question as to whether the point of contact test itself will survive for First Nations. Will there be a perceived unfairness if Métis Aboriginal rights are established at a time when commercial activity was generally more prevalent among all Aboriginal peoples? First Nations communities typically do not appear to have engaged in the same kind of commerce at the time of contact. Certainly, the Métis time frame of pre-control would have made a difference to the determination of the Sto:lo First Nation’s Aboriginal right to trade fish in the Van der Peet case.

A second area the Supreme Court chose not to discuss was the approach taken to persons of mixed ancestry found in common law jurisprudence, particularly from other jurisdictions. With the submissions of the parties and 17 intervenors, the Court had a rich vein of materials to draw upon to sketch the jurisprudential foundations of its reasons. Much of that material, however, demonstrated that persons of mixed ancestry were not recognized as a distinct class of rights-holders holding distinct rights.

The Supreme Court’s reluctance in Powley to refer extensively to existing jurisprudence is not typical of its past practice in landmark Aboriginal rights cases. By way of example, in Van der Peet, which, like Powley, articulated for the first time the legal principles that are to be applied in identifying the Aboriginal rights held by a class of section 35 rights holders, Lamer C.J. (as he then was) considered many deci-

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21 Ontario referred to 14 Canadian decisions, 16 imperial (United Kingdom) decisions, 15 Australian and New Zealand decisions, two United States decisions, three international tribunal decisions, 23 Canadian statutes, two Canadian treaties, 15 United States treaties, six journal articles, 10 legal texts, and numerous extracts from the Report of the Royal Commission on Aboriginal Peoples, although it is not clear how much of this was accepted as admissible by the Court. These materials reached back to the mid-16th century (Buckley v. Rice Thomas (1554), 1 Plowden 118, 75 E.R. 182 (K.B.)) and provided a good overview of the development of the law of Aboriginal rights.
sions and academic articles\textsuperscript{22} and extensively discussed the jurisprudential underpinnings of the common law of Aboriginal rights.

There are several possible reasons for the absence of reference to jurisprudence from both inside and outside Canada. To begin, it may reflect the extent to which \textit{Powley} represents a first exploration of what is truly legal \textit{terra incognita}, and also perhaps the Court’s admonishment that “[a]lthough s. 35 protects ‘existing’ rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities”.\textsuperscript{23} It may also reflect a desire to provide a concise, plainly written decision that is more accessible to the general public. Finally, the Court may have thought that the jurisprudence had already been fleshed out in First Nations cases, although this does not explain the limited discussion of the rationale for the effective control approach.

\section*{IV. AREAS RIPE FOR FUTURE LITIGATION}

Although the \textit{Powley} decision raises a considerable number of issues that may ultimately be litigated, this article proposes to focus on two; namely, the identification of historic rights bearing Métis communities and the verification of individual membership in a Métis community. This is because these two issues raise practical and evidentiary concerns that both governments and the Métis are grappling with at present and that must be resolved quickly in order to avoid extensive litigation.

\subsection*{1. The Meaning of Community}

The existence of distinctive historic Métis communities forms the core of the constitutional protection afforded Métis rights under section 35 of the \textit{Constitution Act, 1982}. As the Supreme Court of Canada explained:

The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices


that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.24 [Emphasis added.]

Although the Court in Powley acknowledged that different groups of Métis exhibit their own distinctive traits and traditions and may therefore be referred to as “peoples”, it found that “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”.25 In other words, although there may be larger Métis peoples, in order to determine section 35 Métis Aboriginal rights, one must look for a site-specific historic Métis community.

