

Report

## Métis Commercial Fishing: A Legal and Historical Overview of Métis Involvement in the Commercial Fishing Industry

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**Abstract:** The Métis freshwater, or inland, fishery has been a contentious issue in the Canadian courts for decades, with little progress from the Métis perspective. This report begins by documenting the long history of the Métis as commercial fishers through their employment contracts with the Hudson's Bay Company (1823–1888), and then discusses the challenges the Métis have faced in acquiring rights to a commercial fishery through numerous legal cases since the 1993 Supreme Court of Canada decision *R v. Powley*. A pathway to resolving the Métis commercial fisheries impasse is probably best found at the negotiation table between Canada, the provinces, and the Métis Nations.

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## 1. Introduction

This report is a contribution to a larger research program that is exploring the ongoing struggle of the Métis Nations of Canada to achieve greater access to, and control over, the natural resources they depend upon, but which have all too often been alienated from them by federal and provincial government policies.<sup>1</sup> For decades, the Métis have fought for their freshwater commercial fishing rights through all levels of courts in Canada, leaving little resolved from the Métis perspective. The Province of Saskatchewan recognizes that certain Métis people in Northern Saskatchewan have an Indigenous right to fish for food, while the Supreme Court of Canada 1993 *R v. Powley* decision outlines the legal test for determining which Métis communities possess Indigenous rights and who can exercise those rights (*R v. Powley*, 2003). The onus is on individual Métis to prove they have the right to fish for food. Some of the Powley Test factors include long-standing self-identification as a Métis, community acceptance, and membership in a modern Métis community with ties to an historic Métis community. In addition, the right is site-specific; that is, it can only be exercised within the traditional area of the individual Métis community (*R v. Powley*, 2003).

However, fishing for food is different from fishing commercially. The ability of Métis people in Northern Saskatchewan to fish commercially has historically been impeded by both provincial and federal law. Quotas are particularly troubling. Although quotas are used to protect the ecology of lakes and to prevent overfishing, Métis fishers argue that quotas are too low to provide a sustainable income. Consequently, many Métis fishers rely on employment insurance during the off-season. The various Métis Nations across Canada support the expansion of Métis commercial fishing rights.

This report begins with an historical review of Métis commercial fishing activity in Northern Saskatchewan as captured by the contract history of the Hudson's Bay Company (HBC). This provides evidence of extensive and long-term Métis commercial fishing based on legal contracts between the HBC and individual fishers into the late nineteenth century. Legal and political impediments began to curtail the Métis commercial fishery in the twentieth century, and this is explored in the next section of the report with a legal timeline. The rights of the Métis to fish commercially in the four western provinces is then reviewed. This leads to a review of their rights as determined by Supreme Court of Canada decisions pertaining to Indigenous rights. The report concludes with recommendations for approaches to resolving the impasse outside the courts, which stress balancing the competing interests through negotiated agreements, and the need to move towards reconciliation.

## 2. The Métis and Commercial Contracts with the Hudson's Bay Company

The history of the Métis People of Northern Saskatchewan and their involvement in the commercial fishing industry is well-documented. Métis Elder Ed Theriau holds that it was common practice for Métis people in Saskatchewan to learn to fish commercially (Theriau, n.d.). It was a way of life sustained by the North's ecological richness and geography. The Churchill River system was at the heart of this industry, and yielded a successful fishing industry (Macdougall, 2010, p. 50).

The Hudson's Bay Company archival records of "Servant's Contracts" indicate that many fishers of Métis ancestry relied on labour contracts with the company to bring hard cash into the economy. Accessible through the Hudson's Bay Company Archives, this searchable online database of contracts provides a wealth of information including the name of the "servant" and the date of their contract, occasionally their age, their own place of origin and their place of work, their occupation (or more specifically what they were contracted to do for the Company), and the value of their contract and its duration (Archives of Manitoba, n.d.). Finally, Company specific location codes indicate whether documentation was from the governor and committee, or post records. For this report, the database of HBC Servant's Contracts was searched in both English and French for common labour activity terms related to fishing. This resulted in 171 unique entries, although some were not complete (see example in Table 1).

The Hudson's Bay Company records indicate that Métis fishers were compensated for their work based on contractual terms, just as were other workers from Eastern Canada and Britain (Archives of Manitoba, n.d.). The HBC records do not differentiate contractors based on ethnicity or race, but they do provide information on place of hire and place of work. This requires linkage of the Servant's Contracts to Métis community genealogy records. Fortunately, the Hudson's Bay Company Archives,<sup>2</sup> as well as the Gabriel Dumont Institute (<https://gdins.org/>) and the Glenbow Museum (<https://glenbow.org/>), among others, have undertaken extensive genealogies of the Métis in Western Canada. The authors have used these sources to build, for the first time, a probable list of Métis involvement in the commercial fishery by linking the HBC Servant's Contracts to genealogical profiles. These three main Métis genealogy sources were sourced online. Inevitably, new biographical entries are being made, some of the Servant's names may be different from those of their biographical entries, and where uncertainty existed the decision was made not to include contractors that could not be clearly defined as Métis. Discussion of these decisions is provided in the text below.

This dataset represents perhaps some of the earliest journey-to-work data available to Canadian labour historians, with dates in our sample ranging from 1823 to 1888, a span of sixty-five years covering most of seven decades. Métis

participation is definitively found throughout the pre- and post-Confederation eras, as is a broad sweep of workers from Eastern Canada and Britain, mainly Scotland.

