

R V HIRSEKORN: ARE MÉTIS RIGHTS A CONSTITUTIONAL MYTH?

Karen Drake*

I. Overview

If 2010 was the Year of the Métis,¹ then 2013 was the Year of Métis Jurisprudence. Courts in Canada handed two major victories to the Métis in 2013. In the decision in *Daniels v Canada (Minister of Indian Affairs and Northern Development)*,² the Federal Court held that the Métis and non-status Indians are “Indians” for the purposes of section 91(24) of the *Constitution Act, 1867*, which designates “Indians, and Lands reserved for the Indians” as a federal head of power.³ In the *Manitoba Metis Federation Inc v Canada (Attorney General)*⁴ decision, a majority of the Supreme Court of Canada held that Canada failed to uphold the honour of the Crown when it delayed in implementing section 31 of the *Manitoba Act, 1870*,⁵ which promised that 1.4 million acres of land would be allotted to Métis children in exchange for the extinguishment of Métis title in what became Manitoba.⁶ In addition to these two victories, the Métis also suffered a baffling defeat; in *R v Hirsekorn*, the Alberta Court of Appeal

* Assistant Professor, Faculty of Law at Lakehead University. The author thanks Andrée Boisselle for her guidance regarding an earlier version of this paper, as well as Jason Madden and an anonymous reviewer for their helpful comments and feedback.

¹ On December 9, 2009, the Parliament of Canada passed a motion commemorating 2010 as the Year of the Métis; see *House of Commons Debates*, 40th Parl, 2nd Sess, No 127, vol 144 (9 December 2009) at 7838-39. Similarly, on April 19, 2010, the Ontario Legislature passed a motion commemorating 2010 as the Year of the Métis; see Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 2nd Sess, No 17 (19 April 2010) at 1400 (Hon Steve Peters). Likewise, the Throne Speech delivered in the Legislative Assembly of Saskatchewan on October 21, 2009 designated 2010 as the Year of the Métis; see Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 26th Leg, 3rd Sess, No 1A, Vol 52 (21 October 2009) at 3126.

² 2013 FC 6, [2013] 2 FCR 268, varied 2014 FCA 101, [2014] FCJ no 383 (QL) [*Daniels*].

³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91(24).

⁴ 2013 SCC 14, 291 Man R (2d) 1 [*Manitoba Metis Federation*].

⁵ SC 1870, c 3, s 31.

⁶ *Manitoba Metis Federation*, *supra* note 4 at para 9.

upheld the conviction of Garry Hirsekorn, a Métis citizen, for hunting outside the open season and without a wildlife permit,⁷ despite the evidence in support of Hirsekorn's assertion that he was exercising a Métis right pursuant to section 35 of the *Constitution Act, 1982*.⁸ The issue was the significance of the site-specific nature of Aboriginal hunting rights in the context of a highly mobile Aboriginal nation, namely, the Métis. The Supreme Court of Canada recently dismissed Hirsekorn's application for leave to appeal,⁹ rendering the Court of Appeal's decision the last word on this issue.

The Alberta Court of Appeal's decision is problematic for at least two overarching reasons. First, the Court invented a new legal test – the traditional territory test, complete with six new factors – to be applied to mobile Aboriginal nations asserting a site-specific Aboriginal right.¹⁰ I argue that this new legal test is not grounded in previous jurisprudence, and as such it adds a new step to the test in *R v Van der Peet*¹¹ for establishing an Aboriginal right; likewise, it expands the ten-step test for establishing a Métis right, as developed in *R v Powley*,¹² into an eleven-step test. It is not clear why mobile Aboriginal peoples in particular should suddenly face a new and additional hurdle in proving their rights.

Second, the Alberta Court of Appeal's application of this new legal test to the facts of the case seems to embody a paradox: the Court of Appeal held that the Métis avoided the relevant area – the Cypress Hills in southeastern Alberta – until shortly before the date of effective control because of the danger it presented.¹³ Indeed, this is the basis on which the Court denied the existence of a Métis right.¹⁴ And yet, the Crown's own expert witness gave evidence demonstrating that Métis women were giving birth in the Cypress Hills as early as thirty-six years prior to the date of effective control, and that there were just under twenty such births per year in the years immediately prior to the date of effective control.¹⁵

⁷ *R v Hirsekorn*, 2013 ABCA 242 at paras 1, 8, [2013] 8 WWR 677, leave to appeal to SCC refused, 35558 (January 23, 2014) [*Hirsekorn*].

⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 35(1) of the *Constitution Act, 1982* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

⁹ *Hirsekorn*, *supra* note 7.

¹⁰ *Ibid* at paras 88, 97.

¹¹ [1996] 2 SCR 507 at paras 51-54, 46, 60-67, 137 DLR (4th) 289 [*Van der Peet*].

¹² 2003 SCC 43 at paras 19-50, [2003] 2 SCR 207 [*Powley*].

¹³ *Hirsekorn*, *supra* note 7 at para 104.

¹⁴ *Ibid* at paras 104-05.

¹⁵ Clint Evans, *The Metis, the Blackfoot and the Crown in Southern Alberta, 1800-1878* (2009) [unpublished, archived at the Alberta Court of Appeal] at 164.

Despite the Court's conclusion that the Métis avoided the Cypress Hills area because it was dangerous, it also accepted the evidence of Métis births in the Cypress Hills prior to effective control.¹⁶ This raises the following question: How could Métis women have felt sufficiently safe in the Cypress Hills area to give birth there if it was such a dangerous place? In other words, how can we reconcile these two seemingly contradictory conclusions? The answer is that this apparent contradiction evaporates once we examine the evidence from the Métis perspective, and particularly once we recognize the operation of Métis laws and legal institutions in the Cypress Hills prior to effective control. I argue that the laws of the plains Métis allowed these communities to exercise a mobile jurisdiction throughout the plains, and that the new traditional territory test discounts the Aboriginal perspective insofar as it takes no account of the Métis Nation's exercise of mobile jurisdiction. This is problematic in the light of the requirement that courts take account of the Aboriginal perspective when assessing Aboriginal rights.¹⁷

When courts substantially revise the test for Aboriginal rights without ordering a new trial, the test becomes a moving target that Aboriginal nations can have little hope of meeting. This practice risks rendering these rights hollow and turning them into nothing more than a constitutional myth.¹⁸

2. Summary of the *Hirsekorn* Decisions

The basic facts in *Hirsekorn* are straightforward and not in dispute.¹⁹ *Hirsekorn* was charged with shooting a deer outside of the regulated season and without a permit,²⁰ in contravention of Alberta's *Wildlife Act*²¹ near Elkwater, Alberta,²² which is located at the western edge of the Cypress Hills in southeastern Alberta.²³ In his defence, *Hirsekorn* argued that he was exempt from the relevant *Wildlife Act* provisions because those provisions infringed his section 35 Aboriginal right to hunt.²⁴ The parties conceded that "hunting for food on the prairies was an integral part of [the]

¹⁶ *Hirsekorn*, *supra* note 7 at paras 42, 102.

¹⁷ *Van der Peet*, *supra* note 11 at para 49.

¹⁸ I am indebted to an anonymous reviewer for providing a particularly articulate statement of this conclusion.

¹⁹ *R v Hirsekorn*, 2010 ABPC 385 at para 2, [2011] 1 CNLR 175 (Prov Ct) [*Hirsekorn PC*].

²⁰ *Ibid* at para 1.