This conclusion remains the subject of debate. Some Métis groups appear to prefer to dispense with the site-specific community requirement and instead, would have Métis dealt with on the basis that they belong to a people who live generally within a larger territory, e.g., the Great Lakes environs. The fact that Métis may exist as broader territorial peoples is certainly relevant to the section 35 analysis but is not likely a sufficient or necessary basis upon which to dispense with the requirement for historic site-specific Métis communities. The wider concept of “peoples” may be relevant to determining the characteristics of a particular community. Thus, for example, the Michif language as a trait of a site specific community may not have to be proved based on specific evidence of each community where the evidence is clear that a community belonged to a wider people or “nation” that spoke Michif. Such an approach would seem to be especially warranted where it appears that the shortfall in community specific evidence can be attributed to a particular deficiency in the historical record such as the destruction of relevant fur trade post records. More generally, the close connection between the concepts of distinct “peoples” and distinct ethnic “communities” suggest that the factors used to identify the existence of distinct “peoples” also are likely to be of some value in identifying distinct communities. Nevertheless, the fact that one can draw inferences about a community based on traits of the peoples more generally is not a basis upon which to suggest that all communities within a broader territory are the same or must hold identical rights. To find otherwise would

24 Id., at para. 13.
25 Id., at para. 12.
certainly deviate from the approach to the definition of community previously adopted by the Courts in the First Nations’ rights context.

Notwithstanding the central importance it placed on specific historic Métis communities, the Supreme Court in Powley provided only very general guidance as to what is required to demonstrate the existence of a distinctive historic Métis community. It noted that “‘Métis’…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”.26 It further explained that there must be a “distinctive collective identity, shared geographic location and common way of life”.27

In order to more fully develop the criteria that demonstrate the existence of historic Métis communities, it is necessary to draw upon other sources. The decisions of the lower courts and the record in Powley are an obvious starting point. For example, the Court of Appeal noted that a community cannot be a political organization:

Neither OMAA nor the MNO constitute the sort of discrete, historic and site-specific community contemplated by Van der Peet capable of holding a constitutionally protected aboriginal right.28

The Court of Appeal further described what the historic Métis community at Sault Ste. Marie looked like. It noted that the majority of inhabitants were of mixed ancestry and that the community was a “hub of early fur trade activity”.29 As well, the Métis occupied a distinctive niche in the fur trade economy as wage earners, skilled tradesmen and farmers. They were more sedentary than the local Ojibway, and most important, they had a distinct culture with separate community structures, mode of dress, musical traditions and language.30

The Superior Court in Powley looked to Black’s Law Dictionary,31 for a definition of “community” in dealing with the issue of whether there is a present day Métis community:

26 Id., at para. 10.
27 Id., at para. 12.
29 Id., at para. 18.
30 Id., at paras. 18-20.
Neighborhood; vicinity; synonymous with locality. . . . People who reside in a locality in more or less proximity. A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges, or interests. . . . It connotes a congeries of common interests arising from associations — social, business, religious, governmental, scholastic, recreational.32 [Emphasis added.]

In spite of this definition, which begins with a physical site-specific proximity, the Superior Court focused ultimately on evidence of kinship. The court relied heavily on the evidence of defence “community witnesses” that spoke about shared family roots. In addition, these witnesses discussed shared economic and cultural activities. By way of example, one witness is quoted in the decision as being part of a community that was centred on music, picnics with berry picking and hunting.33

Finally, the trial judge emphasized cultural attributes, noting that the customs, practices and traditions of the Métis were distinctive and separate from the Ojibway. The court remarked that the Métis were “visually, culturally and ethnically distinct”.34 This point is well illustrated by the evidence of an expert cited by the court:

These people [referring to the Métis] were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between. By the end of the last struggle for empire in 1815, their towns which were visually, ethnically and culturally distinct from neighbouring Indian villages and “white towns” along the eastern seaboard, stretched from Detroit and Michilimakinac to the east to the Red River at the northwest. ... such towns grew as a result of and were increasingly dominated by the offspring of Canadian trade employees and Indian women who, having reached their majority, were intermarrying among themselves and rearing successive generations of Métis these communities did not represent an extension of French, and later British colonial culture, but rather “adaptation[s] to the Upper Great Lakes environment”.35 [Emphasis added.]

In addition to the decisions and the record in Powley, there are a variety of other sources to look to for help in defining the concept of

33 Id., at para. 34.
35 Exhibit #31, Dr. Ray’s Supporting Documents, vol. 3, Tab 7, Many Roads to Red River by Jacqueline Peterson, at 41, cited in Powley, reasons at trial, id., at para. 76.
community. The decisions dealing with Métis rights from the western provinces have shed little light thus far on the issue of what identifies a historic Métis community. This reflects the fact that in most of these cases, the primary issue has been whether the individual qualifies as an “Indian” for the purposes of one of the Natural Resources Transfer Agreements (“NRTA”) of 1930, and the Métis identity of the defendant has been conceded by the Crown. The notable exceptions are Morin and the trial decision in Blais.