The results tallied 171 contracts with references to fishing, of which 166 provided the name and profession of the contractor, with dates of employment and value and term of contract along with location of work and a code for the HBC post or territory. We have less complete data on age and origin. “Origin” creates a challenge for researchers, as in many cases of Métis hires an origin is not provided; only the place of work as per the contract is available. In most cases of non-Métis hires, especially those coming from Britain or Quebec, place of origin (i.e., hire) and place of work are regularly provided. For example, Jean Baptiste Sylvestre of Métis origin headed to Île-à-la-Crosse in 1852, and he is listed as originating in Canada, perhaps meaning locally (see Table 1).<sup>3</sup> But this does not appear to be the case with possible Métis workers such as Baptiste Ducharme (dit) McKay<sup>4</sup> who has neither origin nor place of work listed, but who received payment in 1860 at Fort à la Corne east of Prince Albert. Although this appears to be a Métis name combining French and Scottish heritage, the records accessed to date do not confirm his Métis heritage as we found that the only Baptiste was born after the contract was signed. Perhaps this is his son.

Table 1. Examples from the Name Index. Hudson’s Bay Company Records Servants’ Contracts (1780–ca. 1926)

Name	Date	Age	Origin	Work Location	Occupation	Miscellaneous (Value/Years)	Location Code*
Sylvestre, Jean Baptiste	1852	–	Canada	HB [SK] Île-à-la-Crosse	Fisherman	£20 pa. (1) his mark	A.32/55 fo.283
Beaudrie, Joseph	1855	–	Canada Indian Country	No Data	Interpreter	£30 pa. (3) his mark to receive sterling for animals given to company + ½ 8-gall keg crash sugar 1 bag flour 4 lbs tea	A.32/21 fo.211-212

\* See [https://www.gov.mb.ca/chc/archives/hbca/resource/post\\_rec/types.html](https://www.gov.mb.ca/chc/archives/hbca/resource/post_rec/types.html)

Source: Archives of Manitoba. (n.d.). *Servants’ Contracts (1780–ca.1926)*. Hudson’s Bay Company Archives Resources. [https://www.gov.mb.ca/chc/archives/hbca/name\\_indexes/hbc\\_servants\\_contracts.html](https://www.gov.mb.ca/chc/archives/hbca/name_indexes/hbc_servants_contracts.html)

Of the 162 records indicating a known origin of the HBC fishery contractor, 35% of those contracted between 1823 and 1888 were of Métis ancestry, based on our preliminary cross-referencing of names to genealogical records. Scots made up some 38% of the fishery contractors, while the remaining 28% had origins elsewhere in Canada including Quebec and Manitoba. Metis contractors accounted for slightly more than a third of the HBC’s contracted fishery workforce throughout this sixty-five-year period. However, it is important to consider that the ancestry of several workers could not be traced, and thus this number could be higher.

We can also break out the fishery contracts by whether the workers were domestic or international hires. Throughout the sixty-five years in question the HBC appears to have had a strong investment in local hires, with 51% of their fishery labour force coming from within what is today Canada. But worker’s roots in the Scottish Highlands and Islands is well documented—35% of the fishery labour force originated in Britain from places such as Ullapool in Lochbroom, in northern Scotland, or from Stromness, Sandwick, and Linklater, in the Orkney Islands. These place names appear along with Canadian places of origin such as “Rupert’s Land,” Trois Rivières, St. Michel d’Yamaska, “North West America,” Île-à-la-Crosse, and English River. The place of origin of some 14% of the contractors was not included.

The place of origin of “North West America” and the location of work within North America certainly speaks to the far-ranging nature of the Métis contractors hired. For example, in 1854 Antoine Tourangeau was paid £23 per annum on a three-year term; he made “his mark” (indicating he was illiterate) and promised to remain inland in North West America for one of the three years. He was paid out of Norway House, Manitoba, and was listed as a fisherman middleman. Another example is perhaps indicative of the barter system still being essential to Indigenous workers, with Alphonse Lieucheux signing a contract in 1885 as a fisherman and sawyer for 30 MB (Made Beaver) per month, plus tea and tobacco—a contract he resigned in 1886. In 1843–44 at Fort Vancouver, 30 MB would have bought 90 lbs of tobacco or thirty blankets (Holloway, 2012). However, by the 1880s an MB was actually a value of currency, not an actual beaver pelt.

The data also speaks to the question of wage equality within the commercial fishing industry with domestic contractors averaging £24.3 per annum compared to £24.6 per annum for contractors originating out of Scotland. Given the inequality in the wage economy today between the Indigenous and settler societies, one would expect that it has an historic precedence. This is not the case. Métis fishers were actually paid slightly higher contractual rates than other contractors at £25 per annum compared to £23.8 per annum for “other Canadian” contractors, and £24.6 per annum for the mainly Scottish European contractors. Clearly the HBC

did not financially discriminate against its Métis contractors, seeing them as an important element within their business.

In total, 166 contracts in the database between 1823 and 1888 provided term limitations for the workers, with a two-year contract being most common (63 or 38% of all contracts) (Figure 1). Working in the fishery also created long-term employment opportunities for the Métis and other contractors who signed up out of Quebec and the Scottish Highlands—contracts were one to three years for domestic hires, with the longer five-year contracts (19/166) held by the Scottish contractors. Throughout the period, HBC fishery contracts averaged just over £28 for contracts of between one and two years, but dropped to £23 plus for three and five-year contracts—which suggests that contractors traded income for longer term security (see Figure 2).

