

Law Commission of Canada / University of Winnipeg
Exploring Indigenous Legal Traditions
Roundtable, October 7, 2004

Customary Law and Legal Traditions of the Metis
Presentation Notes by Lawrence Barkwell
Manitoba Metis Federation
Metis Justice Institute

** These are presentation notes; the actual presentation had additional material and stories. The story under "Ceremonies" was told in two-paragraph précis form. The Appendix was not presented but was given to Commissioner Stevenson and Dr. Borrows.*

Basic Concepts in Metis Legal Tradition:

First, we would agree with Dr. John Borrows when he wrote in the McGill Law Journal (1996):

(Aboriginal) First Nations law originates in the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. These principles are enunciated in the rich stories, ceremonies and traditions of First Nations. Such stories articulate the law in first Nations communities, since they represent the accumulated wisdom and experience ...of conflict resolution.

Metis culture is an oral culture just as the Michif language of the Metis is an oral language. One must be aware of the oral traditions. The distinction between oral and written form is important, since both traditions are part of the Metis experience. Family and community rules are transmitted in the oral tradition. However, over the last 150 years others wrote some of the rules down at the time. Nevertheless, no complete written set of all Metis family and community rules exists.

Social control begins at the family level; it may be transferred to the community or national level. At the community, regional and national level decisions are made by Assemblies. On the buffalo hunt the Captains of the *Dizaines* would meet as a group every morning to get their instructions from the Chief of the hunt. Authority is only given to others for a specific purpose and the authority is revocable. In the application of Metis law the Elders have a role as advisors and mediators.

Respect and honesty are the underpinnings of the Michif legal tradition.

Traditional Aboriginal (Cree, Dakota, Nakota, Anishinaabe) and Christian spiritual concepts and values are applied to decisions on social control.

Ceremonies have always been part of the Metis legal tradition. Ceremonies demarcate the establishment of legal relations as well as the renewal of such relationships.

In the early 1820s, the Cree, Assiniboine, Chippewa (Ojibway/Saulteaux), and Michif came together at Buffalo Lodge Lake, in what is now northwest North Dakota. It was then open indigenous buffalo pasture. Here they formed one of the most significant alliances ever to occur at the center of the continent. It was land that had been contested between the United States and England as belonging to (in their terms, respectively) either Louisiana or Rupert's Land. It resides along the border region that ranges from Manitoba, Minnesota, and Ontario convergence to Montana's Rocky Mountain Front, now referred to by peoples of pre-Euroamerican nationalism as the Medicine Line. The political and economic circumstance at the heart of the North American landmass was volatile, unpredictable, and full of jeopardy. New ways of working together needed to be crafted; building new alliances became critical for the survival of the many individual groups then on the Plains. Common interests and shared heritage created the strongest bonds. The Cree, Assiniboine, and Chippewa's were intermarried. The Michifs shared the blood of them each from their mother's side.

The Fur Trade was trapping out in the Woodlands by the late 1700s. Assiniboine (Nakota), or Stony Sioux, had already split from their Dakota and Lakota relations to the south and east and moved to the west to become Plains people many generations earlier. The Anishinabe (Chippewa/Ojibway/Saulteaux) were pushing west from the Great Lakes, competing with the Siouxs and forcing them out onto the prairie. There the Siouxs formed alliance with the Cheyenne who were then the inhibitors of the land between the Red and the Missouri Rivers. The Anishinabe, from the east, had been coming out onto the Plains for a generation. Their Cree cousins, from the northeast, had been on the Plains for a hundred years.

