

## BRIEFING NOTE

**To:** Standing Committee on Indigenous and Northern Affairs  
**From:** Professor Darren O'Toole, Faculty of Law, University of Ottawa  
**Date:** November 13, 2023  
**Re:** Submissions on Bill C-53 the *Recognition of Certain Métis Governments in Alberta, Ontario and Saskatchewan and Métis Self-Government Act*

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### About the Author

I am an associate professor in the Common Law Section of the Law Faculty at the University of Ottawa with a cross-appointment to the School of Political Studies and a member of the Manitoba Métis Federation. My research has mainly focused on Métis land claims in Manitoba and Métis Aboriginal rights under s. 35 of the *Constitution Act, 1982*. More recently, I have begun looking into claims to Métis identity in central and eastern Canada.

### Recommendations

Given that the Aboriginal identity of a large portion of the membership of the Métis Nation of Ontario (MNO) is presently being contested in court, that research is supposed to be carried out in Northwestern Ontario, and that the Métis National Council (MNC) is still in the process of setting up an Expert Panel to review MNO's membership, I would recommend that the committee propose amendments to Bill C-53 that would strike out all references to the MNO. In other words, I would suggest limiting the scope of the bill, and thereby the jurisdiction being extended to "certain Métis governments" to the Métis Nation – Saskatchewan and the Métis Nation of Alberta.

### Analysis

Bill C-53 cannot be read in isolation from other agreements between the Governments of Canada and Ontario and the MNO. It follows on the 2008 *Government of Ontario – Métis Nation of Ontario Framework Agreement*, which was renewed in 2014, the 2017 *Framework for identifying Métis communities in other areas of the province and other parts of Canada* between the MNO and the Province of Ontario which identified six historic Métis communities in addition to Sault-Sainte-Marie,<sup>1</sup> the 2017 *Agreement on Advancing Reconciliation with the Northwestern Ontario Métis Community*,<sup>2</sup> and the 2023 *Métis Self-Government Recognition and Implementation Agreement* between the MNO and the federal government. Superficially, Bill C-53 may seem to be about internal governance affairs, but it will further entrench the statutory recognition of the MNO as an "Aboriginal" government with collective rights as an "Indigenous people" under the quasi-constitutional *Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*.<sup>3</sup>, of its community affiliates as "Aboriginal" communities that are "Aboriginal rights-holders" under s. 35 of the *Constitution Act, 1982*, and its members as "Aboriginal" persons under s. 91(24) of the *Constitution Act, 1867*. The recognized communities include: 1) the Rainy River/Lake of the Woods Historic Métis Community; 2) the Northern Lake Superior Historic Métis Community; 3) the Abitibi-Inland Historic Métis Community; 5) the Killarney Historic Métis Community; 6) the Georgian Bay Historic Métis Community; and 7) the Mattawa/Ottawa River

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<sup>1</sup> <https://news.ontario.ca/en/bulletin/45933/ontario-and-the-metis-nation-of-ontario-announce-identification-of-six-additional-historic-metis-communities> (2 November 2023)

<sup>2</sup> <https://www.metisnation.org/wp-content/uploads/2020/11/doc.pdf> (9 November 2023)

<sup>3</sup> Section 2(1) stipulates that: "*Indigenous peoples* has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*."

Historic Métis Community.<sup>5</sup> Through the principle of the Honour of the Crown, such recognition will trigger a duty to consult these communities whenever they claim that the Crown's dealings with First Nations infringe on their rights. As several First Nation representatives have made known to the Committee, these "Métis" communities are already leveraging the duty to consult in a way that adversely affects the treaty rights of First Nations.

### **The Historic Métis Nation**

Through a process known as "ethnogenesis", the Historic Métis Nation primarily emerged in the geographic area of what is now the Prairie Provinces, although the Métis were also present in what is now the North-West Territory, North Dakota, Northern Minnesota, Northwestern Ontario and Northeastern BC. Historian Gerhard Ens and anthropologist Joe Sawchuck argue that ethnogenesis involved a three-step process:

The **first** necessary step was the decision of European fur traders to winter in Indian country. Here they not only became acclimatized to the environment and Native groups, but also formed relationships with Native women and kin connections with her band. It was this stage that produced a large number of off-spring of mixed-ancestry. They [*sic*] **second** step was the process of "going free" or leaving the employ of fur-trading companies to become an independent trapper, trader, or tripper. This step led almost inevitably to a **third** stage, where various freemen families would join together in bands (northern plains) or trading villages (Great Lakes and Lower Missouri), usually in close proximity to a trading post and Native kin. It was these *residential enclaves*, separate from both European trading post and Indian group, that a new identity was forged emphasizing the middleman-broker skills crucial to operating as an independent factor in the trade. Here *successive generations of Métis children would marry among themselves (endogamy)* and sons and daughters would follow the occupational skills and cultural patterns of their parents. The biracial and bicultural skills of these Métis families and individuals made them the pre-eminent and predominant middlemen and labourers in the dual economy that was the fur trade. Without a catalyst like the fur trade economy, which put a premium on biracial and bicultural skills and *offered relative isolation from the assimilating forces* of large Anglo-American or Euro-Canadian populations, *Métis ethnogenesis would have been very challenging.*<sup>6</sup>