²¹ *Wildlife Act*, RSA 2000 c W-10.

²² *Hirsekorn PC*, *supra* note 19 at paras 2, 20.

²³ See *Evans*, *supra* note 15 at vi.

²⁴ *Hirsekorn PC*, *supra* note 19 at para 2.

distinctive culture” of the Métis Nation.²⁵ The disputed issue, then, was how to frame the requirements regarding the geographic location where the hunting took place.²⁶

A) The Decision of the Provincial Court

The trial judge rejected Hirsekorn’s defence and found him guilty of the *Wildlife Act* charges.²⁷ He articulated and adopted the following test for establishing a section 35 Aboriginal right to hunt: “A constitutional right protected in s. 35 but not equating to Aboriginal title must be established upon the consistent and frequent pattern of usage and occupation of a site specific area.”²⁸ The trial judge held that the Métis failed to meet this test because they were unable to establish “a sufficient degree of use, occupation, stability, or continuity” in the Cypress Hills area prior to the establishment of effective European control, which he held occurred between 1874 and 1878 with the arrival of the North West Mounted Police.²⁹ In support of this conclusion, the trial judge held that prior to effective control, Métis groups travelled and hunted in southern Alberta,³⁰ but they did not establish any settlements, either permanent or semi-permanent, in this area.³¹ According to the trial judge, the Métis presence in southern Alberta was limited in this way because of the “constant threat” posed by the Blackfoot Confederacy.³² The trial judge cited the following incidents gleaned from the expert reports tendered at trial in support of this notion.

²⁵ *Hirsekorn*, *supra* note 7 at paras 33, 50.

²⁶ *Ibid.*

²⁷ *Hirsekorn PC*, *supra* note 19 at para 158.

²⁸ *Ibid* at para 113.

²⁹ *Ibid* at paras 134, 139.

³⁰ *Ibid* at para 130.

³¹ *Ibid* at para 95.

³² *Ibid* at para 97. The trial judge identified the following nations as historically constituting the Blackfoot Confederacy: the Blackfoot, the Peigan, the Blood and the Athapascan-speaking Sarcee nations; see *ibid* at para 49. These are the conventional European terms used in the historical documents, which were drafted by Europeans. The names employed by the First Nations themselves are as follows: the Siksikawa (Blackfoot), the Pikuniwa (Peigan), the Kainaiwa (Blood), and the Tsuu T’ina (Sarcee); see Royal Commission on Aboriginal Peoples, *The Final Report of the Royal Commission on Aboriginal Peoples*, vol 1, *Looking Forward, Looking Back* (Ottawa: Supply and Services, 1996) at 61. The Royal Commission also identifies the Gros Ventres as allies of the Blackfoot Confederacy; see *ibid*. To avoid confusion, in this paper I use the names employed in *Hirsekorn PC*, while recognizing that these are not the names that the Indigenous nations have chosen for themselves. As Evans notes, given that all of the primary and secondary sources presented at trial employ the European variants of the name, using a dual naming system would be unwieldy; see Evans, *supra* note 15 at 4.

First, the trial judge outlined a number of attempts by the Hudson's Bay Company and other fur traders to establish trading posts within traditional Blackfoot territory, which failed due to the danger posed by the Blackfoot Confederacy.³³ Second, he described Colonel John Palliser's expedition throughout southern Alberta in the late 1850s, and noted that the Métis travelling with the expedition did not want to travel into certain parts of Blackfoot territory because they were afraid of the Blackfoot Confederacy.³⁴ In addition, one of the expedition's Métis guides deliberately tried to lead the expedition away from the Cypress Hills because of its dangers.³⁵ Further, the trial judge noted that the Boundary Commission, which was surveying the Canada-US border in 1873-1874, had difficulty hiring Métis individuals to accompany the Commission "to southern Alberta because of the rumours of Indian hostility west of the eastern edge of the Cypress Hills."³⁶ Finally, the trial judge mentioned that in August 1874, the North West Mounted Police met a group of Métis buffalo hunters from Winnipeg who had been in conflict with the Blackfoot.³⁷ On the basis of these events, the trial judge concluded that although the Métis traveled through and hunted in southern Alberta,³⁸ they did not spend extended periods of time there,³⁹ and hence their presence was not sufficient to establish an Aboriginal right to hunt.⁴⁰

B) Critical Analysis of the Provincial Court's Decision

On appeal, the Alberta Court of Queen's Bench correctly rejected the trial judge's version of the test to establish an Aboriginal right to hunt. It disagreed with the trial judge's notion that an Aboriginal community needs to establish "a sufficient degree of use, occupation, stability, or continuity in the area where a practice was exercised to support a site-specific constitutional right."⁴¹ More specifically, the Court of Queen's Bench held that the trial judge erred if he meant that the Métis are required to demonstrate that, prior to effective control, they lived in southern Alberta.⁴² As the Court of Queen's Bench recognized, the case law on this issue, including the Supreme Court of Canada's decision in *R v Adams*,⁴³

33 *Hirsekorn PC*, *ibid* at paras 54, 58-62, 71, 84-85.

34 *Ibid* at paras 67-68, 73.

35 *Ibid* at para 69.

36 *Ibid* at para 88.

37 *Ibid* at para 89.

38 *Ibid* at para 130.

39 *Ibid* at para 97.

40 *Ibid* at para 134.

41 *R v Hirsekorn*, 2011 ABQB 682 at para 124, 53 Alta LR (5th) 91 [*Hirsekorn QB*].

42 *Ibid*.

43 [1996] 3 SCR 101 at para 28, 138 DLR (4th) 657 [*Adams*] (explaining that a lack of settlements does not preclude the existence of a site-specific Aboriginal right).

stands for the principle that site-specific Aboriginal rights, such as hunting rights, may exist even in the absence of a settlement or village.⁴⁴

The Court of Queen's Bench, though, failed to recognize an additional problem with the trial judge's reasoning. The trial judge relied on evidence of Métis reluctance to enter Blackfoot territory as a reason for rejecting Hirsekorn's claim to exercise a Métis right in the Cypress Hills;⁴⁵ and yet the trial judge also found as a fact that the Cypress Hills are *not* located within Blackfoot territory.⁴⁶ This latter finding makes sense, given that the Cypress Hills are not within the area covered by Treaty Seven,⁴⁷ to which the Blackfoot nations are signatories.⁴⁸ Further, historical accounts described the Cypress Hills as a neutral territory that was not controlled by any particular Aboriginal nation.⁴⁹ Rather, the area was potentially dangerous to all Aboriginal peoples, such that anyone camping in the Cypress Hills would erect barricades around themselves for protection.⁵⁰ Despite the finding that the Cypress Hills area was not in Blackfoot territory, the trial judge equivocates between these two areas when citing examples of Métis avoidance of the Cypress Hills.⁵¹ This equivocation is particularly ironic, given that the trial judge rejected any evidence of Métis hunting on the plains that was not specific to the Cypress Hills.⁵² The trial judge seems to have held the evidence in support of a Métis right to a stricter standard than the evidence used by the Crown to defeat a Métis right.

⁴⁴ *Hirsekorn QB*, *supra* note 41 at paras 128-32.

⁴⁵ *Hirsekorn PC*, *supra* note 19 at paras 114, 116.

⁴⁶ *Ibid* at para 49 (explaining that "Blackfoot Territory" refers to an area in Alberta lying west of the Cypress Hills; it is noteworthy that this statement occurs within the "Finding of Facts" section of the decision). This passage is cited in the Court of Appeal's decision; see *Hirsekorn*, *supra* note 7 at para 35.

