

# The indefensible in-betweenness or the spatio-legal arbitrariness of the Métis fact in Quebec

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Translation

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## Abstract

The Métis, the result of the numerous episodes of *métissage* that have occurred in the course of Canada's history between Euro-Canadian and Aboriginal peoples, had their ancestral rights recognized in 1982 by the Constitution. They would have to wait another twenty years before the courts confirmed this official recognition. By granting subsistence hunting rights to the community in Sault Ste. Marie (Ontario) in September 2003, the Supreme Court of Canada sent an enormous shock wave through the country. This ruling profoundly challenged the image of the Métis in the eyes of Canadians, who until that time only associated them with the western provinces. It also re-drew the boundaries of the Métis fact and justice. The Métis of Quebec, a minority society whose existence remains challenged by the political class, placed a great deal of hope in the *Powley* decision. However, the roads of justice contain many obstacles. In this context, which is both exciting and uncertain, what does spatial justice amount to with regard to the Métis fact in Quebec? This matter will be addressed here based on the analysis of the only ruling available to date in the province concerning Métis rights, the *Corneau* case, in which we served as an expert witness for the defence, and the expert opinions the judge used in rendering this decision. This analysis emphasizes the importance of spatial representations in the examination of Aboriginal rights and the power relationships that shape these representations.

## Key words

Métis, Aboriginal rights, spatial justice, spatial representations, Quebec-Canada

## Introduction

The Aboriginal question in Canada is eminently territorial (Harris, 2002). There could be no spatial justice without first redefining the relationship to space and access to territorial resources, in short, without setting in motion a genuine process for reparation of the wrongs caused by the historic "expropriation" of ancestral land from Aboriginal populations. This is the path taken by Canada since the creation of the comprehensive land claims settlement program, a negotiation framework for developing treaties with the Aboriginal populations, in the 1970s. The country took an additional step in recognizing Aboriginal rights by entrenching them in the *Constitution Act* of 1982, identifying the "Indians", "Inuit" and "Métis" as "the Aboriginal peoples of Canada". These constitutional changes accelerated the judicialization of the Aboriginal question in the country, to the point where the weight of the courts in defining what is considered "right" and authentically "Aboriginal" today seems so disproportionate that it exposes the disengagement of the political class vis-à-vis these sensitive matters (Gagné, Larcher and Grammond, 2014, p. 153). Now, if the road to justice is paved with good intentions, it must be admitted that it is also

strewn with obstacles. The exceptional human and financial resources that access to justice demand are cruelly lacking in a number of Aboriginal communities. As well, the court system is not safe from the power struggles that motivate the relationships between Aboriginals and non-Aboriginals in the country. It constitutes the legal arm of state sovereignty (non-Aboriginal) that makes Aboriginal peoples “foreigners” in government or “Crown” land.

The situation of the Métis in Quebec is even more delicate. For some – politicians, scholars or mere citizens – calling the Métis in Quebec an Aboriginal people is heresy. Despite the fact that the only Francophone province in Canada is one of the regions of North America where the *métissage* of the French and Aboriginal populations goes back furthest, the Quebec Métis, unlike those of Western Canada, have never had the right to a chapter in the national historic grand narrative. Thus, contemporary Métis are, from a strictly demographic perspective, marginal to say the least. For all these reasons, they have a hard time getting heard on the political scene, and their demands are routinely rejected by the state authorities, as well as by the First Nations and the Métis populations in the west who claim to be the only ones in the country entitled to this (legal!) identity. To date, neither has recourse to the courts been a satisfactory alternative solution. The Métis in Québec most definitely remain a minority within a minority within a minority (Government of Canada, 1996, vol. 4, p. 298).

What spatial justice is there then for the Métis of Québec? That is the fundamental question of this article. However, we could not offer possible answers without first attempting to understand the spatial representations of the Métis fact, which differ greatly depending on whether they originate with the court authorities or the Métis themselves. Using the February 2015 Quebec Superior Court ruling in the *Corneau* case, in which we gave expert testimony for the defence, we will show what distinguishes the two bodies of spatial representations and how this is revealing of the power relationships which are asymmetrical, to say the least, and which govern the Métis’ relationship with the state. Before that, however, we should clearly identify the historic reasons and contemporary issues hidden behind these spatial representations, and which contribute to the minorization of the Métis in Québec.