In 1670, the Hudson's Bay Company was granted a monopoly on trade in "Rupert's Land" which included the Hudson's Bay drainage basin. Employees, who were for the most part from the Orkney Islands in Scotland, contracted to remain in Rupert's Land for several years, which led to unions with First Nations women, primarily Cree. Eventually, a mixed-ancestry population developed around HBC forts. In the meantime, to the south, the French based their fur trade in Montréal and gradually expanded through the Great Lakes to the Rocky Mountains. From the time that Pierre Gaultier de Varennes et de La Vérendrye established Fort Rouge at the Forks of the Assiniboine and Red Rivers in 1738 until the merger of the North-West Company with the

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<sup>5</sup> <https://news.ontario.ca/en/backgrounder/45936/identification-of-historic-metis-communities-in-ontario> (2 November 2023)

<sup>6</sup> Gerhard Ens and Joe Sawchuck, *From New peoples to New Nations. Aspects of Métis History and Identity from the Eighteenth to Twenty-First Centuries* (Toronto: University of Toronto Press, 2016), 65-66. Italics are mine. It should be noted that, while the fur-trade economy was a necessary catalyst, it was not in itself sufficient to maintain Métis communities.

Hudson's Bay Company in 1821, Fort Frances was the "point of no return" for voyageurs – that is, the point beyond which the voyageurs had no choice but to winter in the Northwest because they could not make it back to Montréal before the rivers and lakes froze. While wintering did also occur in the Great Lakes area, voyageurs from Thunder Bay eastward generally returned to Montréal before the winter. This led to a population of children of mixed-ancestry around the fur-trade forts in the Northwest that tended to be concentrated in the Lake Winnipeg watershed. Some of the children of this first generation of "mixed-bloods" married into First Nations communities, especially when the father abandoned them and went back to Lower Canada. Others were taken back either to the Orkney Islands or Lower Canada where their descendants were assimilated. A third group are what scholars term "proto-Métis": not quite yet a distinctive people, but whose marital and residency choices would see the emergence of one.

It is here that we see a fundamental aspect in the process of ethnogenesis: what anthropologist David Graeber and archeologist David Wengrow calls **schismogenesis**, literally the "creation of division". They define schismogenesis as "a process whereby [...] peoples came to define themselves against each other,"<sup>7</sup> that is "as a kind of mirror image; a conscious inversion."<sup>8</sup> Since people of mixed ancestry were for the most part illiterate, we have little way of knowing how they self-identified and have to look for external indicators. One of the most important indicators of an ethnic boundary is **endogamy**, that is, individuals of mixed-ancestry *consciously choosing* to marry partners who were also of mixed-ancestry rather than marrying First Nations or Europeans. As such, endogamy is a sign of a collective desire to become and remain something different from their neighbours. Of course, this was initially partly due to circumstances since there were very few "white" women in the Northwest until after 1870 and thereafter partly due to racism on the part of "whites" who did not want to marry "savages". On the other hand, **exogamy** indicates a lack of desire to remain a cohesive and distinctive group. If "half-bloods" intermarry with "full-bloods", whether Indigenous or European, it would suggest that the "half-bloods" did not see themselves as culturally distinct. For example, after 1850, most of the "half-breeds" in Sault Ste. Marie married into Ojibwe families on the Garden River and Batchewana reserves.

Economically speaking, Fort Frances was also the point beyond which pemmican, made of dried bison meat, grease and berries, became the fuel that fed the canoe brigades as opposed to wild rice, pork and corn in the Great Lakes area. Under the terms of the *Royal Proclamation, 1763*, The NWC claimed a right to trade in areas of the Northwest where the French had established forts, indicating prior actual possession, while the HBC claimed an exclusive right to trade under its 1670 Charter. The uncertainty of boundaries between the Northwest and Rupert's Land led to a literal "Fur Trade War" that culminated in the Battle of the Frog Plain in 1816 where the *Bois-Brûlés* established themselves as a political force to be reckoned with. It was during the Fur Trade War that the Métis Infinity Flag was first flown. There is no historical evidence that it was flown in Ontario prior to the 1970s or later. Since the HBC *Charter* clearly did not apply to the Great Lakes drainage basin (or what was part of Québec from 1774 to 1791, then Upper Canada from 1791 to 1840), the HBC enjoyed no privileges there and had to take out a license to trade under the *Royal Proclamation* just like any other company. For this reason, clashes between the HBC and the NWC did not occur on the same scale in the drainage basin of the Great Lakes region. Any such clashes would have occurred under the jurisdiction of the courts of Upper and Lower Canada, and it was not in the HBC's interest to be tried where the NWC was well connected.