⁴⁷ Evans, *supra* note 15 at 5.

⁴⁸ *Treaty and Supplementary Treaty No 7 between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100028793/1100100028803>> [Treaty Seven].

⁴⁹ See Isaac Cowie, *The Company of Adventurers: A Narrative of Seven Years in the Service of the Hudson's Bay Company During 1867-1874 on the Great Buffalo Plains with Historical and Biographical Notes and Comments* (Toronto: William Briggs, 1913) at 303-304 (describing the Cypress Hills as "a neutral ground between many different warring tribes" that was so dangerous that Aboriginal peoples would erect barricades around themselves while camping there). This passage is cited within the Crown's expert report; see Evans, *supra* note 15 at 84. It is also cited by the Court of Appeal; see *Hirsekorn*, *supra* note 7 at para 34.

⁵⁰ See Cowie, *ibid*.

⁵¹ This equivocation is carried through to the decision in *Hirsekorn QB supra* note 41 at paras 123, 161, and to the Court of Appeal's decision; see *Hirsekorn*, *supra* note 7 at para 34.

⁵² *Hirsekorn PC*, *supra* note 19 at paras 123-29.

C) *The Decision of the Court of Queen's Bench*

Despite its critique of the trial decision, the Court of Queen's Bench also rejected Hirsekorn's constitutional argument and dismissed his appeal.⁵³ The Court of Queen's Bench began its analysis by adopting the ten-step *Powley* test for establishing a Métis right.⁵⁴ The *Powley* test combines, but also modifies, the test in *R v Sparrow*⁵⁵ and the *Van der Peet*⁵⁶ test, the latter of which expands upon the first step of the former. More specifically, the *Van der Peet* test has two main stages. The first is the characterization stage, where the court must identify the precise nature of the right being claimed.⁵⁷ The second stage asks the court to determine, first, whether the activity on which the claimed right is based was an element of a pre-contact practice, custom or tradition integral to the distinctive culture of the claimant group,⁵⁸ and second, whether continuity exists between the

⁵³ *Hirsekorn QB*, *supra* note 41 at para 168.

⁵⁴ *Ibid* at paras 66-71. At para 71, the Court of Queen's Bench articulated the following ten steps of the *Powley* test:

1. Characterization of the right;
2. Identification of the historic rights-bearing community;
3. Identification of the contemporary rights-bearing community;
4. Verification of the claimant's membership in the relevant contemporary community;
5. Identification of the relevant time frame;
6. Determination of whether the practice is integral to the claimants' distinctive culture;
7. Establishment of continuity between the historic practice and the contemporary right asserted;
8. Determination of whether or not the right was extinguished;
9. If there is a right, determination of whether there is an infringement; and
10. Determination of whether the infringement is justified.

⁵⁵ [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]. The four-step *Sparrow* test is as follows: (1) Is there an existing right? (2) Has the right been extinguished? (3) Has the right been infringed? (4) Is the infringement justified?

⁵⁶ *Van der Peet*, *supra* note 11. For articles critiquing the *Van der Peet* test, see R Barsh and J Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993; John Borrows and Leonard Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta L Rev 9; Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill LJ 1011 at 1030-37; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997-1998) 22 Am Indian L Rev. 37; Douglas Sanderson, "Redressing the Right Wrong: The Argument from Corrective Justice" (2012) 62 UTLJ 93 at 115-17, 131.

⁵⁷ *Van der Peet*, *ibid* at paras 51-54, 76. See also *Adams*, *supra* note 43 at para 35; Jack Woodward, *Native Law*, loose-leaf (consulted on 1 February 2014), vol 1 (Toronto: Thomson Reuters Canada Limited, 1994) ch 5 at 13.

⁵⁸ *Van der Peet*, *ibid* at para 46; see also *Adams*, *supra* note 43 at 37.

present practice, custom or tradition underlying the claimed right and the practice, custom or tradition that existed prior to contact.⁵⁹ The Supreme Court of Canada has also articulated ten factors to be considered when applying the *Van der Peet* test;⁶⁰ the most important of these, in the context of the *Hirse Korn* case, is that a court must take into account the perspective of the Aboriginal people claiming the right.⁶¹ The main difference with the *Powley* test is that it replaces the pre-contact focus of the second stage of

⁵⁹ *Van der Peet*, *ibid* at paras 60-67, 89; see also *Adams*, *supra* note 43 at 47. At para 46 of *Lax Kw'alaams Indian Band v Canada (AG)*, 2011 SCC 56, [2011] 3 SCR 535, the Supreme Court of Canada outlines four steps to be followed in analyzing a s 35(1) claim. Woodward, *supra* note 57 at 13-14, provides the following succinct summary of these four steps:

1. At the characterization stage, identify the precise nature of the claim based on the pleadings;
2. Determine whether the claimant has proved, based on the evidence;
 - a) the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
 - b) that this practice was integral to the distinctive pre-contact aboriginal society;
3. Determine whether the claimed modern right has a reasonable degree of continuity with the “integral” pre-contact practice; and
4. If an aboriginal right to trade commercially is found to exist, the court, when delineating such a right, should have regard to the objectives in the interest of all Canadians and aimed at reconciliation.

The fourth step is not pertinent to the *Hirse Korn* case. The second and third steps together constitute the second stage of the *Van der Peet* test.

⁶⁰ *Van der Peet*, *ibid* at paras 48-74. See Woodward, *supra* note 57 at 17-18, for the following summary of the ten factors outlined by the majority in *Van der Peet* to be considered in the applying the *Van der Peet* test:

1. Courts must take into account the perspective of the aboriginal people claiming the right.
2. Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right.
3. In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question.
4. The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact.
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.
6. Claims to aboriginal rights must be adjudicated on a specific rather than general basis.
7. For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists.
8. The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or traditions be distinct.
9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of the influence.
10. Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

⁶¹ *Van der Peet*, *ibid* at para 49.

the *Van der Peet* test with a focus on the period prior to the time of effective European control.⁶² This modification accounts for the post-contact ethnogenesis of the Métis.⁶³

The Court of Queen's Bench dismissed Hirsekorn's appeal on the ground that he failed to meet the first step in the second stage of the *Van der Peet* test,⁶⁴ or in other words the "integral to the distinctive culture" test, which it characterized in the following way: "In order to determine whether a right to hunt exists in a specific area, it is not sufficient to show that a Métis group was in proximity to the area. It must also be shown the practice *at and/or around that site* was integral to the distinctive culture of the Métis."⁶⁵ Instead of requiring the Métis to prove that hunting was integral to their distinctive culture and that they hunted in the Cypress Hills, the Court of Queen's Bench required the Métis to prove that hunting specifically in the Cypress Hills was integral to their distinctive culture.⁶⁶ The Court of Queen's Bench relied on the trial judge's findings, outlined above,⁶⁷ in support of its conclusion that the "the Métis were afraid of the Blackfoot and avoided Blackfoot Territory in southern Alberta."⁶⁸ Because of this supposed avoidance, the Court of Queen's Bench concluded that the Métis practice of hunting in southern Alberta was not integral to Métis culture prior to effective control.⁶⁹

D) Critical Analysis of the Decision of the Court of Queen's Bench

The Alberta Court of Appeal correctly rejected the Court of Queen's Bench's version of the integral to the distinctive culture test.⁷⁰ The Court of Queen's Bench was influenced by the site-specific nature of certain Aboriginal rights, such as hunting rights, when it held that the Métis must prove not merely that an activity that is integral to their culture took place in a certain territory, but also that that territory was integral to their culture.⁷¹ This raises the question of the way in which site-specificity is to be reflected in the *Van der Peet* test.

