

SECTION 2 - HISTORICAL and CULTURAL BACKGROUND

- **What are the Indigenous Peoples of Canada referred to and known as?**
- **Who are the Métis People?**
 - **What is known about Métis women specifically?**
- **Who are the Métis People in s. 35 of the *Constitution Act, 1982*?**

A. What Are The Indigenous Peoples Of Canada Referred To And Known As?

- **Historical and Current Names of the three Aboriginal Peoples of Canada**

Firstly "Aboriginal" is a commonly accepted term for the general collective of all indigenous persons in Canada. Often used incorrectly in reference to a specific group.

Further, the commonly used terms today of "First Nations", "Inuit" and "Métis" prior to 1982 were known in law as "Indians", "Eskimos" and "Half-breeds" respectively. After 1982 Indian persons started adopting referring to themselves as "First Nation". The "Inuit", although not culturally "Indians" were included within the meaning of "Indians" for the purposes of being included in federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. In the late 1960's and early 1970's the public began to be more sensitized to the language of the naming of the term "half-breed"; and in 1982 the constitutional term "Métis" replaced the previous term "half-breeds" in English legal language. Historically, prior to the inclusion of "Métis" in s. 35 of the *Constitution Act, 1982* the Métis had been called, referred to and or named by others and or themselves, various different names that were sometimes born out of circumstances or events occurring at the time; such as: Half-breed, chicot, bois-bruléé, apeytogosan (Cree-meaning half-people) otepayemsuak (Cree meaning - independent ones, the bosses of themselves, people who own themselves)¹, and the name "Michif" in reference to the people and not the language. Since the inclusion of the specific name "Métis" in s.35, the Metis have now largely adopted this as the commonly accepted name for themselves. Although it should also be noted, that some people proudly prefer to refer to themselves as "half-breeds"; as that is the term they knew themselves to be as they grew up and one that they continue to maintain with pride. As well, the word "otepayemsuak" from the Cree meaning - independent ones, the bosses of themselves and or people who own themselves has

¹ Teillet, Jean, "*Métis Law Summary*" (2004) 4-5

also more recently increased in use, not in replacement of or an alternative to, but along with the name "Métis".

B. Who Are The Métis People?

The Métis

Prior to the nineteenth century, with the arrival of European settlers, Métis people evolved from the descendants of the mixed relationships of the Indian women of the north west central prairie region, of what we now know as Canada, and the male European fur traders. From the mixed ancestry of the original off-spring of these mixed - blood individuals evolved a new shared common culture, language (Michif) and distinct identity of peoples who also established their own distinct communities. The shared identity led to the creation of the Métis Nation.²

As well, a sometimes sensitive matter, including to Métis people themselves, is a possibly often held stereotypical misconception concerning the physical appearance of Métis people, in that Métis people *only have* brown eyes and dark hair and skin tone commonly associated with Aboriginal people in Canada today. While many individual Métis people proudly do possess some and or all of these physical attributes; the evolution of the Indian/Native and European mixed-blood ancestry is not limited to these distinct physical features alone. On the contrary, the evolution of the mixed-blood ancestry presents itself not only with brown eyes, dark hair and skin tone. But presents and is reflected in a diversity of skin tones, hair and eye colours and overall physical appearance; including but not limited to, any variety of light to dark skin tones, blue, green, brown eye colours and blond, red, brown, black and grey hair and other hair colours. Individual Métis people, present and reflect a broad diversity of distinct and diverse looks within the nation and within individual families themselves. This is reflective of the rich and diverse Indian/Native and European mixed blood ancestry and ethnogenesis that evolved and is part of the now shared distinct identity and make-up of "whom the Métis people" in Canada are today.

"Métis Nation and Homeland" - The Métis people constitute a distinct Aboriginal nation largely based in western Canada. The Métis Nation's Homeland is based on the

² Balan, Joel [et al] "*Canadian Constitutional Law*" 3rd Edition (2003) (Toronto: Edmonton Montgomery Publications Limited) 512

traditional territory upon which the Métis people have historically lived and relied upon within west central North America. This territory roughly includes the 3 Prairie provinces (Manitoba, Alberta and Saskatchewan), parts of Ontario, British Columbia and the Northwest Territories, as well as, parts of the northern United States (i.e. North Dakota, Montana).³

