ARE WE MÉTIS OR ARE WE INDIANS? A COMMENTARY ON *R.* V. *GRUMBO*

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What did the government do? It laid its hands on the land of the Métis as if it were its own. By this one act it showed its plan to defraud them of their future.[1]

Louis Riel, Regina, 1885

I. INTRODUCTION

Louis Riel, while writing his last memoir in a cold, lonely jail cell, told of the plight of the Métis of the North West Territories at the hands of the federal government. As it turns out, the future of the Métis was, as he predicted, one without land. The federal government, having washed its hands of any injustice, denies any responsibility to the Métis for reparation of past grievances. Is it possible that after 115 years of injustice, the Métis may be able to obtain redress? Judging from the growth of Métis related litigation, there appears to be a real possibility of positive results.

Many Métis, either as defendants to hunting and fishing charges or as claimants, are now asserting rights at a previously unprecedented rate. Prior to 1990, there were a handful of reported cases involving issues dealing with the rights of the Métis. Since 1990, there have been no less than eight reported cases, while others continue to be filed or are at various stages of negotiation.

A Métis defendant or claimant must make various legal and political strategies and choices in furtherance of his or her case. In making these choices, Métis litigants are often faced with two general approaches. One path inevitably involves a melding of Métis and Indian identity. The other path focuses on the identity of the Métis as a separate and distinct collective.

Some recent litigation has attempted to classify self-identifying Métis litigants as "Indians" under s.91(24) of the *Constitution Act* or as "Indians" under the various Natural Resource Transfer Agreements of the prairie provinces. I can certainly understand the motive behind such claims and I am sympathetic to them. However, I cannot help but be concerned about the cost of such strategies to my own identity as Métis and the cost of such strategies to the honour and integrity of my Métis heritage.

The social and political implications of pursuing such legal strategies was recently highlighted by the Saskatchewan Court of Appeal in *R. v. Grumbo.*

II. BACKGROUND

R. v. Grumbo[2] is one of the few cases at the Court of Appeal level in Canada that deals directly with the rights of the Métis people.[3] In a split decision, the Court of

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[1] L. Riel, "The Métis: Louis Riel's Last Memoire" in A.H. de Tremaudan, ed., *Hold High Your Heads (History of the Métis Nation in Western Canada)* (Winnipeg: Pemmican Publications, 1982) at 205.

[2] *R.* v. *Grumbo* (1998), 159 D.L.R. (4th) 577, 3 C.N.L.R. 172 (Sask. C.A.) [hereinafter *Grumbo* cited to C.N.L.R.].

[3] For the purposes of this paper, I define Métis people as the self-identifying, mixed-blood population of Western Canada that developed a national identity as a result of social and political factors. Although there are other self-identifying, mixed-blood peoples in Canada that call themselves Métis, they are not the focus of my analysis. However, the implications of the *Grumbo* case are relevant to such groups in their claims for recognition of Aboriginal rights.

Appeal raised a fundamental question about the source and nature of Métis Aboriginal rights that to date has not been squarely addressed by the courts. The question is: Are the Métis entitled to claim Aboriginal rights because they are "like Indians" or is their entitlement to Aboriginal rights rooted in their own unique and distinctive character?

In 1994, John Grumbo, who identified himself as a Métis person, received a deer from his uncle, Ken Pelletier, a Treaty Indian. In Saskatchewan, according to s. 32 of the *Wildlife Act*, only certain classes of non-Indians, namely immediate family members, can legally possess wildlife given to them by an Indian.[4] Nephews are excluded from this class of non-Indians who can legally possess wildlife given to them by an Indian.[5] Consequently, on investigation by wildlife officers, Grumbo was charged with possession of wildlife taken by an Indian, contrary to s. 32 of the *Wildlife Act* of Saskatchewan.

At the initial trial level, Grumbo argued that he ought to be considered an "Indian" for the purposes of the s. 12 of the Natural Resource Transfer Agreement (NRTA) and therefore ought to have a right to hunt.[6] The Provincial Court Judge felt bound by the earlier 1978 *Laprise* decision of the Saskatchewan Court of Appeal.[7] In *Laprise*, the Court of Appeal upheld a decision of the Saskatchewan Queen's Bench that held that the term "Indian" in s.12 of the NRTA did not include the Métis. The court agreed that the term "Indian" in the NRTA (which became part of the *Constitution Act, 1930*), meant the same as the term "Indian" as it was defined in the *Indian Act*[8] at the time. As a result of this interpretation, the Provincial Court convicted Grumbo since he was not a registered Indian under the *Indian Act.*

Grumbo successfully appealed to the Queen's Bench. For reasons that are difficult to determine from the judgment itself, the court (without submissions from

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[4] *Wildlife Act*, S.S. 1979, c. W-13.1, s. 32. The classes of non-Indian individuals entitled to possess wildlife received from an Indian are: father, mother, grandfather, grandmother, brother, sister, child or common-law spouse of the non-Indian.