⁶² *Powley*, *supra* note 12 at para 18. An additional difference is that the *Powley* test adds some steps pertaining to identification of and membership in the relevant rights-bearing community, as well as a step regarding identification of the applicable time frame; see steps 2-5 of the *Powley* test, *supra* note 54.

⁶³ *Powley*, *ibid* at para 18.

⁶⁴ *Hirsekorn QB*, *supra* note 41 at para 162.

⁶⁵ *Ibid* at para 161 [emphasis added]. See also *Hirsekorn*, *supra* note 7 at para 84.

⁶⁶ *Hirsekorn QB*, *ibid* at para 161.

⁶⁷ See text accompanying notes 33-40.

⁶⁸ *Hirsekorn QB*, *supra* note 41 at paras 123, 161.

⁶⁹ *Ibid* at para 123.

⁷⁰ *Hirsekorn*, *supra* note 7 at paras 84-88.

⁷¹ See text accompanying notes 65-67.

The Supreme Court of Canada addressed this issue in *Adams* and in *R v Côté*.⁷² These decisions affirm the principle that some Aboriginal rights, such as hunting and fishing rights, are site-specific insofar as they can be exercised only on specific tracts of land.⁷³ This site specificity is incorporated into the test for Aboriginal rights at the characterization stage, which is the first stage of the *Van der Peet* test.⁷⁴ At this stage, a court must correctly delineate the precise nature of the right being claimed.⁷⁵ A site-specific right will be defined as the right to perform the activity in question on the relevant, specific tract of land.⁷⁶ For example, in *Adams*, the accused was charged with fishing without a license in Lake St Francis in Quebec.⁷⁷ Accordingly, the claim was characterized as “a claim for the right to fish for food in Lake St Francis.”⁷⁸ Similarly, both the Court of Queen’s Bench and the Court of Appeal characterized the right at issue in *Hirse Korn* as “the right to hunt for food in the environs of the Cypress Hills.”⁷⁹

Turning next to the second stage of the *Van der Peet* test, the Supreme Court of Canada’s jurisprudence on this issue demonstrates that a claimant seeking to establish a site-specific right need not prove that the territory at issue is integral to the claimant’s distinctive culture, as the Court of Queen’s Bench claimed. The reason is that proof that a particular territory is integral or of central significance to a claimant’s distinctive culture gives rise to Aboriginal title,⁸⁰ but the connection to land required to establish an Aboriginal right is less than that required to establish title.⁸¹ The majority in *Adams* confirms this principle when it explains that the *Van der Peet* test does not require an Aboriginal community to demonstrate “that their

⁷² [1996] 3 SCR 139, 138 DLR (4th) 385 [*Côté*].

⁷³ *Adams*, *supra* note 43 at para 30; *Côté*, *supra* note 72 at para 39.

⁷⁴ *Côté*, *ibid*; *Adams*, *ibid* at para 30.

⁷⁵ *Adams*, *ibid* at para 35; *Van der Peet*, *supra* note 11 at para 51.

⁷⁶ See *Adams*, *ibid* at para 30; see also *Côté*, *supra* note 72 at para 39.

⁷⁷ *Adams*, *ibid* at para 2.

⁷⁸ *Ibid* at para 36.

⁷⁹ *Hirse Korn*, *supra* note 7 at para 57; *Hirse Korn QB*, *supra* note 41 at para 114.

⁸⁰ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 137, 150, 153 DLR (4th) 193 [*Delgamuukw*] (holding that “although aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land ‘was of a central significance to their distinctive culture’”). Although the requirement that the land in question be integral to the distinctive culture of the claimants is not an explicit aspect of the test for Aboriginal title, this requirement is subsumed in the test for Aboriginal title by the requirement of occupancy; see *Delgamuukw*, *ibid* at para 142. In other words, by adequately proving occupancy, the claimant thereby also proves the central significance of the land to their culture; see *Delgamuukw*, *ibid* at para 151.

⁸¹ *Ibid* at para 138.

connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land.”⁸² As such, showing that the territory in question is integral to a claimant’s distinctive culture cannot be a necessary condition of a mere Aboriginal right, even a site-specific one.

Given this, the Alberta Court of Appeal correctly rejected the Court of Queen’s Bench’s approach to the integral to the distinctive culture test on the basis that it “runs the risk of shifting the emphasis from the practice, where it belongs, to the place or location of the practice,” which would eviscerate the section 35(1) rights of nomadic peoples.⁸³ In other words, the Court of Queen’s Bench’s emphasis on place instead of practice runs the risk of importing the test for Aboriginal title into the test for Aboriginal rights. That is, by requiring the Métis to show that their presence in the Cypress Hills was integral to their distinctive culture, the Court of Queen’s Bench in effect denied the existence of an Aboriginal right on the basis of failure to prove Aboriginal title, and the Court of Appeal was correct to reject such an approach.

E) The Decision of the Court of Appeal

Despite its critique of the decision of the Court of Queen’s Bench, the Court of Appeal also concluded that the Métis had failed to establish a right to hunt in the environs of the Cypress Hills.⁸⁴ In reaching this conclusion, the Court of Appeal purported to develop a new approach to the integral to the distinctive culture test, one that “takes into account the aboriginal perspective and the distinctive way of life of the plains Métis.”⁸⁵ But in fact, it invented a new step, complete with its own legal criteria, to be added to the already existing steps of the *Van der Peet* test and applied in the case of nomadic peoples.⁸⁶ This new step asks whether “the historic Métis community include[d] the disputed area within its ancestral lands or traditional hunting territory.”⁸⁷ The Court lists the following factors to be employed in answering this question:

- i. whether the area is reasonably capable of definition;
- ii. the frequency with which the claimant’s community travelled into or used the area;
- iii. the temporal duration of the presence of the claimant’s community in the area;
- iv. the number of people who lived on, used, or travelled through the area;

⁸² *Adams*, *supra* note 43 at para 26.

⁸³ *Hirsekorn*, *supra* note 7 at para 87.

⁸⁴ *Ibid* at para 98.

⁸⁵ *Ibid* at para 88.

⁸⁶ *Ibid* at paras 95-97.

⁸⁷ *Ibid* at para 95.