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<sup>7</sup> David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Toronto: Signal/McClelland & Stewart, 2023), 207.

<sup>8</sup> Graeber and Wengrow, *The Dawn of Everything*, 200.

When the NWC and HBC merged in 1821, some 300 forts were closed, and 1300 employees were dismissed. The HBC encouraged these former employees, along with their Amerindian or mixed wives and children, to settle in Red River. While some of these families were already Métis, many were first generation mixed marriages with mixed-ancestry children, or “proto-Métis”. The massive concentration of mixed ancestry individuals and families in one area led to the establishment of a “métis” population on a scale never seen before and that made endogamy almost inevitable since almost all children born there were mixed. As they intermarried, their descendants had ancestry from several different First Nations from all over the Northwest. For this reason, they could not and did not identify with a *single* First Nation or the surrounding Ojibwe as was the case further east. There, “half-breeds” who were not employees in the fur trade forts tended to be directly related to and live among First Nations. Moreover, after 1821, the canoe route between Thunder Bay and Winnipeg fell into disuse as the flow of goods circulated along the waters of the Winnipeg watershed, either north to Fort York or south along the Red River to St. Paul’s, Minnesota. It was along these routes that the Métis hunted buffalo, were employed on the York Boat brigades and developed Red River cart trails. As such, not only were these activities restricted to the Prairies and the Northwest, but Red River was no longer merely a transient “fur-trade community”. Unlike incipient “métis” communities further east, it had developed an economic basis that could, and did, survive the waning of the fur trade. Finally, when Half-Breed Scrip was distributed to extinguish the “Indian title” of the Métis under the *Dominion Lands Act*, it only applied where the Crown in the right of Canada owned public lands. For this reason, scrip was never distributed in Ontario and it never became a rallying cry both for collective land claims and a shared experience of injustice among “half-breeds” in Ontario as it did with Métis in the Prairies. With few exceptions, all of these factors in the ethnogenesis of the Métis of the Northwest were either inexistant or negligible in Ontario – notably that of endogamy.

### National Definition

According to anthropologist Joe Sawchuck, “no province better illustrates the contradictions, complexities, and stress inherent in the contemporary definition of Métis than does Ontario, home to a non-tribal or mixed-blood Aboriginal population *that for the most part has no direct links with the Red River Métis*, but has *explored many avenues in search of an identity*.”<sup>9</sup> Unlike the Ontario Métis Aboriginal Association, Sawchuck noted that the MNO “stresses ties to Red River, *or at least appropriates the cultural symbols of the prairie group*”<sup>10</sup> and that a “*new Métis identity is being forged* in Ontario through the political activities of MNO and social change.”<sup>11</sup> While Sawchuk personally thinks this recent “*adoption of western Métis values* cannot and should not be interpreted as ‘wrong’ or ‘misguided’,”<sup>12</sup> it is problematic from a legal point of view, as the SCC declared in *Powley* that “self-identification [as Métis] *should not be of recent vintage*: While an individual’s self-identification need not be static or monolithic, *claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement*.”<sup>13</sup> It is interesting to note when the Lake Nipigon Métis Association was the first “Métis” organization formed in Ontario in 1865, the term Métis “*was almost unknown in Ontario at the time*, ‘half-breed’ or ‘breed’ being

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<sup>9</sup> Joe Sawchuck, “The Métis of Ontario,” in Gerhard Ens and Joe Sawchuck, *From New peoples to New Nations. Aspects of Métis History and Identity from the Eighteenth to Twenty-First Centuries* (Toronto: University of Toronto Press, 2016), 417. Italics are mine.

<sup>10</sup> *Ibid.*, 420.

<sup>11</sup> *Ibid.*, 452. Italics are mine.

