

# A Matter of National and Constitutional Import:

Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the *Manitoba Metis Federation* Decision

Thomas Isaac

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The opinions and views outlined in this independent report are those of Thomas Isaac, the Minister’s Special Representative on Metis Section 35 Rights and the *Manitoba Metis Federation* Decision. They are not necessarily the opinions or views of the Government of Canada.

## Letter to the Minister of Indigenous and Northern Affairs

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June 14, 2016

The Honourable Carolyn Bennett  
Minister of Indigenous and Northern Affairs

Re: Report of the Minister's Special Representative on Reconciliation with Métis:  
Section 35 Métis Rights and the *Manitoba Metis Federation* Decision

Dear Minister Bennett:

Please find enclosed my report entitled *A Matter of National and Constitutional Import: Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Metis Federation Decision*.

The attached report addresses the mandate you provided to me to meet with the Métis National Council, its governing members, the Métis Settlements General Council, provincial and territorial governments, and other Aboriginal organizations and interested parties to map out a process for dialogue on Section 35 Métis rights. The mandate also directed me to engage with the Manitoba Metis Federation to explore ways to advance dialogue on reconciliation with Métis in Manitoba in response to the Supreme Court of Canada's 2013 *Manitoba Metis Federation* decision.

Thank you for the opportunity to assist you in advancing the Government of Canada's reconciliation with Métis.

Sincerely,



Thomas Isaac

# Introduction

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Métis peoples hold a central place in the history and development of Canada with their origins emanating from First Nations and European unions. As traders and explorers moved from east to west across what is now Canada, what evolved was a unique and rich Métis identity and culture that are key components of the origins of Canada. Métis represent one of three identified Aboriginal peoples in Section 35 of the *Constitution Act, 1982* (Section 35).<sup>1</sup> Rights held by Métis peoples under Section 35 are constitutionally recognized and affirmed by the Constitution of Canada.

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<sup>1</sup> Subsection 35(2) of the *Constitution Act, 1982* states: "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada."

However, notwithstanding this history, the Métis have largely been forgotten until recent years in the national narrative as a distinct rights-bearing Aboriginal peoples. Part of this challenge has been the Métis' unique heritage and history and because they have not, as a peoples, fit into an easily identifiable legal box. The Métis have struggled to have their unique identity and rights recognized, albeit with some successes and many more challenges.

There is a need for reconciliation between the Crown, federal and provincial, and Métis peoples. This need represents not a challenge but an appreciable **opportunity** for Canada, and provincial and territorial governments, to reconcile with Métis peoples and to re-calibrate their relationships with Métis, recognize and celebrate Métis rights and culture within the context of Canada's larger history, and resolve outstanding Métis claims.

Reconciliation is more than platitudes and recognition. Reconciliation flows from the constitutionally protected rights of Métis protected by Section 35<sup>2</sup> and is inextricably tied to the honour of the Crown, and must be grounded in practical actions. The Supreme Court of Canada's (SCC) seminal 2013 decision of *Manitoba Metis Federation v. Canada (A.G.)*<sup>3</sup> (MMF Decision) stated: "The unfinished business of reconciliation of the Métis people with Canadian sovereignty **is a matter of national and constitutional import.**"

On June 4, 2015 the Minister of Indigenous and Northern Affairs appointed me as the Minister's Special Representative to meet with the Métis National Council, its governing members, the Métis Settlements General Council, provincial and territorial governments, and other Aboriginal organizations and interested parties to map out a process for dialogue on Section 35 Métis

rights, and to engage with the Manitoba Metis Federation (MMF) to explore ways to advance dialogue on reconciliation with Métis in Manitoba in response to the MMF Decision (together, the Mandate).<sup>4</sup>

What follows are my observations and recommendations based on my review of the issues relating to the Mandate. This Report contains my understanding of what was heard with the intent of assisting in the necessary task of reconciliation between the Métis and Canada. I received an immense amount of information and commentary on many issues and matters relating to Métis peoples from across Canada. The Report attempts to capture the spirit of what was heard within the context and focus of the Mandate. A consolidated list of recommendations is set out in Appendix A of this Report.

In developing this Report, I invited submissions from, and met with, Métis governments, institutions and organizations. I did not limit or pre-determine with whom I spoke or from whom I received submissions. The Mandate did not require me, and I did not attempt, to determine whether any of the individuals or groups with whom I met, or received submissions from, met the legal criteria for determining Métis for the purposes of Section 35.

My active engagement period ran from June 2015 to January 2016, with a postponement during the 2015 federal election. I engaged with Métis governments, organizations, institutions and individuals. I also engaged with the Department of Indigenous and Northern Affairs Canada (INAC), Department of Justice and other federal departments and agencies. I also engaged with provincial and territorial governments and other interested parties. A list of those with whom I engaged is attached to this Report in Appendix B.

2 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at paras. 20, 25, 32 (*Haida*); see also *Mikisew Cree First Nation v. Canada (Min. of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, at para. 1: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."

3 *Manitoba Metis Federation v. Canada (A.G.)*, [2013] 1 S.C.R. 623, 2013 SCC 14, at para. 140 (MMF Decision).

4 The Mandate flows from two recommendations relating to the Métis in Douglas Eyford's Report entitled *A New Direction: Advancing Aboriginal and Treaty Rights*, (Ottawa: 2015), 43-44.

Throughout the Report I use the term “Aboriginal”. I note that both INAC and the Minister’s title have changed and use the term “Indigenous”. Given that the Report and the Mandate are focused on two matters coming within the scope of Section 35, it is imperative that the Report use legally-known and legally-defined terms. In its recent decision of *Daniels v. Canada (Indian Affairs and Northern Development)*,<sup>5</sup> the SCC used the term “Indigenous” to describe all those Indigenous peoples in Canada coming under the legislative jurisdiction of Parliament in Section 91(24), *Constitution Act, 1867* and used the term “Indigenous” as a broad and general term<sup>6</sup> that includes all Indigenous peoples, including Aboriginal peoples under Section 35, and referring to all “mixed-ancestry communities” all within the context of Section 91(24).<sup>7</sup>

Given that the Mandate and this Report are focused on Section 35, the Report uses the term “Aboriginal” which applies to Section 35 and not the broader and more general term “Indigenous”. It is essential that the Report be clear about the important place of Métis and their Section 35 rights within existing Canadian law, thereby requiring the use of terminology that is not only legally-correct but up to this point in time used by the SCC in respect of Section 35.

I wish to thank the Métis leaders, representatives and individuals who took the time to meet with me and who provided briefings and materials during the course of the engagement process. I was impressed by all of the Métis governments, institutions and organizations with whom I met and their consistency of focusing on that which is practical and reasonable, while celebrating their unique history and culture.

I also thank the INAC officials and other federal representatives with whom I engaged for their professionalism and who provided many briefings and materials so that I could better understand how Métis issues were historically and currently being addressed within the federal system.

Finally, I wish to thank the provincial and territorial governments and others who met with me or made submissions. Insights from these governments, organizations and individuals assisted in the consideration of the Mandate and the preparation of this Report.

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5 *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (*Daniels*).

6 *Ibid.* at paras. 6 and 23.

7 *Ibid.* at paras. 6, 9 and 23.



# Overview of Métis in Canada

# Overview of Métis in Canada

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## Introduction

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Métis are a unique and distinct rights-bearing Aboriginal peoples<sup>8</sup> and are one of three recognized Aboriginal peoples identified in subsection 35(2) of the *Constitution Act, 1982* whose rights are recognized and affirmed in Section 35.<sup>9</sup> Unlike First Nations and Inuit, whose ancestors were the original inhabitants of Canada, Métis emerged as a distinct Aboriginal peoples as the result of unions between European explorers and traders and the original inhabitants of what is now Canada.

Not every person of mixed European-Aboriginal ancestry is Métis for the purposes of Section 35. Rather it is the combination of self-identification as Métis, along with membership in larger distinct and historical Métis communities with their own

unique culture, practices, traditions and languages that makes Métis distinct Aboriginal peoples and distinct from their European and other Aboriginal ancestors.

Distinct Métis communities have been confirmed by the courts from Ontario westward. This is consistent with the hunting, trading and settlement patterns by European settlers and fur traders and is consistent with the commonly used name “Métis of the Northwest”.

This is not to suggest that there are not self-identified Aboriginal communities east of Ontario or in other parts of Canada that identify as being “Aboriginal”, but not necessarily Métis, First Nation, or Inuit for the purposes of Section 35. *Daniels* appears to address this reality by referring to all Indigenous peoples, including those of mixed ancestry, as coming within the meaning of “Indian” for the purposes of Section 91(24).<sup>10</sup>

The starting proposition for the development of any Section 35 Métis rights framework must be that it deals with ***Métis coming within the meaning of Section 35.***

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8 In *Alberta v. Cunningham*, [2011] 2 S.C.R. 670, 2011 SCC 37, at paras. 66, 68, 70 [*Cunningham*], the SCC stated: “The Métis considered themselves as one of three Aboriginal groups in Canada, but this was not recognized until the *Constitution Act, 1982*. Unlike Indians, however, they enjoyed no land base from which to strengthen their identity and culture or govern themselves. Nor did they enjoy the protection of an equivalent to the *Indian Act*. Their aboriginality, in a word, was not legally acknowledged or protected. [...] The *Constitution Act, 1982*, gave constitutional recognition to the Métis as one of three distinct Aboriginal groups, [...] **The history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians. Caught between two larger identities and cultures, the Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance. The constitutional amendments of 1982 [...] signal that the time has finally come for recognition of the Métis as a unique and distinct people.**” [Emphasis added.]

9 Subsection 35(2) of the *Constitution Act, 1982* states: “In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis Peoples of Canada.”

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10 *Daniels*, at paras. 17–19, and 24.

## Demographic and Socio-Economic Overview

The 2011 National Household Survey indicated that there are 451,795 people in Canada who identify as being Métis, or approximately 32% of Canada's Aboriginal population. The majority of people who identified as being Métis live in western Canada and Ontario, with the largest population in any single jurisdiction being Alberta. The following chart sets out the self-identified Métis population nationally, by jurisdiction:<sup>11</sup>

### Self-Identified Métis population

Canada	451,795
Atlantic	22,975
Quebec	40,960
Ontario	86,015
Manitoba	78,835
Saskatchewan	52,450
Alberta	96,870
British Columbia	69,475
Yukon	845
Northwest Territories	3,250
Nunavut	135

Métis have faced a disproportionate amount of challenges when it comes to social, economic, health, employment and education indicators, although they generally fair better than First Nations and Inuit peoples when compared against these indicators. The Métis population is young compared to the non-Aboriginal population but is not as young as other Aboriginal populations (median age of Métis is 31 years, compared to the Canadian average of 40 years). Although university attainment has generally improved for Métis, there is still a gap when

compared to the non-Aboriginal population. Métis have the largest labour force participation (78.0%) and employment rate (71.2%), and lowest unemployment rate among the Aboriginal population aged 25-64 years (8.6%). Métis households are almost twice as likely to require major repairs than non-Aboriginal households.<sup>12</sup>

In terms of health, Métis adults have a 57.4% survival rate to age 75, compared to the overall population of 71.4% (between 1991-2006).<sup>13</sup> Aboriginal peoples experience a disproportionate amount of disease when compared to non-Aboriginal Canadians. Similar to non-Aboriginal adults, the largest losses of potential years of life among Métis and non-status Indian were due to chronic diseases such as cancer and cardiovascular disease. Injuries were a major contributor to disparities in premature mortality as were alcohol and drug-related deaths among Métis and non-status Indians.<sup>14</sup> One Ontario report found that there were increased risks for cancer among the Ontario Métis population and highlighted the need for culturally sensitive approaches to prevention.<sup>15</sup> Similarly, in 2010 the Manitoba Centre for Health Policy, in collaboration with MMF, released a comprehensive health profile of Métis in Manitoba which supports the observation of a gap in core health statistics between the Métis and non-Métis population in Manitoba.<sup>16</sup>

<sup>11</sup> Statistics Canada. 2013. National Household Survey Profile. 2011 National Household Survey. Statistics Canada Catalogue no. 99-004-XWE. Ottawa. Released September 11, 2013.

<sup>12</sup> Statistics Canada, 2011 National Household Survey, 99-011-X2011036, 2011:22(1), 1991-2001.

<sup>13</sup> Statistics Canada, Table 109-5402, Probability of survival at various ages by population and sex, Canada, occasional CANSIM.

<sup>14</sup> Statistics Canada, Health Reports: 22(1), 1991-2001.

<sup>15</sup> Métis Nation of Ontario and Cancer Care Ontario, *Cancer in the Métis People of Ontario: Risk Factors and Screening Behaviours* (Ottawa, 2015).

<sup>16</sup> Manitoba Centre for Health Policy and Manitoba Metis Federation, *Profile of Métis Health Status and Health Care Utilization in Manitoba: A Population-Based Study*, (Winnipeg: June 2010).

## History of Métis<sup>17</sup>

The Métis story begins in the late 17th /early 18th century when European explorers passed through what is now Canada. The lands were claimed by England which granted to the Hudson's Bay Company control over a large territory called Rupert's Land, occupied by First Nations and Inuit. However, as European influence and presence developed so too did a new Aboriginal peoples with a distinct culture — the Métis, who arose from "early unions between European adventurers and Aboriginal women."<sup>18</sup>

A key and central event in Métis and Canadian history was the Red River Resistance of 1869–70 resulting from Métis resistance to the fur trade policies of the Hudson's Bay Company and the land settlement policies of Canada. Together, these policies were seen as a threat to the Métis and their way of life. Following the Red River Resistance, the Métis, led by Louis Riel, participated in the negotiation of the *Manitoba Act, 1870*,<sup>19</sup> which brought Manitoba into Confederation as a province of Canada.

The *Manitoba Act, 1870* contained provisions for a land base and governance for Métis at Red River, including a 1.4 million acre land grant to the children of the Métis in section 31 thereof. It is this provision, section 31 of the *Manitoba Act, 1870*, that was ultimately central to the declaration issued by the SCC against Canada flowing from the MMF Decision, discussed further below.

The SCC summarized these events in the MMF Decision as follows:

The surveyors were met with armed resistance, led by a French-speaking Métis, Louis Riel. On November 2, 1869, Canada's proposed Lieutenant Governor of the new territory, William McDougall, was turned back by a mounted French Métis patrol. On the same day, a group of Métis, including Riel, seized Upper Fort Garry (now downtown Winnipeg), the Settlement's principle fortification. Riel called together 12 representatives of the English-speaking parishes and 12 representatives of the French-speaking Métis parishes, known as the "Convention of 24". At their second meeting, he announced the French Métis intended to form a provisional government, and asked for the support of the English. The English representatives asked for time to confer with the people of their parishes. The meeting was adjourned until December 1, 1869.