37 These cases generally confirm the importance of a shared mode of life, including cultural and economic practices and activities. By way of example, in R. v. Desjarlais, id., the Court of Queen’s Bench looked to ancestry and to an “Indian mode of life” in addressing the question of whether the defendants were Indians within the protection of the NRTA:

While the Ferguson Court did not attempt to establish an exhaustive list of factors which constitute following an Indian mode of life, the Crown submitted that the Court in Ferguson established certain necessary elements. There must be a connection with the Indian language; there must be a connection with an Indian community; there must be self-identification by the individual in question as an Indian; there must be a connection with traditional Indian food gathering techniques such as hunting and trapping and fishing; there must be a connection with traditional Indian customs, on religion, philosophy and lifestyle. Ferguson does not determine the exact nature of such connections.

This analysis is directed to determining the standing of an individual rather than a group or class of people. However, it is probative of the issue of community identification because communities of course are based on ties between individuals, and the connections that serve to identify a person as a member of an Aboriginal community therefore are very closely intertwined with the connections that serve to demarcate the existence of a community. In this particular case, the connections looked to by the court are broadly similar to those that can be gleaned from the Powley decisions and other sources, e.g., shared cultural and harvesting practices as manifested through constituent elements such as harvesting activities, shared customs and religious traditions.

38 In Howse, the issue was disposed of on appeal primarily on the basis of an absence of evidence of an Aboriginal right. In Dumont v. Canada (Attorney General), [1990] S.C.J. No. 17 [hereinafter “Dumont”]. The Manitoba Métis Federation has sought a “declaration that the federal...statutes and orders-in-council...were unconstitutional measures that had the purpose
In Morin, the trial judge found that the Métis “people of Turnor Lake are currently living as a community and basically off the land as they have since the early 1800’s”. In reaching this conclusion, he remarked that the Métis sprang from the fur trade and their geographic territory was marked by fur trading posts. In Blais, the trial judge simply concluded that Métis in the Red River Settlement were an organized society. However, he also appended to his decision a lengthy summary of the evidence tendered at trial, including the report of an expert dealing with “Origins or Ethnogenesis of the Métis” which, once again, tied the Métis communities to fur trading posts and activity.

Five Métis Aboriginal rights cases have been addressed by courts in New Brunswick in the last three years. In all four cases, the New Brunswick courts have rejected assertions of Métis rights at least in part on the basis that the claimants have not established that there was a historic Métis community. However, these findings for the most part have rested on a generalized consideration of the basic inadequacy of the evidence tendered on behalf of the claimants rather than a specific assessment of what factors inform the determination of whether a historic Métis community existed. The evidence led by the claimants generally has taken the form of unsupported and vague assertions by lay witnesses. As a result, these cases generally shed little light on what factors might serve to identify a historic Métis community.

Although the case law is not advanced on the issue of community definition, Professor Bell has thoroughly addressed the issue in “Who and effect of stripping the Métis of the land base promised to them under Sections 31 and 32 of the Manitoba Act, 1870”. The earlier proceedings in the case dealt primarily with a preliminary motion to strike the claim. In dealing with this motion on appeal, O’Sullivan J.A (in dissent) remarked that the Métis possessed a sufficient self-awareness of their existence as a people to maintain law and order through a provisional government.