<sup>12</sup> *Ibid.*

<sup>13</sup> *R. v. Powley*, [2003] 2 S.C.R. 207, para. 31.

much more common” and that it was simply for “lack of a better term, [that] they called themselves ‘Métis’. This name was *not chosen for cultural or historical reasons*; rather, it was seen as the *widest, most general and all-encompassing* term that could be used.”<sup>14</sup> In other words, it was used in a pan-Indigenous way to designate “all individuals of mixed Indian and European heritage” which is contrary to the SCC definition in *Powley* of “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.”<sup>15</sup>

Again, Sawchuk insists that “most of the Métis of Ontario have *no definite links* to Red River or the historic Métis Nation”<sup>16</sup> and finds it “*extremely problematic* to consider Ontario as part of th[e] historic Métis Homeland.”<sup>17</sup> The MNO did indeed adopt the Métis National Council’s national definition in 2004. However, the national definition stipulates very clearly that “Historic Métis Nation” means “the Aboriginal people, then known as Métis or Half-breeds, who resided in the Historic Métis Nation homeland,” that the “Historic Métis Nation Homeland” means “the area of land in west central North America used and occupied as the traditional territory of the Métis or Half-breeds as they were then known” and that the “Métis Nation” means “the Aboriginal people *descended from* the Historic Métis Nation.” However, the MNO’s own Internal Review confirms then that at least 77% of the members of the MNO are not connected to the Historic Métis Nation.

And yet, in response to MP Jaime Schmale’s question about membership, President Froh claimed that “we all follow a national definition.”<sup>18</sup>

The Métis National Definition of 2002 and the Métis Homeland Map of 2018 are not recent inventions. When the MNC was first created in 1983, it published a pamphlet in which it described a “geographic area, *commonly referred to as the Métis Nation or Homeland*, [that] encompasses the Prairie Provinces, north-eastern British Columbia, part of the Northwest Territories, northwestern Ontario and a portion of the northern United States.”<sup>19</sup> As part of the *Charlottetown Accord*, the *Métis Nation Accord* was signed on 7 October 1992, between the Crown in the right of Canada, British Columbia, Alberta, Saskatchewan, Manitoba and Ontario and the Métis Nation of Canada as represented nationally by the Métis National Council and provincially by the Pacific Métis Federation, the Métis Nation of Alberta, the Métis Society of Saskatchewan, the Manitoba Métis Federation, the *Ontario Métis Aboriginal Association* and the Métis Nation-Northwest Territories. The preamble stated: “Whereas *in the Northwest of Canada* the Métis Nation emerged as a unique Nation with its own language, culture and forms of self-government” and Section 1(a) defined “Métis” as “an Aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit *and is a descendant of those Métis who received or were entitled to receive land grants and/or scrip under the provisions of the Manitoba Act, 1870, or the Dominion Lands Act*, as enacted from time to time.” The preamble and the reference to scrip under the *Manitoba Act* and the *Dominion Lands Act* makes it clear that what the MNC contemplated at the time was that both the definition of “Métis” and the Métis Homeland only included northwestern Ontario and not the entire province.

Curiously in this regard, the Schedule of Bill C-53 “Métis Governments, Métis Collectivities, Treaties and Coming-into-force Dates indicates the “Governments” as being the MNA, the MNS and the MNO, but whereas the “Collectivity” for both the MNA and the MNS mention the “Métis

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<sup>14</sup> *Ibid.*, 422.

<sup>15</sup> *Powley*, para. 10.

<sup>16</sup> Sawchuck, “The Métis of Ontario,” 424.

<sup>17</sup> *Ibid.*, 449.

<sup>18</sup> 16:07:48

<sup>19</sup> Métis National Council, *The Métis: A Western Canadian Phenomenon* (pamphlet produced by the MNC, 1983).

Nation within Alberta” and the “Métis Nation within Saskatchewan” respectively, this language is changed to “Métis communities represented by the Métis Nation of Ontario” for the MNO. Why the discrepancy? Why not the “Métis Nation within Ontario”? At the very least, the very language of the Bill runs the risk of statutorily *creating* “Métis communities” that are not part of the Métis Nation, or worse, creating “communities” where none in fact exist.

### **Potential of Misrecognition of Seven “New” Historical Métis Communities**

While the Powley case was making its way through the courts in Ontario, various reports were commissioned by the federal Department of Justice, the Ontario Ministry of Natural Resources and the MNO itself, which eventually led to the recognition of six “new” Métis communities in Ontario in 2017. In 2019-20, the Manitoba Métis Federation commissioned my colleagues Professors Jennifer Adese, Darryl Leroux and myself to carry out two analyses of these reports.<sup>20</sup> I would like to emphasize that we did not carry out original research – we simply examined the research in the *existing* reports that were used to convince the government of Ontario that there are Métis communities in these areas. We came to the conclusion that the evidence in the reports was either inconclusive or essentially created the impression of a historic Métis community by presuming every reference to a “half-breed” individual – and sometimes even “voyageur” or “canadien” – automatically indicated the presence of a Métis community. Based on the evidence in these reports, we were and remain skeptical that any of these “communities” would be able to pass the *Powley* test.