### **The “constitutional revolution”: from the political to the legal**

When Canada’s historic and geographic imagination is examined in speaking about the Métis, the great prairies of the Canadian West of the 19<sup>th</sup> century and the Red River colony (where the modern day city of Winnipeg, Manitoba, is located) are what stand out. And rightly so. The Red River Métis community has its own history stemming from a demographic, economic, geographic and political context that is completely unique. As shown by research on Métis ethnogenesis<sup>1</sup>, the Red River community was formed in the late 18<sup>th</sup> century in the social, economic and spatial circumstances common to all the other Métis cultural communities in the country. Born in the context of the fur trade and *métissage*, the Métis gradually took advantage of their cultural duality to create and develop their very own economic and cultural niche while forming vast kinship networks that were spatially dispersed but consolidated through great mobility (Brown, 2007; Devine, 2004; Macdougall, Podruchny and St-Onge, 2012). The Red River

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<sup>1</sup> Ethnogenesis studies aim to understand the emergence of the distinct Métis identity. This area of research appeared in the early 1980s and stems from the broader field pertaining to the fur trade.

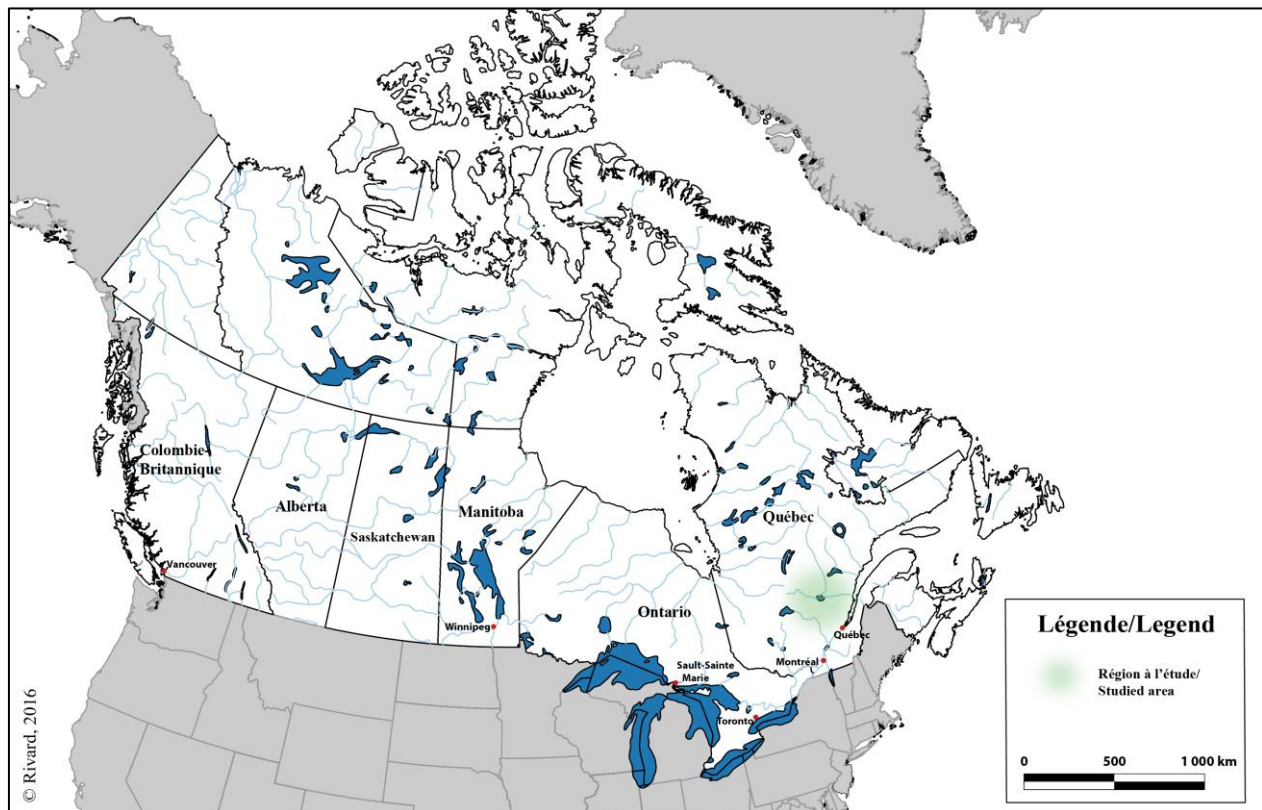
community distinguishes itself from the others by the fact that it is the only one which had developed a strong political awareness of itself and had taken hold of the means to claim it, making itself known as “the Métis Nation” since 1814 (O’Toole, 2013). This feeling of “national” identity and the weight of the Métis in the Canadian imagination would only grow throughout the 19<sup>th</sup> century as this demographically growing population spread completely over the prairies. They reached their peak at the end of the century, specifically at the time of the Métis uprising in the North-West (essentially present-day Saskatchewan) which ended in the insurgents’ defeat by the Dominion of Canada in May 1885 and the hanging of their political leader, Louis Riel, in November that same year.

