

**Canada's Métis and the Duty to Consult:
Why the Common Law Requires It
and What To Do About It**

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I. INTRODUCTION¹

Many commentaries describe how to ensure proper consultation and accommodation for Canada's Indians, but there is little material regarding another of Canada's Aboriginal peoples: the Métis. This paper explains why the common law duty to consult applies equally to Métis as it does to other Aboriginal peoples, and then identifies unique issues to address when assembling a consultation case for a Métis group.

II. WHY THE MÉTIS ARE OWED CONSULTATION BY THE CROWN

A. The Métis Exist

Canada's Métis population is here to stay. Across the country, Métis organizations have secured recognition for their members' Aboriginal rights. National² and several provincial³ Métis organizations work constantly to ensure that both the Crown and third parties honour their members' rights. Métis organizations representing smaller collectives than provincial organizations are also recognized in different agreements and negotiations. For example, in the Northwest Territories (the "NWT"), the Métis are recognized either as accredited signing parties in agreements with other aboriginal groups⁴, or as stand-alone rights-bearing Métis

¹ All references and cases are current to September 21, 2012, the date of submission of this paper to the conference organizers.

² For example: Métis National Council, online: <<http://www.metisnation.ca>>, Metis Nation of Canada, online: <<http://www.metisnationofcanada.org>>, and the Congress of Aboriginal People, online: <<http://www.abo-peoples.org>>.

³ For example: *Alberta*: Métis Nation of Alberta, Consultation policy, online <<http://www.albertamétis.com/getdoc/7e0c448a-71b7-484c-b5c7-71e54c27491f/MNA-FINAL-CONSULTATION-POLICY.aspx>>. Furthermore, the *Métis Settlement Act*, and *R. v. Lizotte*, 2009 ABPC 287 appear to confirm that settlement Métis in Alberta have a legal right to hunt or fish as "Powley Métis" pursuant to section 35 of the *Constitution Act, 1982*.

Ontario: Métis Nation of Ontario; online at <http://www.Métisnation.org>; Métis Nation of Ontario signed it's 9th regional consultation protocol in June, 2011; online:

<<http://www.métisnation.org/media/163598/mno%20consultation%20protocol%20-%20region%209.pdf>>

Ontario Ministry of Aboriginal Affairs, Métis Progress Report, online:

<http://www.aboriginalaffairs.gov.on.ca/english/news/2010/Métis_Progress_Report.asp>;

Manitoba: Manitoba Métis Federation, online: <<http://www.mmf.mb.ca>>, The Tripartite Self-Government Negotiations (TSN) Department is mandated to assist the Manitoba Métis Federation (MMF) in its focus in the development and sustainability of Métis self-government institutions. Information online"<http://www.mmf.mb.ca/index.php?option=com_content&view=article&id=87&Itemid=90>

⁴ For example, in the NWT, the Acho Dene Koe First Nation, which includes the Dene and Métis, the Government of the NWT ("GNWT") and Canada, are negotiating an Agreement-in-Principle on land, resources and self-government. The Dehcho First Nations, including the Fort Simpson Métis Local 52 and the Fort Providence Métis

communities⁵. For those Métis communities that do not have existing government to government agreements in place or negotiations underway with the Crown, they may turn to the courts to assert their members' constitutionally protected rights.⁶

Canada appears to be taking its own steps to identify (but not necessarily to recognize) various Métis communities across Canada. After the Supreme Court of Canada's decision in *R. v. Powley*⁷, the federal Department of Justice commissioned fifteen studies across Canada and began the process of identifying rights-bearing Métis communities in fifteen selected areas. The studies were designed to gather material to answer the legal elements of the framework laid down in *Powley* for identifying the meaning of Métis for the purposes of s. 35, namely "the history related to possible Métis ethnogenesis and the imposition of 'effective European control' in selected sites across Canada"⁸. In addition, the Senate's Standing Committee on Aboriginal Peoples recently established a committee whose terms of reference are to consider the political and legal issues of Métis identity.⁹ The committee's inquiry is ongoing at the present time.

However, while such consideration of, and voluntary negotiation with, Métis communities by the Crown are commendable, not all Crown actions are conciliatory in nature. Whether federally,

Local 57, the GNWT and Canada are negotiating a land, resources and self-government agreement. The Sahtu Dene and Metis of Deline, the GNWT and Canada are negotiating a Final Self-Government Agreement. The K'asho Got'ine Self-Government Secretariat (representing the interests of the Sahtu and Metis of Fort Good Hope), the GNWT and Canada are negotiating a Framework Agreement which will guide self-government negotiations.