Already, by the mid-18th Century there was a distinct society of Mixedbloods at the Forks of the Assiniboine and Red Rivers. Some were Bungi, the offspring of Orkney Viking fathers (the first employees of the Hudson's Bay Company dispatched to the hinterlands after 1670) with various Algonkian speaking tribal women in the area. Others were French stock descendants of La Verendrye's men who came to the territory in the 1730 and 40s and married within the same maternal tribal groups of the country as the Orkneys. A third group, who would come to comprise the most numerous and politically and economically savvy current within that newly forming mixedblood society, were themselves a mixture of the southern Great Lakes and the Mississippi/Missouri River Métis. These Métis were the descendants of the Old French Régime in North America, left dispossessed in the United States after the French and Indian War ended in 1763. These folks had been mixing within the diverse tribal milieu of the southern Great Lakes and east of the Mississippi, and among themselves, for the previous 150 years.

The Assiniboine, Cree, Ojibway, and Michif were squeezed between the Sioux and Cheyenne in the south, and the Hudson's Bay and Nor'westers to the north. By 1812 the Selkirk Settlers had moved in. Then in 1816 the Michif had solidified their clan-based society and national identity on the Northern Plains following the Battle of Seven Oaks. When in 1821 the HBC and NWC combined to become one, and the Siouxs to the south increased their push on extending territory, the need for a formalized alliance between the Assiniboine, Cree, Ojibway, and Michif became paramount.

As the Ojibway and Michif were the newest comers to the territory, they needed to be brought in on the workings of the Great Mystery in that part of the world. A Thirsty Dance was called, where the ceremony would be given to the newcomers. The Ojibways were Midewiwin out of the Woodlands, and the Michifs were Romish (Catholic), but now they also needed to have the 'medicine power' of the Plains, their new home. Some were to take on both traditions inclusively, with many Ojibways holding onto their Midewiwin well into the twentieth century, and Michifs remaining strong in their Catholicism.

The Buffalo Lodge Lake Thirsty Dance would form a bond between these peoples that would create a unified front when dealing with any of their indigenous enemies to the south and west, as well as the HBC and other Euroamerican fur trade outfits. The singular impetus, the defining incident, that crystallized the need for an alliance between these four distinct, yet mutually supportive groups, was the murder of the women and elders, and kidnapping of the Ojibway children, while the men were away hunting. The Sioux, after a starvation winter where they lost most of their children, were forced to seek youngsters to build back up their tribe. Children were the most important resource in sustaining a future for any and every tribe or group of people. Word went out to the four groups that if this can happen to one of them, it can happen to each of them. There was a call to gather at Buffalo Lodge Lake to solidify the unity of the people.

Many Eagle Set was the Cree leader of the dance. It is said it was the largest Sun Dance ever to occur on the Northern Plains. There were fourteen center poles and fifteen hundred dancers comprised of the four groups. Many Eagle Set had a medicine relationship with the Thunder Beings. He received a song from Gishay Manitou, the Creator, to commemorate the Unity of the People and symbolize the alliance made through that Thirsty Dance at Buffalo Lodge Lake. That song was sung to the people there, and lives on through the descendants of those who participated. (Thanks go to Francis Eagle Heart Cree and Nicholas Vrooman for this oral history.)

Metis believe that there are supernatural consequences that result from behavior. Thus laws formulated by man are a secondary way of achieving justice.

The Metis apply social consequences to misbehaviour:

- Healing – the disruption to community relationships must be repaired (restore harmony).
- Shame to family: If you misbehave I will think less of your mother who raised you. The Cree-Metis saying is: “He acts like he was raised in the wilderness.” The Navajo saying is: “He acts as though he has no relations.”
- Shame to self: Getting a lousy nickname, becoming the subject of a community joke.
 - Humiliation
 - Ridicule
 - Chiding and receiving instructions (for males) from cousins who have a “Joking relationship.”
- Compensation to the victim.
- Retribution was not a consequence, thieves would have their horse equipment and clothing cut up, but if they showed appropriate contrition and were truly sorry, the men would replace the equipment and clothing from their own supplies.

Metis children are taught about the consequences of behaviour through the teachings of their grandmothers and traditional stories such as Ti Jean, Nanabush and other stories. The interpretation of these stories reinforces adherence to the values and principles elucidated by the story. These stories are instructive as to accepted community standards as well as the natural, supernatural and cultural sanctions that flow from breaches of the standards and principles.