The one possible exception is the community in Northwestern Ontario due to the proximity with the Red River Settlement. It is precisely in this area that the federal government and the MNO were supposed to carry out studies according to the 2017 *Agreement*. As far as I know, the findings of such studies, if they exist, have not been made public.

### **The MNO Internal Review**

In 2021, the MNO commissioned Know History Historical Services to do an Internal Review of its membership.<sup>21</sup> According to the Review, the MNO has approved over 380 “Verified Métis Family Lines” (VMFL). In order to qualify as “Métis”, members simply need to show they are descended from one or more of these individuals of mixed ancestry. At the time of the Review, there were 23,978 members registered with the MNO.<sup>22</sup> Of these, “22.5% of current MNO files (5,402 MNO citizens) were determined to have ‘incomplete’ files.”<sup>23</sup> The Review defines “incomplete” as: “A citizenship file lacks a historic document or any records evidencing an ancestral connection to a Métis Ancestor as defined by the Registry Policy.” The MNO subsequently held a plebiscite in February 2023 and the majority of members voted to remove incomplete files. In June, the by-laws were effectively amended to do so.

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<sup>20</sup> Jennifer Adese, Darryl Leroux and Darren O’Toole, *An Analysis of the MNO’s Recognition of Six New Historic Métis Communities: A Final Report*, March 2020.

[https://www.researchgate.net/publication/368686269\\_An\\_Analysis\\_of\\_the\\_MNO's\\_Recognition\\_of\\_Six\\_New\\_Historic\\_Metis\\_Communities\\_A\\_Final\\_Report](https://www.researchgate.net/publication/368686269_An_Analysis_of_the_MNO's_Recognition_of_Six_New_Historic_Metis_Communities_A_Final_Report); *Historic Métis Communities of Ontario: An Evaluation of the Evidence*, October 2020.

[https://www.researchgate.net/publication/368686352\\_Historic\\_Metis\\_Communities\\_of\\_Ontario\\_An\\_Evaluation\\_of\\_the\\_Evidence](https://www.researchgate.net/publication/368686352_Historic_Metis_Communities_of_Ontario_An_Evaluation_of_the_Evidence)

<sup>21</sup> Know History Historical Services, *Métis Nation of Ontario Registry and Self-Government Readiness Review Final Report*, May 2021. <https://www.metisnation.org/wp-content/uploads/2022/08/Tab-12-Know-History-Metis-Nation-of-Ontario-Registry-and-Self-Government-Readiness-Review-Final-Report-ZacThiffault.pdf>

<sup>22</sup> *Ibid.*, 8.

<sup>23</sup> *Ibid.*, 6.

Of the 17,014 files that were complete, “59% (7,716) citizens connect to a single VMFL.”<sup>24</sup> In other words, only 7,716 members have no more than a single First Nations ancestor. This implies that these mixed-ancestry ancestors *never practiced endogamy* – as we have seen, one of the most fundamental elements that explains the emergence of distinct historic Métis communities. Moreover, even having two or three Indigenous ancestors is not necessarily an indication of endogamy. According to the *Powley* test, there would also have to be sufficient endogamy to form a community *prior to* Effective Control. One could have three ancestors of mixed ancestry who were born in entirely different times and places and therefore could not have intermarried with each other. If it is only by chance that four or five generations later their lineages meet and only do so after Effective Control, this would not be sufficient to constitute a “historic” Métis community.

It is important to note here that President Froh stated before the Committee that there are now about 27,000 members with “complete files”.<sup>25</sup> This amounts to an addition of 10,000 members since May 2021, or a 59% increase in two years. If this trend continues, the MNO will double its membership to 50,000 in the next five years. The MNO is also still adding new VMFLs to the list of “Métis” ancestors. There is no similar rate of growth in the MNA or MN-S.

With regard to the MNC’s national definition, of the complete files, a “total of 23% of the MNO’s citizenship (3,904 MNO citizens) [are] ancestrally connected to Métis communities in western Canada.”<sup>26</sup> Of these, 2,470 members have ancestors who received Half-Breed Scrip and another 768 with an ancestor who received a half-breed land grant in Manitoba.<sup>27</sup> However, there are 666 members who rely on “other historical documentation from 1901 or earlier.”<sup>28</sup> The 1901 census designated certain individuals as “breeds” (FB – “French Breed”; SB – “Scots Breed”; OB – “Other Breed”). The problem is the census listed status Indians living on reserves as “Breeds” (e.g., “Red Chippewa FB”) as well as the mixed ancestry offspring of First Nations women who had lost their status because they had married a white man. For this reason, it is not an indicator that the individual or family belonged to a historic Métis community unless buttressed with further proof. The Internal Review gives no indication of any such additional proof.