This very geographically localized and historically circumscribed model was somewhat upset around the late 1960s. The civil rights movements that arose around the world marked this era. Canada was thus urged to focus its attention on the unenviable fate of its national minorities, including the Aboriginal populations. This was most particularly the case for non-status Indians – those who despite their ancestry and Aboriginal identity, were not recognized as “Indians” under the terms of the *Indian Act*<sup>2</sup> – and the Métis populations, who were left in a state of extreme poverty and without public assistance of any type. The federal government thus established assistance programs (notably for housing and education) for these populations. To reduce the number of institutional partners, the government encouraged the Métis and non-status Indians to unite within associations at the provincial level in matters such as health, housing and education which come under provincial jurisdiction. Over time, these organizations – like the national organization heading the network, the Native Council of Canada (NCC, now the Congress of Aboriginal Peoples) – would engender a strong feeling of belonging and serve their members’ political agenda (Sawchuk, 2001).

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<sup>2</sup> Since 1876, this law has determined who is an Indian in the country.

## Map 1 : Studied area



Although these changes did not really alter Canadians' view of the Métis – who remained associated with the West in the national imagination – they had significant political consequences for the main parties concerned. Firstly, the very definition of Métis was turned upside down. The term “non-status Indian” – which suggests an identity “by proxy” – disappeared quite quickly within the number of provincial organizations (some just used the term “Métis” while others used more general terms such as “Aboriginal” or “native”), at the same time eliminating the distinction between the groups originally forming these organizations. The second political consequence was guaranteeing these disparate populations a common voice within the Canadian government apparatus. The NCC quickly became a crucial lobby on the federal scene, its political leaders being the main actors in the inclusion of the Métis in the Constitution (*ibid*; Kermoal, 2013). Thus, in principle, in the spirit of this inclusion, the Métis and non-status Indians saw their ancestral rights recognized, nationwide, under the unified designation of Métis<sup>3</sup>.

<sup>3</sup> The euphoria of victory was, however, short-lived. In the years (if not months) following the repatriation of the Constitution, a significant schism appeared between the Métis associations in the country. The Western Métis claimed a monopoly on the Métis identity in Canada, founding the Métis National Council in 1983.

### Judicialization of *métissage*

It was not until the fall of 2003 that the Supreme Court of Canada (the highest court of appeal) made its ruling on Métis rights, recognizing the ancestral nature of hunting for purposes of consumption by the hunter (so-called "subsistence hunting") of the community of Sault Saint Marie, Ontario. This ruling, known as the "*Powley* Decision"<sup>4</sup>, establishes the criteria to be used to identify Métis communities who are able to avail themselves of constitutional protection and establishes precedence in the matter (R. v. *Powley*, 2003). The judges of the Supreme Court of Canada explained that: "...particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions" (*ibid.*, § 11). This decision thus rejected that which ethnogenesis scholars call "Red River myopia", which limits the Métis fact to the geographic, historical and cultural context of the Prairie Provinces (Manitoba, Saskatchewan and Alberta). The *Powley* Decision made sweeping changes to what had been conveyed by the national imagination as the Métis landscape to that point, Ontario being located east of the Canadian prairies (Sawchuk, 2001).

The *Powley* Decision had the effect of an earthquake on the Métis' ability to mobilize and make claims, sending shock waves in every direction. The number of individuals self-identifying as "Métis" skyrocketed between 2001 and 2011 in every region. In Quebec alone, the Métis population nearly tripled in this ten-year period, reaching 41,000 in 2011, while five year earlier it was still only 27,000 and slightly below 16,000 in 2001<sup>5</sup>. Like everywhere in Canada, the Métis in Québec are more active than ever in having their rights recognized, not hesitating to take their demands to the courts. The number of court cases multiplied in various regions of Québec, from the Outaouais to the Côte-Nord by way of Abitibi-Témiscamingue, Saguenay-Lac-Saint-Jean, Témiscouata and Gaspésie.

To date, however, only one decision has been made: that of Justice Roger Banford of the Quebec Superior Court in February 2015 in the *Corneau* case (AGQ v. *Corneau*, 2015). The case involves Ghislain Corneau, a native of Saint-Fulgence on the north shore of the Saguenay River, and 17 more defendants from Saguenay-Lac-Saint-Jean, who were all facing demands to vacate camps set up without a permit on Crown land. According to the defendants and the Métis community of Domaine-du-Roy and Seigneurie de Mingan<sup>6</sup> (CMDRSM), these camps were necessary for them to be able to practice subsistence hunting and fishing. They then pleaded that these demands were void on the pretext that they went against their constitutional rights and ancestral practices. Judge Banford did not accept their argument and as a result ordered them to

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<sup>4</sup> In 1993, Steve and Roddy Powley, the two individuals behind the case, were charged with hunting moose illegally under the laws of the Province of Ontario. As their defence, they pled constitutional protection granted to them by the state as members of the Métis Nation. They won the case.