The Application of Traditional Metis Justice:

Justice is a rights based system (communal and individual rights); it requires both decision-making and educating.

Judicial decisions must be made in the context of a relationship of trust and respect.

Justice is dynamic, laws adapt to changes in customs and practices.

Procedural fairness is important.

- The individual must know the case made against them.
- Must have the opportunity to dispute or correct anything presented that is prejudicial to their position.
- Must be allowed to put forward evidence and arguments supporting their case.
- Application of law is a tool not an ultimate objective.

The law must not be applied too strictly. Absolute adherence to legislation may result in individual or community injustice. “The eyes and ears of justice must look and listen for the effects of a harsh application of the law on the individual and the life in the [community].”

Social control relies on traditional non-adversarial dispute resolution.

The whole community decides rules and limits to authority.

Everyone has input into group decisions.

Decisions are by consensus.

Amendments require the consensus of those affected by the change.

Community people have a positive obligation to intervene when they observe misbehaviour. The front line of responsibility rests with those who named you or were present at your naming ceremony. In Christian practice it rests with those who are your Godparents or were present at your baptism. Another line of responsibility is Grandparents. Male youth who exhibit behaviour problems are often sent to live with their Uncles on the paternal side of the family.

Women have a role in welcoming newcomers to the community and protecting them from those who would take advantage of them.

The Women’s Committee in the community has the responsibility of dealing with domestic violence.

Historically, the Metis had a General Council which supervised a policing organization called *la garde*.

Current Developments:

The federal government in its *Inherent Right Policy* has recognized that s. 35 of the *Constitution Act, 1982* includes the inherent right to self-government. The *RCAP* report stated that the right of self-government is a right of all Aboriginal peoples including the Metis Nation. The Metis National Council and its provincial governing members are the legitimately elected leadership of the Metis people in the Metis Nation and therefore have the right and the responsibility to enact policies, laws and regulations. This includes the asserting right to self-government and such basic rights as language rights, the right to exercise our religion and culture and of course the right to harvest. In practice the MNC pursues a multitude of activities necessary to ensure the survival of the Metis People as an Aboriginal People.

On September 19th, 2003 the Supreme Court of Canada, in *The Queen v. Powley*, wrote:

The inclusion of the Metis in s. 35 is based on a commitment to recognizing the Metis and enhancing their survival as distinctive communities. The purpose and promise of s. 35 is to protect practices that were historically important features of these distinctive communities and

that persist in the present day as integral elements of their Metis culture. (page 6 at paragraph 13)

Based upon this case the MMF set up the *Commission on the Laws of the Hunt*. This Commission looked at our ancestral harvesting practices, starting with the Rules of the Buffalo Hunt. The commission traversed the province collecting the traditional knowledge of Metis harvesting practices. The subsequent report of the Commission offers a modern day framework for how the Metis will practice the rights to hunt, trap, fish and gather in a responsible manner. Subsequently, the Manitoba Metis Federation published the Interim Metis Laws of the Harvest (First Edition), and began to issue Harvesting Cards to qualified Metis of the Manitoba Metis community. On September 24, 2004 Manitoba Premier Gary Doer and Conservation Minister Stan Struthers made a commitment to recognize Metis Harvester Cards and to respect traditional Metis harvesting rights. At the same time both parties will continue to work on establishing a Metis Co-management Agreement. The Minister went even further in his letter to MMF President Chartrand in saying, *“I commend the efforts of the MMF as your organization and members work towards fulfilling your right to practice those customs and traditions that are integral to the Metis way of life.”*

We would also assert that in the areas of criminal, civil and child and family law we have the right to *practice those customs and traditions that are integral to the Metis way of life*. As early as 1851 Alexander Kennedy Isbister was petitioning the Colonial Office in London, England with regard to Metis rights in this area, in part, he requested *“That [they] be invested with full corporate rights, have the power of choosing their own magistrates, and a voice in the passing of their own laws.”*

In July of 2003, the Manitoba Metis Federation set up the Metis Justice Institute as another of its institutions of self-government.