⁵ Northwest Territory Métis Nation: Regional Land and Resources Agreement-in-Principle Negotiations, online: <http://www.daair.gov.nt.ca/_live/pages/wpPages/NorthwestTerritoryMétisNation.aspx>

⁶ For example, judgment is currently reserved in the NWT Supreme Court respecting a consultation case concerning Métis harvesting rights on the north side of Great Slave Lake: *William Enge, on his own behalf and on behalf of the members of the North Slave Métis Alliance v. Fred Mandeville et al.*, In the Supreme Court of the Northwest Territories, Court File No. S-1-CV-2012-000002 ("NSMA Judicial Review"). In the interests of full disclosure, the writers were legal counsel to the Métis applicant in this proceeding.

⁷ *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 ("*Powley*")

⁸ Austin Lawrence, Senior Research Officer, Research and Statistics Division, Department of Justice Canada, "A Program of Research Related to Historical Métis Communities", online: <<http://www.justice.gc.ca/eng/pi/rs/rep-rap/jr/jr15/p5.html>>. The "Post-Powley Response Working Group" was led by the Office of the Federal Interlocutor for Métis and Non-Status Indians (OFI) of the Department of Indian and Northern Affairs Canada, with the assistance of the Métis and Distinctions Team, Aboriginal Law and Policy Section (ALPS) of the Department of Justice Canada, with representation from a number of interested federal departments. From the material available on this website, seven studies appear to exist in an unpublished format. To date, the results of the studies are not publicly available, with the exception of the Jones Report, which is on file with the NWT territorial court since it was submitted as part of the evidence in the NSMA Judicial Review argued in June 2012.

⁹ Standing Senate Committee on Aboriginal Peoples is conducting a study to examine and report on the evolving legal and political recognition of the collective identity and rights of the Métis in Canada. The terms of reference are online at <http://www.parl.gc.ca/Content/SEN/Committee/411/appa/rep/rep05apr12-e.htm>

provincially or territorially, there are a multitude of Crown decisions and actions, which may adversely affect Métis Aboriginal rights, and which are not subject to any such agreements or negotiations. The common law bridges that gap. As long as a Métis community can demonstrate a *prima facie* claim to an Aboriginal right in an area where the Crown contemplates action that will adversely affect that right, consultation and, where appropriate, accommodation with the Métis is a legal obligation on the Crown.

B. The Common Law Requires Consultation with the Métis

In 2004, the Supreme Court of Canada held in *Haida* that a duty to consult and accommodate arises when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal rights protected by Section 35, and contemplates conduct that might adversely affect those rights.¹⁰ Since Section 35 of *Constitution Act*, 1982 recognizes and affirms the existing Aboriginal rights of the “aboriginal peoples of Canada” and that Canada’s aboriginal peoples include both “Indian, Inuit and Métis peoples”¹¹, the Crown’s obligation to consult applies equally to the Métis.¹²

This common law obligation operates independently and lies “upstream” of any voluntary negotiations and policy decisions the Crown enters into or makes with Aboriginal groups.¹³ In some jurisdictions, notably the NWT, the Crown voluntarily follows a policy-driven process of negotiations to deal with Aboriginal rights and claims and the decisions that might adversely affect them.¹⁴ However, though the Crown can voluntarily choose to consult with whomever they wish, the Crown must respect the independent common law obligation to consult with

¹⁰ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (“*Haida*”), paras. 34-35

¹¹ *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11. We note here that in 1999, Mr. Harry Daniels and the Congress of Aboriginal Peoples launched the test case, *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, seeking, amongst other things, declaratory relief that Métis are Indians under subsection 91(24) of the Constitution Act, 1867. To date, the case has not been heard, but the Federal Court has considered some preliminary motions, for example *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCT 295, [2002] 4 FC 550

¹² *R. v. Beer*, 2011 MBPC 82 at para. 31; *William Enge, on his own behalf and on behalf of the members of the North Slave Métis Alliance v. Fred Mandeville et al.*, in the Supreme Court of the Northwest Territories, Court File No. S-1-CV-2012-000002 i.e. the NSMA judicial review

¹³ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, [2011] 3 C.N.L.R. 343, 2011 BCCA 359, leave to appeal to SCC dismissed 2012 CanLII 8361 (SCC) (“*West Moberly*”), para. 106; see also *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, at paras. 18-19

¹⁴ Statement of Defence of the Attorney General of Canada in *Akaitcho Dene v. Canada and NWTMN*, Federal Court File No. T-339-12, filed July 31, 2012 at para. 31.