When the meeting reconvened, they were confronted with a proclamation made earlier that day by McDougall that the region was under the control of Canada. The group rejected the claim. The French Métis drafted a list of demands that Canada must satisfy before the Red River settlers would accept Canadian control.

The Canadian government adopted a conciliatory course. It invited a delegation of "at least two residents" to Ottawa to present the demands of the settlers and confer with Parliament. The provisional government responded by delegating a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott to go to Ottawa. The delegates — none of whom were Métis, although Riel nominated them — set out for Ottawa on March 24, 1870. [...]

17 I note the Report of the Standing Senate Committee on Aboriginal Peoples entitled "The People Who Own Themselves: Recognition of Métis Identity in Canada", (Ottawa: Senate of Canada, June 2013) and its summary of Métis history. I also note that many of the themes discussed in the Standing Committee's Report are similar to the issues raised with me by Métis governments, institutions and organizations. See also *Métis in Canada: History, Identity, Law & Politics*, C. Adams, G. Dahl, and I. Peach (eds.), (Edmonton: The University of Alberta Press, 2013).

18 MMF Decision, at para. 21; See also *Cunningham* at para. 5.

19 *Manitoba Act, 1870*, S.C. 1870, reprinted R.S.C. 1985, App. II, No. 8.

The delegates arrived in Ottawa on April 11, 1870. They met and negotiated with Prime Minister Macdonald and the Minister of Militia and Defence, George-Étienne Cartier. The negotiations were part of a larger set of negotiations on the terms on which Manitoba would enter Canada as a province. It emerged that Canada wanted to retain ownership of public lands in the new province. This led to the idea of providing land for Métis children. The parties settled on a grant to Métis children of 1.4 million acres of land (s. 31) and recognition of existing landholdings (s. 32). Parliament, after vigorous debate and the failure of a motion to delete the section providing the children's grant, passed the *Manitoba Act* on May 10, 1870.<sup>20</sup>

However, Canada failed to live up to its end of the agreement and Riel led a resistance movement to have the rights of Métis respected. Tensions between Métis and Canada increased and ultimately led to armed conflict between Canada and Métis, led by Gabriel Dumont and Louis Riel, beginning at Duck Lake, Saskatchewan in March 1885 and ending in the Battle of Batoche in May 1885. As a result, Louis Riel was hanged for treason on November 16, 1885.<sup>21</sup>

Section 125 of the *Dominion Lands Act* amendment of 1879 provided for land to be granted to Métis to satisfy claims "in connection with the extinguishment of the Indian title, [...] outside the limits of Manitoba."<sup>22</sup> This resulted in the establishment of the first scrip commission in 1885 designated to settle Métis land claims in the then North-West Territories, outside the boundaries of the so-called original postage stamp province of Manitoba. Scrip involved the federal government offering land or money in voucher form to extinguish any outstanding Métis claims. Land allotments were offered to Métis in the form of 160 or 240 acre parcels, but with no specific parcels of land specified. What resulted from the scrip policy was a process that was complex and replete with fraud, abuses, and delays.<sup>23</sup> In short, the scrip policy was largely unsuccessful in bringing economic and social benefits to Métis. The SCC referred to the history of scrip speculation and devaluation as "a sorry chapter in our nation's history".<sup>24</sup>

From this historical point moving forward, Métis in different parts of Canada dealt with the lack of a centralized government policy approach toward them through a variety of means from Alberta instituting provincial legislation to establish the Métis settlements to no apparent or express policy approach by Canada for many years. It is important to note that there was a lack of any material legislative base to deal with Métis peoples, unlike First Nations for example who were, and remain in part, subject to the *Indian Act*<sup>25</sup> and earlier iterations of that legislation to form a basis of engagement with Canada and the provinces.

<sup>20</sup> MMF Decision, paras. 26–28, 30.

<sup>21</sup> In 1992 the House of Commons (Resolution to Recognize the Historic Role of Louis Riel, House of Commons and Senate of Canada, March 10, 1992) and the Manitoba Legislative Assembly (Resolution to Recognize the Historic Role of Louis Riel as a Founder of Manitoba, Manitoba Legislative Assembly, May 1992) passed resolutions honouring the contributions of Louis Riel. The House of Commons resolution stated "That this House recognize the unique and historic role of Louis Riel as a founder on Manitoba and his contribution in the development of Confederation; and that this House support by its actions the true attainment, both in principle and practice, of the constitutional rights of the Métis people." See Jean Teillet, *Métis Law in Canada* (Vancouver: Pape Salter Teillet, 2015), 8–9.

<sup>22</sup> *An Act to amend and consolidate several Acts respecting Public Lands of the Dominion*, 42 Vict. c. 31, 1879, s. 125: "To satisfy any claims existing in connection with the extinguishment of the Indian title preferred by half-breeds resident in the North-West territories outside the limits of Manitoba, [...] by granting lands to such persons, to such extent and on such terms and conditions, as may be expedient."

<sup>23</sup> See generally J. Weinstein, *Quiet Revolution West: The Rebirth of Métis Nationalism*, (Markham, Ont.: Fifth House Ltd., 2007), see in particular pages 1–22. On the issue of fraud and scrip, see for example F. Tough and K. Dimmer, "Dispossession by the Market on the Frontier of Property Systems: Case Studies of the Individualization of the Maori Land Court, Indian Reservation Allotment and Métis Scrip", in C. Lloyd, J. Metzger et al. (eds.) *Settler Economies in World History*, (Brill: 2013), at pp. 224–242.

<sup>24</sup> *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44, at para. 34 (*Blais*).

<sup>25</sup> *Indian Act*, R.S.C. 1985, c. 1–5.

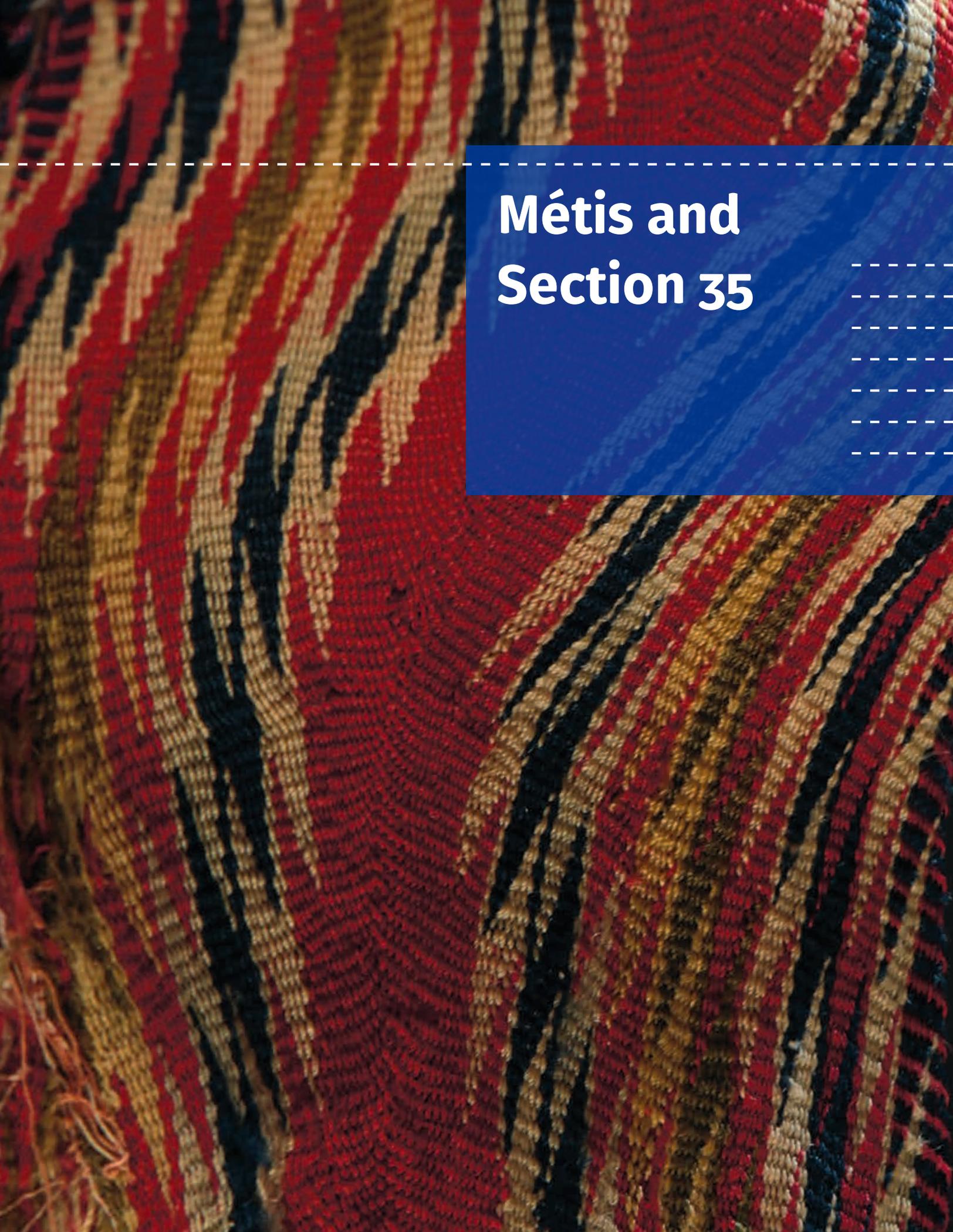
The enactment of Section 35 in 1982 brought about a fundamental change to Canada's legal system and how it addressed Aboriginal and treaty rights. Prior to 1982, Aboriginal and treaty rights could be unilaterally modified or extinguished by the federal Crown. After 1982 existing Aboriginal and treaty rights received the protection of the Constitution of Canada and Métis peoples and their existing Section 35 rights were included therein. Inclusion of Métis in Section 35 accorded Métis a distinct place in the constitutional framework of Canada as an "Aboriginal peoples" within the meaning of the Constitution of Canada. The SCC stated in *Cunningham*:

Governments slowly awoke to this legal lacuna. ...The landscape shifted dramatically in 1982, with the passage of the *Constitution Act, 1982*. Section 35 of the *Constitution Act, 1982* entrenched existing Aboriginal and treaty rights and recognized three Aboriginal groups — Indians, Inuit and Métis. For the first time, the Métis were acknowledged as a distinct rights-holding group. [...]

***The constitutional amendments of 1982 [...] signal that the time has finally come for recognition of the Métis as a unique and distinct people.***<sup>26</sup> [Emphasis added.]

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<sup>26</sup> *Cunningham*, at paras. 8, 13 and 70.



# Métis and Section 35

# Métis and Section 35

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## Introduction

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In order for the reconciliation processes contemplated by the Mandate to have meaning and applicability, there must be a common understanding of Métis representation and identity within the meaning of Section 35 and related tenets of existing Canadian law regarding Métis.

During the course of the engagement process numerous instances of a gap in knowledge about the existing status of Métis and their rights under Canadian law were observed, within the federal system generally and among some of the provinces with whom I met.

For example, a few individuals noted the misconception that treaty rights “trump” Métis rights, even though there is **no** law that supports, and existing law contradicts, this proposition. I also heard the misconception that if provinces carry out Crown-related consultation with provincially-created public governments, for example the northern public-government communities in Manitoba, within which there may be Section 35 Métis rights holders, rather than clearly identifiable Métis rights holders in the same geographic vicinity, the Crown’s duty to consult is fully satisfied. There is **no** case law that stands for the proposition that consultation with a form of public government necessarily equates to consultation with Section 35 rights holders.<sup>27</sup>

Also heard was a suggestion that there is some form of hierarchy of rights within Section 35, e.g. the rights of First Nations supercede the rights of Métis, even though there is **no** law supporting this proposition.

In order for reconciliation to be meaningful, and in order for Canada to pursue a Section 35 Métis rights framework and process relating to the MMF Decision, representatives of the Crown must have a basic knowledge of Métis issues and Section 35 Métis rights. There is a clear need for education within INAC and Canada more generally, along with a number of provincial governments with whom I met, on Métis-related law and is essential in order for Canada to carry out the processes contemplated by the Mandate effectively.

### Recommendation No. 1

*It is recommended that Canada immediately establish a program(s) to educate federal employees involved with Aboriginal-related matters about the history of Métis, Métis contributions to Canada, existing federal initiatives relating to Métis, Métis culture and traditions and Canadian law relating to Métis and their Section 35 rights.*

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<sup>27</sup> See discussion of the Crown’s duty to consult at pages 16, 30–31. Note also para. 72 of the MMF Decision wherein the SCC noted that the honour of the Crown will not “be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples.”

## Métis Representation and Identity

By its very nature, a Section 35 Métis rights framework must conform to, and be consistent with, Canadian law. This means that the test for establishing who is Métis for the purposes of Section 35 set out by the SCC in 2003 in *R. v. Powley*<sup>28</sup> should play a **dominant** role in the development and implementation of any such framework. As such, **Powley must be the starting point for any Section 35 Métis rights framework.**

What this means practically is that while the **process** of engagement that Canada follows to establish a Section 35 Métis rights framework should be broad and flexible, it should not be confused with the actual **application** of any Section 35 Métis rights framework which should be focused on, as the phrase suggests, Métis that come within the meaning of Section 35 and the test set out by the SCC in *Powley*.

Some of the individuals and organizations involved in the engagement process may have a very difficult, if not impossible, task of meeting the standard set out in *Powley* to be Métis for

the purposes of Section 35. This is obviously a sensitive issue and one which Canada and the provinces should consider, from a **policy** perspective. However, for the purposes of the Mandate the focus is on Section 35 and those individuals falling within the legal meaning of “Métis” within the parameters of Section 35.

Métis are represented by a variety of governments and organizations across Canada. The Métis National Council (MNC) is the representative body mandated by the MNC’s governing members to represent their interests nationally. The MNC’s governing members are the Métis Nation of British Columbia (MNBC), Métis Nation of Alberta (MNA), Métis Nation-Saskatchewan (MNS), Manitoba Metis Federation (MMF) and the Métis Nation of Ontario (MNO) (together the Governing Members), who represent the interests of their members in their respective jurisdictions. There is also the Métis Settlement Councils and the Métis Settlements General Council in Alberta, the Northwest Territory Métis Nation, and the North Slave Métis Alliance.