[5] There is a serious question of whether the Saskatchewan legislation is a violation of Aboriginal rights from the perspective of establishing a custom or tradition within Aboriginal societies that sharing of wildlife meat is not restricted to the European definition of immediate family. The Aboriginal custom of sharing food may be broader in scope. Insofar as such a custom is protected from infringement by s. 35 of the *Constitution*, the Saskatchewan legislation may be unconstitutional.

[6] Section 12 of the NRTA states:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

[7] *R.* v. *Laprise*, [1978] 6 W.W.R. 85, 9 C.N.L.C. 638 (Sask. C.A.).

[8] At the time, the definition of Indian was contained in the *Indian Act*, R.S.C. 1927, c.98, s. 2(d) which stated:

> "Indian" means:
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> i) any male person of Indian Blood reputed to belong to a particular band,
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> ii) any child of such person,
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> iii) any woman who is or was lawfully married to such person.

counsel on the issue) held that the Crown failed to prove that Grumbo was a non-Indian and therefore acquitted Grumbo of the charge. In doing so, the court made it clear that *Laprise* was no longer good law because its foundational reasoning was undermined by recent judgments of the Supreme Court of Canada; for example *R. v. Sutherland*[9].

The Crown appealed to the Saskatchewan Court of Appeal. The Crown re-argued that *Laprise* is good law and that it ought to be binding on the court. By the time *Grumbo* was argued before the Court of Appeal, case law from the other two prairie provinces of Manitoba and Alberta had revisited the issue of whether the Métis can benefit from the provisions of the NRTA but with mixed results.[10]

The results of the *Grumbo* case are bittersweet. In one sense, the decision marks a victory for the Métis as the majority decided that *Laprise* no longer constitutes good law by expressly overruling the decision. Unfortunately, the court sent the matter back to trial for a rehearing because of the lack of evidence led about whether Grumbo had an existing Aboriginal right to hunt which would be protected by the NRTA at the time of its enactment in 1930. The court considered this evidence a necessary "contextual factor" in determining whether the Métis are included within the term "Indians" under the NRTA.

The Saskatchewan Court of Appeal refused to address the question of whether Grumbo is an Indian within the meaning of section 12 of the NRTA. In doing so, the court is sending a clear message that the issue of the nature and source of Métis rights must be addressed. One cannot rely solely upon statutory interpretation claims that the drafters of various constitutional and legislative provisions intended that the term "Indians" used in such constitutional and legislative provisions ought to include the Métis people.

III. THE DECISION

I will first summarize the majority and minority judgements regarding whether the *Laprise* decision is still good law in Saskatchewan. I will then look at what the majority judgment of Sherstobitoff, J.A. stated were the "contextual issues" that needed to be addressed before the issue of whether the term "Indian" in s. 12 of the NRTA includes the Métis. In particular, I will comment on two of the pre-requisite questions presented by the court. Namely, are the Métis separate and distinct from the Indian people? and, if so, do the Métis have an Aboriginal right to hunt over the lands in Saskatchewan? I will attempt to situate this analysis within the larger context of Métis identity and the social and political implications of the decision. In particular, I will examine the various legal approaches that Métis claimants could advance that do not necessarily threaten the distinctiveness of the Métis people.

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[9] *R.* v. *Sutherland*, [1980] 2 S.C.R. 451, 5 W.W.R. 456 [hereinafter *Sutherland* cited to W.W.R.].

[10] In *R.* v. *Blais*, [1997] 3 C.N.L.R. 109, the Provincial Court of Manitoba rejected an argument that the term "Indian" in the relevant section of the NRTA included Métis. However, in *R.* v. *Ferguson*, [1994] 2 C.N.L.R. 117, the Queen's Bench of Alberta confirmed a Provincial Court decision, [1993] 2 C.N.L.R. 148 that the term "Indian" was to be read broadly so as to include the Métis.

