

Powley, Rights Recognition, and the Rise of “Métis Denialism”: A Response to First Nations’ Calls for Accountability



by Stephen Mussell

EARLIER THIS YEAR, provincial Métis organizations and Métis people across Canada proudly celebrated the 20th anniversary of a landmark Supreme Court decision on Métis constitutional rights. The 2003 ruling, *R v Powley*, 2003 SCC 43 (*Powley*), formulated a test to define what a Métis constitutional right is and who is entitled to exercise it.

Simultaneously, Ontario First Nations and their supporters gathered on the steps of Parliament¹ in opposition to Bill C-53, *An Act Respecting the Recognition of Certain Métis Governments in Alberta, Ontario and Saskatchewan*, which would, among other things, see the Métis Nation of Ontario (MNO) and other provincial Métis organizations recognized as self-determining, self-governing Métis governments and Indigenous governing bodies.²

Central to this ongoing opposition is the government of Ontario’s recognition, in collaboration with the MNO, of six ostensible *Powley* rights-bearing historic Métis communities. In response, and without any actual verification of these six communities, the MNO has taken an aggressive stance, denouncing the “attacks” directed at it and “Ontario Métis” as a form of “Métis denialism” and accusing those who resist their actions of engaging in “lateral violence.”³

As evidenced by the tumult surrounding the introduction of Bill C-53, in the 20 years since it was decided, *Powley* has paradoxically played an outsized role in the progressive deterioration of the Métis Nation.

While provincial Métis representative organizations have leveraged *Powley* to great effect, bringing themselves unprecedented growth, financial benefits, and Crown recognition, the myopic, *Powley*-centred, and inherently colonial approach employed to achieve these ends has ensured that future generations of Métis will be burdened with the task of undoing the harm that has and will follow.

What is the *Powley* Decision?

On the morning of October 22, 1993, Steve Powley and his son shot and killed a bull moose in the Sault Ste. Marie, Ontario, area. Neither of the Powleys had valid authorization from the government of Ontario to hunt moose. Later that day, conservation officers arrived at the Powleys’ residence and the Powleys were charged with unlawful hunting. The Powleys both entered pleas of not guilty, arguing that, as Métis, they had an Aboriginal right to hunt for food in the Sault Ste. Marie area pursuant to section 35 of the *Constitution Act*, 1982.

Section 35 recognizes and affirms the “existing aboriginal and treaty rights of the [A]boriginal peoples of Canada,” being “the Indian, Inuit, and Métis.” Through *Powley*, the Court established the test for how a person asserting they

are “Métis” within the meaning of section 35 can prove they and their community have a constitutionally protected Aboriginal right. This test, a modified version of the *Van der Peet*⁴ test used to determine the section 35 Aboriginal rights of “Indians” to account for the post-contact ethnogenesis and evolution of the Métis, has the following constituent elements:

1. Identification of a historic rights-bearing community.
2. Identification of a contemporary rights-bearing community.
3. Verification of the claimant’s membership in the contemporary rights-bearing community.
4. Determination of whether the practice was integral to the claimant’s distinctive culture prior to effective European control in the relevant geographic area.
5. Determination of whether there is continuity between the historic practice and the asserted contemporary right.

At the Supreme Court of Canada (Court), the Powleys and their legal team were successful. According to the Court, the Powleys had met the Court’s test — soon to be known as the *Powley* Test — and had proved that, as Métis, they had a right to hunt for food in the area of Sault Ste. Marie. As Aboriginal rights are communal, this right was extended to all members of the historic Sault Ste. Marie Métis community identified by the Court.

The Sources of Métis Rights

From the moment it was decided, enterprising leadership of the various provincial Métis organizations and their advisors put *Powley* to work. Consultation guidelines were drafted, and broad harvesting laws and policies were put in place (including with respect to the territories of First Nations in British Columbia and Ontario that fall outside of the Métis Homeland), research into the identification of *Powley* rights-bearing historic Métis communities increased (particularly in British Columbia and Ontario), and the prioritization of our political and legal relations rapidly shifted from those with First Nations to one laser-focused on the Crown and industry.

For a people historically ignored by the Crown, the recognition *Powley* afforded us proved intoxicating and all-consuming, overwriting earlier and more powerful sources of our rights.

Métis history within the Métis Homeland is one of alliances, trade arrangements, treaties, and intermarriage with First Nations. The complex network of legal, political, and social relationships that resulted led to close alliances between Métis and First Nations peoples. Indeed, the diplomatic relations forged between Métis and our Cree, Saulteaux, and Assiniboine relatives were such that open conflict rarely occurred, and we often joined together to protect our shared interests. This complex network of relationships also functioned as a means of sharing land and resources between extended Métis and First Nations family networks. Over hundreds of years and through these various legal, political, and social means, our Métis ancestors legitimized and solidified our rights and presence on the prairies and within our Homeland.