<sup>5</sup> These data are from Statistics Canada ([www.statcan.gc.ca](http://www.statcan.gc.ca)), and more specifically, the 2001 and 2006 censuses, as well as the 2011 National Household Survey. This latter survey must be taken cautiously as the data were gathered on a voluntary basis, making it impossible to ensure full and complete comparability with the previous censuses ([www12.statcan.gc.ca/nhs-enm/2011/ref/nhs-enm\\_guide/guide\\_4-eng.cfm#A\\_5\\_4](http://www12.statcan.gc.ca/nhs-enm/2011/ref/nhs-enm_guide/guide_4-eng.cfm#A_5_4)).

<sup>6</sup> This is an organization founded by the Métis of Saguenay-Lac-Saint-Jean and the North Shore in 2005, for the purpose of organizing the protection of their rights.

dismantle the camps<sup>7</sup>. As the case has been appealed, enforcement of the judgment is suspended until the decision of the Quebec Court of Appeal, possibly in 2017.

### **An awkward in-betweenness**

The Métis claims in Saguenay–Lac-Saint-Jean and Côte-Nord left no one indifferent. One thing is certain, they were not to the liking of the Innu First Nation<sup>8</sup>, which is also present in the region and had long been demanding its ancestral lands. The Innus' reluctance is easily justifiable. Firstly, the First Nation has been involved for over 40 years in a tedious treaty process with the Canadian federal and Quebec governments. Though the parties reached an agreement in principle that was duly ratified in March 2004, the treaty is still not signed (Charest, 2003; Rivard, 2013). Secondly, with the Métis matter being automatically a question of European and Indian *métissage*, a matter concerning the Innus for the authorities and non-native societies have often promoted the notion of *métissage* as proof of loss of Aboriginal cultural authenticity. There was a time when the notion was even seen as an assimilation strategy. The stigma of assimilation endures in the region and was again brought into the spotlight when the agreement in principle was announced; a significant portion of the Saguenay population was openly hostile to this agreement under the pretext that it was not territorially "equitable" (Rivard, 2013). Among these opponents was the prolific and polemist regional historian, Russel Bouchard, known in part for his writing on the formation of the Métis and challenging the question of Innu identity authenticity (Bouchard, 1995). Bouchard actually self-identifies as Métis and was the main expert witness for the defence in the *Corneau* case.

Métis in-betweenness has always caused considerable concerns to various governments in the country. While the "Indian" matter was clear in the eyes of the colonial authorities and their binary view of inter-ethnic relations – the Indian being a "savage" that must be "civilized" – the Métis case is a bit more perplexing (Macdougall, 2012, p. 424 and 429; Wolfart, 2012, p. 122). The "semi-savage" or "semi-civilized" do not exist in the non-Aboriginal mind, while the Métis, steeped in cultural mixing, showed themselves to be very mobile from an identity perspective, passing from one cultural universe to another (Ray, 1998; Rivard, 2012a; 2012b). This mobility – and the underlying universe somewhere in-between – is still an intellectual challenge, particularly for a judicial system apt to define cultural categories that are specific and airtight. This cultural permeability – so problematic in the eyes of the authorities – is highlighted by the consistent grouping of "non-status Indians" with the Métis. As a matter of fact, due to the mandatory emancipation measures in the *Indian Act*, "non-status" Indians find themselves deprived of their privileges and rights as members of First Nations. And like others before them have done since the 1970s, many of these non-status Indians have found a legal identity refuge in the Métis classification, thus augmenting the number of "claimants" for Métis rights. A significant portion of these individuals are those who have swelled the ranks of the Métis in the Canadian censuses

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<sup>7</sup> The decision did not call into question the historic reality of Franco-Indian *métissage* (meaning intermarriages, but also cultural mixing) on Quebec territory. Both parties' expert witnesses accepted this reality, remaining faithful to the academic literature on this topic (Delâge, 1992; Dickason, 1985; Perrault, 1982; Rivard, forthcoming). What divided the two groups of experts is the idea of this *métissage* as the origin of a distinct Métis identity.

<sup>8</sup> The term "First Nation" is greatly used in Canada, gradually replacing older terms like "Amerindian" and especially "Indian".

in the last ten years or so. The *Powley* decision brought some clarification on how to define the Métis, but as shown in the *Corneau* case, which we will see in the next section, the grey areas are far from having disappeared.

### **The judicial, temporal, conceptual and geographic partitioning of the Métis fact**

What are the consequences of this judicialization for the Métis? What are the mechanisms (legal and intellectual) behind the legal definition of Métis? How important is space – or to put it more correctly, spatial representations – in these mechanisms?