### **Sault St. Marie**

While the *Powley* case is often touted as the first time the Supreme Court of Canada recognized the Aboriginal rights of the Métis, it is often forgotten that on the same day *Powley* was released, the SCC also issued its decision in *R v Blais* [2003] 2 S.C.R. 236. Blais, a Manitoba Métis, argued that the Métis in the Prairies were “Indians” under the hunting rights provisions of the Manitoba *Natural Resources Transfer Agreement* (“NRTA”, incorporated as Schedule (1) to the *Constitution Act, 1930*, and therefore had a constitutional right to hunt for food on unoccupied Crown lands. While the Court disagreed, what is interesting is that, while the Attorney-General denied both that the Powleys were “Métis” and that there was a “Métis” community in Sault-Sainte-Marie through four levels of court, in *Blais* the “parties agreed [...] that the appellant is Métis.”<sup>29</sup> The reason there are no identity criteria in *Blais* is because no one questioned or doubted the appellant’s Métis identity. This is a very telling difference with the “historic Métis communities” in Ontario. Recall that even the MNC definition in 1983 did not contemplate the existence of historical Métis communities outside of northwestern Ontario.

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<sup>24</sup> *Ibid.*, 22. Italics are mine.

<sup>25</sup> 16:16:32

<sup>26</sup> *Ibid.*, 6.

<sup>27</sup> *Ibid.*, 24.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Blais*, para. 4.

Very recently, Professors Celeste Pedri-Spade and Darryl Leroux completed a study commissioned by Robinson Huron Waawiindamaagewin.<sup>30</sup> Their study found that of three lists of “half-breeds” in two petitions in 1850, 34 out of 55 or 62% of signatories in one, and at least two-thirds of the 80 or so names in another end up on treaty annuities pay lists. What is often forgotten in *Powley* is that when Steven Powley was arrested for hunting moose out of season, he was not a member of the MNO. As Justice Vaillancourt noted, at “the time the charge was laid, Steven Powley was in possession of his Ontario Metis and Aboriginal Association card. *This card indicated that he claimed aboriginal rights under the Robinson-Huron Treaty.*”<sup>31</sup>

Powley’s Indigenous ancestor was a status Indian of the Garden River band who lost her status when she married a non-status man. As the trial judge noted, “the Powleys have roots back to the Lesage family, *one of the signatories to the Robinson Huron Treaty of 1850*”<sup>32</sup> and that “Powleys *rely on the fact that they are direct descendants of beneficiaries of the Robinson Huron Treaty and claim its protection for their hunting rights.*”<sup>33</sup> The problem was that on Powley’s OMAA card, his “nationality was listed as Metis.”<sup>34</sup> For this reason, Vaillancourt J. distinguished the *Powley* case from *R. v. Fowler* and *R. v. Chevrier* where the court recognized that *non-status Indians* are still beneficiaries of treaties<sup>35</sup> on the ground that Powley self-identified as a “Métis” and “the evidence regarding the Robinson Huron Treaty 1850, Robinson made it very clear that he did not want the Metis [half-breeds] included as part of the Treaty.”<sup>36</sup> But Powley was not descended from the “half-breeds” who Robinson excluded from the treaty – he was a descendant of a signatory to the treaty and therefore to “half-breeds” who were included. Had Powley self-identified as a non-status Indian rather than “Métis”, the *Powley* case would be known today as a non-status Indian treaty rights case. This is perhaps why the Supreme Court of Canada in *Daniels* seemed to contemplate the possibility that non-status Indian communities of mixed ancestry have misrecognized themselves as “Métis” communities, but that doing so would not exclude them from the ambit of s. 91(24) of the *Constitution Act, 1867*.<sup>37</sup>

Similarly, Mitch Case who appeared before the committee as a representative of the MNO, is a the great-great grandson of Lucy Belleau (b. 16 August 1900), a status Indian from the Garden River band. She was listed as a “Red Chippewa FB” living in Garden River in the 1901 census. She lost her status when she married a “white man”, Edward Jackson. She was a descendant of the Cadotte and Belleau lines. Belleau is not listed among the MNO VMFLs while Pedri-Spade and Leroux have shown that the Cadottes who remained in Sault Ste. Marie married into Garden River and were not members of a distinct Métis community. Michel Belleau married Marie Charlotte Cadotte on 6 August 1847 in Manitowaning, but both of them died as members of Garden River in 1899 and 1901 respectively. From the time the Robinson-Huron Treaty was signed in 1850 until his great-great grandmother lost her status, Case’s ancestors were members of an Ojibwe band, not members of a distinctive historical Métis community.