Beyond these Métis governments and organizations, there are other local communities and national and provincial organizations that assert representation of Métis interests including the Indigenous Peoples’ Assembly of Canada (formerly the Congress of Aboriginal Peoples), Métis Federation of Canada, and the Canadian Métis Council – Intertribal, among others, some of whom are discussed further below. Also see Appendix B which lists those Métis governments, institutions and organizations with whom I met or from whom I received submissions.

This Report uses the term “government” as meaning the system by which a community is governed.<sup>29</sup> For Métis communities this takes at least two forms: (a) more traditional geographic governments like the Métis Settlements in Alberta, and (b) governments that have the legal authority to represent their constituents/communities interests and, in particular, their Section 35 rights. For some Métis, their communities may

28 *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 (*Powley*), at paras. 31–33 the SCC stated: “First, the claimant must *self-identify* as a member of a Métis community. This self-identification should not be of recent vintage: While an individual’s self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement. Second, the claimant must present evidence of an *ancestral connection* to an historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum “blood quantum”, but we would require some proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means. [...] Third, the claimant must demonstrate that he or she is *accepted by the modern community* whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community’s identity and distinguish it from other groups. [...] The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community. [Emphasis in original.]”

29 *Oxford Dictionary of English*, Third Edition, (Oxford: Oxford University Press, 2010), 757.

very well exist within existing publicly-governed communities, but that should make them no less able to have the ability to govern in respect of their unique Métis heritage and Section 35 rights. Of course, in the case of the latter, there must be a clear authorization from the Métis government or Métis individual(s) to so authorize its/their representation by another.<sup>30</sup> Absent this express legal authorization from the collective or individual Section 35 rights' holders, the entity or organization may be a representative body reflecting broader political or other aspirations and positions of Métis but not necessarily empowered to represent Métis for the purposes of Section 35 rights' matters. It is essential that those Métis governments and organizations holding themselves out as appropriate representative bodies for their Métis constituents, be appropriately and transparently mandated to represent such Section 35 Métis interests.

An example of a Métis government being duly authorized by its members can be found in how the Métis Nation of Ontario (MNO) was established and functions. In 1993, Ontario Métis established the MNO to be their representative governance structure provincially to advance Métis rights and claims. At the same time, the MNO created a Secretariat, incorporated under Ontario's not-for-profit corporation legislation, to act as its legal and administrative arm. In the MNO Secretariat's Bylaws, individual Métis applying for citizenship voluntarily mandate the MNO to be their "representative body" for the purposes of advancing Métis rights, claims and interests, which are collective in nature. Through the MNO's centralized and standardized registration processes, these individuals are verified as Métis rights-holders consistent with Powley. In December 2015, the Legislature of

Ontario passed the *Métis Nation of Ontario Secretariat Act, 2015*,<sup>31</sup> which expressly recognizes that the MNO was created to represent its registered citizens, and the Métis communities comprised of those citizens, with respect to their collective rights, interests and aspirations.

I heard concerns from within INAC that, with the exception of the Métis Settlements in Alberta, the other forms of Métis governance such as those found in the Governing Members do not necessarily fall within the typical range of governance examples seen elsewhere in Canada, e.g. land-based, clear geographic parameters to governmental authority. While non-land based forms of governance are different, that does not mean they are illegitimate or that they can or should be ignored. The federal inherent right of self-government policy contemplates non-land based forms of governance. Rather, different forms of governance are not only practical but represent an **opportunity** for Canada to engage and not to be bound by past historical models of governance.

Embracing new or modified forms of governance, provided, of course, that they are democratic, representative and transparent, among other factors, reflects the current realities in the representation of Métis, particularly given their focus on regional representation as evidenced by the Governing Members. The types of functions such governments could perform, outside of a more traditional land-based model, include, Section 35 rights and related consultation representation, protection and maintenance of Métis culture and heritage, Métis-specific programs and services that enhance existing programs and services, management of Section 35 rights such as a right to hunt (e.g. maintenance and operation of Métis-hunting regimes, such as those operated by the MNO and MMF), operation of objectively verifiable Métis registries, and overall democratic political representation regarding Métis-specific political interests.

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30 For the purpose of a Section 35 Métis rights framework, it is imperative that those governments or organizations asserting representation of Métis can demonstrate that they in fact represent Section 35 rights-bearing Métis peoples. In *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227, 2013 SCC 26, at para. 30, the Supreme Court of Canada stated the following regarding who can represent Aboriginal peoples in the context of the Crown's duty to consult: "The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: [...] But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights".

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31 *An Act to recognize the corporate structure of the Métis Nation of Ontario by enacting the Métis Nation of Ontario Secretariat Act, 2015*, S.O. 2015, c. 39.

## Overview of Canadian Law relating to Métis

The existing Section 35 rights of Métis are recognized and affirmed in the *Constitution Act, 1982*. Métis Section 35 rights were first expressly confirmed by the SCC in *Powley* wherein the SCC established the legal test for determining who is Métis for the purposes of Section 35.

For the purpose of establishing a Section 35 right, the SCC held in *Powley* that Métis claimants must establish that they belong to an identifiable Métis community, defined as “a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.”<sup>32</sup> The SCC went on to enumerate three factors that provide the indicia of Métis identity for the purpose of claiming Métis rights under Section 35: (a) self-identification as a member of the Métis community;<sup>33</sup> (b) evidence of an ancestral connection to an historic Métis community;<sup>34</sup> and (c) a demonstrated acceptance by a modern Métis community.<sup>35</sup>

The SCC emphasized the unique and distinct nature of Métis heritage and culture and, importantly, one that is **not** dependent upon First Nations’ culture and heritage:

***The term “Métis” in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.*** Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent.<sup>36</sup> [Emphasis added.]

The SCC defined “Métis” coming within the meaning of Section 35 as follows:

32 *Powley*, at para. 12.

33 *Ibid.* at para. 31.

34 *Ibid.* at para. 32.

35 *Ibid.* at para. 33.

36 *Ibid.* at para. 10.

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. **A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. [...] The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: “What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis”** (RCAP Report, vol. 4, at p. 202).

In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members’ self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim. [Emphasis added.]<sup>37</sup>

Through a purposive analysis of Section 35,<sup>38</sup> and picking up from its 1997 decision in *R. v. Van der Peet*,<sup>39</sup> the SCC in *Powley* determined that the purpose of including Métis in Section 35 is different from the purpose for including First Nations/Indians and Inuit, in that the presence of Métis cannot be traced to pre-contact occupation of Canada. To account for this difference, the SCC modified the *Van der Peet* test as it applies to Métis claimants regarding the focus on pre-European contact practices, customs and traditions. The SCC in *Powley* confirmed that the general test for establishing Aboriginal rights under Section 35

37 *Ibid.* at paras. 12, 23.

38 See Footnote 53.

39 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (*Van der Peet*).

set out by the SCC in *Van der Peet* also applies to Métis Section 35 rights, with some modification as noted by the SCC:

Although s. 35 includes the Métis within its definition of “aboriginal peoples of Canada”, and thus seems to link their claims to those of other aboriginal peoples under the general heading of “aboriginal rights”, the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. [...] The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.<sup>40</sup>

Court decisions throughout the Prairies and Ontario have confirmed the existence of Métis Section 35 rights.<sup>41</sup> While there is a dearth of case law that deals expressly with the nature and application of the Crown’s duty to consult Métis, there is no doubt that, at law, the Crown’s duty to consult Aboriginal peoples applies to Métis.<sup>42</sup> This conclusion is consistent with the SCC’s purposive approach to interpreting Section 35 generally. The SCC in *Powley* confirmed that

Métis rights and interests are recognized and affirmed based on a purposive interpretation of Section 35<sup>43</sup> and the SCC confirmed in *Haida* that the Crown’s duty to consult applies to Aboriginal peoples, which includes Métis.

## **Powley Analysis and Métis Registries**

An essential component for a Section 35 Métis rights framework is the development and maintenance of an objective and legally-sound registry of who is “Métis” for the purposes of Section 35, consistent with the analysis set out in *Powley*.

A central question posed to INAC and other federal, provincial and Métis representatives was: Is it in the public interest that Métis governments and institutions, acting in a reasonable, transparent and accountable manner, have sufficient capacity to determine who meets the criteria for the purposes of identifying Métis within the meaning of Section 35 and the test set out in *Powley*? Invariably the answer was yes, it is in the public interest to have Métis governments and institutions having objectively verifiable mechanisms and processes to determine Métis in accordance with Canadian law for the purposes of Section 35. Is what is presently being done conducive to this result?

Since 2004, Canada has provided funding to assist Métis governments and institutions to put in place objectively verifiable membership systems, consistent with *Powley* pursuant to its *Proactive Reconciliation and Management of Métis Aboriginal Rights*, otherwise known as the *Powley Initiative*. Work has been ongoing to harmonize the respective registry systems by the Governing Members for example, including work with the Canadian Standards Association to develop a Métis Nation Registry Standard that sets out requirements and best practices. *Powley*-compliant Métis registries are active under the guidance of the Governing Members in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia (Métis Registries). There

40 *Ibid.* at para. 67.

41 For example, see *R. v. Goodon*, 2008 MBPC 59; *R. v. Laviolette*, 2005 SKPC 70; *R. v. Morin & Daigneault*, [1996] 3 C.N.L.R. 157 (Sask.P.C.), aff’d [1998] 1 C.N.L.R. 182 (Sask.Q.B.); *R. v. Belhumeur*, 2007 SKPC 114; *R. v. Beer*, 2011 MBPC 82.

42 The Northwest Territories Supreme Court acknowledged that the North Slave Métis Alliance was owed a duty to consult by the Government of the Northwest Territories in *Engle v. Mandeville*, 2013 NWTSC 33; see also *R. v. Beer*, 2011 MBPC 82. See also *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227, 2013 SCC 26, at para. 30 wherein the SCC stated that the duty to consult applies to “Aboriginal peoples”.

43 *Powley*, at para. 13.

remains much work to be done to address the significant backlog of applications and research work in some jurisdictions. The costs associated with operating a professional and objectively verifiable Métis registry, producing individual applicants' genealogical records, procuring supporting documentation (including vital statistic or baptismal records) and the production of membership cards can be considerable given the magnitude of the exercise.

Other federal departments and agencies have accessed funds under the Powley Initiative to improve their outreach with Métis, including Parks Canada, the RCMP and Environment Canada – Canadian Wildlife Service.

While the Métis have generally appreciated the Powley Initiative and its funding, I heard repeatedly that this cannot be a one-time initiative and that **on-going, stable and predictable funding is required** to ensure that Métis registries flowing from the Powley Initiative can be maintained on a go-forward basis.

It is in the public interest that transparent, legally-correct and objectively verifiable Métis membership processes be supported in a manner that is predictable and long-term. In this respect I note the MNC-led sponsored Métis Archival Project at the University of Alberta which is compiling and analyzing critical historical documents relating to Métis scrip, genealogy and other matters of historical significance, all of which is critical to having credible and objectively verifiable Métis registries. This is the type of work that ultimately will serve the public interest, particularly given the importance of historical data to the requirements of the *Powley* analysis.

While the basis for the Indian Registry is different (pursuant to the *Indian Act*) it receives consistent long-term funding as part of an on-going program within INAC. The current funding and policy authorities for the Powley Initiative are presently secured for 2016-17. Likewise, the Powley Initiative should be made part of an on-going program so as to allow a degree of predictability and stability to the issue of Métis Section 35 rights entitlement and membership in accordance with the law set

out in *Powley*. Given that it is in the interests of both Canada and the provinces and territories that functional and accountable Métis registries be supported, Canada should not bear the sole burden of this important work. Canada should take the lead to engage with appropriate provinces and territories to determine the extent to which they can support this important exercise.

A number of provincial governments expressed their dissatisfaction with the *Powley* test and that they are of the view that there remains significant ambiguity as to who is "Métis" for the purposes of Section 35. While determining who is Métis for the purposes of Section 35 is not as straightforward as making an inquiry to the Indian Registrar, the SCC has set out the test for determining who is "Métis" for the purposes of Section 35 and governments are **bound to apply this law**. Simply because a task is difficult or challenging or may have some ambiguities around its edges, cannot be a reasonable reason for not addressing what is a constitutional imperative and an important matter of public policy.

In *Powley*, the SCC expressly acknowledged the need for a systematic approach to identifying Métis rights-holders as an **urgent priority**:

The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations **is an urgent priority**. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.<sup>44</sup> [Emphasis added.]

To the extent that either public governments or Métis themselves disagree with, or object to, the analysis set out in *Powley*, this will in turn only cause further delay and dysfunction on the road to reconciliation. As the SCC noted in *Powley*:

While determining membership in the Métis community might not be as simple as verifying membership in, for example,

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<sup>44</sup> *Powley*, at para. 49.

an Indian band, **this does not detract from the status of Métis people as full-fledged rights-bearers.** As Métis communities continue to organize themselves more formally and to assert their constitutional rights, **it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified.** In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors. **This is not an insurmountable task.**<sup>45</sup> [Emphasis added.]

It is laudable that Canada initiated the Powley Initiative. It is now time to ensure that this “initiative” becomes part of the on-going provision of resources to ensure an objective and transparent Métis registry(ies) for the purposes of Section 35. **This work is essential to implementation of any meaningful Section 35 Métis rights framework because it goes to the core of who actually possesses such Section 35 rights.**

The provinces and territories, to the extent they have Métis Section 35 rights holders, should have the same interest as Canada in ensuring that an objectively verifiable registries be developed and maintained. This is key to legal reconciliation and Canada should not be the only government participating in resourcing this essential task.