However, cash payments were not the only payments made to the contractors, as their contracts could include gratuities such as “a large, dressed Moose skin at Peel River” for Magnus Harvey, from Sandwick, Orkney Islands (Archives of Manitoba, n.d.); or “two large dressed moose skin & reindeer skins 20 lbs grease” (Archives of Manitoba, n.d.) in 1870 for Alexander McLeod C, a Scot out of Stornoway and paid out of Fort Chipewyan. Gratuities, though, were not the norm.

The contracts also provide a unique time series on the value paid over time. Figure 3 displays the rise in the average fishery contract between 1823 and 1888 from £19.65 to about £29 by the end of the 1880s. Two data points have been pulled out, from a low of £17 during the worldwide recession, which especially hit western North America in 1876, and a high of £34 per annum a decade later when labour would have been scarce in the west due to the Riel Rebellion. One of the highest contracts awarded was to John Stuart, a Scot—for his work as “Fisherman, Teamaker, General Service” in Athabasca for two years at £40 per annum.

Across Western Canada, Métis people harvested fish at HBC trading posts. They especially did so in Northwestern Saskatchewan (Reimer & Chartrand, 2002). They were both valued labourers and skilled fishers. Several Métis fishers were employed by the Hudson’s Bay Company to provide fish to feed sled dogs in the region (Theriau, n.d.). This is because travelling by sled was a common mode of transportation at this time, especially during the harsh winter months (Theriau, n.d.).

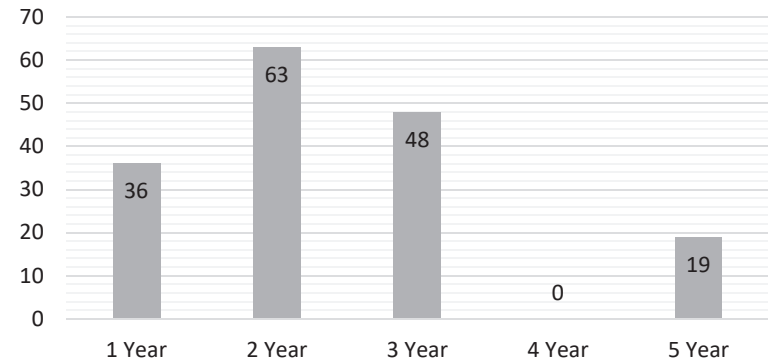


Figure 1. Number of HBC contracts per length of fishing contract, 1823–1888. Source: Archives of Manitoba. (n.d.). *Servants’ Contracts (1780–ca.1926)*. Hudson’s Bay Company Archives Resources. [https://www.gov.mb.ca/chc/archives/hbca/name\\_indexes/hbc\\_servants\\_contracts.html](https://www.gov.mb.ca/chc/archives/hbca/name_indexes/hbc_servants_contracts.html)

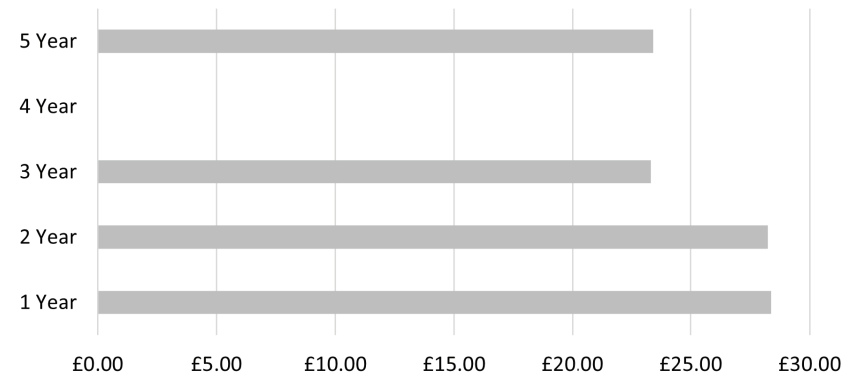


Figure 2. Average HBC payment in £ Sterling, per length of fishing contract, 1823–1888. Source: Archives of Manitoba. (n.d.). *Servants’ Contracts (1780–ca.1926)*. Hudson’s Bay Company Archives Resources. [https://www.gov.mb.ca/chc/archives/hbca/name\\_indexes/hbc\\_servants\\_contracts.html](https://www.gov.mb.ca/chc/archives/hbca/name_indexes/hbc_servants_contracts.html)

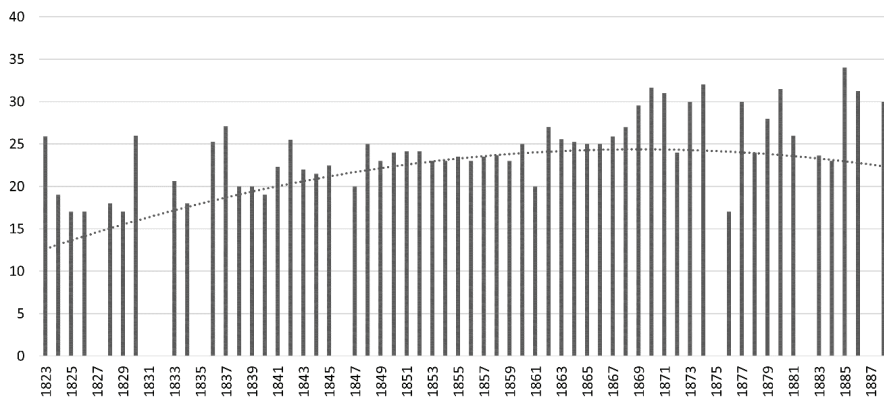


Figure 3. Average HBC payment per year in £ Sterling, HBC fishing contracts 1823–1888 (n=166), with polynomial trendline. Source: Archives of Manitoba. (n.d.). *Servants' Contracts (1780–ca.1926)*. Hudson's Bay Company Archives Resources. [https://www.gov.mb.ca/chc/archives/hbca/name\\_indexes/hbc\\_servants\\_contracts.html](https://www.gov.mb.ca/chc/archives/hbca/name_indexes/hbc_servants_contracts.html)