40 Morin, id., at 166.
41 Blais, supra, note 36, at 133 (Man. Prov. Ct.).
43 Chiasson, id., at paras. 20, 29; Castonguay, id., at paras. 36-51, 55 (espec. para. 51) (Prov. Ct.) and at para. 16 (N.B.Q.B.), Castonguay No. 2, id., at paras. 55, 61-65; and Daigle, id., at paras. 30-38; Hopper, id., at paras. 10 and 21.
are the Métis People in Section 35 (2)?”. At the risk of oversimplification, her analysis is primarily directed to identifying and evaluating competing definitions of Métis, and concludes by recommending that Métis be defined as the descendants of the historic Métis Nation centred on the Red River Settlement or people associated with ongoing Métis [mixed ancestry] collectives. The Supreme Court of Canada appears to have broadly agreed and accepted that Métis peoples may extend beyond the Red River group. Professor Bell also sets out general criteria for “peoples” that are helpful for identifying specific communities. These include common history, ethnicity, culture, language, religion, ideology and economic base. In addition, she suggests that a sufficient number of people may be required, although what that number is cannot be pre-determined.

Finally, the Report of the Royal Commission on Aboriginal Peoples (“RCAP Report”) appears to be exerting a strong influence on the courts, especially in respect to Métis cases. Its relevance on the specific issue of identifying historic Métis communities would seem to be three-fold. First, it specifically identifies a number of historic Métis communities including Sault Ste. Marie, Rainy River and Moose Fac-

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45 Id., at 374. Professor Bell lists the following definitions as some of the broad choices for defining the term Métis:

1. Anyone of mixed Indian/non-Indian blood who is not a status Indian;
2. A person who identifies as Métis and is accepted by a successor community of the Métis Nation;
3. A person who identifies as Métis and is accepted by a self-identifying Métis community;
4. Persons who took, or were entitled to take, half-breed grants under the Manitoba Act or Dominion Lands Act, and their descendants; and
5. Descendants of persons excluded from the Indian Act regime by virtue of a way of life criterion.

47 Supra, note 44, at 364.
Second, the RCAP Report recounts the historical origins of a Métis identity as largely being communities that developed over time adjacent to fur trading posts and ultimately, converging at the forks of the Red and Assiniboine rivers. Third, the RCAP Report specifically addresses the criteria that should be used to identify who qualifies as a “people” under section 35. It does so by citing the criteria used by the International Commission of Jurists (and referred to in the Bell article) above and stressing the importance of the subjective characteristic of “a sense of community”.

In conclusion, a number of elements relevant to identifying historic Métis communities at a general or conceptual level appear repeatedly in sources discussed above. Of these, the most crucial (as a matter of frequency and the importance attached to them) seem to be:

(1) population of mixed Aboriginal and non-Aboriginal ancestry;
(2) culture based on Aboriginal and non-Aboriginal sources;
(3) social ties, especially kinship ties involving intermarriage among families of mixed ancestry;
(4) economic ties, typically involving a distinct economic niche incorporating both Aboriginal and European activities and practices;
(5) site specific physical presence; and
(6) manifestation of some sense of self-awareness as a distinct community that is neither Indian nor European.

As applied to the Sault Ste. Marie Métis, the community in 1850 had many of the above characteristics. In particular, the culture was marked by musical tradition of voyageur songs, distinct Métis fiddling and dances. There was a distinct mode of dress that included wearing the sash, the capote and a general mixture of European and Indian clothes. The inhabitants would likely have spoken some Michif as well as native and European languages, and would have followed the Roman Catholic faith. They typically lived in timber homes on long, narrow lots fronting on the river. They had kinship connections among core families.

49 RCAP Report, id., at vol. 4, at 259-60.
50 RCAP Report, id., at vol. 2, at 150.
51 RCAP Report, id., at vol. 4, at 298.
and practised endogamous marriage patterns. Most important, the community shared an occupational interest in the fur trade.

2. Individual Membership in the Modern Métis Community

(a) The Legal Test

Once a historic and contemporary Métis community has been found, the person claiming a Métis Aboriginal right is required to establish that he or she is entitled to exercise the Métis community’s Aboriginal rights. Because Canadian courts thus far have been called upon to address Aboriginal rights claims typically involving persons recognized as Indians under the Indian Act or as members of statutorily recognized bands, they have not been required to seriously consider individual entitlement.

In contrast, because there is no formal structure such as a band for most Métis or a unanimously adopted definition of who is Métis, the Court in Powley has developed a common law legal test for identifying Métis Aboriginal rights holders. The criteria for demonstrating membership in a community at common law are self-identification, ancestral connection and community acceptance.