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<sup>30</sup> Celeste Pedri-Spade & Darryl Leroux, *The Sault Ste. Marie “Métis” Community and “Halfbreed Petition”*, October 2023, [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://uploads-ssl.webflow.com/64eddfdccee1c8876622c760/654a7e9cd7aa33f863cf0133\\_SSM%20\(Petition\)%20Report.pdf?fbclid=IwAR07HIF2-gULmitOy86eCsxPA2b84xdxNodG\\_vxFxSahV46x3PeDx-tlrM](https://chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://uploads-ssl.webflow.com/64eddfdccee1c8876622c760/654a7e9cd7aa33f863cf0133_SSM%20(Petition)%20Report.pdf?fbclid=IwAR07HIF2-gULmitOy86eCsxPA2b84xdxNodG_vxFxSahV46x3PeDx-tlrM)

<sup>31</sup> *R. v. Powley*, [1998] O.J. No. 5310, para. 5.

<sup>32</sup> *Ibid.*, para. 98.

<sup>33</sup> *Ibid.*, para. 100.

<sup>34</sup> *Ibid.*, para. 5.

<sup>35</sup> *R v. Fowler*, [1993], 3 CNLR 178; *R v. Chevrier*, [1989] 1 CNLR 128.

<sup>36</sup> *Powley*, [1998], para. 100. Note that Robinson never used the term “Métis”, but rather spoke of “half-breeds”.

<sup>37</sup> *Daniels v. Canada*, [2016] 1 S.C.R. 99, paras. 17 and 18.



### **The Abitibi-Inland Historic Métis Community**

Since then, Dr. Leroux has carried out another study specifically on the “Historic Abitibi-Inland Métis Community” for the Wabun Tribal Council.<sup>38</sup> Leroux also came to the conclusion that translating every mention of the word “breed” as “Métis” led the MNO to misrecognize fifteen of nineteen so-called “Verified Métis Family Lines” (VMFL) “as either “Métis root ancestors” or “Documented Métis” in their VMFLs. He concluded that these families were in fact integral members of regional Cree, Ojibway, or Algonquin communities.”<sup>39</sup> As Leroux points out, one of the *sina qua non* criteria of ethnogenesis is that of **multi-generational endogamy**<sup>40</sup> and there is no indication that intermarriage between individuals of mixed ancestry took place. Having reviewed the evidence, I am of the opinion that this so-called “Métis community” would not pass the *Powley* test.

### **The Mattawa/Ottawa River Historic Métis Community**

Regarding the recognition of a community in the Mattawa area, it was partly based on the Stone Circle and Know History’s *Final Synthesis Report for the Mattawa Nipissing Métis Historical Research Project* of 5 May 2015. This same report was used as evidence in *Tremblay*<sup>41</sup>. Justice Gilles Ouellet of the Court of Québec found that what individuals of mixed ancestry there were in the area were too young and too few to form a Métis community prior to the period of effective control in 1870-75. Moreover, he found that endogamy had simply been presumed by the defendant’s expert Dr. Siommon Pulla and not proven.<sup>42</sup> We therefore find ourselves in a situation where, *based on the same evidence*, the executive branch of the Province of Ontario has granted recognition to a “Métis” community, while the Court of Québec has found that no such historical Métis community ever existed.<sup>43</sup> Furthermore, the Algonquins of Ontario have launched a court case in which they “invoke *Powley* and seek a declaration that Ontario has concluded incorrectly that there are historic Métis communities in Killarney and in the Mattawa/Ottawa River area.”<sup>44</sup>

Despite the best efforts of counsel for the MNO, Justice Lauwers of the Ontario Court of Appeal has allowed the case to go forward. Should there be a judicial finding that there is no historical Métis community in the Mattawa area according to the *Powley* criteria, Parliament will find itself in the embarrassing situation of having statutorily recognized a “community” that does not meet the *Powley* test. Prudence would dictate that Parliament should at the very least await the outcome of the case before moving ahead.

### **The Rainy River/Lake of the Woods Historic Métis Community**

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<sup>38</sup> Darryl Leroux, *The “Historic Abitibi-Inland Métis Community” Final Report*, September 2022.

<https://www.wabuntribalcouncil.ca/media-release/wabun-report-2022/>

<sup>39</sup> *Ibid.*, 33.