Records from the HBC also document payment to several contractors referred to as possessing a “Native mark” (Archives of Manitoba, n.d.). Many of the men listed in the name index as Indigenous, such as Joseph McLellan and Baptiste dit McKay Ducharme, possess easily identifiable European names. This suggests that the workers were of mixed Indigenous and European ancestry. These names are only a portion of the extensive research completed into the genealogies of hundreds of HBC contractors. For example, Michel Bouvier, of Île-à-la-Crosse, is recorded as holding a contract in 1842 for one year, and again in 1857 for a single year. In 1857 the contract included allowances of food supplies for his services during the winter as carpenter and *coureur* (runner). Did he only work on contract these two years? That seems unlikely given that he was seen as a valuable carpenter and *coureur de bois*, leaving us to question the completeness of the HBC contracts that are available. Perhaps Michel was employed each year on annual contracts and they have just not survived.

Another example is that of Île-à-la-Crosse resident Pierre Laliberté (dit Lachouette), a family name of considerable history in the community to this day. Pierre is listed twice in the name index as he went by two names, and these are recorded as separate entries. (In our research this second name was removed from the baseline record.) Pierre also appears in two entries, 1842 and 1851, signing up first for a two-year contract, and then a three-year term—as noted by his mark. By 1851, he had moved up to be a “Gouvernail Steersman,” the most responsible position in a canoe. His previous position was listed as *Boutte*, which may be *Jsuis à boutte*, literally meaning “I’m at the end,” so he was always the steersman.

The HBC fishery contracts indicate that these Métis men were regarded as contractors working for the HBC in the fishing industry, illustrating that their history is rooted in commercial fishing practices. The contracts also indicate that these Métis fishers accounted for a significant portion of the commercial fishing industry during the HBC’s economic monopoly, acting as entrepreneurs harvesting the region’s natural resources for profit through the sale of their services to the Company.

### 3. Legal Timeline

In 1878, the Canadian government first interfered with Indigenous fishing rights by making a distinction between fishing for subsistence purposes (food) and fishing for sale and trade (that is, small-scale commercial fishing); and in 1889, the *Federal Fisheries Act* prohibited Indigenous people from selling fish or owning fish licences (British Columbia Ministry of Education, n.d.). Canada first modified Indigenous fishing rights through the *Constitution Act 1930*, “which dictated that First Nations would retain the right to fish and hunt off reserve, but only for subsistence rather than commercial purposes” (Pitawanakwat, n.d.). Since then, Canadian courts have restricted the Indigenous right to sell and trade fish, or have allowed the Crown to limit the right through regulations intended to protect fish stocks (Pitawanakwat, n.d.).

Running parallel to this fishing history is the history of an emerging legal framework that recognizes the Métis as distinct Indigenous Peoples with fishing rights that mirror the rights of First Nations Peoples, and recognizes the need to renew nation-to-nation relations with the Métis based on co-operation and partnership.

The Métis “have had a unique ... route to Canada’s recognition of [their] rights. The genesis of the limited Métis rights dynamic can be traced to Canadian policymakers in the nineteenth century who either downplayed Métis Indianness, or only recognized Métis rights and title in order to extinguish them” (Gaudry, 2018). It was only in 2003, with the Supreme Court of Canada decision in *R v. Powley*, that the Métis as a rights-bearing community distinct from First Nations or Inuit Peoples were first recognized. In 2016, the *Daniels v. Canada* decision established that the federal government, rather than provincial governments, holds the legal responsibility to legislate on issues related to the Métis (and non-status Indians). In this case, the Supreme Court of Canada reaffirmed the Crown’s fiduciary duty to consult with Indigenous Peoples when they have credibly asserted or established their rights and claims, a duty originally recognized in 1984 in *Guerin v. The Queen*. The Métis community has taken this to mean that the federal government has the heightened responsibility to negotiate with the Métis

on such issues as land and natural resource rights (Manitoba Métis Federation, 2020). On June 27, 2019, the federal Liberal government signed self-government agreements with the Métis Nations of Ontario, Alberta, and Saskatchewan. The agreements set out a process for negotiating other agreements, such as fishing agreements. These agreements are a breakthrough for some Métis communities who have long demanded the right to own, govern, and use the fishing resources on their Traditional Territories (Tasker, 2019). Since these negotiations are in their earliest stages, the precise nature of future Métis commercial fishing rights remains unsettled.

The historical legal timeline shows that Métis fishers have relied heavily on the courts to define the nature and scope of Indigenous fishing rights and the interrelationship between Indigenous rights and both federal and provincial laws. When Métis fishers approach the courts for recognition of their rights to sell and trade fish, they must work within and against this framework. It is important to note that their recourse for this right is to use a system that has historically oppressed them and denied them their rights. It is not surprising then, that Métis fishers have routinely been dissatisfied with how the courts have characterized their right to sell and trade fish.