Mission statement of the Metis Justice Institute:

- The mandate of the Metis Justice Institute is to develop and maintain a full range of Justice Services and Programs that meet the expectations of the Metis community and supports those customs and traditions that are integral to the Metis way of life.
- The Metis Justice Institute believes that enhanced community involvement by Metis people is the key to dealing with Justice Issues for Metis people.
- The Metis Justice Institute is founded on an Integrated Model in which all communities and service sectors work together.

Values and Principles:

- The Metis Justice Institute is committed to strengthening Metis families and communities to promote a strong Nation.
- The Metis Justice Institute is dedicated to supporting the grassroots level. Justice Measures should be developed and provided by individuals who have a direct interest in the victim, offender, and community.

- The Metis Justice Institute believes that Justice Measures should be culturally specific. They should incorporate Metis Values, Traditions, and Culture.

The Functions of the Metis Justice Institute:

The proposed functions of the MJI are fourfold: (1) Research and planning, policy analysis, program development and evaluation (2) Human resource development (3) Program and service operations, including the provision of community and youth correctional services, open custody, fine option, probation and parole and Aboriginal Court Work programming and (4) Enhancement and support of Metis self-government in areas directly affecting Metis communities and community life.

References:

- Barkwell, Lawrence J., and Chartrand, David N. Devalued People: The Cycle Leading into Demoralization and Victimization. Winnipeg: Manitoba Metis Federation Inc., 1989.
- Barkwell, Lawrence J., Gray, David N., Richard, Ron H., Chartrand, David N., and Longclaws, Lyle N. Research and Analysis of the Impact of the Justice System on the Metis. Winnipeg: Manitoba Metis Federation Inc., 1989.
- Barkwell, Lawrence J., Gray, David N., Richard, Ron H., Chartrand, David N., and Longclaws, Lyle N. "Devalued people: The status of the Metis in the justice system." In Canadian Journal of Native Studies, Vol 9, (1), 1989.
- Barkwell, Lawrence J. "Early law and social control among the Metis." In S.W. Corrigan and L.J. Barkwell (Eds.) The Struggle for Recognition: Canadian Justice and the Metis Nation. Winnipeg: Pemmican Publishers Inc., 1991.
- Barkwell, L.J., Gray, D.N., Chartrand, D.N., Longclaws, L.N. and Richard, R.H. "Devalued people: The status of the Metis in the justice system." In S.W. Corrigan and L.J. Barkwell (Eds.) The Struggle for Recognition: Canadian Justice and the Metis Nation. Winnipeg: Pemmican Publishers Inc., 1991.
- Barkwell, Lawrence J. and David Chartrand. "Canadian Justice and the Metis Nation." In Curt T. Griffiths (Ed.). Self-Sufficiency in Northern Justice Issues, (pp. 107-120). Vancouver: The Northern Justice Society and Simon Fraser University, 1992.
- Barkwell, Lawrence J. (1992). "Early law and social control among the Metis." In R.A. Silverman and M. Nielson (Eds.) Aboriginal Peoples and Canadian Criminal Justice. Toronto: Butterworths, 1992: 61-68.
- Barkwell, Lawrence J., Leah Dorion and Darren R. Préfontaine. Metis Legacy: A Metis Historiography and Annotated Bibliography. Winnipeg: Pemmican Publications and Louis Riel Institute, 2001.
- Barkwell, Lawrence J. and Ed Swain. "Contributions made by Metis people." In Saskatchewan Learning, Aboriginal Education Unit, Native Studies 10 Curriculum Guide, Regina: Saskatchewan Learning, July 2002: 324-325.