First of all, we can see judicialization as evidence of society's caring about the rights of cultural diversity and its willingness to seek an equitable and "restorative" formula with regard to the cultural and territorial prejudices inherited from colonialism. Recourse to courts contributes to the strengthening of the ties that shape a community's social fabric, mobilizing its members around a common cause (and a common "enemy"), as well as the identity dynamics that define its sociocultural boundaries. By the same token, the courts have established a cross-cultural dialogue in which the Métis are recognized as full participants. The same cannot be said about the political scene, as their existence is systematically and very openly denied by the Quebec government (Quebec, 2011, p. 11).

However, recourse to the courts obliges the Métis (as well as other Aboriginal groups) to accept the terms of dialogue imposed on them by the legal institution itself, which by its nature, is not Aboriginal. Access to justice is definitely not an easy row to hoe. That is the opinion of the trial judge in the *Powley* case, the Hon. Charles Vaillancourt, who states that:

"The criminal process is not a particularly effective or efficient tool to arrive at the required solutions. It is a blunt instrument. It is also an expensive, time consuming, and cumbersome process. The issues raised have significant political components that are best addressed in the political arena" (R. v. Steve Powley and Roddy Powley).

### **The too-heavy burden of proof**

Disputes in Aboriginal law are in the peculiar position of having the burden of proof – which normally is on the attorney general or the state – reversed. This is due to the fact that the defendants admit the facts forming the basis of their accusation and they must, as a result, demonstrate that they indeed belong to an Aboriginal people as referred to in section 35 of the Constitution. As constitutional protection rests on the principle of "prior occupation of land" – at least that is what the judges of the Supreme Court deduce (R. v. Van der Peet, 1996) – a "documentary" burden is added to the legal burden per se. The documentary burden is all the more considerable in that the historic sources available are not Métis, which introduces a colonial bias to the research. Thus, these historic sources remain silent – at least explicitly – regarding the existence of historic Métis communities in Eastern Canada. Finally, because documentary investigation is primarily done by university researchers, it also translates into a financial burden. The combination of these burdens – legal, documentary and financial – often limits the chances for success and the quest for justice of many of the country's Métis communities (Grammond, Lantagne and Gagné, 2012).

These burdens are made even heavier by the imbalance existing between the means available to the defendants and those of the plaintiff (the state), the latter having the advantage of privileged

access to public resources. This imbalance also reverberates through the quantity of items of evidence produced and filed with the Court by the parties. In the *Corneau* case, the CMDRSM and the defendants had to respond to a 3,000 page scientific second expert opinion, produced by a dozen researchers, many of whom were well known in their field. The Attorney General of Quebec (AGQ) spent over \$1,000,000 (Canadian) in professional fees to cover these opinions alone. The Métis took advantage of a costs provision<sup>9</sup> requiring the AGQ to pay for second second-opinions of four expert witnesses (Gauthier, 2012; Lacoursière, 2012; Michaux, 2012; Rivard, 2012a). That said, the amount Judge Banford granted to the Métis was one-quarter of what the AGQ spent on researchers. Moreover, the original expert opinion provided by the main witness, Russel Bouchard, was excluded by the judge from the provision for costs. So, Bouchard himself, as author, absorbed the costs associated with this expert opinion, the very one which would justify, in the eyes of the AGQ, a large share of the huge sums spent in second-opinions (Bouchard, 2005; 2006a; 2006b).

According to Judge Banford, the Métis were not able to meet the burden of proof, as they had been unable to make a demonstration based “[translation] on serious and specific facts” (AGQ v. Corneau, 2015, § 206). He stated moreover, that he had been flexible on the nature of this burden, taking as an example the legal precedent established by the Supreme Court in the *Van der Peet* decision:

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. *The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case (ibid., § 27, our italics).*

Despite these claims, his decision was the result of a rather inflexible concept of the burden placed on the Métis’ defence. When this ruling is closely examined, it can be observed that the nature of what the trial judge considered “serious and specific facts” was limited to solely the documentary proof that claimed to be explicit and unambiguous regarding the existence of a distinct Métis community. For Judge Banford, a “historic Métis community” is recognized particularly by the fact that its members have:

... [translation] developed a culture, practices and traditions that were distinct from their ‘Indian and non-Indian’ ancestors and *recognized by other ethnic groups* ...Such a community, which would distance itself from known Indian bands and the Euro-Canadian population present, if it had manifested itself in some manner or other, *would not have been able to escape all the observers at the time, missionaries, census-takers, surveyors or an amateur chronicler like Neil McLaren*” (AGQ v. Corneau, § 55 and 262, our italics).

In other words, since apparently no “non-Métis” ever indicated being in the presence of an ethnic group specifically situated between the Amerindian and Euro-Canadian societies, Judge Banford concluded that such a group cannot have existed.