Although Métis fishers have traditionally relied heavily on the courts, the courts have nevertheless routinely suggested that the best way to balance the competing interests of Métis fishers with the right of the Crown to manage fisheries is through negotiation and compromise. The courts should only be used as a last forum to settle disagreements.

#### 4. Selling and Trading Fish in Western Canada

##### a. *British Columbia*

Commercial fisheries are a significant contributor to the economy of British Columbia (BC). The industry includes the commercial harvesting of more than eighty different species of fish and marine plants from both freshwater and marine environments (Government of British Columbia, n.d.).

Satisfying the legal test that will yield a constitutional right to fish commercially is a hurdle for any Métis fisher who wants to fish commercially. In 1995, Dorothy Van der Peet, a member of the Stó:lō Nation, was arrested for selling ten salmon that were caught under a food-fishing licence intended for food and ceremonial purposes. Van der Peet believed that section 35(1) of the *Constitution Act, 1982* enshrined her right to sell fish. She was found guilty both by the provincial court and on appeal (*R v. Van der Peet*, 1996).

The Supreme Court of Canada upheld the conviction, finding that to constitute an Aboriginal right, an activity must be an element of a custom, practice,

or tradition forming an integral part of a distinct culture of the Aboriginal group claiming the right in question. In the words of the Court, Van der Peet had “failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact” and so it was not an “Aboriginal right recognized and affirmed under s. 35(1) of the Constitution Act, 1982” (*R v. Van der Peet*, 1996, para. 91). Thus, Van der Peet’s fishing rights did not extend to the right to exchange fish for money or other goods. As noted by Hanson and Salomons:

Critics of the *Van der Peet* test also point out that the test situates Aboriginal cultural practices in the past. Critics argue that both the ruling and the test rely on the notion that Aboriginal cultures and traditions are static and unchanging, and ignore the inherently dynamic, adaptive nature of culture. (Hanson & Salomons, 2009)

During the salmon fishing season, tensions between Indigenous and non-Indigenous fishers are common on the Fraser River. In 1998, a group of non-Indigenous fishers protested an Indigenous-only opening on the lower Fraser River that had been negotiated by three First Nations under a pilot sales agreement (Indigenous Foundations, 2009). The non-Indigenous fishers argued that the agreement gave the First Nations an unfair “race-based” advantage that “violated equality guarantees in the Constitution” (Indigenous Foundations, 2009). Both the BC Court of Appeal and the Supreme Court of Canada rejected this, finding that Indigenous fisheries “are not race-based, nor were they created or ‘granted’ by the Crown” (Indigenous Foundations, 2009; The Canadian Press, 2007).

Eight years later, on July 12, 2006, Prime Minister Stephen Harper vowed to end the so-called race-based commercial fisheries in Canada. In a letter published in the *Calgary Herald*, Harper wrote “In the coming months, we will strike a judicial inquiry into the collapse of the Fraser River salmon fishery and oppose racially divided fisheries programs” (*Harper vows*, 2006). The debate about whether Indigenous fishers enjoy a race-based advantage continues.

Confrontations on river and coastal fishing grounds, such as the one on the Fraser River in 1998, represent ongoing conflicts that have deep historical roots. The Indigenous claim is that Indigenous communities used and managed the salmon fisheries as distinct political communities long before British assertions of sovereignty. With the growing importance of the West Coast non-Indigenous fisheries, the management of fisheries in British Columbia was gradually and systematically taken over by the state, which has fostered much disagreement and litigation between Métis fishers and the province (Aboriginal Fisheries in British Columbia, 2009).

On February 13, 2019, the Métis Nation of British Columbia (MNBC) wrote to the National Indigenous Fisheries Institute (NIFI) (Métis Nation of British Columbia, 2019). The MNBC supports involvement of the Métis in commercial fisheries in BC and their increased participation in fisheries management decision-making processes. In the letter, the MNBC wrote that fishing, including commercial fishing, has always been a vital aspect of Métis culture in British Columbia. The MNBC therefore requested that the Métis be included in any Indigenous-directed fishery programs administered by the Government of Canada. Inclusion would:

- acknowledge the importance of fishing to Métis culture,
- give the Métis the capacity to undertake scientific stock assessments,
- allow Métis to undertake habitat management activities in the field,
- allow Métis fishers to monitor catch and fishing activities, and
- allow the Métis to enforce rules set for food, social and ceremonial purposes. (Métis Nation of British Columbia, 2019)

It is noted in the letter that Métis participation in any Indigenous-directed fishery programs flows from the constitutionally protected rights of the Métis under section 35 of the Canadian constitution. In the letter, the MNBC states that it will work diligently to protect and enhance the fishing “resources that the Métis people in BC rely on as a way of life and cultural connection” (Métis Nations of British Columbia, 2019, para. 13).

In the spirit of reconciliation, the Métis Nation of British Columbia (MNBC) continues to highlight its commitment to work with the governments of Canada and British Columbia, as well as First Nations, to enhance Métis commercial fishing rights.

#### *b. Alberta*

Commercial fishing is not permitted in Alberta. All commercial fisheries in Alberta were closed as of August 1, 2014 (Government of Alberta, 2019). All fish resources in Alberta are managed entirely for Indigenous subsistence commitments and for tourism and sport (Freshwater Fish, 2016).