The Powley Test, which, as outlined above, focuses primarily on the court or Crown-determined existence of a historic and contemporary Métis “rights-bearing community,” doesn’t take any of this into account.

Rather, *Powley* enables a Métis right to be established absent any consideration of the legal, political, and social context that always informed the existence (or non-existence), and valid exercise of that right. It also empowers Métis and non-Métis alike to conjure up historic and contemporary Métis “rights-bearing communities” by employing tactics such as simple assertion, the misrepresentation of unreliable census data and historical accounts, the co-opting of cultural markers, and the pointing to of contemporary association as evidence of historic community.

In my view, the *Powley* decision is also inconsistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, as its application has led to the complete neglect and undermining of Indigenous law and jurisdiction in favour of a legal benchmark set by colonial courts.

The Powley Legacy

The implications of our obsession with *Powley* manifest in a variety of ways:

- In British Columbia, a situation I have written on previously,⁵ both Métis Nation British Columbia (MNBC) and the BC Métis Federation (BCMF) have

been accused of engaging in Métis colonialism by, among others, the First Nations Summit, Union of British Columbia Indian Chiefs (UBCIC), and British Columbia Assembly of First Nations.⁶

- The Assembly of First Nations passed a resolution at its July Annual General Assembly affirming that no land, air, or water-based inherent and constitutional Métis rights exist in Ontario or British Columbia.⁷
- In September of 2021, the Manitoba Métis Federation (MMF) withdrew from the Métis National Council, citing concerns with the MNO's citizenship registry, specifically the inclusion of non-Métis Nation citizens in their registry. Since then, they have voiced their support for First Nations in British Columbia and Ontario.
- The Presidents of Métis Nation Saskatchewan and, interestingly, MNBC, have written to MNO President Margaret Froh imploring the MNO to form relationships and build trust with First Nations and to deal with concerns raised with respect to the MNO's citizenship registry and identification of the six ostensible *Powley* rights-bearing historic Métis communities.¹⁰
- Controversy surrounds the entering of a memorandum of understanding between Canada and the NunatuKavut Community Council (NCC) — formerly known as Labrador Métis Association and later the Labrador Métis Nation — in 2019, which, among other things, purported to recognize NCC as an Indigenous collective capable of holding section 35 rights.¹¹ Both the Inuit of Nunatsiavut and the Innu Nation, supported by the Métis National Council and the Manitoba Métis Federation, reject the NCC's claims as fraudulent.¹²

Amidst this turmoil, the unwavering dependence on *Powley* by provincial Métis representative organizations as the foundation of our rights stands out as a common thread. Further, despite the deep divisions and damage done by *Powley*, the federal and provincial governments continue to facilitate its exploitation. For example, Minister Marc Miller recently announced that Canada will provide up to \$3.3 million in multi-year funding to support MNBC's research into the existence of section 35 Métis rights in British Columbia,¹³ Bill C-53 continues to lurch towards becoming law with the federal government's vocal support,¹⁴ and the Province of Ontario has defended

its recognition of the six ostensible *Powley* rights-bearing historic Métis communities in court.¹⁵

The Myth of Métis Denialism

In proper context, it's clear that so-called Métis denialism is largely a counterfactual political myth. Certain First Nations individuals may indeed deny that both Métis and our rights exist. However, as First Nations leadership in British Columbia and Ontario have frequently repeated, they do not deny the existence of us or our rights.¹⁶ What they do deny is an approach to the recognition of Métis rights that relies exclusively on *Powley*, violates their rights, and ignores and undermines the relationships that have mediated coexistence between Métis and First Nations since the Métis Nation first emerged.

First Nations are justifiably calling for us to approach the recognition of our rights with humility, accountability, and due regard for the historical legal, political, and social relationships to which those rights owe their existence (or non-existence), and valid exercise.

If we are genuine and non-rhetorical in our efforts to decolonize and revitalize our laws, systems of governance, and relations with First Nations, these caring calls are ones we should welcome and actively facilitate rather than loudly oppose with insincere, inflammatory, and hyperbolic accusations.

Métis rights unquestionably exist in Canada, but they exist despite *Powley*, not because of it. The uncomfortable truth is that it is far past time that our damaging veneration of and reliance on *Powley* come to an end.

ENDNOTES

¹ Shari Narine, "Ontario chiefs' rally turns up the heat on Métis self-government legislation," Windspeaker.com, September 21, 2023, <https://windspeaker.com/news/windspeaker-news/ontario-chiefs-rally-turns-heat-metis-self-government-legislation>

² Parliament of Canada, Bill C-53: Recognition of Certain Métis Governments in Alberta, Ontario and Saskatchewan and Métis Self-Government Act (Ottawa, ON: Parliament of Canada, November 2021), <https://www.parl.ca/legisinfo/en/bill/44-1/c-53>

³ Metis Nation of Ontario, "Responding to First Nation Attacks on Ontario Métis and Métis Denialism," Metis Nation of Ontario, June 19,

2023, <https://www.metisnation.org/news/responding-to-first-nation-attacks-on-ontario-metis-and-metis-denialism>

⁴ R v Van der Peet, [1996] 2 SCR 507.