A. *The Validity of Laprise*

Justice Sherstobitoff, writing for the majority, held that *Laprise* should no longer be followed by the court. The majority disagreed with the interpretation of the term "Indian" in s. 12 of the NRTA adopted by Justice Woods in *Laprise*. As stated earlier, *Laprise* held that the term Indian in s. 12 of the NRTA did not include Métis people but was to take the same meaning as the term "Indian" in the *Indian Act*. Justice Sherstobitoff held that a constitutional term cannot be defined by reference to an ordinary statute. Otherwise, the result of this incorporation by reference would be that Parliament is empowered to amend the Constitution by simply amending the definition of the word "Indian" in the *Indian Act* from time to time as it has done in the past.[11]

Justice Wakeling, speaking for the minority, held that the *Laprise* decision did not err in concluding that "Indians" in the NRTA means Indians as defined in the *Indian Act*. Justice Wakeling held that the parties to the NRTA acted legally in agreeing that reference to Indians in paragraph 12 was intended by the parties to mean Indians as defined in the *Indian Act*. In referring to the judgement of Justice Woods in *Laprise*, he states:

> I see no reason why [Justice Woods] should not be taken to have concluded the parties to the NRTA had accepted that with the passage of time, the definition of "Indian" might need to be contracted or expanded and whichever way the definition might be changed, that would be the "Indians" to which paragraph 12 was meant to relate.[12]

Justice Wakeling then proceeds to politely fill in the gaps of legal reasoning that he thinks were unfortunately omitted by Justice Woods in the earlier *Laprise* decision. He claims that *Laprise* makes good sense given the historical inability of the federal or provincial governments to accept responsibility for the Métis.

In promoting the historical conception of the Métis as the forgotten people, Justice Wakeling observes the federal government's historical denial of responsibility for the Métis, taking the position that the Métis are a provincial concern. Likewise, the Provinces have seen the "Métis as little different from the Indian and logically the responsibility of the federal government"[13].

The minority in *Grumbo* states that this "hands off" understanding by the governments of the day towards the Métis was prevalent at the time the NRTA was enacted. Justice Wakeling refers to a letter written by T.C. Davis, Attorney General of Saskatchewan in 1935 to confirm that this was indeed the understanding at the time.[14]

Given this historical backdrop, the federal government consistently refused to accept responsibility for the Métis. Thus, it is understandable that they did not show any interest in the preservation of Métis rights when the NRTA was negotiated. "[N]either level of government was prepared to acknowledge they had any obligation to identify and preserve the rights of the Métis".[15] It is therefore quite logical, Wakeling J. argues, that both levels of government would have agreed that the term "Indians" in s. 12 means "Indians" as defined in the *Indian Act* from time to time.

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[11] *Supra* note 2 at para. 24.
[12] *Ibid.* at para. 57 and also 68.
[13] *Ibid.* at para. 63.
[14] *Ibid.* at para. 62.
[15] *Ibid.* at para. 65.

However, it must be remembered that had Justice Wakeling's reasoning prevailed, it would not necessarily be definitive. Grumbo could still rely upon a defence based on section 35(1) of the *Constitution Act, 1982*.[16] He could still argue that he has an Aboriginal right to hunt deer or possess deer given to him by his relatives.

In fact, the minority position that the Métis were excluded from the application of the NRTA would likely aid Grumbo in asserting an unextinguished right to hunt or possess wildlife.[17] For example, if the governments that were parties to the NRTA intended to ignore the Métis, how could these same government parties take the position that there was a "clear and plain" intention to extinguish or limit Métis rights by the NRTA? Since both the provinces and the federal government denied legislative responsibility over the Métis, it would be logically inconsistent to find that legislation dealing with Métis Aboriginal rights was intended by implication to extinguish or limit Grumbo's rights.

B. *The Contextual Issues*

The majority in *Grumbo* took the view that a constitutional term which defines a class of people entitled to certain benefits under a constitutional provision cannot be defined by reference to ordinary legislation. As a result, the court overruled *Laprise*. The court did not, however, hold that the Métis were "Indians" as the term was used in s. 12 of the NRTA. Rather, the court stated that the issue could not be resolved until certain contextual issues were first addressed.

The court interpreted s. 12 of the NRTA as a provision that did not create new rights for Indians, but simply accommodated pre-existing rights under the NRTA. Consequently, "if s. 12 related to pre-existing Aboriginal rights relating to land, the existence or non-existence of such rights, vested in the Métis, would be very relevant to, and indeed a decision respecting them would be necessary for, a determination of the question of whether s. 12 applied to the Métis people."[18] In other words, since the court did not hear any evidence that Grumbo enjoyed an Aboriginal right to hunt in Saskatchewan, a right that would be preserved by s. 12 of the NRTA when it came into force, the issue of whether Grumbo, as a Métis, was included within the term "Indian" in section 12 could not be satisfactorily resolved by the court. In the minds of the majority, certain contextual issues needed to be resolved first. These contextual issues were identified by the court as:

1) Are the Métis people, under the Canadian Constitution, an Aboriginal people separate and distinct from the Indian people?
2) If so, did they own any Aboriginal title to land in Saskatchewan, or at least, an Aboriginal right to hunt over lands in Saskatchewan?
3) If so, was the Aboriginal title or right to hunt extinguished?[19]

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[16] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11; R.S.C. 1985, App. II, No.44.