#### **Recommendation No. 2** -----

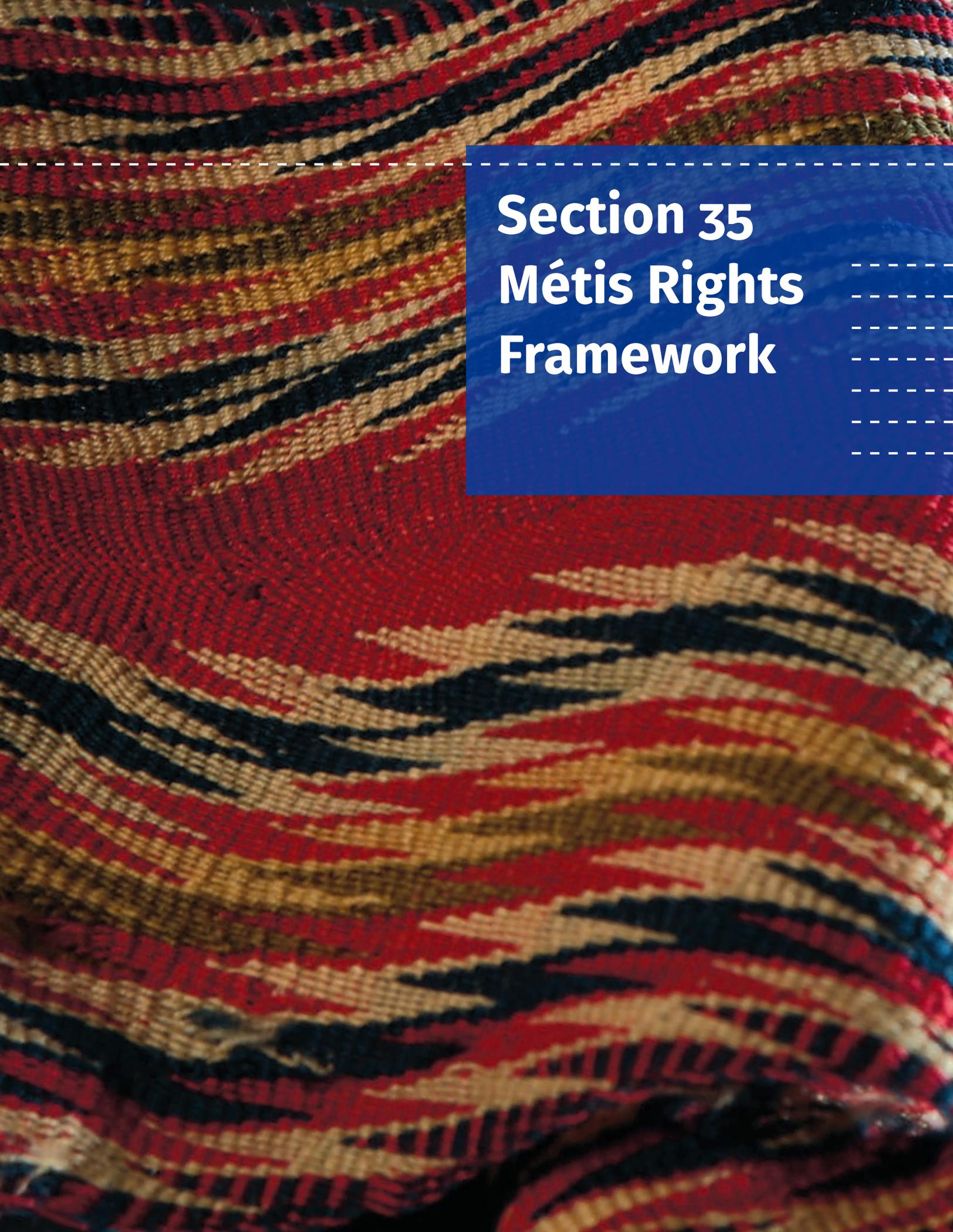
*It is recommended that Canada, in a timely manner, develop and implement a predictable, long-term and stable funding regime to support the ongoing operation of the Métis Registries (as defined) consistent with the Powley test set out by the Supreme Court of Canada.*

*It is also recommended that Canada take the lead in engaging with appropriate provinces and territories to determine the extent to which they can support the Métis Registries.*

*It is further recommended that Canada should continue to contribute to historical research data collection relating to Métis history to facilitate the identification of Métis within the meaning of Section 35.*

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<sup>45</sup> Powley, at para. 29.



**Section 35  
Métis Rights  
Framework**

# Section 35 Métis Rights Framework

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## Introduction

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During the engagement process comments were provided on Section 35 Métis rights and on what a process should include regarding Canada's development of a Section 35 Métis rights framework. In many of these discussions there was a wider array of other issues raised, some related to Section 35 Métis rights and some related to the concepts of the honour of the Crown and reconciliation more generally. I heard many submissions regarding the importance of maintaining and promoting Métis culture and traditions, including the preservation and enhancement of Michif, the unique Métis language. I also received many comments on the services, or lack thereof, currently provided by Canada and provinces to Métis, areas for improvement, and numerous examples of unresolved Métis claims and concerns.

Overall, three consistent themes emerged during the engagement process of importance to the development and implementation of a Section 35 Métis rights framework: (a) recognition of Métis rights, history and culture and Métis forms of governance, (b) relationships among Métis with Canada and the provinces and territories, (c) reconciliation. For the purposes of the following discussion I have organized what was heard and related discussion around these three themes. The following is a brief synopsis of what I heard, related observations, and, where appropriate, recommendations.

## What was Heard and Related Observations

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The following discussion of the various jurisdictions in which I engaged is in no way intended to reflect every submission made during the engagement process, but rather is intended to provide a snapshot of the engagement process and some of the broader issues not otherwise raised in the Report dealing with the Section 35 Métis rights framework.

In Ontario I met with the Métis Nation of Ontario (MNO), the Government of Ontario, INAC's Ontario Regional Office, the Historic Saugeen Métis Nation, the Red Sky Independent Métis Nation, and the Métis Federation of Canada.

The MNO is made up of 29 Chartered Community Councils with the MNO being empowered by its citizens to represent their individual rights collectively in consultation-related matters, which provides an important platform from which to represent Métis-related issues on matters involving consultation. In December 2015 the Ontario Legislature passed legislation formally recognizing MNO.<sup>46</sup>

I observed a positive and constructive relationship between Ontario and the MNO. Ontario and the MNO signed a five year Framework Agreement on November 17, 2008 and subsequently signed a new Framework Agreement on April 17, 2014 for a five year term focused on advancing

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<sup>46</sup> An Act to recognize the corporate structure of the Métis Nation of Ontario by enacting the Métis Nation of Ontario Secretariat Act, 2015, S.O. 2015, c. 39.

reconciliation and other collaborative approaches. These agreements refer to working with Canada on Métis rights matters and related consultation issues together. Objectives flowing from this Framework Agreement include recognition and support for MNO's structures, operational capacity and financial management; recognition of, and support for, the distinct history, identity and culture of Métis and their contributions to Ontario; enhancement of the individual and communal well-being of Métis; and recognition and respect for Métis rights in Ontario consistent with the honour of the Crown. I note that Ontario regularly consults with MNO on an array of matters, including federal additions to reserve.

The MNO has a comprehensive Métis hunting policy which is coordinated with the July 2004 MNO-Ontario Interim Harvesting Agreement that sets out an arrangement between Ontario and MNO regarding the exercise of Métis harvesting rights. The Métis Voyageur Development Fund was established in 2012 and provides funding to Métis businesses, with \$30 million in total committed by Ontario. The MNO Métis Registry has a backlog of applications to be processed.

Significantly, Canada signed a consultation agreement with the MNO in July 2015. This agreement is the first of its kind with a Métis government and sets out a common set of principles and objectives by which the parties will operate regarding matters of mutual interest relating to consultation and establishes a clearer and more efficient process of consultation. Not only is this agreement important in its subject matter but also in its cooperative approach, which furthers the objectives of Métis recognition and reconciliation. Ontario provides a positive example of what can happen when willing partners (MNO, Canada and Ontario) work together to achieve outcomes where they have a common interest.

In Manitoba I met with the Manitoba Métis Federation (MMF) and received extensive briefings from many of its impressive institutions and agencies responsible for the delivery of health, education and social services, along with economic development institutions such as the Métis Economic Development Fund. The Fund

was established to provide capital to Métis entrepreneurs and businesses, with Manitoba committing \$10 million in total. I also met with the Louis Riel Capital Corporation which, in its 23 years of operation has advanced over \$32 million in loans to over 600 Métis businesses.

I met with the Louis Riel Institute which focuses on education and training for Métis in Manitoba. I also note the success of the Métis Employment and Training/Aboriginal Skills and Employment Training Strategy Agreement initiative. MMF has a detailed approach to Métis registration with its Central Registry Office but has a backlog of applications and needs additional and stable resources. The MMF has a comprehensive hunting policy. Manitoba (with a \$5.5 million commitment) and the MMF have recently partnered to build affordable homes for Métis families.

I also met with L'Union nationale Métisse de St-Joseph du Manitoba who have a long history of representing Métis matters, particularly focused on preserving and promoting Métis cultural awareness, including their more recent initiative of developing Parc Vermette within Winnipeg to celebrate Métis culture.

I met with the Government of Manitoba who outlined its September 2010 Manitoba Métis Policy (Manitoba Policy) which includes, in part, the following high-level principles:

- + The Métis were leaders in the creation of the Province of Manitoba.
- + The Métis are a distinct Aboriginal peoples in Manitoba with a unique history, culture and aspirations to be protected and nurtured while respecting diverse Métis needs and the common values shared by all Manitobans.
- + The MMF is a political representative of Métis people in Manitoba and represents in Manitoba the Métis who collectively refer to themselves as the Métis Nation.
- + The MMF and the Government of Manitoba are accountable to their respective constituencies and to each other.

- The MMF and Government of Manitoba will have the resources to meaningfully participate in their renewed relationship within the overall priorities of, and resources available to the Government of Manitoba.

The 2012 Memorandum of Understanding relating to the recognition by Manitoba of Métis harvesting rights over a defined territorial area is a significant accomplishment for Manitoba and the MMF. This agreement deserves special mention as it is a practical example of avoiding litigation and using agreements as a practical means to addressing and recognizing Métis rights and to promote reconciliation.

In Saskatchewan I met with the Métis Nation Saskatchewan (MNS) which is currently facing capacity and governance challenges and encourage Canada and Saskatchewan to offer assistance, as appropriate and reasonable, to assist Métis in Saskatchewan in resolving these challenges. I also met with Métis institutions and organizations including the Gabriel Dumont Institute and the Clarence Campeau Development Fund. Both of these organizations demonstrate that federal and provincial support in strong and credible Métis institutions are sound investments.

I met with the Government of Saskatchewan who explained its general approach to dealing with Métis issues, including its 2010 *First Nation and Métis Consultation Policy Framework*. Saskatchewan expressed its desire to work proactively with the MNS in a number of areas including socio-economic issues and Métis rights. In 2002, Saskatchewan proclaimed the *Métis Act* which committed Saskatchewan and MNS to work together on a number of issues of mutual importance.

In July 2015 I attended the Back to Batoche Days celebration and Métis gathering at Batoche, Saskatchewan. This event left a deep impression on me as it celebrated Métis history and culture, including fiddle music and jigging. I was particularly struck by how the celebrations began, first with a large Canadian flag appearing as a backdrop followed by the Canadian national anthem. Following the anthem there was a recognition of

the Métis veterans present, which was followed by the Métis anthem and flag. This celebration was a truly Métis-Canadian event and one that reflected the unique historical circumstances of Métis not only as distinct Aboriginal peoples but also as proud Canadians.

In Alberta I met with the Métis Nation of Alberta (MNA) and received a briefing on MNA's comprehensive Métis registration program. However, MNA stated that, like other Governing Members, it had a backlog of applications and could use additional and more stable and predictable long term funding to this important exercise. MNA also provided an extensive briefing on its well-developed health, education, social services and housing programs.

I met with Apeetogosan (Métis) Development Inc. (AMDI) which was established in 1984 with a capital commitment of \$8 million from Canada. Since 1988, AMDI has lent \$60 million to Métis entrepreneurs and has helped to create 1000 Métis-owned businesses in Alberta while still being able to add to its original capital base. I also met with the Rupertsland Institute, an affiliate of MNA, that provides important and demonstrably effective labour market services to Métis in Alberta.

Alberta is also home to the only Métis-dedicated and legislated land base in Canada: the eight Métis Settlements of Alberta (Buffalo Lake, East Prairie, Elizabeth, Fishing Lake, Gift Lake, Kikino, Paddle Prairie and Peavine) comprising approximately 1.3 million acres of land with a population of approximately 5,000 people. The unique history and settlement of Métis in Alberta enabled the negotiation of a legislative basis for the establishment of the Métis Settlements.

The Métis Settlements General Council is the political and administrative body representing the collective interests of the Métis Settlements.<sup>47</sup> In 2013 a long term funding arrangement was reached between the settlements and Alberta

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<sup>47</sup> The Métis Settlements of Alberta were established by provincial legislation known as the *Métis Population Betterment Act* in 1938, and now governed by the *Métis Settlements Act*, R.S.A. 2000, c. M-14 and the *Métis Settlements Land Protection Act*, R.S.A. 2000, c. M-16, among other provincial statutes.

amounting to \$85 million over 10 years. The Settlement Investment Corporation has been a successful economic development entity for the Métis Settlements.

I met with the Métis Settlements General Council who stated that while they understand the unique role that Alberta has played in their establishment and funding, they also want a better relationship with Canada. They expressed a desire for their lands to be constitutionally protected and noted a number of unresolved claims relating to scrip, among other matters. They also raised concerns relating to the Cold Lake Air Weapons Range and its effects on traditional Métis related activities and rights such as hunting and trapping. In meetings with the Government of Alberta they explained to me their policy approach to dealing with Métis issues, and they focused much of the discussion on the Métis Settlements. Alberta took a significant leadership role in the early/mid-20th century with the establishment of the Métis Settlements.

The 2004 Interim Métis Harvesting Agreement (2004 Agreement) between Alberta and the MNA recognized the Métis right to harvest for food by members of the MNA at all times of the year on all unoccupied Crown lands throughout Alberta without a licence. In 2007 this agreement was terminated by Alberta and replaced unilaterally with a policy that recognized 17 Métis communities north of Edmonton to harvest generally within a 160 km radius of the community. The termination of the 2004 Agreement is a significant irritant for the Métis in Alberta. This in turn affects who Alberta consults with regarding potential adverse effects to Métis harvesting rights. Alberta, the MNA and the Métis Settlements General Council should discuss and attempt to resolve the termination of the 2004 Agreement so that the ultimate framework to manage Métis harvesting rights in Alberta is based on mutual agreement, as the 2004 Agreement contemplated.

I also met with the Aseniwuche Winewak Nation of Canada who also describe themselves as “Rocky Mountain people” who seek recognition as a unique Aboriginal group that includes Métis peoples.

In British Columbia I met with the Métis Nation British Columbia (MNBC) who provided an historical briefing of how Métis fit into the history of British Columbia. MNBC also provided a briefing on its Métis registry process and their need for additional and more stable resources. MNBC seeks a deeper relationship with Canada and trilateral discussions among MNBC, Canada and British Columbia to deal with matters such as self-government, funding, harvesting rights and programs and services. MNBC also stated that it would like to see British Columbia acknowledge the existence of Section 35 Métis rights in British Columbia.

I also met with the British Columbia Métis Federation and the Kelly Lake Métis Settlement, both of whom desire recognition as representing the interests of their respective members.

I met with the Government of British Columbia who expressed a desire to continue to work with MNBC and other Métis in British Columbia, but also stated clearly that they do not believe that there are Métis rights-bearing communities that would meet the criteria set out in *Powley*. Because of this position, British Columbia does not consult with Métis regarding assertions of Section 35 Métis rights.