The Métis Nation grounds its assertion of Aboriginal nationhood on well-recognized international principles including it has a shared history, traditional territory, extensive kinship connections from Ontario westward, distinct way of life, collective consciousness, common culture (song, dance, dress, national symbols, etc.) and unique language (Michif).⁴

The Culture - a Snapshot

The Métis are a people with a common culture that includes:

- A unique language known as Michif (with various regional dialects) is a mixed language primarily made up of Cree verbs and French nouns and grammar
- Song, Fiddle music and Jig Dancing
- Medicines (Seneca Root) and Food (Bannock)
- Beadwork (Flower)
- *National symbols; i.e.:*

The Métis Infinity Flag - The Métis Nation has many symbolic flags that evolved over time. The blue infinity flag is a Métis National Flag and represented the political and military force of the Métis as early as 1816. This flag is still flown by the Métis Nation today. This particular flag has a blue background with a white infinity symbol that has two meanings:

- The joining of two cultures.
- The existence of a people forever.

The Métis Sash - Historically the sash has had a different meaning to the many whom have shared in its origin. The colourful sash, as well as being distinguishable Métis apparel, has many more functional uses. It had fringed ends that served as emergency sewing kits when the Métis were out on a buffalo hunt. The Sash also

³ Métis National Council web-site document; www.metisnation.ca/who/index.html: "*Who Are The Métis*", 1

⁴ *ibid*

served as a key holder, first aid kit, washcloth, towel, and as an emergency bridle and saddle blanket.⁵

Métis Women - Historical Beginnings - What is Known and or Documented

Historically, it is known that Métis women were the originators of the Métis Nation born out of the unions between the European fur traders and native Indian women. "Native society approved of marriages between its' women and European traders; such unions were consistent with pre-contact practices in which inter-tribal marriages cemented trade and military relationships between groups."⁶

What were often known as "country marriages" were generally looked upon favourably by the natives who used them to enhance their position in the fur trade and to forge alliances with the white traders. The women who married the fur traders often enjoyed a richer material lifestyle via gaining access to things such as European materials. Even though, the marriages were not recognized by the church officials, the North West Company encouraged its employees to establish relations with native women knowing the importance of the solid economic and social links with the aboriginal tribes.⁷ For a period of time, the Hudson Bay Company (HBC) was more hesitant and even had regulations forbidding their employees to have such relationships.

Later, the traders often proved fickle marriage partners when it came time to retire, as they would time and again abandon long-term relationships that had produced many children.⁸ Frequently, they would leave and returned to Europe alone.

Valued Matriarchal Society

Métis societies have a matrilineal and matriarchal history wherein Métis women's roles in the family and community were valued and fundamental to the preservation of the Métis culture⁹; for example:

⁵ Web-site - Manitoba Métis Federation: www:mmf.mb.ca

⁶ Conrad Finkel, *'History of the Canadian Peoples'* - Beginnings -1867 Volume 1 3rd Edition (2002) (Toronto, Ontario: Addison, Wesley Longman) 226

⁷ *"Rupert's Land To Riel - Manitoba 125 A History"* Volume 1 (1993) (Winnipeg: Great Plains Publications) 69

⁸ Supra at 6; 226

⁹ Barkwell, Lawrence J.[et al] *"Métis Legacy"*1st Edition (2001) (Winnipeg: Pemmican Publications Inc.) 15

- Métis women, maintaining the leatherwork skills of their ancestors, used beads rather than porcupine quills to decorate the coats, belts and moccasins they produced. Later the women of the plains nations also adopted this practice.¹⁰
- Métis women taught newly arrived Euro-Canadian and European persons to prepare and preserve wild game and other foods so that they could survive the harsh winters that they were not accustomed to;¹¹ and
- There is some documentation of Métis women working alongside the men in building buffalo pounds, hauling and skinning meat as well as scouting and interpreting.¹²

Note re: Written Historical Documentation on Métis Women

What has been found about the historical documentation of Métis women is recounted in the book "Métis Legacy" wherein, it states that.... "since the 1980's more historians, communities and families are documenting the lives and contributions of Métis women. Unfortunately, there is still limited information about the 19th century Métis women. In order to have a comprehensive understanding of Métis history it is necessary to learn about Métis people and the fur trade but again unfortunately most fur trade literature entirely ignores the contribution of Métis and First Nation women. If women were mentioned it was often as a passing reference in a trader's journal, and most often framed in a variety of popular stereotypes that used pejorative and stereotypical images of Métis women. More comprehensive research is needed about the extensive historical experience and contributions of Métis women."¹³

Historical Context - Brief Overview

1869 - with Louis Riel as the leader, the Métis people formed a provisional government to negotiate the terms of Manitoba's entry into Canada.