[17] The effect of the NRTA has been to unilaterally limit the exercise of Aboriginal and treaty rights to hunt. See *R.* v. *Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 [hereinafter *Badger* cited to D.L.R.].

[18] *Supra* note 2 at para. 31.

[19] *Ibid.* at para. 33.

These are fundamental questions which, according to the court, cannot be circumvented by short-cut arguments that the Métis are "Indians" within the meaning of the term in s.12 of the NRTA. Consequently, the matter was sent back to trial for a determination on these contextual issues.

Grumbo must now argue that he has an Aboriginal right to hunt or possess deer. This finding would then be an important factor in determining whether he, as a Métis, would benefit from the NRTA provision. Interestingly, if he was found to have an unextinguished Aboriginal right to hunt/possess deer, his Aboriginal right would in turn be protected by s. 35 of the *Constitution*. If such is the case, why would Grumbo then want to further argue that he falls within the provisions of s. 12 of the NRTA? It would probably be more beneficial to remain outside of the scope of s. 12 so that the provision does not affect his full enjoyment of the Aboriginal right.

Viewed from this perspective, the effect of the majority and the minority decision are essentially the same. No real difference exists between them. In applying either rationale, Grumbo must satisfy a legal claim that he has an Aboriginal right to hunt or possess deer. This is because Grumbo is either not an "Indian" and therefore not included in the term as applied in the NRTA or he must prove he possesses an Aboriginal right to hunt as a preliminary matter before the court will entertain the question of whether he is an "Indian" within the meaning of the term as it is applied in the NRTA. Regardless, the court must come to terms with the question: who are the Métis?

1. *The First Contextual Issue: Are the Métis People Separate and Distinct from the Indian People?*

The Métis people are, without a doubt, a separate and distinct people. This is certainly true historically and culturally.[20] However, from a legal standpoint, there appears to be some doubt. By posing the question, the majority in *Grumbo* expressed some doubt that the Métis are indeed separate and unique from Indians.

There has always existed a tension in the Métis community as to our identity with Indians. The potential benefits that affiliation with Indians might provide puts pressure on us to describe ourselves as similar to Indians politically and legally. For instance, if I could receive financial assistance for post-secondary education by identifying more with being Indian, then that is a strong motivating factor to promote such an identity. However, being Métis means that you are distinct from Indians because of a unique history, culture and world view. There is a danger that if we push the "Indian card" too far we may lose our own unique identity. Will we bring dishonour to our grandparents who struggled so hard over the years to maintain our unique and distinctive identity?[21]

The minority illuminated this dilemma facing the Métis in addressing the

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[20] See Royal Commission on Aboriginal Peoples, *Perspectives and Realities, vol. 4* (Ottawa: Canada Communications Group, 1996), for an overview of Métis history and culture.

[21] At this point, I am only asking the question. I certainly don't have the answer. However, I do believe the Métis people of this country must collectively consider the issue in a positive environment that will promote a broad and wide ranging airing from a variety of perspectives. Leaving the question to the haphazard of litigation is an invitation to confusion and in the end may jeopardize progress rather than facilitate it.

question formulated by the court. The observation was made that if the Métis emphasize their separateness from Indians, they are put in the difficult position of diminishing their claim to inclusion under the term "Indians" as it appears in the NRTA or in s.91(24).[22]

Of course, inclusion of the Métis within the term "Indian" in the NRTA and s. 91(24) of the Constitution Act, 1867 is advantageous in that the Métis may thereby gain certain benefits currently received by Indians.[23] While this may be seen as a positive development, what cost does such a legal strategy of inclusion entail? Should we as the Métis people continue to put forth such arguments? Are they not inconsistent with our history as Métis people distinct from our European and Indian counterparts? Does inclusion of the Métis as Indians not threaten our very identity as a separate and unique Nation?

As a unique Aboriginal Nation, distinct from the European and Indian Nations, we need not deny our difference or our separateness to defend our legal rights. We can claim Aboriginal title and Aboriginal rights that flow from our existence as a separate and distinct Aboriginal People. As a result, we should avoid framing our rights as Indian rights that happen to also belong to the Métis people. Our rights can be and should be Métis rights that belong to the Métis people in and of their own right.[24]

Unfortunately, there is a strong trend in legal thought about the source of Métis Aboriginal rights that is contrary to furthering and supporting a distinct Métis identity. That trend is the idea that Métis rights flow from our Indian ancestors and not from the Métis Nation itself. This trend has gained strength as a result of the recent *Van der Peet* decision and the test formulated by Chief Justice Lamer in proving the existence of an Aboriginal right.[25] I will return to this issue later in the paper.