- v. the ability of the claimant's community to use the area free of challenge from other groups; and,
- vi. the lack of competing claims by other Aboriginal groups.⁸⁸

In applying this new step to the facts of Hirsekorn's case, the Court of Appeal acknowledged the evidence of Métis presence in the Cypress Hills prior to 1874,⁸⁹ which it held was the date of effective control.⁹⁰ It accepted the evidence of just under twenty Métis births per year in the Cypress Hills between 1872 and 1874.⁹¹ However, the Court of Appeal held that this evidence of Métis presence in the area was not sufficient to ground an Aboriginal right because it did not satisfy the third factor of the new "traditional territory" test.⁹² That is, according to the Court of Appeal, the Métis presence in the Cypress Hills was not of a sufficiently long duration; the Court of Appeal attempted to ground this finding in the supposedly dangerous nature of the area, as articulated by the two lower courts.⁹³

3. Critique of the New "Traditional Territory" Test

At first glance, adding the concept of "traditional territory" or "ancestral lands" to the test for Aboriginal rights may seem innocuous. After all, in common parlance, it sounds perfectly natural to say that Aboriginal peoples may exercise their Aboriginal rights within their traditional territories or their ancestral lands. The problems arise when this casual assertion is turned into a new legal test. Turning the notion of "traditional territory" into a legal test is akin to putting the (Red River) cart before the horse. That is, it is unproblematic to conclude that if an Aboriginal people establishes its entitlement to a site-specific Aboriginal right, then the territory where that right can be exercised is part of its traditional territory. But the truth of this conditional statement does not guarantee that its antecedent and consequent can be reversed and modified to produce an equally true statement. That is, it is not correct to say that an Aboriginal people must first prove that a particular tract of land forms part of its traditional territory before it will be entitled to exercise Aboriginal rights on that land. The reason is that a test for establishing Aboriginal rights already exists, and this test makes no mention of either "traditional territory" or "ancestral lands." It is not clear why mobile Aboriginal peoples in particular should now face an additional hurdle in proving their rights.

⁸⁸ *Ibid* at para 97.

⁸⁹ *Ibid* at paras 101-102.

⁹⁰ *Ibid* at para 69.

⁹¹ *Ibid* at paras 101-102.

⁹² *Ibid* at para 104.

⁹³ *Ibid* at paras 100, 104.

The Court of Appeal's concept of "traditional territory" is not merely a benign rephrasing of some aspect of the *Van der Peet* test. I say this for three reasons. First, a majority of the Supreme Court of Canada in *Adams* rejected the notion that an Aboriginal people must prove that the practice at issue occurred within that people's traditional territory in order to prove an Aboriginal right. Second, none of the six "traditional territory" factors identified by the Court of Appeal are germane to the *Van der Peet* test. Indeed, the Supreme Court's analysis in *Adams* illustrates that at least some of these factors are positively irrelevant to the test for Aboriginal rights, including site-specific Aboriginal rights. Third, these factors ignore the Métis perspective, including Métis laws and legal traditions regarding Métis hunting rights. I discuss each of these reasons in the next three sections.

A) "Traditional Territory" is not a Pre-Condition to Establishing an Aboriginal Right

The Court of Appeal attempted to find support for its new "traditional territory" test in the Supreme Court of Canada's decision in *Côté*.⁹⁴ Here, a majority of the Supreme Court affirmed the evidence of one of the experts at trial who testified that the area in question was within the "ancestral lands" of the Aboriginal claimant.⁹⁵ It is clear, however, that the majority did not intend this comment by one of the witnesses to ground a new and additional step in the *Van der Peet* test. That is, as discussed below, the majority's analysis in the companion case to *Côté*, namely *Adams*, demonstrates that even site-specific Aboriginal rights may exist in the absence of a finding that the area in question constitutes the "traditional territory" of the Aboriginal claimant.

In *Adams*, the second stage of the *Van der Peet* test required the court to determine whether fishing for food in Lake St Francis was integral to the distinctive culture of the Mohawk people prior to European contact.⁹⁶ The Supreme Court of Canada did not have the benefit of explicit findings of fact from the trial judge on this issue, as the Supreme Court's decision in *Van der Peet* had not yet been released at the time of the trial decision in *Adams*.⁹⁷ For this reason, a majority of the Supreme Court in *Adams* looked directly to the expert evidence in order to make a decision on this aspect of the *Van der Peet* test.⁹⁸ On the one hand, the claimant's expert in

⁹⁴ *Ibid* at paras 90-91.

⁹⁵ *Côté*, *supra* note 72 at para 67.

⁹⁶ *Adams*, *supra* note 43 at para 37.

⁹⁷ *Ibid* at para 39.

⁹⁸ *Ibid*. This lack of guidance on the test for an Aboriginal right explains why the experts who testified at the trials in both *Adams* and *Côté* framed their testimony in terms

Adams testified that the Mohawk people had used the territory in question as their hunting and fishing grounds.⁹⁹ On the other hand, the Crown's expert testified that the Mohawk people "used the territory in question solely for war purposes."¹⁰⁰ According to this view, the Mohawk people happened to hunt and fish in the territory during their military campaigns, but the territory did not constitute their hunting and fishing grounds.¹⁰¹ A majority of the Supreme Court found it unnecessary to decide between these two conflicting accounts.¹⁰² On either account, according to the majority, the Mohawk people had established an Aboriginal right to fish in Lake St Francis.¹⁰³ In other words, in order to meet the *Van der Peet* test, there was no requirement in *Adams* that the Aboriginal community establish that the territory in question constituted its hunting and fishing grounds, or in other words, its traditional territory. On the contrary, even if the area in question was found to be positively *not* its traditional hunting and fishing grounds, the Aboriginal nation was still able to meet the second stage of the *Van der Peet* test in the context of a site-specific right. In other words, the Supreme Court of Canada has rejected the notion that proving a historical practice occurred within an Aboriginal nation's traditional territory is a pre-condition to establishing a site-specific Aboriginal right.

B) Six Brand New Factors for the Métis to Meet

The six "traditional territory" factors¹⁰⁴ identified by the Court of Appeal in *Hirsehorn* are foreign to the *Van der Peet* test for an Aboriginal right, even a site-specific one. A majority of the Supreme Court of Canada in *Van der Peet* delineated ten factors that courts must consider when applying the *Van der Peet* test.¹⁰⁵ None of the six factors identified in *Hirsehorn* are

of the "ancestral lands" or "hunting and fishing grounds" of the Aboriginal claimant. See *Adams*, *ibid* at para 43; *Côté*, *supra* note 72 at para 67.

⁹⁹ *Adams*, *ibid* at para 43.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at paras 43-44.

¹⁰² *Ibid* at para 45.

¹⁰³ *Ibid*.

¹⁰⁴ See text accompanying note 88. For ease of reference, these factors are:

- i. whether the area is reasonably capable of definition;
- ii. the frequency with which the community travelled into or used the area;
- iii. the temporal duration of the presence of the community in the area;
- iv. the number of people who lived on, used, or travelled through the area;
- v. the ability of the community to use the area free of challenge from other groups; and,
- vi. the lack of competing claims by other aboriginal groups.

¹⁰⁵ *Van der Peet*, *supra* note 11 at paras 48-74. See Woodward, *supra* note 57 at 17-18, for a summary of these ten factors; see also *supra* note 60 for a reproduction of this summary.

among the ten listed in *Van der Peet*. Similarly, the modified *Powley* test lists ten steps to be met by a Métis claimant seeking to establish an Aboriginal right.¹⁰⁶ Again, none of the six *Hirsekorn* factors appear among these ten steps.

Moreover, the Supreme Court's analysis in *Adams* shows that at least some of the six *Hirsekorn* factors are plainly *not* relevant to the test for a site-specific Aboriginal right. For example, as discussed above, a majority of the Court in *Adams* declined to decide between conflicting expert evidence about the exact nature of the Mohawk people's use of the land in question at the time of contact.¹⁰⁷ On one account, the Mohawk people conducted military campaigns in the area.¹⁰⁸ Indeed, the Court stated that the area in question "was the subject of conflict between various aboriginal peoples, including the Mohawks."¹⁰⁹ Even the Alberta Court of Appeal in *Hirsekorn* acknowledges that the Mohawk nation in *Adams* was "conducting campaigns of war" in the territory in question.¹¹⁰ And yet, the Mohawk nation was still able to establish a site-specific Aboriginal right to fish in this militarily-contested area.¹¹¹ This means that the last two *Hirsekorn* factors cannot be relevant to the test for Aboriginal rights. These two factors ask whether the Aboriginal community was able "to use the area free of challenge from other groups" and "whether the area is subject to competing claims by other aboriginal groups."¹¹² It is clear that the territory in question in *Adams* was not free of challenge and that it was in fact subject to competing claims insofar as it was the site of military activity and war campaigns. As such, an absence of challenge from other Aboriginal groups cannot be a prerequisite for an Aboriginal right, even a site-specific one.