Aboriginal groups, including the Métis, should the Crown contemplate decisions that will adversely affect those groups' rights.

III. WHAT TO DO ABOUT IT

For the most part, the legal analysis for ensuring Métis groups receive the consultation they are owed is the same used for other Aboriginal peoples. However, there are unique features to consultation with Métis owing to their particular history and constitutional recognition, especially with respect to establishing the strength of claim element of the analysis.

Like other Aboriginal groups, Métis communities may use the administrative law mechanism of judicial review to challenge a lack of consultation and must be careful to identify both the impugned decision and the particular aspect of Crown which bears the obligation to consult. More challenging, is how a Métis community may successfully navigate potential uncertainties regarding which group may assert the right to consultation from the Crown and what particular framework should be used to perform the preliminary assessment of the strength of the claim to Métis rights and adverse impacts upon them as required by *Haida*.

A. Use an Application for Judicial Review

To begin, there is no question a judicial review application based on a summary record, rather than a trial of an action, is the appropriate civil procedure for a Métis group to use in order to assert a breach of the Crown's duty to consult with them with respect to a decision that has potential adverse impacts on their asserted Métis rights.

In *Beckman*, the Crown raised a preliminary objection that the question of adequate consultation requires adjudication of Section 35 rights via a full trial, and that judicial review on a summary record was procedurally inappropriate. The Supreme Court of Canada disagreed:

The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new "constitutional remedy". Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. Moreover, the impact of an administrative

decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant.¹⁵

The most recent statement confirming judicial review is an appropriate forum to review consultation is in *West Moberly*. In that case, all three justices of the BC Court of Appeal rejected the argument of British Columbia and Alberta that a trial was necessary to determine Treaty interpretation issues relevant to ascertaining the adequacy of consultation. Finch C.J.B.C. wrote that the question of whether judicial review was an inappropriate procedure in consultation cases was “put beyond question” by the Supreme Court of Canada in *Beckman*.¹⁶ Strategically, applicants do well to challenge a discrete decision which is obviously administrative, rather than legislative.¹⁷

B. Identify the Crown Actor

The next step is to carefully consider that the duty to consult and accommodate arises when the “Crown” has knowledge of Aboriginal rights and considers conduct that might adversely affect those rights. Carefully choosing which impugned decision to review dictates which aspect of the Crown is responsible for the decision. Most of the time it is obvious; however, where there may be overlapping jurisdictions (such as in the NWT), playing “spot the Crown” cannot be dismissed out of hand as each level of government may seek to pin the obligation to consult on the other.

C. Consider Who Brings the Application

Choosing who shall bring an application for judicial review on behalf of a Métis community is perhaps one of the “meatiest” considerations facing an applicant. Unlike the situation of most First Nations, whose governance and corporate structures have been influenced (rightly or wrongly) by the *Indian Act*, there has never been legislation or state regulation that formed the governing bodies amongst the Métis. Today, no statute guides either the government or the Métis with respect to what Métis groups should benefit from the Crown’s obligation to consult.

¹⁵ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 2010 SCC 53 (“*Beckman*”) at 47

¹⁶ *West Moberly*, para. 97

¹⁷ See *L’Hirondelle v. Alberta (Sustainable Resource Development)*, 2011 ABQB 646 at paras. 24 – 26, where a judicial review was not the appropriate proceeding to determine what the judge found was a constitutional question.

Instead, the particular history and ethnogenesis of Canada's Métis means Métis collectives formed and self-identified based on the Métis' own conceptions of community. There are several Métis organizations nationally, provincially and regionally that claim to represent some or all of the Métis in their respective jurisdictions. However, there are enough examples of competing Métis organizations within certain jurisdictions to consider cautiously if any one group speaks for all Métis people in the asserted jurisdiction.¹⁸

How then to confirm that whomever is chosen to ask the court to review a decision has standing to bring the action? One approach may be to consider the issue in a manner similar to how the courts assess representative proceedings for other Aboriginal groups. Indian band chiefs and councils commonly bring representative actions on behalf of their First Nation members to assert their Aboriginal and Treaty rights. To do so, a Métis representative would have to show that he or she represents a community "capable of clear definition" and is able to bring forward issues "common to all class members" such that "success for one class member means success for all".¹⁹ The representative applicant must "adequately represent the interests of the class." In this analysis, the "class" becomes a synonym for "community" or "collective". The legal test requires the construction of a legal class, or community, to be well enough defined to meet a number of legal standards. A class that passes the legal test suggests a community which demonstrates enough certainty to assert that collective's rights.