2. *Not All Métis Need to Prove Aboriginal Rights*

Before we look at the next question posed by the court, it is important first to understand that there are "Métis" who should not be required to first prove that they possess Aboriginal rights or title to land before making the argument that they are

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[22] *Supra* note 2 at para. 85.

[23] For example, health care, post-secondary education, access to comprehensive and specific claims processes are a few of the possible benefits providing the Métis are able to convince the Federal government that they have a positive obligation to treat the Métis equally with status Indians in this regard. It must not be forgotten, however, that if the federal government has the power and authority to legislate with respect to the Métis, this does not translate into a legal obligation to legislate. The federal government could simply continue to do what it is currently doing. No doubt, such recognition would facilitate arguments that there is a positive obligation given the fiduciary duty owed to Aboriginal peoples and s.15 of the *Charter*.

[24] Notwithstanding this concern, the Congress of Aboriginal Peoples has recently filed a claim against the federal government arguing that Métis and Non-status Indians are covered by s. 91(24) of *the Constitution Act*. The Congress is claiming to represent the Western Métis people, and hence the Métis Nation itself. This claim would no doubt be contrary to the views of the Métis National Council which currently claims to represent the descendants of the historic Métis Nation and its contemporary manifestations. Perhaps this is of no concern in the end since the Métis National Council's position regarding the inclusion of the Métis under s. 91(24) is the same as that being claimed by the Congress. See Statement of Claim, online at: (http://www.cyberus.ca/~mfdunn/metis/Legalmetis/CAPclaim.html).

[25] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 4 C.N.L.R. 177 [hereinafter *Van der Peet* cited to C.N.L.R.].

"Indian" within the meaning of the NRTA.

There are many individuals that identify with being "Métis" or are labeled as "Métis" in circumstances where objectively they belong more to an Indian community than a Métis community. There are a number of reasons why there are individuals who are culturally "Indians", but are categorized as "Métis".

Firstly, the *Indian Act* definition over time has become increasingly restrictive. For example, the *Indian Act* forced Indian women to lose their status if they married a non-Indian man.[26] In addition, the children of such marriages would also lose their status. These non-status Indian people would sometimes adopt the identity of Métis despite having more in common with their Indian relatives and communities. Part of the motivation for some to identify as Métis was likely influenced by the political associations that formed in the prairies. Non-status and Métis people had common political concerns about recognition and the need to promote their Aboriginal rights. Joint non-status and Métis associations were common in the prairies. For political reasons, these joint efforts are no longer as common, but their effects on identity remain fixed.[27]

Secondly, during the period of time during which most treaties were being signed (late 1800s to early 1900s), treaty commissioners would travel along with scrip commissioners.[28] If you were a "half-breed", you were told to take scrip and, if you were "Indian", you were told to take treaty. The decision would often be arbitrary. If an individual told the commissioners that they had a non-Indian relative in their ancestry, they would be given scrip even if they lived in an Indian community, spoke the language and identified in all other respects with that community.[29] The case of *R. v. Ferguson*[30] is illustrative of this kind of arbitrary effect of early treaty and scrip commission decisions. In his trial for a hunting violation, Ferguson identified as a Cree Indian. He spoke Cree, and he lived a Cree lifestyle. But, because his great-grandparents accepted scrip, he was exempt from being allowed to be registered "Indian" under the *Indian Act*. Thus, he was labeled by the law as non-treaty or Métis by default, yet Ferguson was culturally and linguistically Cree Indian.

Under such circumstances, individuals should be considered "Indian" for the purposes of the NRTA. The fact that there is now recognized group rights that belong to the Métis as a culturally distinct community should not prejudice individuals like Ferguson from being entitled to base their Aboriginal and treaty rights as a member of Cree society. The constitutional definition of "Indians" in the NRTA should not be based on arbitrary historical factors but on the reality of an individual's cultural identity and acceptance by an Aboriginal community.

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[26] *Indian Act*, S.C. 1951, c.29 at s. 12(1)(b).

[27] For an overview of the historical alliance between non-status and Métis, see J. Sawchuck, "Some Early Influences on Metis Political Organization" (1982) 3 Culture 85.

[28] Scrip was a document that gave the bearer a right to convert it into ownership of a certain amount of lands.

[29] See in particular the comments by Meagher, P.C.J. in *R.* v. *Morin and Daigneault*, [1996] 3 C.N.L.R. 157 at 174 (Sask. Prov. Ct.) where the judge, after a review of the historical evidence, states: "I have come to the inescapable conclusion that the Crown, with Treaty 10 and the issuance of scrip, with no improper motive, arbitrarily divided the Aboriginal community into the two groups – Indian and Half-breeds."