The factor that played the most significant role in the Court of Appeal's decision in *Hirsekorn* was the "temporal duration" factor. The Alberta Court of Appeal discounted the evidence of Métis presence in the Cypress Hills on the ground that "it was not of long duration."¹¹³ In support of its reliance on this factor, the Court of Appeal noted that the majority in *Adams* held that the Mohawk nation used the area in question from at least the time of contact, namely 1603, until the 1650s and that the majority was prepared to infer from this that using the area was a

¹⁰⁶ See *supra* note 54 for a list of these ten steps.

¹⁰⁷ See text accompanying notes 99-103.

¹⁰⁸ *Adams*, *supra* note 43 at para 44.

¹⁰⁹ *Ibid.*

¹¹⁰ *Supra* note 7 at para 104.

¹¹¹ *Adams*, *supra* note 43 at para 45.

¹¹² See text accompanying note 88.

¹¹³ *Hirsekorn*, *supra* note 7 at para 104.

significant part of Mohawk culture prior to contact.¹¹⁴ In other words, the Alberta Court of Appeal derived its temporal duration criterion from the majority's willingness to infer in *Adams* that an activity occurred prior to contact if it occurred for a fifty-year duration post-contact. It should be noted, though, that what the majority in *Adams* inferred was not that the practice occurred for any particular period of time prior to contact. Of course, there is no reason why the majority would have made any such inference, given that temporal duration is simply not a factor in the test for Aboriginal rights.¹¹⁵ The Alberta Court of Appeal's reasoning, then, is a *non sequitur*. It does not follow that any particular pre-contact or pre-control period of use is required just because a post-contact period of use was used to infer the fact of pre-contact use. For this reason, *Hirse Korn's* temporal duration criterion should be rejected.

The Court of Appeal claimed that the six factors making up its traditional territory test provided a necessary alternative to the approach adopted by the Court of Queen's Bench, which inappropriately required proof that the territory in question was integral to the Aboriginal claimant's distinctive culture;¹¹⁶ this requirement was inappropriate because it is the basis for Aboriginal title, not Aboriginal rights.¹¹⁷ However, what these six factors assess is precisely whether the territory in question is integral to the relevant Aboriginal culture. Indeed, the second, third and fourth factors assess occupation, while the last two factors assess the exclusivity of that occupation. But exclusive occupation is the test for Aboriginal title, not Aboriginal rights.¹¹⁸ That is, the Court of Appeal's "traditional territory" concept amounts to a new legal category of Aboriginal land: a sort of "Aboriginal title lite" that seems to sit somewhere in between Aboriginal title and Aboriginal rights. It is not clear, though, why *Hirse Korn* was required to meet the test for Aboriginal title lite when what he sought to exercise was merely an Aboriginal right.

The Alberta Court of Appeal has identified no compelling reason why the Métis in particular should now be required to satisfy the six additional criteria of the "traditional territory" test. There is, however, a persuasive reason for rejecting the six *Hirse Korn* factors: they ignore the Métis perspective, including the role that Métis laws and legal traditions played in securing Métis rights to hunt in what might otherwise have been dangerous territory. I discuss this point in the following section.

¹¹⁴ *Ibid.*

¹¹⁵ See text accompanying notes 104-106.

¹¹⁶ *Hirse Korn*, *supra* note 7 at paras 87-88.

¹¹⁷ See text accompanying notes 80-82. See also *Delgamuukw*, *supra* note 80 at para 137.

¹¹⁸ *Delgamuukw*, *ibid* at para 143.

C) Métis Laws and Legal Traditions

One of the most intriguing aspects of each of the three decisions in Hirsekorn's case was the apparent contradiction between the finding of a Métis presence in the Cypress Hills prior to effective control¹¹⁹ and the finding that the Métis avoided the Cypress Hills because this area was dangerous.¹²⁰ The former finding is supported by the expert evidence tendered at trial, including the second appendix of the Crown's expert report, prepared by Clint Evans.¹²¹ This appendix contains a table listing all references to Métis vital events and residency at Cypress Hills, beginning in 1838, which were gleaned from Métis scrip applications.¹²² "Vital events" include births, marriages, deaths and the act of living in the specified area.¹²³ According to this table, a Métis individual was born in the Cypress Hills in each of the following years: 1838, 1849, 1857, 1861 (x 2), 1863, 1864, and 1866.¹²⁴ After 1866, the frequency of vital events increases to three in 1870, four in 1871, sixteen in 1872, eighteen in 1873, and sixteen in 1874.¹²⁵ The majority of these vital events are births; only four are marriages and three are deaths.¹²⁶ In other words, Métis women were giving birth in the Cypress Hills as early as 1838. Indeed, Métis people were living, dying, getting married and giving birth in the Cypress Hills for decades prior to effective control in 1874.

This evidence provides a sense of the type of stability and safety that must have characterized Métis activity in the Cypress Hills. It is not reasonable to suppose that a rational individual would enter a territory fraught with danger when she was about to give birth. It is similarly not reasonable to suppose that rational individuals would enter such a dangerous territory in order to conduct a marriage ceremony. This evidence of safety and stability contrasts sharply with findings that the Métis avoided the Cypress Hills because the area was dangerous.¹²⁷ How can these conflicting notions be reconciled?

¹¹⁹ See text accompanying notes 15-16, 89-91.

¹²⁰ Although the trial judge equivocated between "Blackfoot territory" and the Cypress Hills, as indicated above in section 2 B), he also identified some historical evidence of Métis individuals avoiding the Cypress Hills specifically; see text accompanying notes 35-36.

¹²¹ Evans, *supra* note 15 at 164.

¹²² *Ibid.*

¹²³ *Ibid* at 164-77.

¹²⁴ *Ibid* at 164.

¹²⁵ *Ibid* at 164-69.

¹²⁶ *Ibid.*

¹²⁷ See text accompanying notes 35-36.

To find the answer, we must look to the Métis perspective, including the laws and legal traditions of the Métis who hunted on the plains. As indicated above, the *Van der Peet* test requires that courts consider the Aboriginal perspective.¹²⁸ In fact, the Supreme Court of Canada has consistently reiterated that courts must take into account the perspective of the Aboriginal nation in question when assessing the existence of an Aboriginal right.¹²⁹ This Aboriginal perspective includes the laws and legal traditions of the relevant Aboriginal nation.¹³⁰ For example, a majority of the Supreme Court in *Van der Peet* embraced the principle, espoused by a majority of the Australian High Court in *Mabo v Queensland*,¹³¹ that Aboriginal rights have their origin in and are given “content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.”¹³² In other words, the “practices, traditions and customs”¹³³ that inform Aboriginal rights are not merely historical activities, but also include the laws of the Aboriginal nation in question.¹³⁴ A majority in *Van der Peet* also went on to endorse Brian Slattery’s assessment that Aboriginal rights are concerned with the customary laws and political institutions of Aboriginal peoples.¹³⁵ As John Borrows puts it, “Indigenous legal traditions are inextricably intertwined with the present-day Aboriginal customs, practices, and traditions that are now recognized and affirmed in section 35(1) of the *Constitution Act, 1982*.”¹³⁶

Of course, Indigenous legal traditions, just like non-Indigenous legal traditions, are not static, historical artefacts; on the contrary, they grow and develop as society and circumstances change.¹³⁷ Despite this fact, the

¹²⁸ See text accompanying note 61.