- Barkwell, Lawrence J. Metis Legacy: Michif Heritage, Folklore and Culture. Winnipeg: Manitoba Metis Federation, 2002.
- Bell, Catherine E. Contemporary Métis Justice the Settlement Way. Saskatoon: Native Law Centre, University of Saskatchewan, 1999.
- Corrigan, Sam W. and Lawrence J. Barkwell (Eds.). The Struggle for Recognition: Canadian Justice and the Metis Nation. Winnipeg: Pemmican Publications Inc., 1991.
- Borrows, John. "With or Without You: First Nations Law (In Canada)." McGill Law Journal, 1996, vol. 41 629.
- Borrows, John. "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission." McGill Law Journal, 2000 vol. 46 615.
- Hoebel, Adamson. The Law of Primitive Man. New York: Atheneum, 1974.
- Llewellyn, Karl N. and Hoebel, A.E. The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence. Oklahoma: University of Oklahoma Press, 1941.
- Longclaws, Lyle, Lawrence Barkwell, Wes Charter, Ann Charter. "Traditional Healing: Harmony and balance in the contemporary context." In M. Nicholson (Ed.) Justice and Northern Families: In Crisis ... In Healing ... In Control. Vancouver: Simon Fraser University, 1994, pp. 103-118.
- Longclaws, Lyle N., Lawrence J. Barkwell, and Paul Rosebush. (1993). "Report of the Waywayseecappo First Nation Domestic violence project." Winnipeg: Contract No. 1514-93/WA1-525, Solicitor General of Canada, Corrections Branch, Ministry Secretariat.
- Longclaws, Lyle N., Lawrence J. Barkwell, and Paul Rosebush. "Report of the Waywayseecappo First Nation Domestic violence project." Canadian Journal of Native Studies, Vol. 14, No. 2, 1994.
- Longclaws, Lyle N., Bert Galaway, and Lawrence J. Barkwell. (1996). "Piloting Family Group Conferences for Young Aboriginal Offenders in Winnipeg, Canada." In J. Hudson, A. Morris and B. Galaway (Eds.) Care, Crime and Conferencing. Annadale, New South Wales, Australia: Federation Press Pty Ltd.
- Manitoba Metis Federation, Senator Ed Head (Commission Chairperson).. The Report of the Commission on the Laws of the Hunt. Winnipeg: Manitoba Metis Federation, 2002
- Manitoba Metis Federation. Metis Laws of the Harvest (First Edition). Winnipeg: Manitoba Metis Federation, 2004.
- Shore, Fred J. "Customary Laws of the Metis Nation." In F. Shore and L. Barkwell, Past Reflects the Present: The Metis Elders Conference. Winnipeg: Manitoba Metis Federation, 1997: 211-234.
- Shore Fred J. and Barkwell, Lawrence J. (Eds.) Past Reflects the Present: The Metis Elders Conference. Winnipeg: Manitoba Metis Federation, 1997.
- Teillet, Jean. Metis Law Summary, 2004. Ottawa: Metis National Council, 2004.

Zion, James. "Working Papers Prepared by the Working Group on Customary Law, Volume II." Regina: Joint Canada-Saskatchewan-FSIN Studies of Certain Aspects of the Justice System as They Relate to Indians in Saskatchewan, Volume II: April, 1985.

APPENDIX A

METIS LAW
& SOCIAL CONTROL MECHANISMS
OF THE PAST

MANITOBA METIS FEDERATION

METIS JUSTICE INSTITUTE

This information has been taken from Past Reflects the Present: The Metis Elder's Conference (1991). These laws and/or social control mechanisms have been described by the Elders from memories taken from their own experience and that of their parents, grandparents, and great-grandparents.

ABUSE

1. Cases of spouse abuse were rare.
2. If a husband abused his wife, the Elders would go to him and tell him to stop or he would have to leave the woman.
3. If he continued, the Elders would exile him from the family and often the community.
4. Whenever a family was left without a husband, everyone else in the family and the community helped out in whatever way they could.

COMMERCE

1. Business deals were based on mutual trust, respect and honesty. Written receipts were not used.
2. One's reputation was extremely important and an honest reputation was the best recommendation in business dealings.
3. Anyone could ask about the reputation of someone they did not know. Those asked always would provide a truthful response.