1870 - *Manitoba Act, 1870* - The *Act* that established and admitted Manitoba as a Province into the Dominion of Canada; and in c.3 s. 31 - using the term "half breed" in reference to the Métis; the *Manitoba Act* provided for the provision of land "for the benefit of the families of half-breed residents"; ¹⁴ through a land grant /scrip process.

¹⁰ Supra at 6; 226

¹¹ Supra at 9; 1

¹² *ibid.* at 15

¹³ *ibid*

¹⁴ *Manitoba Act, 1870*, 33 Victoria, c 3 (Canada)

1902 - 2009 - The issue of Métis land continues to be largely unresolved. The Manitoba Métis Federation (MMF) is currently remains involved in a land claims case that commenced in the courts on April 3, 2006. As per David Chartrand; MMF President:

- "The legal action has its origins in the turbulent period of 1869 -1870, commonly known as the Red River Resistance, when the Métis established a Provisional Government and drew up a bill of rights. Subsequently, at the invitation of Canada, the Provisional Government sent delegates to Ottawa to negotiate the terms under which they would agree to join Canada.
- The Métis believe there were solemn promises and a treaty; which led to the Manitoba Act and the creation of "our" province. Evidence shows, as part of the agreement to enter Confederation, the Métis children were to receive lands distributed according to the wishes of the Métis in blocks next to the Red River Settlement and comprising river lots, wooded areas, hay lands and other lands of benefit and value.
- The MMF argued in court that there was a fiduciary and legal duty to the Métis people under sec. 31 of the *Manitoba Act 1870*, which said that 1.4 million acres of land were to be reserved for Métis children. In the view of the MMF, sec. 31 acknowledges that the land was granted to the Métis in return for extinguishing Indian title, or collective claim to the land. The *Manitoba Act 1870*, including sec. 31, is part of the Constitution of Canada." ¹⁵

1960's - the Métis Nation joined with First Nation and Inuit peoples, in pan-Aboriginal political organizations, to push forward their collective agendas.

1982 - as a result of these united efforts, Canada's Aboriginal peoples achieved monumental success with the protection of their existing Aboriginal and Treaty rights in s. 35 of the *Constitution Act, 1982*. In particular, this was a watershed for the Métis Nation, with the explicit recognition of the Métis as one of Canada's three distinct Aboriginal peoples.

Section 35 of the *Constitution Act, 1982* provides:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.¹⁶

- Note the rights are also guaranteed equally to male and female persons.

C. Who Are the Aboriginal and Métis in s. 35 of the *Constitution Act*, 1982?

- **Who are the Aboriginal peoples with rights in Canada?**
- **Are Métis the same as First Nations or Inuit peoples?**
- **Are all those who identify as "Métis" the same?**

1. Who are the Aboriginal people with rights in Canada?

"The legal case *R.v. Van der Peet* (1996) pointed out that "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries." This fact distinguishes aboriginal people from all other minority groups in Canada, and explains why aboriginal rights have a special legal, and now constitutional, status."¹⁷

Much confusion surrounds "who the Métis people are". This issue also raises the following questions:

2. Are Métis the same people as First Nation persons in Canada?

- The Métis are not the same as First Nation persons. The federal *Indian Act* defines the term "Indian", and establishes a register to record the names of those who qualify to register as "Status Indian". The statutory definition of the term "Status Indian" derives from tracing Indian status from particular bands whose charter members were normally determined at the time of the establishment of a reserve or the making of a treaty and that status then devolves from those charter members to their descendants.¹⁸ The terms "Treaty" and "Status" have two different meanings; which are not interchangeable and not having an association to a specific treaty does not make a First Nation person ineligible to register as a "Status" Indian. Not all

¹⁵ Web-site - Manitoba Métis Federation "*MMF v Canada*"

¹⁶ *Constitution Act 1982 s. 35*

¹⁷ Hoog, Peter W., "*Constitutional Law of Canada*", Student Ed. (Toronto: Thomson Carswell Publishing, 2007) 616

¹⁸ *ibid.* 597

registered "Status" First Nation persons come from communities associated with specific "treaties". But all "Status Indians" have the same and or same type of rights negotiated in all of the FN treaties based on a collective right of the nation as a whole. Persons who qualify to register as "Status Indian" have the right and entitlement to live on Indian reserves and are eligible to access other Indian Act privileges. Specific to the Métis, at present, outside of individual self-initiated memberships with Métis specific organizations, the Métis do not have any formal registration or enumeration process to register as "Métis". That being said, and as already stated earlier in this document, the Métis, in the MMF Manitoba Land claims case, believe there were solemn promises and a treaty, which led to the *Manitoba Act* and the creation of the province of Manitoba. This is one of the primary arguments being presented as a justified basis for the case.