¹²⁹ See *Van der Peet*, *supra* note 11 at para 49; *Delgamuukw*, *supra* note 80 at paras 81-81, 112, 148; *R v Marshall*; *R v Bernard*, 2005 SCC 43 at paras 48, 50, 69, [2005] 2 SCR 220.

¹³⁰ For a comprehensive argument in favour of drawing upon Aboriginal laws when deciding Aboriginal issues, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 3-28.

¹³¹ *Mabo v Queensland* [No 2] (1992), 175 CLR 1 [*Mabo*].

¹³² *Van der Peet*, *supra* note 11 at para 40, citing *Mabo*, *ibid* at 58.

¹³³ *Van der Peet*, *ibid* at para 44.

¹³⁴ For a compelling argument that Indigenous laws in Canada have never been extinguished and as such they should be fully recognized within the Canadian legal system, see generally John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), especially at 6-22 [Borrows, *Canada’s Indigenous Constitution*].

¹³⁵ *Van der Peet*, *supra* note 11 at para 42, citing Brian Slattery, “Understanding Aboriginal Rights” (1987), 66 Can Bar Rev 727 at 737.

¹³⁶ Borrows, *Canada’s Indigenous Constitution*, *supra* note 134 at 11.

¹³⁷ *Ibid* at 8.

Powley test forces us to focus on pre-control Métis practices and legal traditions. When we look to the legal traditions of the Métis who hunted on the plains, we find that this community employed an extensive system of laws that allowed them to comfortably enter into and hunt within what would otherwise have been dangerous territory. This is most vividly illustrated by the account of Alexander Ross, a Scotsman who relocated to what is now North America and worked for various fur trading companies in the nineteenth century.¹³⁸ Ross provides a detailed account of his experience accompanying a Red River Métis buffalo hunting expedition in the spring of 1840.¹³⁹ From his account, we can glean at least three aspects of Métis laws and legal institutions that allowed the Métis to safely hunt within what might otherwise have been dangerous territory.

First, Ross reveals that the expedition adopted a military-like governance structure by selecting not only a captain of the hunt known as “the great war chief,”¹⁴⁰ but also nine additional captains, each of whom commanded ten soldiers.¹⁴¹ The duties of the captains and soldiers included protecting the camp by patrolling it and keeping guard; this function is reflected in one of the positive, enumerated laws established by the expedition.¹⁴² Presumably, the captains and soldiers were guarding against an external attack, as explained below.¹⁴³

Second, whenever the Métis expedition camped within dangerous territory, the laws of the encampment required that the tents and carts be positioned so as to create a strong barrier to defend against an enemy attack. For example, Ross explains that the Red River carts, of which there were 1,210, were placed side by side in a circle, and that the tents and animals were arranged inside this circle in all dangerous areas.¹⁴⁴ In contrast, in safe locations, the animals were kept outside the circle.¹⁴⁵ Ross explains that “the carts formed a strong barrier, not only for securing the people and their animals within, but as a place of shelter and defence

¹³⁸ See WL Morton, “Introduction to the New Edition,” in Alexander Ross, *The Red River Settlement: Its Rise, Progress, and Present State, with Some Account of the Native Races and its General History, to the Present Day* (London: Smith, Elder and Co, 1856) at xvi.

¹³⁹ Ross, *ibid* at 245.

¹⁴⁰ *Ibid* at 248.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at 249 (articulating the fourth enumerated law established by the expedition’s council: “Every captain with his men, in turn, to patrol the camp, and keep guard”).

¹⁴³ See text accompanying notes 146-47.

¹⁴⁴ Ross, *supra* note 138 at 246.

¹⁴⁵ *Ibid*.

against an attack of the enemy without.”¹⁴⁶ Similarly, in a later passage, Ross notes that the necessity for guarding the horses well at night stems not only from the risk that they will run off, but also from the risk that they will be stolen by the enemy.¹⁴⁷ Ross’s account also emphasizes the deference accorded to the captains and soldiers as they enforced the laws regarding the placement of carts,¹⁴⁸ presumably because the precise ordering of the carts was integral to forming a secure barrier.

Third, Métis laws ensured that the Métis hunting expedition operated with military-like organization and precision,¹⁴⁹ the goal of which seems to have been protection from outside threats by maintaining the unity of the community. That is, the selected officials exercised great control over the community in order to ensure that it moved and operated cohesively as a single unit, or as Ross put it, “with the regularity of clock-work.”¹⁵⁰ For example, Ross describes a system whereby the raising of a flag every morning signaled the raising of camp.¹⁵¹ The flag remained raised as long as the community was on the move; the lowering of the flag was a direction to the community to make camp again.¹⁵² As long as the flag was raised, the community was under the authority of a guide who commanded the captains and soldiers.¹⁵³ When the flag was lowered, the captain and soldiers took charge again.¹⁵⁴ Similarly, HY Hind, in describing his visit to the North West in 1857-58, recognized the military-like discipline of a Métis hunting expedition. He described the Métis as possessing “splendid organisation when on the prairies” which “would render them a very

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid* at 254.

¹⁴⁸ *Ibid* at 251:

As a people whose policy it is to speak and act kindly towards each other, the writer was not a little surprised to see the captains and soldiers act with so much independence and decision, not to say roughness, in the performance of their camp duties. Did any person appear slow in placing his cart, or dissatisfied with the order of the camp, he was shoved on one side sans ceremonie, and his cart pushed forward or backward into line in the twinkling of an eye, without a murmur being heard.

Ross goes on to suggest that the soldiers’ moving the carts instead of coercing citizens to do it themselves betrays the lack of authority of the soldiers; see *ibid.* In my view, however, the opposite conclusion is more persuasive; the lack of protest when soldiers took control of individuals’ carts illustrates the authority of the soldiers.

¹⁴⁹ See Royal Commission on Aboriginal Peoples, *The Final Report of the Royal Commission on Aboriginal Peoples*, vol 3, *Gathering Strength*, (Ottawa: Supply and Services, 1996) at 17 (describing the Métis buffalo hunting expedition as being “a quasi-military organization”).

¹⁵⁰ Ross, *supra* note 138 at 249.

¹⁵¹ *Ibid* at 248.

¹⁵² *Ibid* at 248-49.

¹⁵³ *Ibid* at 249.

¹⁵⁴ *Ibid.*

formidable enemy in case of disturbance or open rebellion.”¹⁵⁵ Even Evans, the Crown’s expert in *Hirsehorn*, acknowledged “the careful defensive measures implemented by the . . . inhabitants [of a Métis hunting expedition] and their military-style organization.”¹⁵⁶ The second positive law established by the Métis expedition in 1840 emphasized the importance of maintaining the cohesiveness of the community by prohibiting smaller parties from branching off or lagging behind the community as a whole.¹⁵⁷ Presumably, the cohesiveness of the community was important because the great size of the encampment would have forestalled enemy attacks. As Ross reports, the encampment included 1,630 individuals and occupied as much space as a modern city.¹⁵⁸ An enemy raiding party consisting of a handful or even a few dozen individuals would think twice before provoking the ire of such a formidably large and well-organized group.