MNBC and British Columbia signed a 2006 Métis Nation Relationship Accord which guides their relationship and focuses on practical socio-economic initiatives and not Métis rights-based matters, consistent with British Columbia’s current position. The Memorandum of Understanding between MNBC and the Métis Commission for Children and Families of B.C. and the B.C. Ministry of Children and Family Development are both positive initiatives that demonstrate a cooperative relationship between Métis and British Columbia on practical issues.

In the Northwest Territories I met with the Northwest Territory Métis Nation (NWTMN) who focused their comments on their Land and Resource Agreement-in-Principle with the Governments of Canada

and the Northwest Territories.<sup>48</sup> The AIP was signed in July 2015 and deals with many matters including wildlife, fish, trees, plants, national parks, protected areas, subsurface resources, mineral royalty sharing and economic measures. A transfer of over 25,000 sq. kms of land is also contemplated by the AIP. The NWTMN is also a party to the NWT Land and Resources Devolution Agreement. The NWTMN expressed concerns regarding the lack of funding for membership and ratification processes and unresolved overlapping claims issues with First Nations. Views were expressed that a neutral third party could assist in furthering reconciliation between the parties. Views were also expressed that the AIP should ultimately be constitutionally protected so that Métis in the Northwest Territories were being treated equitably with First Nations and their respective agreements.

I also met with the Government of the Northwest Territories and INAC's Northwest Territories' Regional Office, both of whom appear to have a good working relationship with the Métis of the Northwest Territories. I received a submission from the North Slave Métis Alliance confirming their distinct membership and their desire for recognition of their rights and political organization.

I also spoke with and received submissions from individuals and groups from east of Ontario including the Sou'West Nova Métis Council (Nova Scotia). A number of groups I spoke with clearly identify as being "Aboriginal" and, in some cases, are clearly living a traditional Aboriginal lifestyle, but who also appear to have fallen through the cracks in terms of governments generally having a difficult time understanding where they fit on the spectrum of Aboriginal peoples and in respect of Section 35. In particular I note the Kelly Lake Métis Settlement and the Aseniwuche Winewak Nation of Canada.

I heard descriptions from some groups that describe themselves as including Métis members but also refer to themselves more generally as "Aboriginal". This is obviously a complex and

sensitive issue that governments will eventually need to address from a policy perspective, as suggested by the SCC in *Daniels*.<sup>49</sup> However, for the purpose of developing a Section 35 Métis rights framework, ***the legal tests established by the SCC for determining Section 35 Métis rights must be the starting point to develop and implement of any such framework.***

## Recognition

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A consistent theme heard throughout the engagement process was the deep desire by Métis governments, institutions and organizations for increased recognition generally by Canada and INAC more specifically, and the provincial governments with whom they engage.

I heard numerous examples of how Métis felt that their history and culture as an Aboriginal peoples was either not known or misunderstood generally when dealing with Canada and the applicable provinces. The recognition that many Métis sought related to being recognized as a culturally distinct Section 35 rights-bearing peoples, having their forms of governance recognized as legitimate, and not being mixed in with a generic "Aboriginal" grouping. Other issues raised relating to recognition ranged from the broad, such as the possible establishment of a national Métis heritage and cultural centre, to specific, such as INAC policies regarding non-distinction-based programming (i.e. programming that is geared towards Aboriginal peoples generally and not specifically to Métis).

Many comments were made regarding the issue of Métis access to federal policies, programs and services. While not strictly within the parameters of a Section 35 Métis rights framework, equitable and fair access to programs and services by Métis is a matter directly relevant to reconciliation and the honour of the Crown and, in turn, related to Section 35.

Presently, Métis have access to provincial services, which many First Nations peoples, particularly

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<sup>48</sup> I note that this agreement is being negotiated on the basis of Dene ancestry rather than Métis-specific ancestry or the application of the criteria set out in *Powley*.

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<sup>49</sup> *Daniels*, at para. 15.

those living on reserves, do not. A number of Métis representatives stated that they did not want to be treated like First Nations. A consistent message from Métis was wanting “a hand up, not a hand out”. This means that Métis want Canada to play a larger role in the reality of Métis peoples as a rights-bearing Aboriginal peoples under Section 35 and to provide **equitable** treatment to Métis peoples under the framework of reconciliation and the honour of the Crown.

While there are positive examples of Métis accessing existing programs and services within INAC, Parks Canada, Canadian Heritage, and others, many of these programs are non-distinction based and not specifically designed or designated for Métis-related purposes, and ultimately not objectives expressly associated to reconcile with Métis. ***It is in the best interests of Canada that it designate programs and services, or parts thereof, as may be appropriate, as Métis-specific so as to be able to track success on the road to reconciliation with Métis peoples and treat Métis as distinct Section 35 rights-bearing peoples.***

Presently, Métis access a very small proportion of Canada’s resources set aside to deal with Aboriginal peoples, with almost the entire amount of such resources being devoted exclusively to First Nations and Inuit. For some Métis with whom I spoke, they feel like they are an after-thought in Canada’s consideration of Aboriginal issues generally. Nevertheless, given that Métis make up approximately one-third of all Aboriginal peoples in Canada, any serious attempt at reconciliation with Métis by Canada must include a comprehensive review and re-calibration of federal programs and services to ensure that Métis are being materially and equitably considered and recognized.

A number of Métis representatives raised concerns regarding the Urban Aboriginal Strategy (UAS). Between 2007 and 2013, the UAS allocated \$58.45 million in funding to 908 projects in 15 cities, supporting the participation of urban Aboriginal peoples in the economy. The UAS has been funded through to the end of 2016/17 and is managed by the National Association of Friendship Centres (NAFC). The UAS has laudable objectives focused on the practical needs of Aboriginal peoples in

Canada’s urban centres. The concerns raised were not directed towards the NAFC or indeed the services provided under the UAS. Rather, the concerns were related to the perception that Canada has referred to the UAS as a program benefitting Métis and involving Métis. The Métis with whom I met took great exception to this perception. They were careful not to be critical of the NAFC, but disagreed that the program should be seen as one focused on Métis issues, instead of more generic “Aboriginal urban” issues, of which Métis may be a component. There needs to be greater sensitivity to distinct needs and identity of Métis. It may be that the UAS is a valuable and important program initiative and one where Métis can and do add value, but it should not be held out as dealing expressly with the needs of Métis when the Métis fundamentally disagree with that proposition.

Overall, Métis view Canada’s Aboriginal Skills and Employment Training Strategy (ASETS) (Métis-operated in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia) and the Skills and Partnership Fund positively. However, funding levels for ASETS have not changed in 15 years despite significant population increases and inflation and there is a desperate need for increased funding to meet the need. A more Métis-specific approach to ASETS and for the fragmented approach to programs and services currently eligible to Métis is required. Canada’s Budget 2016 commitment of \$15 million over two years to initiate a pilot project to enhance training and community needs could be a useful starting point to renew and enhance the ASETS program.

Many of the programs presently available to Métis offered by INAC and Canada are framed under a general “Aboriginal” framework. Indeed, in many instances the use of the terms “non-status” and “Métis” are used together as if there was an automatic connection between the two groups. These terms should **not** be used together and Métis representatives stated repeatedly that the mixing of these two peoples is offensive and underscores a fundamental misunderstanding or misinformation regarding the nature of Métis as a distinct Aboriginal peoples under Section 35. There is a demonstrated need to re-examine federal Aboriginal representative programs to

ensure the program objectives enable a distinct focus on Métis as a distinct Aboriginal peoples in Canada, rather than being grouped in to general “Aboriginal” programming.

This is an **opportunity** for Canada to re-examine how it is spending its resources and whether such expenditures are fulfilling the objectives of reconciliation. In no way is this to suggest that Métis should, or even want, to be treated the same as with First Nations on the issue of programs and services. It is about **equitable** treatment of Métis as one of three Aboriginal peoples in Canada and to which the honour of the Crown fully applies. Canada has an opportunity to play a leadership role nationally to ensure that Métis get the “hand up” which they seek, and is ultimately good for the country as a whole.

**Recommendation No. 3** -----

*It is recommended that Canada review its existing policies, programs and services dealing with, or available to, Aboriginal peoples, or any of them, to ensure that Métis peoples and Section 35 Métis rights, are expressly and distinctly considered and be cognizant that any new Aboriginal-related policies, programs and services consider and, where appropriate, address Métis and their Section 35 rights distinctly and equitably.*

**Relationships with Canada and the Provinces**

Another central theme that emerged from the engagement process was a deep desire by Métis to have a better relationship with Canada and with the provinces. For the purpose of developing a Section 35 Métis rights framework, respectful and transparent relationships among **all** of the parties is essential.

In 1985 Canada established the Office of the Federal Interlocutor for Métis and non-Status Indians (OFI) with key objectives including to bring attention to Métis rights within the federal system and act as a key liaison between Métis and Canada. In 2004 OFI was transferred to INAC in an effort

to broaden INAC’s mandate beyond First Nations’ and Inuit issues and to be more inclusive of all Aboriginal peoples under one department. INAC’s name change in 2011 to Aboriginal Affairs and Northern Development Canada (from Indian Affairs and Northern Development) reflected the reality that INAC seeks to work with all of the Aboriginal peoples recognized by Section 35. In 2015 the name of INAC was changed again to its existing name Indigenous and Northern Affairs Canada. In 2012 INAC established a new branch (Aboriginal and External Relations) within the Policy and Strategic Direction sector to deal with relationships and funding agreements with Aboriginal representative organizations and is a focal point for Métis relations, along with relations with non-status Indians.<sup>50</sup> The Inuit Relations Secretariat deals with relations with Inuit within the Northern Affairs Organization Sector of INAC.

Métis and federal representatives repeatedly stated that the transition from OFI to INAC of responsibility for Métis-related matters did not go smoothly. Among many Métis was a sense that they fell between the cracks of INAC and, at times, have sensed an indifference to their issues. Given the minor role that Métis-specific programming presently plays and the over-whelming focus of INAC on First Nations and Inuit affairs, it is not at all surprising that INAC would struggle with a transition to becoming responsible for Métis matters, an issue that Canada has historically argued is not within Canada’s legislative responsibility. Daniels has since clarified that Métis and non-status Indians fall within the legislative authority of Parliament under Section 91(24).

During the engagement process, INAC demonstrated a genuine willingness to consider Métis matters and explore ways to improve INAC’s treatment of Métis-related issues. Métis-related issues need to be fully integrated into INAC’s activities, programs and policies, as appropriate. Métis are distinct and they should not necessarily be treated the same as First Nations on reserve, but there needs to be a greater understanding and inclusion of Métis-distinct issues.

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<sup>50</sup> The legal name of INAC remains the Department of Indian Affairs and Northern Development.

Within the federal system, INAC leads Métis issues which are exclusively managed from Headquarters in Ottawa, with the exception of INAC's Northwest Territories Regional Office. It was noteworthy that many of INAC's Regional Offices do not generally see Métis-related issues as a key part and, in some cases, any part of their day-to-day mandate. In speaking with a number of the Regional Offices, I was left with the impression that Métis-related issues were simply not part of their job, notwithstanding that INAC's name implies that all three enumerated Aboriginal peoples fall within their mandate. I heard frequently from Métis representatives that they wanted a working relationship with INAC's Regional Offices. I also heard from a number of the provinces that they too wanted a better relationship with INAC on Métis-related matters, including INAC's Regional Offices.

While there are invariably Métis issues of national scope, given the regional differences that exist generally in Canada, and specifically among Métis, it is essential that Canada have good on the ground relationships with Métis in the regions. This is in the public interest and will assist with the reconciliation process. To that end, Canada should ensure that its appropriate Regional Offices are provided the necessary tools and accountabilities to play a meaningful role in Canada's process for developing and implementing a Section 35 Métis rights framework.

#### **Recommendation No. 4** -----

*It is recommended that Canada ensure that INAC's Regional Offices have, as part of their mandate, responsibility for developing relationships with the appropriate Métis governments, institutions and organizations and provincial governments on Métis issues in their respective jurisdictions and ensure that INAC's Regional Offices are provided the necessary tools and accountabilities to play a meaningful role in Canada's development and implementation of a Section 35 Métis rights framework.*

MNC and a number of the Governing Members also expressed concern regarding the lack of a

dedicated office within INAC to deal with Canada's relationship with the Métis, including specifically dealing with their Section 35 rights and interests. INAC should ensure that there is a clearly identified senior office and senior official within INAC to deal exclusively with Métis-related matters on a whole-of-department basis and mandate.

#### **Recommendation No. 5** -----

*It is recommended that INAC ensure that there is a clearly identified senior office and senior official within INAC to deal exclusively with Métis-related matters with a whole-of-department mandate, including Métis Section 35 rights and interests.*

MNC also noted the frustration that it and its Governing Members and their respective institutions have with the present trend towards program-related funding rather than more block-type/government-to-government styled funding.

***In order for reconciliation to take hold and relationships to flourish, it is essential that Canada, and the provinces and territories as appropriate, have duly mandated, democratically elected and transparent Métis governments with whom to deal. Offering stable and predictable political and financial support to Métis governments is an important element of overall reconciliation, and should be considered as Canada progresses down the road of developing a Section 35 Métis rights framework. It is in all of our interests that Métis have distinct democratic representation as Section 35 rights-bearing peoples.***

Canada presently provides funding to the Governing Members, and the MNC and other institutions and organizations. The funding typically comes in the form of both core and project funding, with a trend in recent years to allocations being based on yearly applications and allocations for both forms of funding. There were many complaints and criticisms regarding this annual funding model, in terms of the processes being used to allocate funding, the focus of such allocations and the amounts being allocated. There was a strong desire expressed to move back to more "block-type" funding models — funding that at its

core has more flexibility and is more akin to a government-to-government relationship.

Even though the applications for funding are required prior to the fiscal year beginning, when such funding is finally approved (with such approval not occurring until the very fiscal year in which the funding was to flow), it is typically many months before funds would flow to the Métis government, institution or organization with some not receiving their funds until the end of the fiscal year in which the funding was to be applicable. Additionally, the restrictive nature of the funding and the overall lack of flexibility presents challenges to ensure that the funds were being used as efficiently and effectively as possible.

The uncertainty of funding on a year by year basis, the delays in receiving already approved funding, the onerous single-year application and approval processes, and lack of flexibility do not support or reward good governance. On the contrary, many of the governments and organizations engaged were in a state of not knowing from one year to the next whether they would be funded at all and, if so, to what extent, and even then continue to be unsure about when they would actually receive their funding. The public interest is not served by Métis governments and organizations not knowing with reasonable predictability if, and to what extent, they will be funded.