⁵ Stephen Mussell, Yellowhead Institute, accessed online at <https://yellowheadinstitute.org/author/stephen-mussell>

⁶ UBCIC, “UBCIC Unanimously Passes Resolution Rejecting and Denouncing Métis Colonialism in BC and the Crown’s Past and Ongoing Facilitation of it,” UBCIC, June 13, 2023, https://www.ubcic.bc.ca/ubcic_unanimously_passes_resolution_denouncing_metis_colonialism

⁷ Assembly of First Nations (AFN), 2023 Annual General Assembly – Halifax, Nova Scotia, Final Resolutions (Ottawa, ON: AFN, July 2023), <https://afn.bynder.com/m/56f6babcd82e05f9/original/2023-Final-Resolutions-Halifax-Nova-Scotia.pdf>

⁸ Manitoba Métis Federation, “MMF withdraws from MNC - Focus on being the national voice for the Red River Métis,” Manitoba Métis Federation, September 29, 2021, <https://www.mmf.mb.ca/news/mmf-withdraws-from-mnc-focus-on-being-the-national-voice-for-the-red-river-metis>

⁹ See Manitoba Métis Federation, “MMF supports First Nations in denouncing Métis colonialism in British Columbia,” Manitoba Métis Federation, June 28, 2023, <https://www.mmf.mb.ca/news/mmf-supports-first-nations-in-denouncing-metis-colonialism-in-british-columbia> and Manitoba Métis Federation, “MMF supports First Nations in denial of Métis communities in Eastern Ontario,” Manitoba Métis Federation, June 18, 2023, <https://www.mmf.mb.ca/news/mmf-supports-first-nations-in-denial-of-metis-communities-in-eastern-ontario>

¹⁰ See Chiefs of Ontario, “MNS Correspondence,” (Toronto, ON: Chiefs of Ontario, 2023), <<https://chiefs-of-ontario.org/wp-content/uploads/2023/07/MNS-Correspondence.pdf> and Chiefs of Ontario, “MNBC Correspondence to MNO,” (Toronto, ON: Chiefs of Ontario, 2023), <https://chiefs-of-ontario.org/wp-content/uploads/2023/07/07-12-2023-MNBC-Correspondence-to-MNO.pdf>

¹¹ See Crown-Indigenous Relationships Canada, “Memorandum of Understanding on Advancing Reconciliation,” (Happy Goose Valley, NL: NunatuKavut 2019), <https://nunatukavut.ca/site/uploads/2019/09/Memorandum-of-Understanding-on-Advancing-Reconciliation-NCC-Canada-SIGNED.pdf> and Brett Forester, “Former Indigenous Relations minister was warned against signing 2019 MOU with Labrador group,” CBC News, October 11, 2023, <https://www.cbc.ca/news/indigenous/nunatukavut-mou-signing-court-challenge-1.6991672>

¹² Brett Forester, “Former Indigenous Relations minister was warned against signing 2019 MOU with Labrador Group,” CBC News, October 11, 2023.

¹³ Metis Nation British Columbia, 2023 Annual Report (Thompson Rivers University, Kamloops: September 2023), <https://www.mnbc.ca/media/2166>

¹⁴ See Fraser Needam, “Liberals introduce Métis self-government legislation just before Parliament rises for summer,” APTN National News, June 22, 2023, <https://www.aptnnews.ca/national-news/liberals-introduce-metis-self-government-legislation-just-before-parliament-rises-for-summer> and Brett Forester, “Minister blames ‘misconceptions’ for concerns over Métis self-government bill,” CNC News, November 30, 2023, <https://www.cbc.ca/news/indigenous/minister-gary->

[anandasangaree-m%C3%A9tis-bill-1.7045197](https://www.cbc.ca/news/indigenous/minister-gary-anandasangaree-m%C3%A9tis-bill-1.7045197)

¹⁵ *Whiteduck v Ontario*, 2023 ONCA 543.

¹⁶ For example, accompanying UBCIC’s resolution denouncing Métis colonialism was a quote attributed to Grand Chief Stewart Phillip, UBCIC President, which stated in part: “First Nations in BC take no issue with the Métis Nation, the Métis people, or their struggle to protect and advance their rights within their historic Homeland.” Similarly, in testimony before the House of Commons Indigenous affairs committee in Ottawa regarding Bill C-53, Nishnawbe Aski Nation Grand Chief Alvin Fiddler noted that “Métis in Canada do have rights and do have a rich history in this country...It just didn’t happen in our territories.”

CITATION

Mussell, Stephen. “Powley, Rights Recognition, and the Rise of “Métis Denialism”: A Response to First Nations’ Calls for Accountability”. *Yellowhead Institute*. 7 December 2023. <https://yellowheadinstitute.org/2023/12/07/metis-response-to-first-nations-calls-for-accountability/>