Turning to the first requirement, the Supreme Court cautioned that “self-identification should not be of recent vintage: While an individual’s self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.” By stressing that self-identification must be longstanding, the Court sought to avert opportunistic identification as Métis by individuals of mixed ancestry who have tenuous connections to Métis communities.

The criterion of an ancestral connection is perhaps the most controversial and the Court was careful not to cast its contours in stone. Instead, it highlighted that the purpose of the ancestral connection of the claimant to the historic community was to ensure that there was a “real link”. It further noted that while it would not require a minimum “blood quantum”, it would “require some proof that the claimant’s ancestors

52 Powley, supra, note 48, at para. 31 (S.C.C.).
belonged to the historic Métis community by birth, adoption, or other means.”53

What the phrase “other means” encompasses is perhaps deliberately left open by the Court. Reading it in the context of the earlier requirements, however, would suggest a fairly narrow extension beyond hereditary connection. The Court was concerned about perceived arbitrary blood quantum cut-offs as has been alleged is created by the Indian Act for the definition of Indian. This, however, does not mean that a person can claim an ancestral connection simply by virtue of living with and among a Métis community. If the Court had intended to permit membership through merely self-identification or acceptance, it would not have included the requirement of an ancestral connection.

As to the criterion of community acceptance, the Court was clear that membership in a Métis political organization may be relevant to but is not determinative of the question of community acceptance. Further, the relevance of membership in a political organization is dependent on a contextual understanding of the membership requirements of the organization and its role in the Métis community. The Court concluded:

The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.”54 [Emphasis added.]

While setting out a fairly straightforward legal test for individual membership in a community, the Court was quick to realize that this was an area ripe for negotiations. It appreciated that the question of who is a Métis has both legal and political dimensions and that, ultimately, “[i]n the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt…”55 Until negotiations resolve outstanding identity issues, they will fall by default to the courts to decide. This was explicitly recognized by the Supreme Court of Canada which noted that “[i]n the mean-

53 *Powley, id.*, at para. 32.
54 *Powley, id.*, at para. 33.
55 *Id.*, at paras. 30 and 50. In addition to negotiating identity issues, the parties may also have to deal with a host of other issues including priority rankings between Aboriginal peoples and communities.
time, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis”.56

(b) Practical Evidentiary Considerations

The test for membership in a community raises serious evidentiary concerns. For example, when endeavouring to demonstrate self-identification, the claimant must show that it is not “made belatedly”.57 The requisite evidence must come from either the claimant or witnesses who know the claimant. Because of the acutely personal, subjective and sensitive nature of how one self-identifies or feels about being part of a community, the best evidence is clearly from the claimant. Yet this may pose a problem in a prosecution where the accused may choose not to testify for reasons separate from the Aboriginal claim. In Powley, the lower courts expressed some unease with the absence of testimony from the claimants. At trial, Vaillancourt J. remarked:

…oral evidence by the Powleys would have allowed the court a better opportunity to assess how the Powleys interact within the Métis community of the Sault Ste Marie area.

Although I agree with Mr. Long that this oversight is a very significant omission, it is not in itself fatal to the overall position taken by the Powleys.58 [Emphasis added.]

Sharpe J.A. at the Court of Appeal also commented on this issue:

While I recognize that an accused person has the right not to testify and that the decision to call or not to call an accused will often involve difficult tactical considerations for counsel, where a defense is based on the assertion of an aboriginal right, it remains an essential element of the defense to establish the claimant of the right is a member of the aboriginal community. ….. it might have been preferable to have direct evidence

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56 Id., at para. 29.
57 Id., at para. 31.
from the respondents as to their membership in and acceptance by the local Métis community... [Emphasis added.]

In spite of this unease, however, both judges found that the Powley’s did self-identify as Métis. This was based largely on the fact that they wrote their membership number in a Métis organization on a slip of paper attached to their moose before they were charged. This suggests that, at the end of the day, the threshold for demonstrating self-identification may be low.