These comments are in no way to detract from the need for fully accountable and transparent use of public moneys. Institutions of governance or service delivery that are not stable or well-managed should not be treated the same as well-managed and transparent institutions of governance and service delivery. In order to move to a more flexible block funding arrangement, issues such as adequate capacity, appropriate financial and administrative controls and transparency must be in place and transparency and accountability between Métis governments and organizations and their respective constituents must be in place. This is an issue that some Métis governments and organizations will need to address. There is a gap between the objectives and goals of wanting

to develop positive working relationships and to further reconciliation and supporting good governance on the one hand, with the actual actions relating to how Métis governments and organizations have funding approved and received, on the other.

It is also in the public interest that reasonable, transparent, well-managed Métis governments, representative bodies and service delivery organizations be supported. It is in the public interest for Canada, and the provinces and territories as appropriate, to support stable, democratically elected Métis rights-based governments and institutions. However, how Canada presently provides funding is not always conducive to maintaining, encouraging and offering support to these governments and institutions, and can undermine the very purposes behind the funding.

Coherent, stable and credible Métis governance bodies to undertake Métis rights discussions with the Crown are necessary to move towards reconciliation and the lack of such good governance can be an impediment to implementing successfully any Section 35 Métis rights framework. It may be that in some jurisdictions there is more than one government or organization asserting representation of Métis interests. Of course these circumstances can be challenging but it does not mean or justify ignoring groups that may be *bona fide* representatives of a Section 35 Métis rights-bearing community. A case by case approach needs to be taken in these instances.

Finally, I note Canada's Budget 2016 commitment to provide an additional \$96 million over 5 years and \$10 million ongoing to Aboriginal representative organizations which could assist in promoting and enhancing Métis governance as discussed above.

**Recommendation No. 6** -----

*It is recommended that Canada review how it presently funds Métis governments, institutions and organizations and make such funding more stable, predictable, long-term and flexible and, in the case of Métis governments, consistent with a government-to-government relationship and the long term objective of supporting good governance.*

Another matter of relationships that was raised related to MNC's frustration with the lack of progress on implementing the renewed Métis Nation Protocol (originally signed in 2008, and extended for a further five year term in April 2013). The Protocol and its companion Governance and Financial Accountability Accord and the Métis Economic Development Accord (together the Protocol) cover an array of subjects including: economic development, Métis rights, governance, lands and resources, child and family services, housing, economic development, justice and policing, education and training. The Protocol contemplates both bilateral (among MNC and its Governing Members and Canada) and multilateral (adding the provinces from Ontario westward) discussions. The Protocol has the potential to be a significant instrument to improve relations between Canada and the MNC and its Governing Members and to further reconciliation. Canada should be clear with the MNC and its Governing Members regarding its willingness to implement and fund the Protocol and its companion accords, as appropriate. I note Canada's Budget 2016 Métis Nation Economic Development Strategy (\$25 million over 5 years to support Métis economic development).

**Recommendation No. 7** -----

*It is recommended that Canada discuss with MNC and its Governing Members the extent to which funding can be provided in a stable and timely manner to give effect to the Métis Nation Protocol and its companion Governance and Financial Accountability Accord and the Métis Economic Development Accord with MNC.*

Relationships among the Métis, the provinces and the Northwest Territories are also critical. In 2012 Canada disbanded the tripartite forums which provided a formal opportunity for federal/provincial/territorial/Métis dialogue to address a variety of issues including self-government discussions. The tripartite tables also provided leadership, expertise and capacity resources for the creation of several key provincial Métis institutions of governance, primarily because of the flexibility in approach to funding and the understanding that establishing and promoting capacity is an important aspect of the Crown-Métis relationship. Many of the present success stories relating to Métis governance, economic development and labour market initiatives, among others, can trace their roots back to the self-government devolved funding arrangements of the 1980s and early 1990s. Given the important role that the provinces and territories **must** play in meaningful reconciliation with Métis peoples, the need for this type of forum remains. I understand that Canada is in the process of reinstating tripartite tables in Ontario westward to British Columbia including involvement of Métis.

**Recommendation No. 8** -----

*It is recommended that Canada use multilateral forums as a mechanism to discuss Métis issues among the federal, provincial, territorial governments and Métis, as appropriate.*

## Reconciliation

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Throughout the engagement process the principle of reconciliation between Canada and Métis was raised as a pre-dominant objective of a Section 35 Métis rights framework. The principle of reconciliation is broad but simply put should be focused on settling past grievances with a plan to moving forward together collaboratively and in accordance with Canadian law. A Section 35 Métis rights framework can play an important role on the road to reconciliation.

Dealing with past legal claims and grievances is a central component to furthering reconciliation with Métis. The lack of existing processes and

structures to address Métis Section 35 rights claims and issues is apparent when discussing what is available presently to implement, by way of process, the MMF Decision's declaration against Canada, discussed further below. Absent clear direction, addressing Métis issues or claims outside of an express policy or framework cannot be expected or implied. INAC officials, while sometimes willing to take a flexible approach to policy interpretation, are reluctant to go beyond the clear parameters of their respective mandates, policies or procedures. Express policies relating to Métis claims and Section 35 rights-based issues are required to further reconciliation and clear dialogue.

Outside of litigation, Métis presently have no formal means to bring claims relating to Section 35 rights before Canada for consideration. The present Comprehensive Land Claims Policy deals with the issue of Aboriginal title that has not yet been addressed through treaty or other legal means. Likewise, the specific claims process is restricted to First Nations dealing with historical grievances relating to the fulfilment of treaties and the Crown's management of First Nations' reserve lands or other assets. The Special Claims Process has no established process for how Métis claims are to be addressed, thereby resulting in the need to seek specific Cabinet direction on a case-by-case basis. This adds a high degree of uncertainty, ambiguity, complexity and time, all without structure, as to whether such claims are viable for consideration.

Some of the examples provided of unresolved Métis claims (some federal and some provincial) include, the Métis land claim in North-West Saskatchewan, concerns regarding the Cold Lake Weapons Range and its effects on Métis harvesting activities, implementation of *Dominion Lands Act* related scrip commissions, Treaty 3 Adhesion, harm caused by the Federal Pasture Lands Policies where Métis communities in Manitoba and Saskatchewan were removed in the 1930s, and various claims against governments regarding the failure of the Crown to consult with Métis, among others. Addressing outstanding Métis claims is inextricably tied to a Section 35 Métis rights framework.

**Recommendation No. 9** -----

*It is recommended that Canada either amend its existing Comprehensive Land Claims and Specific Claims Policies, or develop a new policy, that expressly addresses Métis Section 35 rights claims and related issues, and that the basis for such amended policies or a new policy be founded on the legal principles of reconciliation and the honour of the Crown. It is also recommended that Canada should work with the appropriate provinces and territories to develop a joint process by which to address unresolved Métis Section 35 rights claims and related issues.*

Even though this Report is directed to Canada, those provinces and territories dealing with Métis issues should also consider adopting express policies and frameworks to deal with unresolved Section 35 Métis rights claims and related issues. Canada's leadership in developing a Section 35 Métis rights framework is commendable, but provincial and territorial leadership and initiative in this area is also **required** and, to the extent reasonably possible, Canada should be seeking to work together with the appropriate provinces and territories on consistent approaches to dealing with Métis Section 35 rights' matters.

Although Canada has an articulate consultation policy regarding Aboriginal peoples that expressly applies to Métis, it does not appear to be consistently applied to Métis.<sup>51</sup> Examples were provided to me of instances where Métis were, in some cases, not being consulted, including where lands being proposed for reserves could have an adverse effect on Métis Section 35 rights or interests. Depending on the region of Canada in which the addition to reserve was being contemplated, Métis were not being consulted.

While it can be difficult for governments to balance competing First Nation and Métis interests, difficulty by itself does not excuse

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<sup>51</sup> Canada, Indigenous and Northern Affairs Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, March 2011, at p. 11.

the need to adhere to the honour of the Crown which demands a full implementation of the Crown's obligations to **all** Aboriginal peoples under Section 35.

Acting honourably is essential for the Crown in all its dealings with Aboriginal peoples and the implementation of the honour of the Crown must not be interpreted narrowly or technically.<sup>52</sup> Section 35 is to be interpreted using the “purposive approach” set out by the SCC<sup>53</sup> which also supports the application of the Crown's duty to consult Aboriginal peoples to Métis peoples. Any process aimed at achieving reconciliation with Métis must expressly deal with the principle of the honour of the Crown which, in part, manifests itself in the Crown's duty to consult Aboriginal peoples.

#### **Recommendation No. 10** -----

*It is recommended that Canada conduct a review of its policies and practices associated with the Crown's duty to consult Aboriginal peoples to ensure that such policies and practices are being fully implemented with respect to Métis in accordance with Canadian law.*

#### **Recommendation No. 11** -----

*It is recommended that Canada pursue consultation agreements, similar to the agreement signed with MNO, with the other Governing Members of the MNC and the Métis Settlements General Council, and Métis not otherwise represented by these governments as may be appropriate, to promote greater certainty relating to consultation and further the goal of reconciliation.*

Finally, on the issue of Métis membership and registries, a number of Métis Registries underscored the need to ensure that Métis applicants not also be on the Indian Registry, for obvious reasons. However, presently those Métis who are on the Indian Registry cannot have their names removed, even though they do not consider themselves to be “Indian” as that term is used in the *Indian Act*. INAC confirmed that under the present legal regime it is unable to remove a Métis person from the Indian Registry.

This policy must change. It is offensive for any Canadian not to be in control of how they are identified. In this case, Métis individuals cannot be placed on a Métis Registry until they are removed from the Indian Registry. Canada should immediately initiate the process to amend the *Indian Act* to allow those individuals who do not identify with being Indian as being able to have their names removed from the Indian Registry in an efficient manner.

#### **Recommendation No. 12** -----

*It is recommended that Canada immediately initiate the process to amend the Indian Act to allow those individuals who are Métis and who do not identify with being Indian as being able to have their names removed from the Indian Registry in an efficient manner.*

A number of the Métis Registries noted that they must check the Indian Registry as part of the Métis application procedure to ensure that a Métis applicant is not a registered Indian. Presently, checking for Métis applicants names on the Indian Registry is not part of the formal duties of Indian Registry officials. This has meant that practically when the Indian Registry is busy or has other pressing matters, the checking of Métis applicants on the Indian Registry is not a priority and has resulted in some instances in significant delays. INAC should review its procedures regarding requests from the Métis Registries to check for the names of Métis applicants to ensure a reasonable, timely and efficient approach to such requests.

52 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, at para. 24.

53 The use of the purposive approach in Charter interpretation was endorsed in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344: The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in light of the interests it was meant to protect.

The SCC in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1106 held that “[t]he nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.”

**Recommendation No. 13** -----

*It is recommended that INAC review its procedures regarding requests from the Métis Registries to check for the names of Métis applicants to ensure a reasonable, timely and efficient approach to such requests.*

A key component to reconciliation is addressing matters of symbolic importance. One such example that struck me was in Batoche, Saskatchewan. While in Batoche attending the Back to Batoche Days celebration in July 2015, I also visited the mass gravesite of fallen Métis fighters of the North-West Resistance at the Batoche Historical Site which is an impressive and historically significant site. It is disturbing that Métis must pay an admittance fee to get into the very historical site where their ancestors perished defending their rights and way of life. This is something that Canada should correct.

**Recommendation No. 14** -----

*It is recommended that Canada change its policy that presently requires Métis to pay to enter the Batoche Historical Site.*

It is clear from the law to date that there is no hierarchy of Aboriginal rights within Section 35. Métis are a distinct Aboriginal peoples with equal but unique Aboriginal rights as other Section 35 Aboriginal peoples. There is no question that balancing rights *within* Section 35 is a challenging proposition. However, simply because something is challenging cannot be a reason for ignoring the rights of one peoples over another and is inconsistent with the honour of the Crown and Section 35 more generally.

During the course of the engagement process, it became clear that there is a need for Métis and First Nations' rights holders to reconcile their interests and rights and to assist the Crown in its burden of balancing competing interests in a fair, reasonable and transparent manner. If reconciliation is to be achieved, all parties, governments (federal, provincial and territorial), all Aboriginal peoples, and non-Aboriginal peoples must take ownership over their own actions and the ultimate goal of reconciliation.

This reality represents another *opportunity* for Canada to lead on the issue of reconciliation among Aboriginal peoples, and will be an important factor in the development and implementation of a Section 35 Métis rights framework given that reconciliation is the ultimate objective of the exercise. The provinces and territories also have a role to play in this important initiative. Central to such an initiative would be to provide the necessary tools for Aboriginal peoples to work out disputes **among them and by them**, ultimately benefitting all Canadians.

**Recommendation No. 15** -----

*It is recommended that Canada put in place resources, and explore possible mechanisms, to facilitate, in appropriate circumstances, mutual dialogue among all three Aboriginal peoples to further the objectives of reconciliation. It is also recommended that Canada invite provinces and territories to also participate in making such resources available and exploring possible mechanisms for reconciliation among Aboriginal peoples.*

A Section 35 Métis rights framework can be an important step along the broader road to reconciliation Canada desires with Métis under Section 35 and more generally.

## **Section 35 Métis Rights Framework**

The majority of submissions received during the engagement process dealt with macro-Section 35 rights issues and dealt little with the actual process related to framing a federal Section 35 Métis rights framework. Submissions were made regarding the importance of harvesting rights (hunting, trapping, gathering, fishing), the Crown's duty to consult and its application to Métis, and the potential role of the United Nations Declaration on the Rights of Indigenous Peoples as providing a framework for future interactions between the Crown and Métis. On this last point, in terms of legally protecting within domestic law the rights of Indigenous peoples, Canada is among very few nation-states globally that have actually fettered the power of the state in their domestic constitutions to protect Indigenous

rights and, in the case of Canada, these protected rights include Métis rights. In this respect, Canada's constitutional and legal regime relating to the protection of Aboriginal and treaty rights at law is unique and unparalleled.

To assist Canada as part of its dialogue relating to a new framework for addressing Section 35 rights generally, Canada released *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*.<sup>54</sup> Although dealing with Aboriginal rights generally and comprehensive claims, this document included basic principles relating to Section 35 generally. Canada's *Statement of Principles on the Federal Approach to Modern Treaty Implementation*<sup>55</sup> and the principles contained in that document is a helpful example of general principles that can be applied. In this respect, a document outlining general principles regarding Section 35 Métis rights and Canada's general approach would assist Canada and the Métis in their further discussions as Canada develops a Section 35 Métis rights framework. Of course, such a document would be interim as it ultimately should reflect, in part, what flows from Canada's engagement with Métis.