CRIMINAL LAW

1. Serious crime (assault, murder, sexual assault) was dealt with by exiling the offender.
2. An exiled offender could return only if the community allowed it.
3. Running a gauntlet was used in some communities to punish spouse abusers.
4. In some cases, flogging was used as punishment for more serious crimes.
5. In certain cases, restitution was required of an offender. The Elders would set the type and amount of restitution required.
6. In certain cases, an offender was punished by having to work for a certain time for those he had offended. The Elders always set the type and amount of work involved.

7. In some cases, the compensation required for a crime also included compensation to the community.
8. Public shaming was an accepted form of punishment. Embarrassment was a powerful tool in social control since personal reputation was highly regarded.

DISCIPLINE

1. Discipline was based on respect for those older than yourself.
2. Children did not interrupt Elders.
3. If a child was unable to listen or to be quiet in the presence of Elders, then the child was sent elsewhere.
4. Physical discipline was used on children but apparently in a controlled manner. Excess was considered abuse.
5. Children who stole or who caused problems with other families had to apologize to those they had offended. Restitution in some form was also an acceptable means of control.
6. Scolding was used for less serious childhood offences.
7. Patience was an esteemed virtue for all who were involved with children.

ELDERS

1. The Elders were the judges in cases of unacceptable behaviour.
2. Elders were responsible for the disposition of children in the case of adoption or the separation of parents.
3. Elders acted as a community court in setting penalties for criminal behaviour.
4. The Elders saw to it that the laws and social control mechanisms of the people were remembered and practiced.
5. The Elders were the epitome of respect in all Metis communities.
6. Elders could involve themselves in any area of community life. They were, in effect, the guardians of the community's morals, customs, and behaviours.
7. The decisions of the Elders were final.

FAMILY

1. The extended family was the basic unit of the Metis Nation.
2. Most social control mechanisms operated first at the family level and then at the community level.
3. Caring for their older people was the responsibility of everyone in the family.
4. Children were cared for by parents and grandparents.
5. Family honour was jealously guarded at all times.
6. Families decided what was best for themselves, provided it did not impact negatively on others.
7. Older children were responsible for helping out in the family as soon as they were old enough to do so.
8. Illegitimate children usually went with the single mother's family or were adopted by a relative. Rejection was never practiced.

HONESTY

1. Honesty was equal to honour and was considered an absolute necessity at all times and in all circumstances.
2. People trusted each other.
3. Public opinion and family reputation were closely involved with honesty.
4. Theft was punishable by shaming and restitution.
5. In serious cases, exile was an acceptable punishment.
6. In cases of theft, the Elders decided on the level and type of restitution.

SOCIAL CONTROL

1. Control was usually based on an individual's personal honour.
2. Public shaming was the primary method of control.
3. Exile was used for more serious offences.

THE BUFFALO HUNT OF 1840

The Buffalo Hunt was one of the first national institutions that the Metis developed. Beginning in the early spring and continuing until late in the summer, Metis Buffalo Hunts ranged across the plains area of Rupert's Land, often involving more than two or three thousand people. The need to formulate a system to manage such a large group of "individualistic" people was the motivating factor behind the development of Metis Government.

The combination of individual honour, consensus democracy and total committal to authority was what made the Metis Buffalo Hunt the successful collective activity that it was. The practices of the Hunt were also applicable to any situation where collective activity was necessary, be that situation social, economic or political.

RULES

1. No buffalo to be run on the Sabbath-day;
2. No party to fork off, lag behind or go before, without permission;
3. No person or party to run buffalo before the general order;
4. Every Captain with his men, in turn, to patrol the camp, and keep guard;
5. For the first trespass against these laws, the offender to have his saddle and bridle cut up;
6. For the second offence, the coat to be taken off the offender's back, and be cut up;
7. For the third offence, the offender to be flogged; and
8. Any person convicted of theft, even to the value of a sinew, to be brought to the middle of the camp, and the crier to call out his or her name three times adding the word "thief", at each time.