In March 2019, the Métis Nation of Alberta announced the new Métis Harvesting Agreement and Policy. The agreement recognizes the rights of eligible Métis to fish for food in five regional Métis Harvesting Areas in central and northern Alberta (Métis Nation of Alberta, 2020a). The policy “significantly expands the harvesting areas in which approved Métis fishers can ... fish,” and it “states that Métis harvesters must show both an ancestral and current connection to the area in which they would like to [fish]” (Métis Settlement of Alberta, 2019). Qualified Métis fishers can fish for food year-round on all unoccupied Crown

lands within the harvesting area. However, as mentioned above, commercial fishing is not permitted in Alberta.

On January 28, 2020, Alberta Fish and Wildlife Enforcement (AFWE) “announced the conclusion of a two-year investigation targeting the illegal trafficking of fish in northern and central Alberta” (Métis Nation of Alberta, 2020b). Charges were brought against thirty-three individuals with eighty counts of illegal trafficking of fish. The case involved several Métis Albertans. The Métis Nation of Alberta (MNA) asserted that it was “unclear whether the case is one of Métis commercial fishing rights” (Métis Nation of Alberta, 2020b). At any rate, commercial fishing “has always been a part of Métis livelihood” (Métis Nation of Alberta, 2020b). Although the MNA “does not condone poaching or overharvesting in any way,” the MNA said they will continue to assert a Métis commercial fishing right and will continue negotiations with Alberta to have the right recognized (Métis Nation of Alberta, 2020b).

#### *c. Manitoba*

Commercial fishing is a valued industry in Manitoba (Tough, 2020). The majority of production comes from Lake Winnipeg and Lake Manitoba. The Government of Manitoba “is trying to replenish the fish stock” in the lakes “by reducing the number of allowable catches ... Quotas determine how much fish can be taken from the water each year by commercial fishers” (Froese, 2019). As of 2019, the province “has bought back 126 quotas from ninety fishers, representing almost 525,000 kilograms of fish that can no longer be caught commercially ... The size of Manitoba’s fish stock has been depleting due to overfishing,” and regulation “changes will move [Lake Winnipeg] closer to a tenable population” (Froese, 2019).

On May 8, 2019, the Manitoba Métis Federation (MMF), Manitoba Keewatinowi Okimakanak (MKO), and Southern Chiefs Organization (SCO) hosted an emergency meeting to address the consequences of the Province of Manitoba’s commercial fishing licence buy-back program. According to David Chartrand, MMF President, the buy-back is devastating to “Métis villages that rely on the Lake Winnipeg fishery” (*Plans to replenish*, 2019). The resulting job losses mean not only that people are thrown out of work and families are moving away, but that these villages and a whole way of life are being lost.

#### *d. Saskatchewan*

The Government of Saskatchewan recognizes the Métis right to fish as an inherent right. However, Canada and Saskatchewan first modified this fishing right through the *Saskatchewan Natural Resources Act, 1930* by placing restrictions

on that right, which prevented Indigenous Peoples from selling or trading fish (Pitawanakwat, n.d.). In short, in Saskatchewan, Métis fishers do not possess the right to fish commercially; fish cannot be advertised, sold, bartered, or traded. Individuals may only take numbers of fish that are reasonably required to feed themselves, their families, and other community members.

On December 18, 2019, the Government of Saskatchewan and the Métis Nations–Saskatchewan (MNS) signed a memorandum of understanding (MOU) agreeing to discuss current provincial harvesting rights (hunting, trapping, and fishing). Even though harvesting rights are recognized by the courts, as MNS president Glen McCallum observed, there are “so many restrictions with regards to how we can practice our way of life, our traditions, our values” (Dove, 2019). The MNS hope that a new channel of dialogue with the province will eventually lead to agreement for Métis people to exercise their harvesting rights and create a province-wide co-management approach that will be unique in Canada (Dove, 2019; Short, 2019).

### 5. Supreme Court of Canada Decisions: Fishing Rights as Indigenous Rights

The following cases involve First Nations Peoples and not Métis. However, the cases are helpful for demonstrating the difficulties that Indigenous Peoples have in securing an Indigenous right to a commercial fishery.

In *R v. Sparrow* (1990), the Supreme Court of Canada held that Aboriginal rights such as fishing, which were “existing” at the time of the Canadian Constitution Act 1982, are protected and cannot be infringed without justification. Although the scope of the right was restricted to fishing for food and for social and ceremonial purposes, the SCC did not rule out the possibility that an Indigenous group could one day claim a commercial fishing right. This contentious issue came before the SCC in the *Van der Peet*, *Gladstone*, and *Smokehouse* cases.

As mentioned earlier, in *R v. Van der Peet* (1996), the majority opinion of the SCC concluded that, while *Van der Peet* had a right to fish for food or ceremonial purposes, this right did not extend to the right to exchange fish for money or other goods. The test involved the ability of *Van der Peet* to demonstrate that the exchange of fish for money or other goods was an integral part of her distinctive Stó:lō society that had existed prior to European contact. Since *Van der Peet* had failed to pass this test, she lost her case.