[30] *R.* v. *Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.), aff'd [1994] 1 C.N.L.R. 117 (Alta. Q.B.).

In the case of Grumbo, there is more evidence of his affiliation with the distinct Métis culture and community. He was the son of a Michif interpreter who identified as "Métis all the way".[31] Grumbo was also from the Métis community of Crescent Lake Métis Village. He identified as both Indian and Métis. His explanation for identifying as Indian, however, was because of how others labeled him. "You go to any white place and you are dark. Naturally, they are not going to call you a Métis. You're automatically Indian."[32]

Under these facts, it is quite appropriate for the court in *Grumbo* to insist that the defendant prove an Aboriginal right based on his identity with the Métis community and whether the Métis community, as such, possess such an Aboriginal right. Unfortunately for Grumbo, the Aboriginal rights of the Métis are only now beginning to be affirmed by the judiciary. Whereas, in the case of Ferguson, Indian rights to hunt have been affirmed by the Supreme Court of Canada and indeed are recognized in the NRTA itself. No doubt, it is more attractive to take such a short-cut and argue that Métis are "Indians", thus avoiding the evidentiary difficulties and costly litigation of proving Aboriginal title and/or Aboriginal rights to hunt by Métis communities. However, the Court of Appeal viewed the resolution of this issue as an important factor that would influence the decision of whether a Métis community should be included within the definition of "Indian" under the NRTA.

3. *The Second Contextual Issue: Do the Métis Have an Aboriginal Right to Title or an Aboriginal Right to Hunt?*

I will restrict my analysis to an Aboriginal right to hunt by the Métis and leave for another day the issue of Métis Aboriginal title. As we know, the legal test for establishing an Aboriginal right was recently stated by the Supreme Court of Canada in *R. v. Van der Peet.* The test is that s. 35 (1) protects those practices, traditions and customs integral to the distinctive cultures of Aboriginal Peoples that existed prior to contact with Europeans.

As courts and others have observed, the obvious problem with Chief Justice Lamer's test is that the Métis did not exist prior to European contact and could therefore never be able to establish Aboriginal rights according to a strict application of this test. Chief Justice Lamer in *Van der Peet* notes this potential dilemma and states that the Court may need to devise a test that is unique to the Métis given that the Métis people have a history distinct from the Indian people.[33]

There are three competing theories about the source and nature of Aboriginal rights in the *Van der Peet* decision itself. These approaches can provide guidance in overcoming the dilemma posed by the pre-contact requirement of the general test.

4. *The Approach of Tracing Indian Ancestry*

This approach is based on an analysis that really does not require a new or modified test. Rather, it simply acknowledges that the Métis can trace their Aboriginal

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[31] *R.* v. *Grumbo*, [1996] 3 C.N.L.R. 122 at 125, 10 W.W.R. 170 (Sask. Q.B.) [cited to C.N.L.R.].

[32] *Ibid.* at 125.

[33] *Supra* note 25 at 207.

rights through their Indian ancestors who did exist prior to contact with Europeans. Indeed, Chief Justice Lamer alluded to this approach as a possibility in the *Van der Peet* judgment itself.

> It may or may not be the case that the claims of the Métis are determined on the basis of the pre-contact practices, traditions and customs of their Aboriginal ancestors; whether that is so must await determination in a case in which the issues arise.[34]

In a case like *Grumbo*, a Métis would have to argue that it was customary for his or her Indian ancestors to hunt and distribute deer to relatives other than the immediate family, and that his or her "contemporary Métis community" still hunts for deer and distributes it to relatives in the same way as their Indian ancestors did. Then the claimant could establish that a Métis Aboriginal right to receive deer meat from relatives continues to exist.

This approach to determining the nature and scope of Métis Aboriginal rights is obviously problematic. As Cathy Bell notes in her article,[35] there are customs and traditions that are unique to the Métis which do not have their equivalents in their Indian ancestor's traditions or customs. For example, Métis communities have distinct forms of music, art, dance, language, cultural symbols of national pride, governance and land-holding systems. Ironically, under this tracing test, it is these same customs and traditions which make the Métis Nation distinct and unique which would not be protected as Aboriginal rights under s. 35(1) of the Constitution. Cathy Bell summarizes the problematic implications of applying this approach:

> To the extent that they lead a life akin to judicial constructions of traditional Indian life, the Métis are Indians and have Aboriginal rights; to the extent that they are different, they are not viewed as Aboriginal. Non-Aboriginal activities are not within the scope of s. 35 protection.[36]

It is illogical and inappropriate for the Métis to rely on their Indian ancestor's customs and traditions in order to assert Aboriginal rights. What other alternatives can the Métis rely on?