However, Judge Vaillancourt showed himself to be much more open in his judgment at trial in the *Powley* case. He recognized the validity of the remarks of the expert Arthur Ray, a

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<sup>9</sup> The request for provision of funds is based on the power of the Superior Court to act to correct unfair situations.



geographer and historian:

*Dr Ray also noted that "Metis people tend to be invisible or unidentifiable in official records in other primary sources upon which historians rely to construct the history of Aboriginal groups in Canada. As such, it is very difficult to provide a continuous, well-documented and authoritative history of their communities (R. v. Steve Powley and Roddy Powley, 1998, p. 13).*

Judge Vaillancourt thus allowed that a Métis community may well have existed as a distinct identity reality without necessarily having been reported – indeed, recognized – by non-Métis observers, who are the main documentary sources referenced by historians.

Unlike his Ontario counterpart, Judge Banford ignored evidence that was consistent with the theoretical and empirical patterns developed by the leading university authorities in Métis ethnogenesis for nearly 40 years. The research produced in the field was specifically developed in response to the absence of direct documentary evidence and the need to design an approach that would report the diversity of the Métis fact. All the theoretical framework and the empirical process of the ethnogenesis researchers rested on the construction of an "indirect" demonstration (St-Onge and Podruchny, 2012, p. 59), also called the "ethnogenesis indicators". There are many of these indicators. They basically consist of recognizing the importance of the geographies of the fur trade (hydrographic networks, trading posts, etc.), extended networks of kinship, the Métis involvement in the fur economy and their role as economic (the specific niche they occupied) and cultural (like guides or interpreters, for examples) intermediaries, as well as the significance of the great geographic and identity-related mobility that this role imposed (Macdougall, Podruchny and St-Onge, 2012).

### **Defining a constitutionally entitled community**

In Canada, Aboriginal rights are considered collective rights. It would not be possible to have constitutional protection of ancestral practices of individuals who do not belong to a constitutionally entitled community. This community must have historic foundations. How an historic Métis community is defined is therefore crucial from a legal perspective. The recognition of this fact means that a judgement is much more than a simple opinion issued by a competent individual (a judge in this case). A judgement, even a decision by the court (and therefore setting the standard), is also an opinion resulting from an intellectual process. And with this process comes a particular way of conceptualizing and choosing the representations or models that will ultimately make it possible to "authenticate" the groups benefitting from rights.

The intellectual process used by the judges is distinct from that used by ethnogenesis researchers. While the latter work at finding indicators for identifying conditions favourable to the emergence of Métis identities, the former are invested in seeking criteria to help them discriminate (to reduce the domain of the possible), that is, to identify among all the individuals claiming a Métis identity, those who are able to claim Aboriginal rights.

This is the type of process that motivated the Supreme Court judges in the *Powley* decision, who based themselves on the findings of the Report of the Royal Commission on Aboriginal Peoples (Canada, 1996) and stated:

The term "Métis" in s. 35 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, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of

European control, when the influence of European settlers and political institutions became preeminent (R. v. Powley, 2003, § 10).

Not only is the Court not interested in all individuals identifying as Métis or all self-proclaimed Métis communities, it did not hesitate either in establishing a temporal criterion – the date on which the colonial or state authorities had “effective control” over the land in the dispute – which marks the “prior occupation of land” of the Métis people as a legal category.

### **Spatial justice tagging along behind spatial representations**

Although Judge Banford agreed with most of the cultural or temporal concepts (the principle of “prior occupation of land”) stemming from the *Powley* test, he differs with regard to its geographic foundations. Among the criteria that Judge Banford imposed with a view to identification of the community are the concepts of “demographic density” and “proximity” (AGQ v. Corneau, 2015, § 18). It was on the strength of these concepts that he rejected the defendants’ historic arguments. He deemed, not incorrectly, that the defendants presented him a “diffuse and scattered” community:

[translation] Behold the historic Métis community identified by the respondents’ main witness. Seven “Métis” couples *scattered* at the mouths of seven tributaries of the Saguenay river, prior to 1842, i.e. the Michel Tremblays (so-called Gros-Michaud), the Peter McLeods, the Alexandre Murdocks, the Jean Dechènes, the Cyriac Buckells, the Simon Rosses and the Peter McLeods junior (*ibid.*, § 173, our italics).

As the judge said nothing about the degrees of density and proximity making it possible to identify a Métis community, it is necessary to speculate on the premises that led him to his conclusions. It nonetheless seems reasonable to think that his concept of community is based on the village nucleus model. In the 19<sup>th</sup> century, villages were sprinkled throughout the countryside of the Laurentian Valley<sup>10</sup> (core of the historical low-density population in Québec which essentially extended over the planes on both shores of the St. Laurence River) and formed the pioneering edges of the forests surrounding this valley, particularly in the Saguenay-Lac-Saint-Jean region, starting in the 1840s. The village model relies on a completely “geographic” vision of community. This aligned with a contiguity logic based on the assumption that social ties are the results of cohabitation, of an immediate and daily nearness.