However, here the "representative approach" may run up against a conceptual roadblock: although the Métis community may be capable of clear definition ethnically-speaking, it may be an open question how that collectivity should be represented in court when more than one organization is formed by different members of that ethnic collective. Uncertainty may arise in the eyes of the court (and the Crown respondents) where two or more contemporary Métis

¹⁸ For example: In the Great Slave Lake area of the Northwest Territories, the North Slave Métis Alliance and the Northwest Territory Métis Nation (the latter formerly known as the South Slave Métis Tribal Council); in BC, the Métis Nation of BC, online: <<http://www.mpcbc.bc.ca>>, and the BC Métis Federation, online: <<http://bcmetis.com>>.

¹⁹ *Western Canadian Shopping Centres Inc v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 ("Western Canadian Shopping") at para. 48. Following the decision at the British Columbia Court of Appeal in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 ("Kwicksutaineuk"), which emphasized the high standards which must be met to bring a class action, this paper only uses the *Western Canadian Shopping* framework to consider a representative proceeding.

organizations, grounded in the same historical collective, separately assert Aboriginal rights on behalf of their members.²⁰

Turning back to the common law for guidance, the more practical approach to Métis identity is to focus on how the ethnic community of the Métis in a region self-organizes to assert its Aboriginal rights. The Supreme Court of Canada has recognized that there has never been a Métis equivalent to an Indian Band, nor has there been one collective voice for the Métis. While some provinces have made strides to create bodies that can serve the purpose of asserting and upholding the Métis people's constitutional rights (such as under the *Métis Settlement Act* in Alberta), Métis in other provinces or territories are left to create their own political and social organizations.

In *Cunningham*, the Supreme Court of Canada described the unique character of the Métis and required courts to show deference to how the Métis define their political organizations:

While this case is not about defining entitlement to s. 35 rights, it is about the identification of membership requirements for Métis settlements for the purpose of establishing a Métis land base. The Court's reasons in *Powley* suggest that Métis communities themselves have a significant role to play in this exercise. We wrote, at para. 29:

As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified.

The self-organization and standardization of the Métis community in Alberta is precisely what the Alberta legislature and the Alberta Métis have together sought to achieve in developing, agreeing upon and enacting the membership requirements found in the MSA and challenged here. The significant role that the Métis must play in defining settlement membership requirements does not mean that this exercise is exempt from Charter scrutiny. Nevertheless, it does suggest that **the courts must approach the task of reviewing membership requirements with prudence and due regard to the Métis' own conception of the distinct features of their community.**

I conclude that the exclusion from membership in any Métis settlement, including the Peavine Settlement, of Métis who are also status Indians, serves and advances the object of the ameliorative program. It corresponds to the historic and social distinction between

²⁰ For example, in British Columbia, the BC Métis Federation openly challenges the right of the Métis Nation of BC to represent the rights-bearing Métis of BC. See, as an example, the BC Métis Federation Press Release, dated June 7, 2012, online: <<http://fnbc.info/bc-métis-federation-news-release-enbridge-claims-60-aboriginal-communities-support-claim-unfounded>>.

the Métis and Indians, and furthers realization of the object of enhancing Métis identity, culture and governance, and respects the role of the Métis in defining themselves as a people. [Emphasis added]²¹

In both *Powley* and *Cunningham*, the Supreme Court of Canada noted that the Métis themselves have a large role to play in defining themselves as a people and organizing themselves in communities. The court directed that the “Métis' own conception of the distinct features of their community”²² must be taken into account. The goal is not to flatten out the individual nature of the communities in question but rather to listen for these differences, and build a legal and political construct that is elastic enough to accept different histories into each identity.

This notion of the significance of self-organization was recently addressed in the context of overlapping First Nation communities. In July 2012, the British Columbia Court of Appeal in *William v. British Columbia*, provided that “the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself.”²³ The trial judge had found that, both historically and currently, an aboriginal person can be a member of “a family, a clan or descent group, a hunting party, a band, and a nation.”²⁴ This dovetails with the same court’s decision in *Kwicksutaineuk* three months earlier when the court considered if Indians could form collectives other than Indian bands. Garson J. A. wrote that:

...the chambers judge designated the class members as “Aboriginal collectives” because of his recognition of the fact that Band membership does not necessarily establish the requisite ancestral connection to assert an Aboriginal right. I agree with the chambers judge in this regard. This is so because in some cases, an Aboriginal collective may self-identify along traditional lines independent of Indian Act designation as a Band. A Band is not necessarily the proper entity to assert an Aboriginal right.²⁵