Such a discussion document could be used to initiate a discussion on governance issues of concern to both Canada and Métis, including what new or modified forms of governance could look like, how democratic, representative and transparent governments can be established, and how Métis governments could exist outside of more traditional land-based models. Also, issues such as how Métis governments can represent Section 35 Métis rights holders and related consultation representation, protection and maintenance of Métis culture and heritage, Métis-specific programs and services that enhance existing programs and services, management of Section 35 Métis rights, operation of *Powley*-compliant Métis registries and overall democratic political

representation regarding Métis-specific political interests, could all form the basis of a useful discussion among the appropriate representatives from Canada and the Métis.

The types of principles in such an interim document should be unassailable and fundamental in nature. The following principles are set out for consideration by Canada as part of its process to develop a Section 35 Métis rights framework:

- + Métis are a unique and distinct rights-bearing Aboriginal peoples and are one of three recognized Aboriginal peoples identified in Subsection 35(2) of the *Constitution Act, 1982* whose rights are recognized and affirmed in Section 35.
- + Métis rights are protected equally along with First Nations (Indian) and Inuit Section 35 rights.
- + Reconciliation with all three Aboriginal peoples is a fundamental objective of Section 35.
- + Reconciliation with, and among, Aboriginal peoples is a central component of Canadian nation-building and is an on-going process.
- + The Crown as a whole, federal and provincial, is accountable for its obligations to Métis as Section 35 rights-bearing Aboriginal peoples.
- + Consistent with the honour of the Crown and achieving meaningful reconciliation with Métis, Canada takes a whole-of-government approach to Métis Section 35 rights and related issues.
- + All governments, federal, provincial and territorial, must play a role in reconciliation with Métis peoples.
- + There is no hierarchy of Aboriginal rights within Section 35. Métis are a distinct Aboriginal peoples with equal but unique Aboriginal rights as other Section 35 Aboriginal peoples.
- + The constitutional principle of the honour of the Crown is a guiding principle for the Crown in its relationship with Métis peoples.

54 Canada, Indigenous and Northern Affairs Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, (September 2014).

55 Canada, Indigenous and Northern Affairs Canada, *Statement of Principles on the Federal Approach to Modern Treaty Implementation*, (July 2015).

- + Canada recognizes the unique role that Métis peoples have played, and continue to play, in the development and creation of Canada.
- + The Crown has a duty to consult and, where appropriate, accommodate Métis peoples when the Crown contemplates conduct that might adversely affect potential or established Section 35 rights.

Given the importance of reconciliation with Canada's Aboriginal peoples, Canada's engagement with Métis on a Section 35 Métis rights framework should be initiated as soon as reasonably possible.

### Proposed Process

The engagement process undertaken for the Mandate was intentionally broad so as to ensure a wide range of views were heard and considered. Any engagement by Canada towards a Section 35 Métis rights framework should also be broad and inclusive so as to ensure a full range of views are heard on any such framework. This means in practice of ensuring that engagement occurs beyond the Governing Members and the MNC and include Métis institutions and organizations that want to be heard. Additionally, this means broadening the invitation for engagement to include **all** organizations that purport to represent Métis, without determining whether they actually represent Métis coming within the meaning of Section 35.

The focus should be on a fair, broad and transparent engagement **process** that will lead to a Section 35 Métis rights framework, keeping in mind that the likely **application** of any such framework will be **narrower** assuming it is focused on Métis coming within the meaning of Section 35 and *Powley*. The process of engagement also need not take a singular form but rather be tailored as appropriate to meet the needs of Canada and the respective Métis government, organization or institution being engaged.

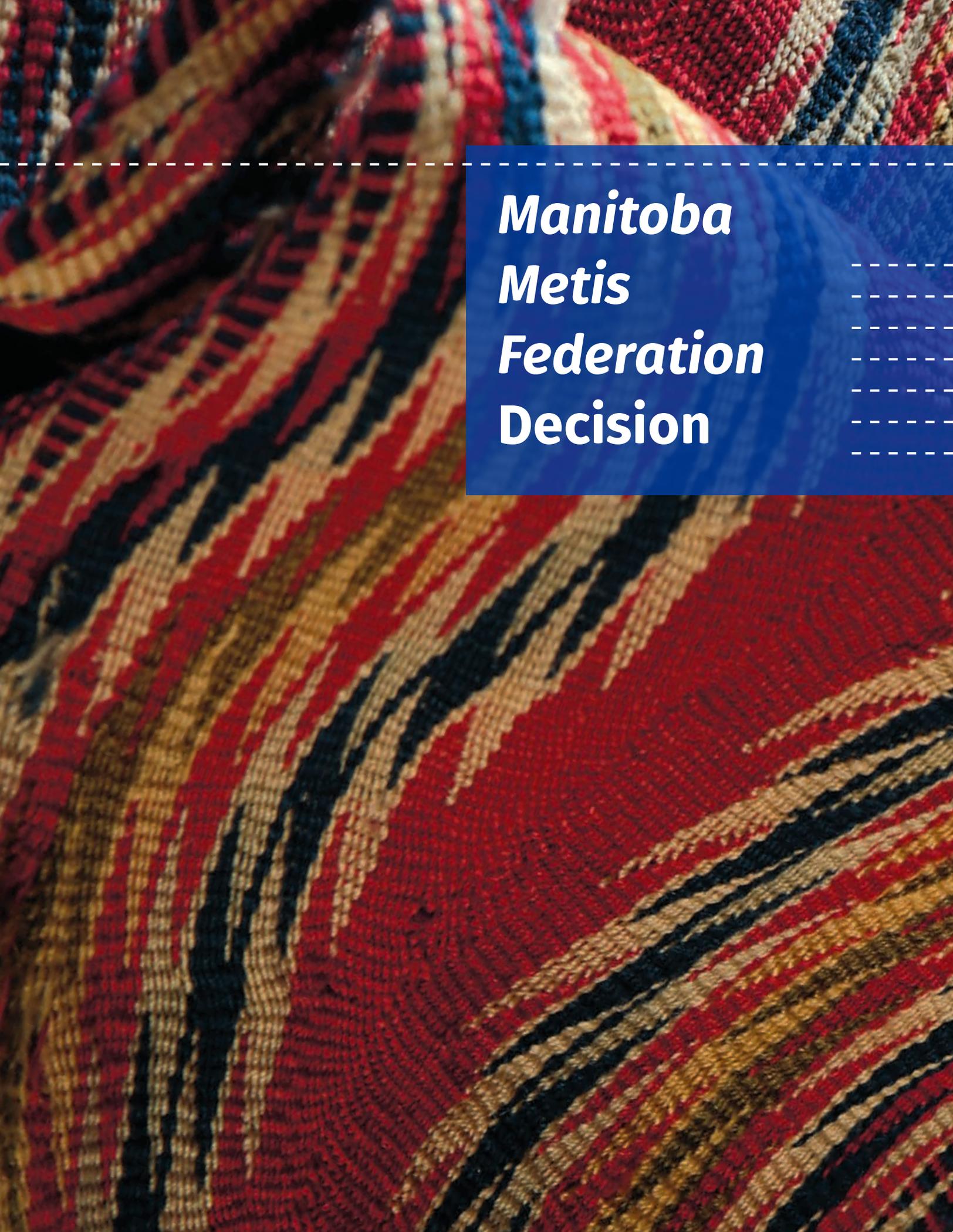
The governments, institutions, and organizations listed in Appendix B of this Report should be a starting point for invitations by Canada to engage on the development of a Section 35 Métis rights framework.

#### Recommendation No. 16 -----

*It is recommended that Canada, with INAC taking the lead role, engage with Métis on developing a Section 35 Métis rights framework in whatever fora appropriate and should take a flexible approach to ensure a reasonable, transparent and broad engagement. The MNC and its Governing Members, along with the Métis Settlements and the Métis Settlements General Council should be core to any federal engagement on these matters.*

*It is also recommended that Canada invite participation from all those who hold themselves out as representing Métis to participate, including those Métis governments, institutions and organizations set out in Appendix B of this Report. Canada should also engage the provinces and territories on a Section 35 Métis rights framework and to seek to develop a cooperative and coordinated approach to Métis and their constitutionally protected rights.*

*It is further recommended that Canada develop a discussion document for its engagement with Métis regarding basic principles to initiate a discussion of a Section 35 Métis rights framework and consider the principles set out in the Report for inclusion in such discussion document. Canada should undertake its Section 35 Métis rights framework process as soon as possible.*



***Manitoba  
Metis  
Federation  
Decision***

# Manitoba Metis Federation Decision

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## Introduction

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The Mandate also required a consideration of ways to advance reconciliation with Métis in Manitoba and more specifically in respect of the MMF Decision. The use of the term “reconciliation” is important in that it underscores a fundamental objective of Canada — doing that which is reasonable and consistent with the honour of the Crown to reconcile with Métis regarding the MMF Decision. This task means dealing directly with the declaration issued by the SCC in the MMF Decision which states: “That the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.”(MMF Declaration)<sup>56</sup>

Before discussing what was heard during the engagement process from the MMF regarding the MMF Decision and the MMF Declaration, it is important to understand the fundamental tenets of the MMF Decision and its significance in Canadian law.

## MMF Decision

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In 1981, the MMF sought a declaration that the lands they and their children were promised in section 31 of the *Manitoba Act, 1870* were not provided in accordance with the Crown’s special trust-like relationship with Aboriginal peoples. The Manitoba Court of Queen’s Bench held that although there were delays based on government errors and inaction to the allotment of land to Métis under section 31, this did not amount to a breach of the Crown’s fiduciary duty or to the honour of the Crown, and denied all aspects of the MMF’s claim.<sup>57</sup> On further appeal, the Manitoba Court of Appeal also refused to issue a declaration against the Crown.<sup>58</sup>

The SCC allowed an appeal by the MMF and granted a declaration confirming that Canada implemented section 31 of the *Manitoba Act, 1870* in a manner that breached the honour of the Crown: “That the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.”<sup>59</sup>

The MMF Decision is a significant victory for the MMF and Métis elsewhere in Canada. It is also a significant decision in terms of the scope and protection offered by Section 35 and the principle of the honour of the Crown more generally to all Aboriginal peoples.

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<sup>56</sup> MMF Decision, at para. 154.

<sup>57</sup> 2007 MBQB 293.

<sup>58</sup> 2010 MBCA 71.

<sup>59</sup> MMF Decision, at para. 154.

Importantly, the SCC confirmed that the MMF was the appropriate body to bring forward the “collective Métis interest” regarding the claim.<sup>60</sup> The SCC found that the words of section 31 of the *Manitoba Act*, and the evidence presented, do not establish a pre-existing Métis Aboriginal title, and therefore, with respect to both sections 31 and 32 (dealing with the settlement of title for Métis and non-Métis) of the *Manitoba Act, 1870*, Canada was not under a fiduciary duty regarding the administration of the Métis children’s lands and their allocation.<sup>61</sup>

The SCC confirmed that the record left no doubt that the honour of the Crown was engaged regarding the section 31 land rights and stated that such rights were a “solemn obligation” and “treaty-like” in nature.<sup>62</sup> Therefore, section 31 was a constitutional obligation to Métis, whereas section 32 was held not to engage the honour of the Crown because it was also available to non-Aboriginal peoples.<sup>63</sup> The SCC concluded that the Crown breached the honour of the Crown regarding the implementation of section 31 vis-à-vis Métis:

We conclude that, viewing the conduct of the Crown in its entirety and in the context of the situation, including the need for prompt implementation, the Crown acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. Canada’s argument that, in some cases, the delay secured better prices for Métis who sold is undermined by evidence that many Métis sold potential interests for too little, and, in any event, it does not absolve the Crown of failure to act as its honour required. The delay in completing the s. 31 distribution was inconsistent with the behaviour demanded by the honour of the Crown.

The honour of the Crown did not demand that the grant lands be made inalienable. However, the facts on the ground, known to all, made it all the more important to complete the allotment without delay and, in the interim,

to advise Métis of what holdings they would receive. By 1874, in their recommendations as to how the allotment process should be carried out, both Codd and Lieutenant Governor Alexander Morris implicitly recognized that delay was encouraging sales at lower prices; nevertheless, allotment would not be complete for six more years. Until allotments were known and completed, delay inconsistent with the honour of the Crown was perpetuating a situation where children were receiving artificially diminished value for their land grants.

We conclude that the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention inconsistent with the honour of the Crown that typified the s. 31 grants.

Given the finding at trial that the grant was intended to benefit the individual children, not establish a Métis land base, we accept that random selection within each parish was an acceptable way to distribute the land consistent with the purpose of the s. 31 obligation. This said, the delay in distributing land, and the consequential sales prior to patent, may well have made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

***The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in “the most effectual and equitable manner”. Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.*** [Emphasis added.]<sup>64</sup>

60 MMF Decision, at para. 44.

61 *Ibid.* at paras. 59, 64.

62 *Ibid.* at paras. 91, 92.

63 *Ibid.* at para. 95.

64 *Ibid.* at paras. 110, 117, 123, 127–128.

The honour of the Crown was invoked when implementing section 31 and the Crown did not meet its obligations in respect thereof. The SCC's reference that the Métis were seeking declaratory relief to assist them in "extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation"<sup>65</sup> is notable. The process Canada is seeking with the MMF flowing from the MMF Decision is bound up in the need for "extra-judicial negotiations", a theme the SCC has focused on in other decisions relating to Section 35 as being an important element of reconciliation.

The SCC also confirmed its role as a guardian of the Constitution and that reconciliation must weigh heavily in any interpretation regarding constitutional principles:

What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. ***The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import.*** The courts are the guardians of the Constitution and, as in *Ravndahl and Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. ***The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72. [Emphasis added.]<sup>66</sup>

***The MMF Declaration is directly tied to the "unfinished business of reconciliation" with the Métis and this is more than simply a political or constitutional imperative. It is ultimately founded in legal principles and the rule of law. This is the fundamental basis for Canada implementing the MMF Declaration and engage with the MMF on this matter.***

65 *Ibid.* at para. 137.

66 *Ibid.* at para. 140.

## Discussion

The SCC stated that the claims made by Métis in the MMF Decision were collective in nature and not claims for individual relief. The SCC described the relief being sought as declaratory relief "for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada."<sup>67</sup> The claim made was collective in nature and the SCC stated that the collective claim "merits allowing **the body** representing the collective Métis interest to come before the court. We would grant the MMF standing." [Emphasis added.]<sup>68</sup>

There can be no doubt that based on the SCC's statements in the MMF Decision, that the MMF represents Métis in Manitoba and can forthrightly represent Métis interests in respect of any discussions or negotiations relating to the implementation of the MMF Declaration.