Accordingly, Ross’s account illustrates that the pursuit of the buffalo by the Métis “was ordered through laws that identified appropriate behavior during a potentially difficult and dangerous pursuit.”¹⁵⁹ Evans, the Crown’s expert witness in *Hirsehorn*, recognizes this fact when he states that the Red River Métis “had a wealth of experience hunting buffalo in hostile country,” namely, in Sioux territory, and “so it should come as no surprise to learn that they too had begun to infringe on the hunting grounds of the Blackfoot tribes” before the arrival of the North West Mounted Police.¹⁶⁰

As discussed above, although the trial judge sometimes equivocated between the Cypress Hills and Blackfoot territory, he also found that the Cypress Hills were not part of Blackfoot territory.¹⁶¹ Evidence led at trial showed that the Cypress Hills were not controlled by any one Aboriginal people, and that the area was potentially dangerous to everyone.¹⁶² Far from avoiding the Cypress Hills, the Métis developed a sophisticated

¹⁵⁵ HY Hind, *Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858* (New York: Greenwood Press, 1969) at 179.

¹⁵⁶ Evans, *supra* note 15 at 96. In making this statement, Evans relies on the report of Samuel Anderson, a scientist and a captain in the Royal Engineers; see Samuel Anderson, “The North American Boundary from the Lake of the Woods to the Rocky Mountains” (1875–1876) 20:4 *Proceedings of the Royal Geographical Society of London* 274 at 291. Anderson’s description of the Métis expedition is also cited in *Hirsehorn QB*, *supra* note 41 at para 160.

¹⁵⁷ See Ross, *supra* note 138 at 249.

¹⁵⁸ *Ibid* at 245-46.

¹⁵⁹ Borrows, *Canada’s Indigenous Constitution*, *supra* note 134 at 87.

¹⁶⁰ Evans, *supra* note 15 at 79.

¹⁶¹ See text accompanying note 46.

¹⁶² See text accompanying notes 49-50.

system of laws that allowed them to hunt and camp within this area. The picture that emerges is one of the Métis Nation exercising a kind of mobile jurisdiction. Métis communities governed themselves by formulating and enforcing an extensive set of laws, thereby exercising jurisdiction over themselves. These communities, though, did not simply exercise their jurisdiction over a single, static area. The entire community went where the buffalo went,¹⁶³ and they took their jurisdiction with them. Indeed, it was their distinctively Métis laws, with their military-style organization and their effectiveness in protecting against attack, that allowed entire Métis communities to follow buffalo herds into what might otherwise have been unsafe territory, such as the Cypress Hills. From the Métis perspective, then, their ability and their right to hunt in the Cypress Hills was grounded in their own laws and their exercise of jurisdiction over themselves while they were in the Cypress Hills. The traditional territory test is deficient insofar as it ignores this Métis perspective. Instead of asking what rights the Métis enjoyed pursuant to their own laws and exercise of jurisdiction as required by the majority in *Van der Peet*, the traditional territory test focuses on factors that are alien to the Métis perspective such as frequency of use, temporal duration of use and a lack of competing claims. As such, although the Alberta Court of Appeal purported to account for the Aboriginal perspective,¹⁶⁴ in fact it failed in this regard. The factors it identified are alien not only to the Métis perspective, but also to the jurisprudence on Aboriginal rights, as discussed above.¹⁶⁵

Only the trial judge's finding that the Métis were afraid to enter the Cypress Hills remains to be explained.

In all of the scenarios described by the trial judge, a European official was trying to put together a team to accompany a European expedition into either Blackfoot territory or the Cypress Hills. These expeditions, however, did not consist of Métis communities who were enforcing Métis laws and exercising mobile Métis jurisdiction. Rather, these were European-led expeditions that were composed of a small number of individuals, some of whom happened to be Métis. Accordingly, these European-led groups do not represent the Métis perspective insofar as these European-led expeditions were not enforcing or complying with the Métis laws that provided for mobile Métis jurisdiction. However, as discussed above, Aboriginal laws and legal traditions undergird the Aboriginal

¹⁶³ See Ross, *supra* note 138 at 265 (explaining that the Métis buffalo hunting expedition of 1840 was “led backwards and forwards at the pleasure of the buffalo, often crossing and re-crossing [its] path, until [it] had travelled to almost every point of the compass”).

¹⁶⁴ *Hirse Korn*, *supra* note 7 at paras 47, 74-76, 88.

¹⁶⁵ See section 3 B), above.

perspective.¹⁶⁶ The European expeditions lacked the size necessary to effectively implement the Métis laws providing for the military-style organization and defensive measures characteristic of a Métis expedition. For example, in 1857, Colonel John Palliser tasked his geologist, Dr James Hector, with putting together a team to accompany him into Blackfoot territory. In March of 1858, Hector reported that the Métis with whom he spoke “all seemed to consider the service a dangerous one, and were very particular in stipulating that the party would be sufficiently numerous and well supplied with ammunition.”¹⁶⁷ Similarly, when Felix Munroe, a Métis man accompanying Palliser on his 1859 expedition, protested against travelling into the heart of Blackfoot territory, his reason was that “the party was too small.”¹⁶⁸ If the invitation had been to join a Métis community engaging in a typical Métis hunting expedition, then the responses of these Métis individuals likely would have been quite different. The trial judge does not provide any examples of a Métis community exercising mobile jurisdiction who were afraid to enter the Cypress Hills.

4. Conclusion

In *Hirsekorn*, the Alberta Court of Appeal invented a new test to be applied to those mobile Aboriginal nations who assert a site-specific Aboriginal right. This traditional territory test contradicts the Supreme Court of Canada’s jurisprudence in *Adams* insofar as a majority in *Adams* rejected the notion that an Aboriginal people must first prove that the practice at issue occurred within that people’s traditional hunting and fishing territory in order to establish an Aboriginal right. Furthermore, of the six factors that make up the traditional territory test, all are foreign to both the *Van der Peet* test for Aboriginal rights and the *Powley* test for Métis rights, at least two contradict the majority’s analysis in *Adams*, and one is unsupported by that analysis. Finally, the traditional territory test ignores the Métis perspective, including Métis legal traditions regarding Métis hunting rights. Métis legal traditions underpinned the exercise of a mobile jurisdiction that allowed the Métis to comfortably hunt within the Cypress Hills, which might otherwise have been dangerous territory. By affirming the Court of Appeal’s decision, the Supreme Court of Canada makes the test for Aboriginal rights into a moving target, the criteria of which an Aboriginal nation cannot know until its appeals are exhausted; this practice of reframing and reformulating the test for Aboriginal rights risks

¹⁶⁶ See text accompanying notes 129-36.

¹⁶⁷ Irene M Spry, ed, *The Papers of the Palliser Expedition, 1857-1860* (Toronto: The Champlain Society, 1968) at 221-22 [*Palliser Papers*].

¹⁶⁸ *Ibid* at 406.

rendering these rights hollow and turning them into nothing more than a constitutional myth.¹⁶⁹

¹⁶⁹ I am indebted to an anonymous reviewer for providing a particularly articulate statement of this conclusion.