Furthermore, *Williams* emphasized that years of governance under the *Indian Act* has increased the apparent importance of the establishment of, and membership in, bands, when in fact their construction was only a convenience to both governments:

The creation of bands did not alter the true identity of the people. Their true identity lies in their Tsilhqot’in lineage, their shared language, customs,

²¹ *Cunningham*, paras. 81 - 83

²² *Cunningham*, para. 82

²³ *William v. British Columbia*, 2012 BCCA 285 (“*William*”), para. 149

²⁴ *William*, para. 51

²⁵ *Kwicksutaineuk*, para. 77

traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people.²⁶

When Métis form collectives and communities out of the historical, ethnic collective to assert their communal Aboriginal rights and title, their approach is consistent with the common law. If, per *Williams*, forming a collective based on “shared language, customs, traditions and historical experiences” is an expression of a collective’s “true identity”, then this must be as true a definition of Métis communities as it is for Canada’s other Aboriginal people.²⁷ Indeed, the law of consultation goes a long way to ensuring that a vast number of organizations raising frivolous claims will not require consultation by the Crown. While the Supreme Court of Canada was clear that deference should be given to the organizational form chosen by the Métis, the court also specified that such organizations require definitive membership requirements.

Every Métis community bringing an application in court should adduce evidence to ensure they prove, to a *prima facie* level, that they are a community with whom the Crown is obliged to consult. There is no denying that subsets of a larger Métis collective who form a community to assert their collective rights create a practical challenge, but the Supreme Court of Canada in *Powley*, stated that determining with which Métis organizations the Crown must engage “is not an insurmountable task”²⁸.

D. Use the Correct Legal Analysis

For unproven Aboriginal rights, the extent of the Crown’s duty to consult and accommodate is determined by the Crown’s preliminary assessment of the strength of claim and the seriousness of the potential impacts on those rights.²⁹ Assessing a pre-proof claim for the purposes of consultation is done to differentiate between a tenuous claim and a claim possessing a strong

²⁶ *William*, para. 56, quoting the trial decision in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 469

²⁷ Indeed, Groberman, J.A., opined that some variation of the *Powley* test for establishing Métis identity could be used to resolve the question of the proper rights holder in the Aboriginal rights cases when Indians asserted rights through any collective other than their Bands: *William*, para. 157

²⁸ *Powley*, para. 29

²⁹ *Haida*, para. 39

prima facie case. It is not done with an eye for final resolution of the claim. The legal duty to consult is Crown “behavior before the determination of the right.” The Supreme Court of Canada rejected the proposition that proof of right, through a trial or otherwise, is a pre-condition to the consultation process.³⁰

For Métis rights, the applicant still follows *Haida*, but determining the strength of claim for a Métis right requires using the framework provided by the Supreme Court of Canada in *Powley*. Importantly, when building, presenting or assessing a case respecting the strength of claim, the proof required is that of a *prima facie* basis.³¹ This is because judicial reviews are determined on summary evidence rather than viva voce evidence as would be the case normally at trial.

E. Characterization of the Right

Aboriginal and Métis rights are contextual and site-specific. In *Powley*, the court characterized the relevant right of the Métis of the Sault St. Marie community by stating:

The relevant right is not to hunt moose but to hunt for food in the designated territory.³² [Emphasis in original]

In the recent *West Moberly* decision, a majority of the BC Court of Appeal held that the First Nation’s Treaty right to hunt necessarily included a species-specific protection, in that case for caribou, given that the specific species was of central significance to the First Nation’s traditional way of life.³³

Further, the impugned decision should be scrutinized to see if it crystallizes the asserted right. In *Van der Peet*, the Supreme Court of Canada wrote that to characterize an applicant’s claim correctly, a court must consider in part “the nature of the governmental regulation, statute or action being impugned”.

Thus, a Métis group challenging a Crown decision or action on the basis of a lack of consultation should present evidence for a *prima facie* characterization of both their right to a specific animal

³⁰ *Haida*, paras. 34 and 36 (See also paras. 44 and 47)

³¹ *Haida*, para. 36, 37, 44 and 47

³² *Powley*, para. 20

³³ *West Moberly*, para. 162

and, in the alternative, to hunting generally. Interestingly, the Alberta Court of Appeal is currently considering if the “site-specific” element of this part of the test should be modified to match with the Métis’ nomadic hunting style, particularly in cases where communities followed herds to hunt.³⁴ It will be interesting to see whether that court follows the same approach as in *West Moberly*, or offers a different analysis on this issue.