Notwithstanding the SCC's guidance on this point, I heard from others in Manitoba that the Manitoba Métis are a collective entity and that the MMF does not speak for all Métis in Manitoba and all Métis Section 35 rights holders should be a part of any reconciliation process. The SCC was clear in terms of MMF's standing and it flows that Canada should focus its efforts in terms of addressing the MMF Declaration on the MMF, but **not** to the exclusion of other Métis in Manitoba that are not represented by the MMF. Canada and Manitoba should see the MMF as clearly a core representative government for Métis in Manitoba, consistent with the SCC's direction, but not necessarily the only body that can represent Métis interests in Manitoba. The clarity provided by the SCC should be seen positively and should give comfort to Manitoba and to Canada in dealing with the MMF as a duly constituted SCC-recognized Métis representative body.

67 *Ibid.* at para. 44. The Manitoba Provincial Court in *R. v. Goodon*, 2008 MBPC 58, at para. 52 referred to the MMF as the "governing body" of the Métis in Manitoba.

68 *Ibid.*

Given the uncertain role of Manitoba at this point, it may be that lands available for any potential agreement with MMF are limited. In this context Canada should take a flexible approach to ensure that the ultimate objective of any potential agreement with MMF results in a meaningful agreement consistent with, at minimum, the nature of the MMF Declaration. For example, such flexibility could result in more focus on financial or revenue streams as opposed to out-right land grants, obviously depending on what the parties agree should be included in any potential agreement.

The MMF stated that it prefers a settlement process relating to the MMF Declaration that occurs in advance of, and separate from, any Section 35 Métis rights framework process. Given that the MMF Declaration flows directly from the SCC in 2013, there is no apparent reason or requirement to link any MMF Decision discussions to a Section 35 Métis rights framework process.

The MMF put forward a comprehensive set of matters that, in its view, should assist in developing a framework for negotiations with Canada, and Manitoba to the extent Manitoba is involved, including:

- + Financial support for negotiations
- + Subject matters for negotiation:
  - beneficiaries
  - compensation and settlement trust
  - self-government
  - lands
  - financial issues (financial transfer agreement; tax sharing arrangements; capital transfer)
  - wildlife and fishing
  - subsurface rights
  - environmental management
  - management of settlement assets
  - programs
  - trans-boundary claims
  - shared territories and overlapping claims
  - dispute resolution
  - certainty-related issues and
  - incremental approaches/measures to a settlement.
 (together the “MMF Matters for Negotiation”)

## Proposed Process

While the MMF Matters for Negotiation look similar to an outline for negotiation of a comprehensive claims settlement, the Comprehensive Land Claims Policy, Specific Claims Policy or the Special Claims Policy are not appropriate or designed to implement a declaratory judgement of the SCC. The MMF Declaration is not a claim. The MMF Declaration is also not the settlement of litigation. The litigation is complete. The MMF Declaration is about the implementation of declaratory relief from the highest court in Canada, and more broadly about implementing in practical terms the honour of the Crown and achieving reconciliation with the Métis of Manitoba. ***This is an important step in the overall objective of reconciliation and one upon which Canada should act immediately without any further delay.***

Considering the constitutional magnitude of the MMF Decision and MMF Declaration, the discussions and negotiations that should flow from the MMF Declaration should be treated as the implementation of a declaratory judgement on the basis of the honour of the Crown and the objective of pursuing reconciliation with Métis in Manitoba.

While MMF may be the key negotiating body for Métis in Manitoba, it is essential that any negotiations be transparent and that there be adequate consultation with all Métis in Manitoba in respect of any negotiations and ultimate agreement(s), including L'Union nationale Métisse de St-Joseph du Manitoba. Additionally, Canada and the MMF should consider the extent to which, if any, consultation should occur with the descendants of Métis children who have left Manitoba. Ultimately, this is a discussion regarding who should be the reasonable beneficiaries of any potential agreement between Canada and MMF. It will be a benefit to Canada **and** Manitoba that the outstanding matters underlying the MMF Declaration be settled with the Métis of Manitoba in a fair, transparent, timely and reasonable manner.

Canada and the MMF, and to the extent possible Manitoba, should engage *immediately* in discussions to negotiate a framework agreement to guide their negotiations. Given the passage of time since the MMF Decision in 2013, every effort should be made by Canada to engage with the MMF expeditiously to give effect to the MMF Declaration in a timely manner.

Given the importance of these issues to Manitoba, Manitoba should be a party to the process contemplated herein. Manitoba could play a positive role in an historically significant process. If Manitoba chooses not to be involved in this important exercise of reconciliation with the Métis of its province, this should not be used as a reason by Canada to delay the process moving forward, albeit unfortunately in such circumstances with likely fewer options given the lack of provincial participation. The honour of the Crown and the spirit of the MMF Declaration demand this matter be treated seriously and in a timely manner by Canada and, if possible, Manitoba.

**Recommendation No. 17** -----

*It is recommended that Canada immediately engage with the MMF to establish a framework agreement for good faith negotiations to give effect to the MMF Declaration and to restore the honour of the Crown in respect thereof as soon as possible. The framework agreement should be framed around the concept of reconciliation and should consider issues such as the schedule for negotiations, subject matters to be discussed, including full consideration of the MMF Matters for Negotiation, potential interim measures, reasonable funding for MMF to participate in the negotiations, the process of negotiations, including ratification, and address the need for broader consultation among Métis not represented by the MMF in Manitoba.*

*It is also recommended that Canada and the MMF invite Manitoba to participate in these negotiations.*



# Concluding Comments

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# Concluding Comments

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**Throughout the engagement process, it was evident that Métis have and will continue to play a significant role in Canada’s development and continued prosperity. Métis are a distinct Aboriginal peoples with a unique history and culture and possess Section 35 rights.**

There is a significant degree of variability in how provinces and territories are managing Métis issues generally, including Métis Section 35 rights. This necessitates a flexible but consistent federal policy approach to addressing Section 35 Métis rights matters. The lack of consistency across the country on Métis-related matters provides an opportunity for Canada to lead on, but not take sole ownership of, Métis rights’ matters generally. The provinces and territories, as appropriate, have an important role to play as well.

Canada’s initiative of developing a Section 35 Métis rights framework and pursuing the implementation of the MMF Decision and Declaration are timely and necessary steps in moving further down the road of reconciliation with Métis peoples.

It is my hope that this Report will assist not only Canada, but the MNC, its Governing Members, the Métis Settlements and the Métis Settlements General Council and other Métis, and the provinces and territories on moving forward with a collective vision that results in Métis being fully incorporated into the constitutional and national fabric of Canada in a manner that benefits us all.

## Appendix A / Consolidated List of Recommendations

### Recommendation No. 1

It is recommended that Canada immediately establish a program(s) to educate federal employees involved with Aboriginal-related matters about the history of Métis, Métis contributions to Canada, existing federal initiatives relating to Métis, Métis culture and traditions and Canadian law relating to Métis and their Section 35 rights.

### Recommendation No. 2

It is recommended that Canada, in a timely manner, develop and implement a predictable, long-term and stable funding regime to support the ongoing operation of the Métis Registries (as defined) consistent with the Powley test set out by the Supreme Court of Canada.

It is also recommended that Canada take the lead in engaging with appropriate provinces and territories to determine the extent to which they can support the Métis Registries.

It is further recommended that Canada should continue to contribute to historical research data collection relating to Métis history to facilitate the identification of Métis within the meaning of Section 35.

### Recommendation No. 3

It is recommended that Canada review its existing policies, programs and services dealing with, or available to, Aboriginal peoples, or any of them, to ensure that Métis peoples and Section 35 Métis rights, are expressly and distinctly considered and be cognizant that any new Aboriginal-related policies, programs and services consider and, where appropriate, address Métis and their Section 35 rights distinctly and equitably.

### Recommendation No. 4

It is recommended that Canada ensure that INAC's Regional Offices have, as part of their mandate, responsibility for developing relationships with the appropriate Métis governments, institutions and organizations and provincial governments on Métis issues in their respective jurisdictions and ensure that INAC's Regional Offices are provided the necessary tools and accountabilities to play a meaningful role in Canada's development and implementation of a Section 35 Métis rights framework.

### Recommendation No. 5

It is recommended that INAC ensure that there is a clearly identified senior office and senior official within INAC to deal exclusively with Métis-related matters with a whole-of-department mandate, including Métis Section 35 rights and interests.

### Recommendation No. 6

It is recommended that Canada review how it presently funds Métis governments, institutions and organizations and make such funding more stable, predictable, long-term and flexible and, in the case of Métis governments, consistent with a government-to-government relationship and the long term objective of supporting good governance.

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**Recommendation No. 7**

It is recommended that Canada discuss with MNC and its Governing Members the extent to which funding can be provided in a stable and timely manner to give effect to the Métis Nation Protocol and its companion Governance and Financial Accountability Accord and the Métis Economic Development Accord with MNC.

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**Recommendation No. 8**

It is recommended that Canada use multilateral forums as a mechanism to discuss Métis issues among the federal, provincial, territorial governments and Métis, as appropriate.

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**Recommendation No. 9**

It is recommended that Canada either amend its existing Comprehensive Land Claims and Specific Claims Policies, or develop a new policy, that expressly addresses Métis Section 35 rights claims and related issues, and that the basis for such amended policies or a new policy be founded on the legal principles of reconciliation and the honour of the Crown. It is also recommended that Canada should work with the appropriate provinces and territories to develop a joint process by which to address unresolved Métis Section 35 rights claims and related issues.

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**Recommendation No. 10**

It is recommended that Canada conduct a review of its policies and practices associated with the Crown's duty to consult Aboriginal peoples to ensure that such policies and practices are being fully implemented with respect to Métis in accordance with Canadian law.

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**Recommendation No. 11**

It is recommended that Canada pursue consultation agreements, similar to the agreement signed with MNO, with the other Governing Members of the MNC and the Métis Settlements General Council, and Métis not otherwise represented by these governments as may be appropriate, to promote greater certainty relating to consultation and further the goal of reconciliation.

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**Recommendation No. 12**

It is recommended that Canada immediately initiate the process to amend the *Indian Act* to allow those individuals who are Métis and who do not identify with being Indian as being able to have their names removed from the Indian Registry in an efficient manner.

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**Recommendation No. 13**

It is recommended that INAC review its procedures regarding requests from the Métis Registries to check for the names of Métis applicants to ensure a reasonable, timely and efficient approach to such requests.

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**Recommendation No. 14**

It is recommended that Canada change its policy that presently requires Métis to pay to enter the Batoche Historical Site.

**Recommendation No. 15**

It is recommended that Canada put in place resources, and explore possible mechanisms, to facilitate, in appropriate circumstances, mutual dialogue among all three Aboriginal peoples to further the objectives of reconciliation. It is also recommended that Canada invite provinces and territories to also participate in making such resources available and exploring possible mechanisms for reconciliation among Aboriginal peoples.

**Recommendation No. 16**

It is recommended that Canada, with INAC taking the lead role, engage with Métis on *developing* a Section 35 Métis rights framework in whatever fora appropriate and should take a flexible approach to ensure a reasonable, transparent and broad engagement. The MNC and its Governing Members, along with the Métis Settlements and the Métis Settlements General Council should be core to any federal engagement on these matters.

It is also recommended that Canada invite participation from all those who hold themselves out as representing Métis to participate, including those Métis governments, institutions and organizations set out in Appendix B of this Report. Canada should also engage the provinces and territories on a Section 35 Métis rights framework and to seek to develop a cooperative and coordinated approach to Métis and their constitutionally protected rights.

It is further recommended that Canada develop a discussion document for its engagement with Métis regarding basic principles to initiate a discussion of a Section 35 Métis rights framework and consider the principles set out in the Report for inclusion in such discussion document. Canada should undertake its Section 35 Métis rights framework process as soon as possible.

**Recommendation No. 17**

It is recommended that Canada immediately engage with the MMF to establish a framework agreement for good faith negotiations to give effect to the MMF Declaration and to restore the honour of the Crown in respect thereof as soon as possible. The framework agreement should be framed around the concept of reconciliation and should consider issues such as the schedule for negotiations, subject matters to be discussed, including full consideration of the MMF Matters for Negotiation, potential interim measures, reasonable funding for MMF to participate in the negotiations, the process of negotiations, including ratification, and address the need for broader consultation among Métis not represented by the MMF in Manitoba.

It is also recommended that Canada and the MMF invite Manitoba to participate in these negotiations.

## Appendix B / List of Governments, Organizations and Individuals Engaged

Métis National Council	Eastern Woodland Métis Nation	Capt. (Ret.) Donald M. Fowler, CD
Métis Nation of Ontario	Sou'West Nova Métis Council	Professor Frank Tough
Manitoba Metis Federation	Tribe of the Anishinabek Solutrean Métis	Province of Ontario
Métis Nation – Saskatchewan	Kineepik Métis Local Inc. (#9)	Province of Manitoba
Métis Nation of Alberta	Kelly Lake Métis Settlement Society	Province of Saskatchewan
Métis Settlements General Council	Aseniwuche Winewak Nation	Province of Alberta
Métis Settlements Appeal Tribunal	Apeetogosan (Métis) Development Inc.	Province of British Columbia
Métis Nation of British Columbia	Louis Riel Institute	Government of the Northwest Territories
Northwest Territory Métis Nation	Gabriel Dumont Institute	Canadian Métis Council - Intertribal
Congress of Aboriginal Peoples/ Indigenous Peoples' Assembly of Canada	Rupertsland Institute	INAC Senior Management, and numerous other headquarters' officials
L'Union nationale Métisse de St-Joseph du Manitoba	Métis Child, Family and Community Services (Manitoba)	INAC Regional Offices in Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and Northwest Territories
British Columbia Métis Federation	Clarence Campeau Fund	
North Slave Métis Alliance	SaskMétis Economic Development Corporation	
Historic Saugeen Métis	Métis Addictions Council of Saskatchewan	Various Government of Canada departments and agencies including, Natural Resources Canada, Justice, Privy Council Office, Canadian Heritage, Employment and Social Development Canada, Fisheries and Oceans Canada, Parks Canada
Red Sky Métis Independent Nation	Jason Madden	
Ontario Congress of Aboriginal Peoples/Ontario Métis and Aboriginal Association	Jean Teillet, IPC	
Jachfish Métis Community	Tony Belcourt, OC	
Métis Federation of Canada	Paul Chartrand, IPC	
	Professor Larry Chartrand	

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