5. *The Approaches of McLachlin and L'Heureux-Dubé JJ.*

Both Justices McLachlin and L'Heureux-Dubé formulated tests for establishing an Aboriginal right that do not involve an analysis restricted to activities and customs prior to European contact *per se*.

Justice McLachlin takes a more liberal, and arguably more realistic, approach to defining the point in time that ought to be used in determining which activities are Aboriginal and which are not. She argues that the significance of contact with Europeans is not in the actual initial encounter by a First Nation of a single European explorer into their territory. Rather, the relevant point of contact is that point in time when the Europeans were able to acquire the level of presence and authority in the territory to be able to superimpose their laws and customs onto the First Nation.[37]

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[34] *Ibid.*

[35] C. Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L.R. 180.

[36] *Ibid.* at 210.

[37] *Supra* note 25 at 261-62.

The implications for the Métis under the application of such a test is that they would be able to claim Aboriginal rights based on their customs and traditions which existed prior to the imposition of European and/or Canadian law. Arguably, under this definition of contact, the relevant time would be some time after 1870 in Manitoba and after 1885 in the rest of the North West.[38] Justice McLachlin specifically acknowledges that her version of the test for establishing the existence of an Aboriginal right would accommodate the Métis situation.

> This approach accommodates the specific inclusion in s. 35(1) of the *Charter* of the Aboriginal rights of the Métis people, the descendants of European explorers and traders and Aboriginal women.[39]

L'Heureux-Dubé J. takes a more flexible approach to the question by stating that there is no need to identify a point in time for establishing an Aboriginal right. All that is needed is that the activity, custom or tradition has been an integral part of the Aboriginal culture for a "substantial period of time" (approx. 20 - 50 years).[40] Incidentally, it is this approach that L'Heureux-Dubé J. acknowledges as the least offensive in terms of freezing Aboriginal peoples rights in time and thus denying their fundamental right as a society to evolve like any other self-determining people.

Naturally, as the most liberal approach to defining Aboriginal rights, this test would not create any serious difficulties for the Métis. In the case of Grumbo, he would have to satisfy the court that the Métis community had a custom of sharing their deer meat with relatives and that custom existed for more than 50 years and continues to exist.

Cathy Bell takes the view that the test that ought to be applied to the Métis lies somewhere between L'Heureux-Dubé J.'s variable time test and Lamer C.J.C.'s strict pre-contact time period. Her approach is arguably closest to McLachlin J.'s approach which she describes as the "height" or "peak of colonization" test for determining the relevant point in time for defining an Aboriginal right.[41]

Although such approaches are preferable over tracing Aboriginal rights through the Métis' Indian ancestors, courts may be hesitant to create a separate category of Aboriginal rights jurisprudence specifically for the Métis with its own unique test and criteria.

However, if courts were hesitant to apply a modified test for the Métis, I would not necessarily conclude that the only option is to trace Aboriginal rights of the Métis through to their Indian ancestors. The observation that the Métis would not be able to satisfy Lamer C.J.C.'s strict test because they did not exist prior to contact with Europeans is not so obvious. I would argue that the Métis could readily meet even Lamer C.J.C.'s strict test for defining an Aboriginal right without tracing their rights through to their Indian ancestors.

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[38] The relevance of the Hudson's Bay Charter of 1670 (HBC) and the governing authority of the HBC over the territory claimed within it prior to purchase by Canada would have to be examined more thoroughly to determine the nature of the relationship between the HBC and the Métis. It may be argued that sometime prior to 1870 the Métis were under the authority and governance of the HBC officials in different parts of the North West Territories over different periods of time. A site-specific and localized approach may be necessary.

[39] *Supra* note 25 at 262.

[40] *Ibid.* at 238.

[41] *Supra* note 35 at 216.

6. *The Métis Nation Contacts Europeans*

Chief Justice Lamer's test for defining Aboriginal rights would appear to focus more on the significance of contact itself than on who discovered who first.[42]

It is said that the Métis cannot meet the test because the Métis Nation did not exist prior to European contact. But if we acknowledge that the test is concerned primarily with the "event" of contact with European peoples, then it is possible to argue that there is indeed a point in history where the Métis Nation, as a nation, met the Europeans for the first time in such a nation to nation capacity.

If the test focuses on the point of contact between a particular Aboriginal people and Europeans, then the test can be applied to the Métis even though Europeans were in North America before the Métis Nation, as a nation, even existed. As a result of the unique history of the Métis Nation, the point of contact between the Métis Nation and Europeans would not have occurred until the Métis Nation was born into existence as a unique and independent people. The first contact made with the Europeans by this newly independent nation could be the point in time referred to as "contact" by Chief Justice Lamer.