Demonstrating community acceptance could pose similar difficulties where the political and legal institutions of the community itself are not well developed. The various courts in Powley, however, as with self-identification, have not set a very high threshold. While membership in an organization alone will not suffice, participation in some cultural and social activities among a group of families in the area who can also trace their ancestry to a recognized community, has sufficed to meet the community acceptance test.

In consequence, the ancestral connection will likely be critical to the disposition of a claim. In this regard, the trial judge remarked that the “current practice of individuals financing independent ancestral searches is both cumbersome and expensive”. Nevertheless, in Powley, the availability of fairly extensive documentation (such as Hudson’s Bay Company records, treaty pay lists, various official reports and census records), the relatively small number of families that likely form the genealogical baseline for the Métis community and the probability that many Métis claimants will be closely related suggest that considerable progress in tracing ancestral connections can be made at a reasonable cost through a co-ordinated effort.

In Ontario, at least one Métis organization states that it is assembling genealogical evidence in an effort to identify Métis who may hold harvesting rights. The Métis Nation of Ontario (“MNO”) issues “Harvesters Certificates” to members that demonstrate that “he or she is

60 Powley, supra, note 58, at para. 38.
61 According to the MNO’s website at <http://www.metisnation.org/insideMNO/registry.html>, the MNO presently applies the following definition of Métis in determining membership in the MNO:
ordinarily resident and intends to participate in the Métis harvest in his or her traditional territory which is within the Province of Ontario or that a direct ancestor was a beneficiary of an Ontario treaty and that he or she is ordinarily resident and intends to participate in the Métis harvest in that treaty area”. According to the MNO, Harvesters Certificate “shall be considered proof that the holder has been verified by the MNO Registrar as having provided sufficient documentation to support a claim to an Aboriginal or treaty right to harvest”.

1.1 “Métis” means a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of Historic Métis Nation ancestry, and is accepted by the Métis Nation.

**Defined Terms in National Definition of Métis**

1.2 “Historic Métis Nation” means the Aboriginal people then known as Métis or Half-breeds who resided in the Historic Métis Nation Homeland.

1.3 “Historic Métis Nation Homeland” means the area of land in west central North America used and occupied as the traditional territory of the Métis or Half-breeds as they were then known.

1.4 “Métis Nation” means the Aboriginal people descended from the Historic Métis Nation which is now comprised of all Métis Nation citizens and is one of the “aboriginal peoples of Canada” within the meaning of s.35 of the Constitution Act 1982.

1.5 “Distinct from other Aboriginal peoples” means distinct for cultural and nationhood purposes.

This definition was adopted by the Métis National Council (of which the MNO is a member) on September 27-28, 2002.

Previously, acceptance by the MNO was dependent upon the following criteria:

2.2 Citizenship in the MNO shall be limited to individuals interested in furthering the objects of the MNO and who are Métis within the definition adopted by the MNO in accordance with the Métis National Council which is as follows:

a) Anyone of Aboriginal ancestry who self-identifies as Métis as distinct from Indian or Inuit; has at least one grandparent who is Aboriginal; and whose application for admission as a citizen is accepted by the MNO.

2.3 A person is entitled to be registered as a citizen of MNO who:

a) Provides sufficient documentation that he or she is Métis within the meaning of 2.2(a);

b) is not enrolled on any other Aboriginal registry; and

c) whose application for admission as a citizen has been approved through the registry process of the MNO as amended from time to time.


The other large province-wide Métis organization in Ontario, the Ontario Métis Aboriginal Association (“OMAA”) appears to only require its members to attest to the identity and treaty area of ancestors who were members of an Indian band and issues “Certificates of Aboriginal Status” which OMAA advises can “be used for identification purposes including, but not limited to… harvesting (hunting, fishing, trapping, gathering”). Demonstrating that a person can attest to the identity and treaty areas of ancestors who were members of Indian bands self-evidently is not the same as proving “that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means”.