In *R v. N.T.C. Smokehouse Ltd.* (1996), the *Smokehouse* food processing plant was convicted of purchasing and selling fish caught without a commercial fishing licence. *Smokehouse* argued that the fishing regulations infringed upon the Aboriginal rights of the Tsesaht and Hupačasath Peoples from whom they bought the fish. The majority of the Court acknowledged that “the claim to an Aboriginal

right to fish commercially would be far more difficult to establish than the claim to an Aboriginal right to exchange fish for money or other goods” (Allain, 1996). They agreed with the trial judge that since sales of fish were incidental and not an integral part of the Tsesaht and Hupačasath cultures, they did not constitute an Aboriginal right to sell fish.

In *R v. Gladstone* (1996), the SCC decided that, unlike in the *Smokehouse* case, the evidence at trial established that trade in fish (specifically, the trade to harvest herring eggs) was not an incidental activity of *Gladstone*’s people, the Heiltsuk, “but rather was a central and defining feature of the society” (Allain, 1996). Although the Court found that the Heiltsuk have a pre-existing right to harvest herring eggs and that there is a commercial component to this right, the Court also held that governments can regulate commercial fishing. The Court added that the federal government can take into account regional and economic fairness in distributing the available catch.

In *R v. Marshall* (1999), the appellant had caught 210 kg of eels, which he sold for \$787.10. He was charged with fishing without a licence, selling eels without a licence, and fishing during a closed season. *Marshall* claimed he had a treaty right to catch and sell fish. In September 1999, the SCC confirmed that *Marshall* had a treaty right to catch and sell fish but only to earn a “moderate livelihood,” which does not mean the open-ended accumulation of wealth but the modern equivalent of trading for necessities to survive. Furthermore, the Court reaffirmed that treaty rights were not unlimited and Aboriginal fishing activities could be regulated (Meloney, 2018).

In *Lax Kw’alaams Indian Band v. Canada* (2011), the Court rejected the claim of *Lax Kw’alaams* that it had an Aboriginal right to large-scale commercial fishing activity (of all species of fish) located in traditional waters. *Lax Kw’alaams* argued that it had an existing right to harvest and sell fish from their territories on a commercial scale. The Court reasoned that historically they did not fish commercially in any significant way; that is, their limited trade in fish did not translate into a broad commercial fishery right.

### 6. Balancing Competing Interests through Negotiated Agreements

Historically, the concept of Indigenous rights contains the protection for activities necessary to ensure the survival of Indigenous Peoples. This includes such basic rights as the right to fish for food on a small scale. However, no right is absolute, and Indigenous rights are no exception to this rule. Limitations to a fishing right are generally motivated by a concern that Métis rights to fish all year in a regional fishing area could lead to fish being overharvested. Consequently, governments claim the right to limit a fishing right for purposes of conservation (as well as



health and safety). The status quo is that, even though a Métis fisher may have the right to fish to provide a moderate livelihood for such basics as food and a few amenities, the right does not extend to the right to sell fish in quantities on a large-scale commercial basis (see *R v. Marshall*, 1999).

Consequently, catch limits can be imposed by the Crown, which could reasonably be expected to produce a moderate livelihood at present day standards (Caldwell, 1999). While recognizing the value of preserving the fish stock, Métis fishers argue that their current participation in the small-scale fishing sector is constrained by requirements dictated by sustainability and marketing requirements to the point where any rights the Métis might have are being squeezed dry (Canadian Council of Professional Fish Harvesters, n.d.). Although Métis fishers may still participate in commercial fisheries by acquiring boats and licences on the open market, this option does not achieve the goal of a community-based fishery or greater say in management (Harris & Millerd, 2010).

The issue of Métis commercial fishing rights, and the activities that spring from them, are woven into the desire for self-government and are the foundation for a renewed relationship with the Crown and a pathway to economic development. Possessing jurisdiction over ancestral territory and greater authority to manage territorial fishing resources are considered prerequisites for expanded Métis commercial fishing rights (Doerr, 2006). On the issue of self-government, the federal government has recognized that s. 35 of the *Constitution Act, 1982* includes the inherent right to self-government (Government of Canada, 2010). The Report of the Royal Commission on Aboriginal Peoples (1996) states that the right to self-government is a right of all Indigenous Peoples, including the Métis (Government of Canada, 2016).

As mentioned earlier, in June 2019 the federal Liberal government signed self-government agreements with the Métis Nations of Ontario, Alberta, and Saskatchewan. The agreements affirm the Métis right of self-government. These agreements are a breakthrough for at least some Métis communities who have long demanded that their Indigenous rights—including fishing rights—and the right to own, govern, and use the resources on their Traditional Territories be respected by Ottawa (Tasker, 2019).

Federal recognition of Métis self-government is considered an act of reconciliation (Gaudry, 2018). Until now, litigation has been the primary way in which a Métis fisher has tried to achieve an economically viable commercial fishing right. The problem is that the courts have made it difficult for Indigenous Peoples to expand constitutional commercial fishing rights in the face of the Crown's competing right to manage fisheries wherever they occur in Canada.

The above-mentioned 2019 self-government agreements between the federal government and three Métis Nations open another path to expanding

Métis commercial fishing rights. The agreements recognize that the relationship between the Crown and Indigenous Peoples requires reconciliation, and sets out processes for negotiating other agreements, such as fishing agreements, which will give the Métis greater opportunity to share decision making in a number of areas, including fishing and fisheries (Métis Nation of Alberta, 2020b).

The courts have routinely stated that negotiated agreements are preferable to litigation (Harris & Millerd, 2010); that litigation should be the last option. The preferred option is to balance interests and concerns at the negotiation table. One question to ask is: With respect to expanding Métis commercial fishing rights and balancing these rights with the rights of government to manage fisheries, where should the debate take place, before the courts or around the negotiating table?