Judge Banford’s intellectual journey is understandable. One can certainly agree with him that *socially and spatially* isolated individuals have if not no, at the very least little, opportunity to form a community. Therefore, the village model is not irrelevant for the Métis reality. Demographic density is definitely – with the political, trade and geostrategic context – one of the factors that fostered the Métis’ political awareness in the Red River colony in the early 19<sup>th</sup> century (O’Toole, 2013).

Nonetheless, the ideas put forward by Judge Banford remain inadequate because they are fragmentary. The *Powley* decision did not establish specific criteria regarding the demographic composition of the groups under investigation, specifying only that relevant “...demographic evidence...” was needed (R. v. Powley, 2003, § 23). So, the Supreme Court’s definition of a Métis

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<sup>10</sup> It is however necessary to remember that the village model was a rather recent phenomenon at that time (Courville, 1990) prior to which, habitat was being especially dispersed and linear, the peasant family being then the main unit of production and socialization (Harris, 2008, p. 76 and 83).

community makes it impossible to arrive at the concept of a single place of occupation<sup>11</sup>, “A Métis community can be defined as a group of Métis with a distinctive [*sic*] collective identity, *living together in the same geographic area* and sharing a common way of life ” (*ibid.*, § 12, our italics). In light of this definition, nothing indicates that supposedly “scattered” and “dispersed” communities need be disqualified a priori (Wolfart, 2012, p. 133), terms which moreover, do not appear in the ruling. Furthermore, a number of courts in the country, in British Columbia (R. v. Willison, 2005, § 135), Saskatchewan (R. v. Laviolette, 2005, § 30) and Manitoba (R. v. Goodon, 2008, § 34 and 46), had already accepted the “regional” community argument.

The jurisprudential discrepancy in Judge Banford’s decision has its scientific equivalent. Contrary to what the judge states, the individuals – or better, the families (these “units of production”) – whose destinies he comments on, may well be “scattered” but are certainly not socially “isolated”, a nuance very clearly supported by the empirical data presented in the expert opinions of the defence. Here the judge dismisses the essence of that which makes the Métis a separate cultural group, and which, therefore is central to the ethnogenesis research: a unique spatiality shaped by the fur trade experience, by their role as intermediaries, and by mobility that is spatial, of course, but also “identity related” - and strong bonds of kinship (Brown, 2007; Devine, 2004; Macdougall, Podruchny and St-Onge, 2012, p. 7; Ray, 1998, p. 7; Rivard, 2012a, p. 29-32). Bearing these characteristics in mind, a Métis community cannot necessarily be reduced to a specific place and the “demographic density” and “geographic proximity” criteria imposed by Judge Banford. “Dispersion” is in some ways, a distinguishing characteristic of most, if not all, Métis communities referred to by ethnogenesis scholars studying the Métis, including the 19<sup>th</sup> century Red River community (Rivard, 2012b, p. 154-161), which it must be pointed out, remains the quintessential Métis community in the Canadian imagination.

An even brief analysis of the expert opinions filed to his attention is enough to show that the judge based his intellectual process on expert opinions submitted by the Quebec Attorney General in this dispute, and in particular that of sociologist Jean-Philippe Warren who openly sets out the concept of “demographic density” (2009, p. 4), and historian Louis-Pascal Rousseau who prefers the idea of “geographic concentration”, i.e. the combination of “demographic density” and “geographic proximity” (Rousseau, 2009a, p. 110). To be exact, Judge Banford did not just borrow the concepts of the AGQ’s expert witnesses, he is also steeped in their methodology which they describe as “comparative” (Brisson, 2009; Gélinas, Eveno and Lévesque, 2009; Rousseau, 2009b; Warren, 2009; Havard, 2009). As Warren explains:

[translation] To be able to identify ... the reality of *métissage* in the Saguenay-Lac-Saint-Jean region, it is necessary to make a comparison with the situation that dominated in western Canada. Demographic density: the Métis community in western Canada emerged when a critical mass had been achieved, allowing endogamy and solid cultural and political groupings, among other things, for the protection of common interests (2009, p. 4).

What these experts, and by extension the trial judge, are implicitly proposing is to observe the historic situation in the *Domaine-du-Roi* (the historic territory that encompasses all of the

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<sup>11</sup> Canadian sociologist, Chris Andersen, who is also Métis, would definitely object to a statement of this sort. He is rather of the opinion that the *Powley* case wrongly promotes a “proximist”, “centre-peripheral” or “village” concept of community anchored in a European ontology that is completely foreign to the Métis situations (2012, p. 397-407; 2014, p. 137-139).

present-day Saguenay–Lac-Saint-Jean) in light of the only historically documented Métis reality – that of the Red River. This region’s demographic, cultural, economic and political characteristics are thus the absolute Métis model from which the experts have drawn their “ethnogenesis criteria” (see especially Rousseau, 2009b).