F. Identification of the Historic Rights-Bearing Métis Community

According to *Powley*, there must exist a historic community in which to ground the asserted right. Demographic information, proof of shared customs, traditions and collective identity all establish the existence of a historic community.³⁵ A Métis community may have been “invisible” in historic records, while still continuing to exist. For example, in *Powley*, the Métis community in Sault Ste. Marie continued to exist, but was essentially an invisible entity from the mid-nineteenth century to 1970.³⁶

Furthermore, a historic Métis community does not have to be centered in one settlement: historically, Métis people tended to have a regional consciousness and were highly mobile. Since *Powley*, the courts have found historic rights-bearing Métis communities which are “regional”. For example, in *R. v. Goodon*, the Manitoba Provincial Court found a historical regional community of Southern Manitoba³⁷, and in *R. v. Laviolette*, the Saskatchewan Provincial Court confirmed another in Northern Saskatchewan³⁸. These kinds of communities are characterized by a regional network within which there would be certain fixed settlements, connected by transportation systems of river routes, cart trails and portages along which people also settled.³⁹

Somewhat in contrast, there is a recent line of Métis hunting cases using a site-specific analysis of the hunting right, and looked for evidence of the historic community in the specific area the right to hunting is claimed. In *R. v. Hirsekorn*, the court characterized the right as the right to hunt for food in the Cypress Hills area⁴⁰, and found that while Métis people were hunting on the plains before the Northwest Mounted Police arrived, the Métis only entered Cypress Hills and

³⁴ *R v Hirsekorn*, 2012 ABCA 21 at para. 6. The Alberta Court of Appeal will hear oral arguments February 7, 2013.

³⁵ *Powley*, paras. 21-23

³⁶ *Powley*, para. 24.

³⁷ *R. v. Goodon*, [2009] M.J. No. 3, 2009 MBPC 59 (“*Goodon*”), para. 48

³⁸ *R. v. Laviolette*, [2005] S.J. No. 454, 2005 SKPC 70 (“*Laviolette*”), paras. 28, 35

³⁹ *Laviolette*, paras. 19-28; *Goodon*, paras. 34-36 and 43-48

⁴⁰ *R. v. Hirsekorn*, 2011 ABQB 682 (“*Hirsekorn ABQB*”), para. 167

southern Alberta for short periods of time: violence in that Blackfoot territory meant the Métis avoided the area until the police established some semblance of order to the area.⁴¹ In *R. v. Langan*, the court found the historic community in the specific area in question did not exist until a date later than European control when Métis people moved from North Dakota to homestead this area.⁴² This more narrow approach will receive scrutiny from a higher court when the Alberta Court of Appeal hears an appeal in *Hirse Korn* on February 7, 2013.⁴³

Regardless, Métis applicants must present evidence that a historic rights-bearing Métis community existed in the area in question. This evidence may be in the form of primary research or even a literature review of relevant historical, ethno-graphical and anthropological materials, ideally summarized by someone knowledgeable about Métis history and ethnogenesis. The Department of Justice Canada's reports on fifteen potential rights-bearing Métis communities across Canada may be an excellent resource on which to draw.⁴⁴

G. Contemporary Rights-Bearing Métis Community

The *Powley* framework requires a clear definition of the Métis community which collectively holds the asserted rights. The Supreme Court of Canada stated that Métis communal rights “may only be exercised by virtue of an individual’s ancestrally-based membership in the present community”.⁴⁵ While many of the *Powley* elements are a matter of expert historical analysis regarding a specific communities’ ethnogenesis, articulating the contemporary community is paramount. As discussed above, the common law requires deference to how the Métis self-identify, but also provides that as the Métis organize themselves more formally, they must standardize their membership requirements.

That is exactly what Canada’s many different Métis communities have done. The present-day organizations regularly advocate for their members’ rights. The organizations’ constitutions are most likely filed with a province’s society registry and should place distinct requirements on members, defining a class of persons who make up the membership. Furthermore, the existence

⁴¹ *Hirse Korn ABQB*, para. 161

⁴² *R. v. Langan*, 2011 SKPC 125 (“*Langan*”), para. 24.

⁴³ Edmonton Journal, September 19, 2012 “Alberta’s Metis to challenge hunting rights ruling”, at <http://www.edmontonjournal.com/news/alberta/Alberta+Metis+challenge+hunting+rights+ruling/7268257/story.html>

⁴⁴ See note 5. Likely, the cost of submitting the ATTIP request to Canada will be less than retaining an expert to produce a historical report that may duplicate the reports DoJ presumably already has in hand.