The final practical concern with identification of Métis rights holders is a potential difficulty in distinguishing Métis Aboriginal rights holders from other rights holders. This concern has been raised by Professor Slatterly, who suggests that because many Aboriginal people are of mixed-Aboriginal and non-Aboriginal ancestry and belong to communities whose distinct cultures originate in both Aboriginal and non-Aboriginal influences, it is difficult to distinguish the individuals and communities that are Métis as defined in Powley. In Powley itself, the historical record demonstrated that a “significant number of [Sault Ste. Marie Métis] families joined the local Ojibway bands on the near by Batchewana and Garden River reserves. By 1890, 191 of 285 Batchewana band members were Métis, as were 199 of 412 Garden River band members.” Descendants of the historic Métis of Sault Ste. Marie continue to enjoy membership in the Batchewana and Garden River bands. The Powleys’ own ancestors were recognized as band members

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64 Ontario Métis Aboriginal Association application form, undated.
69 As of 1999, band councillors for the Batchewana band included Adelene Corbière, Joe Sayers, Noel and Holly Syrette and Chief Vernon Syrette. The band council for the Garden River band in 1999 included Blaine and Terry Belleau, L.M. and Doreen Lesage, Terry and Darrell Boissonneau, Stuart Soulière and Chief Lyle Sayers. All these surnames are closely associated with historic Sault Ste. Marie Métis families identified in the 1861 census and listed on the Batchewana and Garden River treaty paylists beginning between 1857 and 1874.
from the 1850s until 1918. In sum, there can be little doubt that many Indians in the Sault Ste. Marie area possess a mixed ancestry heritage and strong connections to the historic Sault Ste. Marie Métis community.

Similarly, in “The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises, Professor Bell and Karin Buss remark:

By 1899, many Aboriginal people in Treaty 8 territory were of mixed Indian and European ancestry, making it difficult to distinguish “Indians” from "Métis". Many people who entered into treaty, as well as those receiving scrip, had mixed Indian and European ancestry and included some people believed by officials to be Indians. In certain instances, some members of the same family took scrip while others took treaty benefits.

Some of the potential problems in distinguishing Métis and Indians in addressing section 35 rights perhaps can be minimized by ensuring that due weight is placed on the importance of self-identification as Métis. By way of example, in Sault Ste. Marie itself, there are those that self-identify as Métis and those who self-identify as band members. Applied to individuals of mixed Aboriginal and non-Aboriginal ancestry, the Powley test permits persons of mixed ancestry to either emphasize their Métis or Indian heritage and to claim rights in line with that self-identification.

It can be argued that such an approach eschews objectivity in that it allows individuals whose most immediate and substantial Aboriginal connections extend to First Nations rather than distinct Métis communities to nonetheless assert rights as Métis because they happen to have a remote ancestral connection to a distinct historic Métis community and prefer, for whatever reasons, to emphasize and rely on this connection. However, as long as individuals are not permitted to pick and choose their identity simply as it suits them at any given time, there does not appear to be any obvious practical defect with such an approach. Moreover, as a matter of principle, it may be more consistent with the traditional perspective of many Aboriginal peoples as reflected in the

70 Powley, supra, note 68, at para. 138.
historical fluidity of Aboriginal identity. Doubtlessly historical circumstances will be raised that pose challenges for distinguishing between Métis and Indian communities, rights and rights holders, but the self-identification criterion may go a considerable distance in unravelling this knot.

V. CONCLUSION

The Powley case provides a firm foundation upon which to build a Métis section 35 Aboriginal rights jurisprudence. It is fundamentally based on the First Nation Aboriginal rights model but with some variation and one critical change. The “pre-contact” requirement for the establishment of the community is now a “pre-control” requirement. Although the jurisprudential underpinnings for this approach are not dealt with in any detail by the Court, the concept of pre-control provides sufficient clarity to ensure that Métis communities enjoy broad but not open-ended constitutionally protected Aboriginal rights. As well, courts will be required to more strenuously review claims of community membership given the absence of legally recognized communities in parts of the country. No doubt further litigation will ensue to flesh out those areas left open by the Court such as the extent to which ancestral connections may be departed from in determining membership. As well, courts will have to grapple with the impact of Powley on other Aboriginal groups. Consultations, negotiations and non-judicial processes will also impact on the ultimate shape of Métis Aboriginal rights. The Powley decision therefore should be regarded as providing a sound first step in the ongoing process of defining and refining Métis Aboriginal rights.