On May 24, 2019, the Government of Canada announced its support for the development of Indigenous-owned communal commercial fishing enterprises and aquaculture operations (Government of Canada, 2019). The commitment expressed by the federal government addresses areas of mutual interest in the fisheries by:

- Upholding the SCC's decisions regarding Indigenous rights to harvest and sell fish in pursuit of a moderate livelihood;
- Reducing socio-economic gaps by supporting capacity to participate in fisheries and obtain additional fisheries' access, such as licences and quota, as well as vessels and gear; and,
- Establishing future negotiation processes regarding the co-development of a collaborative fisheries management approach. (Government of Canada, 2019)

## 7. Garnering Support for a Renewed Nation-to-Nation Relationship

On July 7, 2015, Prime Minister Justin Trudeau stated that,

Canadians recognize the urgent need for a renewed nation-to-nation relationship between the federal government and Indigenous peoples – one built on respect, rights, and commitment to end the status quo. A Liberal government will recognize Aboriginal governments as full partners in the federation and will work with Indigenous peoples to create fairness and equality of opportunity in Canada. (Liberal Party of Canada, 2015)

One outcome of this commitment is the 2019 self-government agreements mentioned above.

Although the Métis Nations have a seat at the negotiating table, it should be acknowledged that discussions will inevitably begin within a historical legacy where the Crown has been positioned to limit and diminish the fishing claims and

rights of Indigenous Peoples. Implementing the Liberal Party agenda will require framework and policy setting in conjunction with Indigenous Peoples to ensure that discussions do not become fixated on historical grievances.

At a two-day national summit to articulate the characteristics of a nation-to-nation relationship held on November 27-28, 2017 (Institute of Governance, 2017), Senator Murray Sinclair discussed Call to Action #45 in the Truth and Reconciliation Commission of Canada's Calls to Action. Call to Action #45 calls "upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown" (Truth and Reconciliation Commission of Canada, 2015, p. 4). According to Senator Sinclair, a Royal Proclamation would serve as a message to Indigenous leadership that the Crown is serious about upholding its intent to affirm a nation-to-nation relationship with Indigenous Peoples (Meyer, 2017). The Proclamation's commitments would include:

- Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius (land that never belonged to Indigenous inhabitants and could be taken by seizure);
- Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation;
- Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving treaties, land claims, and other constructive agreements. (Truth and Reconciliation Commission of Canada, 2015; Crown-Indigenous Relations and Northern Affairs Canada, 2022)

It is recognized that garnering both federal and provincial support for a renewed nation-to-nation relationship is easier said than done. At the National Summit meeting, the Right Honourable Joe Clark observed: "How do we change a majority mindset that is not only by and large ignorant to Indigenous reality, but may well be hostile?" (Institute of Governance, 2017, p. 14). Carolyn Bennett, then minister of Crown-Indigenous Relations, remarked that one of the biggest challenges impeding reconciliation is the racism stemming from a misinformed Canadian public (Institute of Governance, 2017).

Returning to the discussion of commercial fishing, the arguments of the Métis Nations are consistent: The separation between fishing for food and fishing for trade and sale is artificial. Although the separation had no precedence

in Indigenous societies, it opened a space into which the state inserted its management authority. Indigenous Peoples never did accept this state of affairs, and they remain separated from the wealth of their fish resources. The economic development of the Métis Nations in modern Canada depends, in large part, on the ability to exploit natural resources commercially. Activities such as commercial fishing and the activities that spring from it must be more readily available to Métis fishers.

Creating the political will to seriously consider reconciliation and a new nation-to-nation relationship requires garnering the support of the federal, provincial, and territorial governments as well as public opinion. All public governments will have to be prepared to cede some of their management authority to the Métis fishing sector. For their part, Métis fishers will have to lay aside doubts and suspicions that have grown over many years. While the negotiating table opens a channel of dialogue between the Métis Nations' and the Crown's understandings of fishing rights, discussions will take place within a legacy where the Crown's sovereignty is paramount and where Métis Nations want greater flexibility for negotiations based on the recognition of rights, cooperation, and partnership.

## Notes

1. The project was initiated in 2020 at the request of The Honourable Buckley Belanger who served as a minister in numerous Saskatchewan governments and who sat in the Saskatchewan legislature for the electoral district of Athabasca in northern Saskatchewan from 1995 to 2021. See Indigenous Saskatchewan Encyclopedia. (2022). *Honourable Buckley Belanger (1960 - )*. University of Saskatchewan. [https://teaching.usask.ca/indigenoussk/import/belanger\\_buckley\\_1960-phi](https://teaching.usask.ca/indigenoussk/import/belanger_buckley_1960-phi)
2. See Archives of Manitoba. (n.d.). Hudson's Bay Company Archives – Biographical Sheets. <https://www.gov.mb.ca/chc/archives/hbca/biographical/index.html>
3. Sylvestre is referenced in *Les Metis: Voyageurs and grandparents. Part Two*. Memories of Deep River: Hunting, trapping, fishing, and fur fishing in Northern Saskatchewan, Canada. <https://www.jkcc.com/voyageurs2.html>
4. There are a number of Métis contractors listed with a second surname which is shown as (dit). For an explanation of the use of *dit* names see Powell, K. (2020, August 27). *What Is a Dit Name?* <https://www.thoughtco.com/what-is-a-dit-name-3972358>

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