<sup>40</sup> *Ibid.* 6. See Foster, John Elgin. 2001. “Wintering, the Outsider Adult Male and the Ethnogenesis of the Western Plains Métis,” in Theodore Binnema, Gerhard John Ens & Rod C. MacLeod (eds.), *From Rupert’s Land to Canada. Essays in Honor of John E. Foster*, Edmonton: University of Alberta Press, p. 179–93; Reimer, Gwen & Jean-Philippe Chartrand [Praxis Research Associates]. 2005. “A Historical Profile of the James Bay Area’s Mixed European-Indian or Mixed European-Inuit Community.” Report prepared for the Attorney-General of Canada, p. iv.

<sup>41</sup> *Directeur des poursuites criminelles et pénales c. Tremblay*, 2018 QCCQ 20838 (CanLII).

<sup>42</sup> *Ibid.*, para. 92.

<sup>43</sup> To be sure, Justice Ouellet benefitted from the expert witness report for the Attorney-General of Québec. See Leila Inksetter, Jérôme Morneau, Louis-Pascal Rousseau, « Existence d’une communauté métisse historique » Rapport produit dans la cause D.P.C.P. c. M. J. Tremblay et P.G.Q. Dossier de Cour du Québec n° 610-61-015090-143 et al.

<sup>44</sup> *Whiteduck v. Ontario*, 2023 ONCA 543, para. 7.

Contrary to what representatives of the MNO have declared before the Committee with regard to land, the MNO clearly “asserts that the Northwestern Ontario Métis Community has *outstanding rights, interests and claims* based on its unique history and geography in the Northwest that require reconciliation, *including*, but not limited to, *an outstanding collective claim of the Métis descendants of the “Halfbreeds of Rainy River and Lake” whose representatives signed an Adhesion to Treaty No. 3* with federal Crown representatives on September 1 1875 (the “Treaty 3 Halfbreed Adhesion”).” The 2017 *Agreement on Advancing Reconciliation with the Northwestern Ontario Métis Community* is partly about a *land claim* that involves the “Half-Breed Reserve” now known as Couchiching which is a member of the Grand Council of Treaty 3. The members of Couchiching have been under the *Indian Act* for 150 years and in the 2016 census not a single member living on reserve self-identified as “Métis”. Insofar as there are descendants of “half-breed” families who for some reason did not settle on the reserve, their claim would be that of non-status Indians who have a right to be instated as members of the Couchiching band under the *Indian Act* and thereby live on the reserve, not that of a distinct “Métis” community with an outstanding land claim. Section 3.2.1 of the Agreement was to establish 2 “terms of reference *for research and a collaborative review of evidence* related to the outstanding claims of the Northwestern Ontario Métis Community.” Bill C-53 puts the cart before the horse by running the risk of entrenching the statutory recognition of “historical Métis communities” before such research has been completed and made public.

## Conclusion

Recently, in *MNC v. Chartier et al.*, Justice Robert Centa ordered the “MNC to provide a complete and substantive answer [...] within 20 days of the release of these reasons for decision”<sup>62</sup> with regard to the MMF’s request that the MNC “confirm whether it is the MNC’s position that the six Ontario new historic Métis communities fall within or don’t fall within the historic Métis Nation Homeland.”<sup>63</sup> Since this decision was rendered on 28 September 2023, if we presume that Justice Centa meant 20 working days, the MNC was to provide a substantive answer to the MMF by 27 October 2023 at the latest. So far as I know, the MNC not made its position clear to the Committee on this matter.

According to the MNC’s webpage, the MNC is in the process of setting up an Expert Panel: “In 2021 that the MNC General Assembly directed the establishment of an Expert Panel to protect the territorial integrity of the historic and modern-day Métis Nation. The Expert Panel has a mandate to review the history of six Ontario Métis communities recognized by the Metis Nation of Ontario in 2017 through the lens of the National Definition and contemporary Métis governance.”<sup>64</sup> As of November 2023, not only has the Expert Panel not begun its work, but it’s still looking for two members-at-large and won’t submit a report for at least another year.

Given that the Métis National Council has set up a panel to review MNO’s membership and that there is currently a court case that questions the very existence of a historical Métis community in Mattawa, adopting Bill-C53 is premature at best. At best, Parliament risks statutorily entrenching the recognition of non-status Indian populations as historical Métis communities or, at worse, statutorily entrenching the recognition of non-Aboriginal populations as Aboriginal communities.

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<sup>62</sup> *Métis National Council Secretariat Inc. v. Chartier*, 2023 ONSC 5469, para. 352.

<sup>63</sup> *Ibid.*, para. 347.

<sup>64</sup> <https://www.metisnation.ca/news-and-media/press-releases/57/the-metis-national-council-expressed-continued-support-for-bill-c-53-provides-update-on-work-of-expert-panel> (10 November 2023).