⁴⁵ *Powley*, para. 24

of present-day Métis organizations is widely-available public knowledge. As noted above, the federal Department of Justice itself identified fifteen potential rights-bearing Métis communities across Canada.⁴⁶

H. Verification of the Applicant's membership in the Métis community

In *Powley*, the Supreme Court identified that ascertaining Métis identity will be on a case-by-case basis. The court emphasized that they were not creating a comprehensive definition of Métis for the purposes of a Section 35 analysis. The court did, however, identify three broad factors as indicia of Métis identity: self-identification; ancestral connection to a historic Métis community and community acceptance.⁴⁷

When a community chooses a representative to bring the judicial review on the community's behalf, they should choose someone well known in the community, who can prove his or her ancestry. Genealogic information is becoming more readily available and should be adduced in court. The president of the Métis local, with a family tree tracing back to the "founding fathers (or mothers)" of the Métis community may be a good choice. His or her position can be improved if the board passes a resolution authorizing them to represent the members' rights in the action. In contrast, appointing a random member of the community makes it harder to verify the three factors required by the common law. As an example, a New Brunswick man charged with a fishing offence provided the court with his full ancestry and his membership card to the Canada Métis Council, but the court found he failed to demonstrate that he was an accepted member of a contemporary Métis community.⁴⁸

I. Relevant Time Frame for when the Asserted Métis Right Arose

Unlike in other Aboriginal rights' cases, the legal test used for Métis rights is "a post-contact but pre-control test"; that is to say, the relevant time frame for establishing the Aboriginal rights in question is the point in time after the Métis community and customs arose, but before Europeans effectively established political and legal control in the area of the Métis community. As well, the practices of the Métis community need not originate in the pre-contact practices of the

⁴⁶ See note 5

⁴⁷ *Powley*, paras. 29-34

⁴⁸ *R. v. Joseph Cyrille Cais*, 2012 NBPC 1 ("*Joseph*"), para. 31. In fact, in that case, the court did not find a contemporary Métis community in the area in question at all. *Joseph*, para. 33

historic community's aboriginal ancestors.⁴⁹

Historical reports are necessary evidence for this element of the test. Applicants need objectively verifiable historical information that can prove, on a balance of probabilities, the time of effective control of the area in question. Establishing effective control turns on the answers to questions such as: when the first police presence arrived in the area, when the first government officials arrived in the area and when the first governmental decisions were made that shaped life in the area. Arguably, effective control exists only when the “Crown’s activity has the effect of changing the traditional lifestyle and the economy of the Métis in a given area”⁵⁰. In *Powley*, the court found effective control when “colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement”⁵¹.

J. The Right was Integral to Distinctive Métis Culture

In *Powley*, the right being claimed was a practice of both the Ojibway and the Métis. The court stated that this did not negate the Métis right as long as the practice grounding the right was distinctive and integral to the pre-control Métis community.⁵²

In *Powley*, hunting for food was integral to the Métis way of life at Sault Ste. Marie for the period just prior to the date of effective control. The Court found that a key feature of Métis life is their special relationship with the land and their ability to earn a substantial part of their livelihood off it: even if a particular species’ availability varied, hunting and fishing remained a constant in the Métis community.⁵³

In contrast, the Alberta Queen’s Bench in *Hirse Korn*, found Métis hunting in the area in question was not integral to the distinctive Métis culture since evidence showed that the Métis actually avoided that area until the arrival of the Northwest Mounted Police had made it safe enough for them to hunt there. The court concluded that prior to the police gaining effective control over the

⁴⁹ *Powley*, para. 18

⁵⁰ *R. v. Laviolette*, 2005 SKPC 70, para. 37. See also *R. v. Belhumer*, 2007 SKPC 114, *Minister of National Revenue v. Ochapowace Ski Resort Inc.*, [2002] 4 C.N.L.R. 76 (Sask. Prov. Ct.)

⁵¹ *Powley*, para. 40. A recent example of an effective control analysis is in *Langan*, see note 46 at paras 25 - 39

⁵² *Powley*, para. 38, 41 and 43

⁵³ *Powley*, para. 41

area, the Métis had been too wary of the Blackfoot to hunt in there.⁵⁴

K. Continuity between the Historic Practice and the Asserted Contemporary Right

In *Powley*, the Supreme Court of Canada observed that Section 35 reflects “a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities”. The court held that hunting was an important feature of the Sault Ste. Marie Métis community and has been a continuous practice until the present.⁵⁵

A Métis community seeking judicial review will need to be able to demonstrate that the Aboriginal practice rooted in the historic right-bearing community continues in the contemporary community. This evidence is likely to come in the form of affidavits from elders, harvesters and other land users giving first-hand accounts of using the land as their family and ancestors have always used the land.