3. What does the term " Mixed- Blood" mean?

- "Métis" is a French word when translated can mean "mixed". Theoretically any person of more than one ancestral heritage is of "mixed blood". As well, there are a number of persons in Canada who theoretically are of "mixed" European and Native / Aboriginal ancestral heritage; ie. during the French regime, intermarriage between white men involved in the fur trade and Native women was so common that one demographer suggests that as many as 40 percent French-Canadians in Quebec today have at least one Native ancestor. Although, these children of part-Native descent who integrated into Quebec society did not develop a sense of being members of a separate nation, nor did the offspring of Native-white liaisons who rejoined the tribes of their mothers. ¹⁹

4. How is it that Métis and Inuit persons of "Mixed Blood" are different?

- Concerning the Métis and Inuit persons of "Mixed Blood" - At the Supreme Court of Canada, in the *R v Powley* Métis hunting rights case, the factum of the Labrador Métis Nation stated: "...Labrador Métis" remain a continuing manifestation of an authentic Inuit culture...The Métis-Inuit are not a society separate and distinct from the Inuit. It is an Inuit culture, which uses the constitutional descriptor of "Métis". ²⁰

¹⁹ Supra at 6; 226

²⁰ Supra at 1; 9

5. **Are all persons of "Mixed blood" ancestry who identify themselves as "Métis" in Canada the same people who have rights further to their recognition in s.35 of the *Constitution Act, 1982*; and**
6. **Who are the "Métis" who are recognized as one of the three Aboriginal peoples in s.35 of the *Constitution Act, 1982***

In 2003 the *Supreme Court of Canada* provided a response to the above questions when they ruled in the case of *R v. Powley*, wherein they stated:

The term "Métis" in s.35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage;

- Rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group separate from their Indian or Inuit and European forbears.
- A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.
- The purpose 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.²¹

Further to the above, although, the court did not define a specific definition or reference any requirements specific to blood quantum, it did state: "In particular we 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".²²

7. What was the *R v Powley* Case?

In October 1993, Steve Powley and his son Roddy killed a moose just outside Sault Ste. Marie, Ontario which they tagged with a Métis card and a note that read "harvesting my meat for winter." The next week Conservation officers charged the Powleys for hunting without a license and unlawful possession of a moose contrary to Ontario's *Game and*

²¹ *R.v.Powley* [2003] 2 S.C.R. 207;10

²² *ibid.* at 30

Fish Act. In 2003, the Supreme Court of Canada ruled unanimously that the Powleys, as members of the Sault Ste. Marie Métis Community, could exercise a Métis right to hunt that is protected by s.35²³ of the *Constitutional Act, 1982*.

- **"Métis Right" as per the Powley Test**

The Supreme Court further stated that... the appropriate way to define Métis rights in s. 35 is to modify what is known as the *Van der Peet* test²⁴ which is a legal test used to define the Aboriginal rights of Indians. A defining difference between Métis and Indian and Inuit peoples concerns pre and post Colonial / European contact. Specifically, a defining difference here is thatin applying the *Van der Peet* test to determine the Métis ' s.35 entitlements, the pre-contact aspect of the test must be adjusted to take into account the post-contact ethnogenesis and evolution of the Métis. A pre-control test establishing when Europeans achieved political and legal control in an area and focusing on the period after a particular Métis community arose and before it came under the control of European laws and customs is necessary to accommodate this history.²⁵ The Supreme Court of Canada further defined a Métis specific test; which has ten parts to it and is now called the "*Powley* test".

²³ Métis National Council document: "*Fulfilling Canada's Promise. Métis Rights. Recognized and Affirmed. R.v. Powley* A Case Summary and Frequently Asked Questions";2

²⁴ *ibid.* at 4

²⁵ *Supra* at 21; 36-37