In light of the above, it must be admitted that the *Corneau* decision is based on a fundamental contradiction. The judge advocates a definition of community that rejects the main contribution of the ethnogenesis scholars – the expansion, beyond the Red River model, of our understanding of the Métis identity – all the while very openly stating that the “scientific concept of ethnogenesis” is crucial to the qualification of Métis rights (AGQ v. Corneau, 2015, § 52). Obviously, the studies of Métis ethnogenesis have their methodological and analytical limits (see below). But once we accept the relevance of these studies, we must at the same time endorse their main findings. Here the judge does the complete opposite.

How can such a contradiction be explained? First of all, it has to be admitted that this is a complex case, entailing over 4,000 pages of expert opinions and at least as many pages of documents cited and relevant jurisprudence. And despite this volume of learned opinions, and perhaps therein lies the key to the matter, the judge apparently found no explicit documentary evidence that could help him make a ruling. The expert opinions filed by the defence offered valuable information concerning the conditions favourable to the emergence of a Métis community; on the other hand, they only very partially shed any light on the social or cultural conditions that make it possible to describe the community as such (Rivard, forthcoming). For their part, and as has just been discussed, the expert opinions of the AGQ use a comparative process which particularly addresses the absence of explicit documents thereby denying the existence of an historic Métis community in the Saguenay-Lac-Saint-Jean region. The judge is forced to differentiate between two diametrically opposed schemes for interpreting geo-historical realities, schemes that are both based on a process advocating for indirect demonstration.

So, why examine the AGQ’s arguments? Because, one could think, they represent a lesser intellectual challenge. In justice, it seems, imagination weighs heavily. According to Arthur Ray, with long-standing experience as an expert witness in many Aboriginal rights cases in the country, including the *Powley* case:

*Judges often regard new claims-oriented research suspiciously when it contradicts the extant pre-claims scholarly literature. They consider the former work to be purposeful (which it clearly is) and, therefore, biased, and the latter to be ‘more objective’ and accepted science. In today’s postmodernist and post-colonial theoretical climate, many, if not most, scholars would flatly reject such a dichotomy because much of this older scholarship was rooted in a scholarly discourse that privileged Western cultural values and institutions (2003, p. 263).*

In the face of an impasse, Judge Banford resorted to a “comfortable” model of the Métis community that was in keeping with the Canadian imagination, even if it meant a leap backward from a knowledge and jurisprudence perspective and thus sanctioned the revival of “Red River myopia”.

## Conclusion

Spatial justice is not defined in absolute terms. It first and foremost arises from the intercultural relations that shape a society, its relationship with cultural diversity and territory. The nature of

what is just and authentic is the product of endless cross-cultural dialogue, which the recent judicialization of the Métis realities in Quebec confirms. By modifying the possible with regard to recognition of rights for off-reserve Aboriginal communities, the *Powley* decision is, in a certain way, the source of a new identity paradigm, thus forcing the communities to reposition themselves along these lines. That is precisely what they do, not hesitating to call upon the courts to expose their difference. Their enthusiasm is also cognizant of the fact that there is no equivalent space for dialogue on the political scene, at least at the provincial or federal level. The courts are places of challenge, or as Chris Andersen says so well, "...forums of political struggle" (2014, p. 136).

That said, the dialogue space opened by judicialization is traversed by force fields of varying intensity. The Métis are not the ones shaping the fundamentals of the categories structuring their legal identity and recognition of their rights. At best, they may slightly influence the evolutionary trajectories that these categories take over time. But in the process, they still have to make an investment that is both symbolic and concrete. Asserting one's rights requires considerable capital not available to all the communities but which is not a problem for the State. Moreover, the investment is no guarantee of success; the Métis of the "Domaine-du-Roi" can attest to that fact. And greater strength does not necessarily result from every defeat: it reduces the chances of legal recognition and, subsequently, of being considered a political stakeholder.

That which is "just", is not always so where "justice" is strictly concerned; the same holds true for "appropriateness". It is this ideal of appropriateness which justifies the contribution of the court researchers, whose mission is to "serve the court" in the examination of a right, even if the reality is such that they more often act in the service of the legal argument of one of the parties (Ray, 2003, p. 254). Except appropriateness does not always triumph (Andersen, 2014, p. 395-397). The case of the Saguenay – Lac-Saint-Jean Métis clearly exposed that. The spatial representations that were deemed decisive were not the ones that were supposed to be most "appropriately" founded from a scientific perspective. For all these reasons, one is certainly entitled to wonder how there could be any kind of spatial justice for an Aboriginal group without a subtle understanding of the territorial realities at the origin of its cultural and identity-related distinction.

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