L. The Métis Rights have not been extinguished

Finally, the *Powley* test requires the court to consider whether the asserted Métis common law rights were extinguished somehow prior to April 17, 1982, when any such existing rights received constitutional recognition (and protection from extinguishment) in the *Constitution Act, 1982*.⁵⁶

For the Métis, this generally involves considering the history of Métis involvement in treaty making and the taking of scrip from various “half-breed commissions”.⁵⁷ When Canada engaged in the making of the historic numbered Treaties in central, western and northern Canada, its practice ranged from lumping the Métis in with the Indians (because they all followed ‘an Indian way of life’) to providing scrip to Métis in exchange for their interest in the Aboriginal title of their indigenous ancestors. In part, Canada’s approach shifted due to the effectiveness of the Métis as negotiators for themselves and the Indian populations with whom they co-existed. On the face of both the numbered treaties and scrip certificates, the Aboriginal title interest is

⁵⁴ *Hirsehorn ABQB*, paras. 123, 148, 161, 167. As noted above, *Hirsehorn* is subject to appeal.

⁵⁵ *Powley*, para. 45

⁵⁶ *Powley*, para. 46

⁵⁷ Patricia McCormack, “Northern Métis and the Treaties”, *Picking Up the Threads: Métis History in the Mackenzie Basin* (Métis Heritage Association of the Northwest Territories and Parks Canada-Canadian Heritage, 1998); Richard Hardy, “Métis Rights in the Mackenzie River District of the Northwest Territories”, [1980] 1 C.N.L.R. 1

purported to be extinguished. The question remains (for Indians and Métis peoples), if this fact was achieved in law.

Regardless, courts have considered, quite apart from the issue of extinguishment of Aboriginal title, whether scrip extinguished the other Aboriginal rights of the Métis, such as harvesting rights. In *Blais*, the court held that Métis harvesting rights are not dependant on the existence of title. The Manitoba Court of Appeal held that the Supreme Court of Canada had clearly established in *Adams* that Aboriginal rights are not tied to Aboriginal title. This element of the decision was not disturbed on appeal to the Supreme Court of Canada.⁵⁸ In *Morin & Daigneault*, the court held that absent any clear wording or evidence to the contrary, scrip documents alone are not enough to establish the extinguishment of Métis harvesting rights. In that case, the analysis focused on the ordinary meaning of the statute and scrip documents. The court then applied the Supreme Court of Canada's decision in *R. v. Sparrow*, and found no evidence of any clear and plain language which indicated extinguishment. Finally, the court contextualized the scrip materials within their historical background, using oral history, expert witnesses, and other historical documents of the time to determine the original intent of the parties.⁵⁹

This step in *Powley* cannot be lightly brushed over. Depending on the specific historical facts and legal instruments that may apply to the specific Métis community in question, the answer to the extinguishment factor may differ. Counsel should pay close attention to the legal ramifications of this aspect of the *Powley* test, even on a summary application like a judicial review.

IV. SUMMARY AND CONCLUSION

The Métis, like the other Aboriginal peoples of Canada, must be consulted if the Crown contemplates action that adversely affects their Aboriginal rights. The jurisprudence on consultation applies to the Métis, just as it does to Indians, but with the necessary adjustments to accommodate the particular history and ethnogenesis of the Métis. It is particularly worth noting that for the purpose of asserting the procedural right to be consulted, Métis groups need not prove

⁵⁸ *R. v. Blais*, [1996] M.J. No. 39, [1997] 3 C.N.L.R. 111 (Man. Prov. Ct.) at 140-144; *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 130; *R. v. Blais*, [2001] M.J. No. 168, 2001 MBCA 55, para. 15

⁵⁹ *R. v. Morin & Daigneault*, [1998] 159 Sask. R. 161 (Sask. Q.B.) at 11-12, 15-16

that they have existing Aboriginal rights; they need only show on a balance of probabilities that their members likely hold the Aboriginal rights so asserted or claimed.

Métis peoples can and should harness the power of the consultation law developed in *Haida*, especially Métis communities which do not have bi-lateral agreements with the Crown or which are struggling to negotiate such arrangements. The common law can help.