From this perspective, the relevant question becomes, at what point did the Métis Nation, acting as a unified people, conscious of their identity, establish contact with Europeans?

The birth of the Métis Nation is said to have occurred prior to August 1812. It is at this time that a group of Métis, recognizing their common purpose and understanding of their collective rights to the territory, responded to the threat of European settlers intent on farming the territory.[43]

This consciousness of identity as a separate and unique nation was confirmed two years later at the famous Battle of Seven Oaks. A Métis army of 65 individuals under the leadership of Cuthbert Grant was formed at Portage La Prairie and this army confronted Governor Semple and 26 other Selkirk settlers on June 18, 1816. Semple and 21 of his men died on the field. The Métis army lead by Cuthbert Grant lost only one man.[44]

In accordance with these historical events, the point of contact with Europeans for the purposes of the *Van der Peet* test would fall somewhere between the initial confrontation in August of 1812 and the Battle of Seven Oaks in 1816. It was at this point in time that the Métis were consciously aware of their collective existence and common interests as a people and as a new nation and engaged the Europeans from that national understanding. This ought to be satisfactory for establishing the point of contact for the *Van der Peet* test.[45]

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[42]. A simple illustration might clarify the distinction. Imagine that Europeans landed on territory frequented by a tribe of Indians. However, the Europeans were able to build cabins and begin a small settlement before the Indians discovered them. The relevant question is not which party was occupying the land first and which party discovered the other, but the actual time of contact between the two parties.

[43] J. Howard, *Strange Empire: Louis Riel and the Métis People* (Toronto: Lewis and Samuel, 1952) at 34.

[44] *Ibid.* at 35-37.

[45] Given the short period of time between birth of the Métis Nation and contact with Europeans, there may be some difficulty in proving activities, customs or traditions distinctive to the Métis people. This difficulty could be overcome, however, by applying the principle stated

Of course, this approach is not the preferred approach to the issue of defining the nature and scope of Métis Aboriginal rights.[46] Nevertheless, I would argue that this approach to defining Métis rights is to be preferred over any approach that involves tracing our rights through to our Indian ancestors.[47]

IV. CONCLUSION

Ideally, the best alternative for the Métis would be a test which acknowledges a point in time for establishing an Aboriginal right that recognizes that they were an independent governing nation before Canada was able to fully assert its laws and institutions on the Métis.

The relevant period of determining what are the Aboriginal rights of the Métis would be during this period of self-government and autonomy enjoyed by the Métis prior to Canadian/European imposition of authority.[48]

The courts need not be hesitant in the development of a separate body of Aboriginal rights jurisprudence that deals only with the rights of the Métis people. Aboriginal rights are *sui generis*. Such rights are unique and that principle alone can justify the development of a separate set of legal principles that would recognize the unique nature and independent status of the Métis people.

If such a test for establishing an Aboriginal right was formulated by the courts, (or if the courts applied the principle of contact as described above) the Métis people would not be forced to lose their unique identity as Métis people and they would not be forced to make arguments that they are included within the term "Indians" within various constitutional documents.

As Métis people, we have struggled too long and have paid a great price to maintain our identity. Let's be careful in choosing the legal strategies and arguments in furthering our rights. The cost in not being careful could be far too great. This, perhaps, is the important underlying message that the Court of Appeal in *Grumbo* is giving us. Are we Métis or are we Indians?

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by Chief Justice Lamer in *Van der Peet* to the effect that the test for establishing Aboriginal rights can still be satisfied by proving the existence of Métis activities, customs and traditions post-contact so long as such activities, customs and traditions can be said to have their genesis prior to contact. In some cases, the court may have to apply this principle quite liberally given the short duration between birth of the Métis Nation and contact.

[46] The approach of Justice McLachlin or Justice L'Heureux-Dubé would be preferable since they are the least offensive in terms of denying the Métis Nation the right to evolve as a nation over time.

[47] One of the theoretical difficulties with the trace theory is that it is counter intuitive to the nature of Aboriginal rights as collective rights and not individual rights. How can the collective rights of one distinct people be said to be the basis of an entirely different and distinct people? Collective rights flow from the collective and not from the individual pasts of members of the collectivity. This is particularly true since the Indian ancestors of the Métis do not come from one single Indian Nation. Members of a Métis community may have ancestors from the Cree, Assiniboine and Ojibway peoples. How then do we determine what are the relevant customs, traditions and activities that are to be traced from?

[48] A version of this test was recently adopted by the Ontario Superior Court. See *R.* v. *Powley* [2000] O.J. No. 99 (QL), aff'g [1999] 1 C.W.L.R. 153 (Ont. Ct. (Prov. Div.)).