



MÉTIS RIGHTS UPDATE

2015-2016



MÉTIS RIGHTS UPDATE

Métis Nation of Alberta Annual General Assembly Métis Rights Update August 2016

This past year we have seen some exciting changes and developments - both provincially and nationally - that we hope will lead to significant progress and new mandates and negotiations on Métis rights and outstanding claims here in Alberta.

From the election of the Liberal party as the new federal Government and commitments identified in their "Métis Policy Platform" to the historic Supreme Court of Canada ruling in Daniels v. Canada to the report by Canada's Ministerial Special Representative on Métis Section 35 Rights which pioneers groundbreaking recommendations, we have many exciting and new opportunities available to us that we must seize on in order to advance our Métis rights agenda.

In order to be successful though, we must work - together. The MNA is the government of the Métis Nation in Alberta and has the clear mandate to deal with outstanding Métis rights and claims for all Métis in this province. Our Locals, Regions and Provincial Council must work together to effectively represent all Alberta Métis. We are one Métis Nation - one Métis people. We must advance our rights on that basis. And, we will, by working - together.

This document has been developed to provide the MNA Annual General Assembly with an update on what has happened over the last year with respect to Métis rights, what the MNA is currently working on with respect to Métis rights and what is on the horizon for the remainder of 2016 and 2017.



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SECTION 1

The Liberal Party Campaign Platform





ADVANCING AND ACHIEVING, RECONCILIATION FOR THE MÉTIS NATION

The Métis are one of this country's three constitutionally-recognized Indigenous Peoples. Over the last several years, courts have repeatedly recognized that Métis communities possess Aboriginal rights protected by s. 35 of the *Constitution Act, 1982*, and that certain Métis communities have outstanding claims with the Crown.

The unique rights and claims of the Métis Nation require the federal government – in collaboration with Métis people, the provinces, and territories – to meaningfully engage, negotiate, and reach just and lasting settlements with Métis communities. This is essential to how reconciliation will be meaningfully advanced and achieved with the Métis Nation.

A Liberal government will:

- Immediately establish a negotiations process between Canada and the Manitoba Métis Federation in order to settle the outstanding land claim of the Manitoba Métis community, as recognized by the Supreme Court of Canada in *Manitoba Métis Federation v. Canada (AG)*.

- Work with Métis people, as well as the provinces and territories, to establish a federal claims process that sets out a framework to address Métis rights

protected by s. 35 of the *Constitution Act, 1982*, recognize Métis self-government, and resolve outstanding Métis claims against the Crown.

- Convert current year-to-year funding – made available to provincial Métis communities for Métis identification and registration – into a permanent initiative. This will provide an ongoing and reliable base of funding for these groups to undertake this important work of identifying Métis rights-holders.

**IMPROVING MÉTIS
QUALITY OF LIFE
REQUIRES DISTINCT
AND INNOVATIVE
APPROACHES, AND
REAL PARTNERSHIP
WITH THE MÉTIS
NATION, AS WELL AS
THE PROVINCES AND
TERRITORIES.**

Strengthening economic outcomes and opportunities

Métis individuals and communities face unique socio-economic issues and challenges based on their

ADVANCING AND ACHIEVING RECONCILIATION FOR THE MÉTIS NATION

distinct histories, geographies, and on-the-ground realities. Improving Métis quality of life requires distinct and innovative approaches, and real partnership with Métis people, as well as the provinces and territories. A Liberal government is committed to working with these partners to achieve results for Métis children, youth, families, and communities.

A Liberal government will:

- Undertake a collaborative review, in partnership with Métis communities, of existing federal programs and services available to the Métis Nation, to identify gaps and areas where strategic investments are needed in order to improve Métis quality of life.
- Renew the Aboriginal Strategic Employment and Training Strategy (ASETS), including the continuation of nation-to-nation and distinctions-based approaches. These respect the unique realities of First Nations, Inuit, and the Métis Nation, in the delivery of these programs and services to their communities. We will also expand ASETS funding by \$50 million per year.
- Work with Métis communities and existing Métis financial institutions to develop a Métis Economic Development Strategy that identifies strategic federal investments that can be made to enhance Métis entrepreneurship, as well as Métis participation in business development and economic growth. We will also provide \$25 million over five years to implement this new strategy.
- Fulfill the commitment in the Kelowna Accord to enhance existing scholarships and bursaries available to Métis students, at various colleges and universities across Canada, in partnership with the Métis Nation.



SECTION 2

United Nations Declaration on the Rights of
Indigenous Peoples (UNDRIP)





Premier of Alberta

Office of the Premier, 307 Legislature Building, Edmonton, Alberta, Canada T5K 2B6

July 7, 2015

Colleagues,

As you know, our government is committed to renewing and improving our relationship with Indigenous peoples. We intend to work with Indigenous peoples as true partners to ensure that:

- Their constitutional rights are protected;
- The air, land and water that they, and all our communities, rely on is protected; and
- They can build more prosperous, self-reliant and culturally strong communities.

The United Nations *Declaration on the Rights of Indigenous Peoples* speaks to Indigenous people's basic human rights, language, equality, land and their right to control their own lives. At its heart, the UN Declaration encourages all of us to celebrate and preserve Indigenous cultures and traditions and to work alongside Indigenous people to ensure they are participating in decisions that concern them.

In considering the objectives of the UN Declaration, our approach will be based on the principle that the bounty of Alberta's resources must be shared by all Albertans. Our task will be to engage directly with Indigenous people to find a common and practical understanding of how the principles of the UN Declaration can be implemented in a way that is consistent with our Constitution and with Alberta law.

I expect that the most challenging part of the discussion will be related to land and resources. Many Indigenous people in Alberta are directly employed in or indirectly benefitting from Alberta's resource-driven economy. They don't want to stop resource development, but, like all Albertans, do want to ensure the air, land and water are protected so their children and grandchildren can continue to enjoy the land. I believe there is balance to be found here, working in partnership with Indigenous people so they are able to participate in a more meaningful way, and therefore benefit from, the development of natural resources in the province and the preservation and conservation of the environment.

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The UN Declaration is broad-reaching and has the potential to impact how we work with Indigenous people in a myriad of ways. This is why I am asking you now, as Cabinet Ministers, to conduct a review, including budget implications, of your Ministry's policies, programs and legislation that may require changes based on the principles of the UN Declaration. I look forward also to hearing about programs and initiatives already under way that speak to the promise of the UN Declaration.

As you move forward in this analysis, you will need to work closely with Indigenous leaders. The anticipated establishment of engagement tables with each of the three Treaty areas could be the vehicles for this engagement later in the fall. Engagement with the Metis Nation of Alberta Association and the Metis Settlements General Council must also occur. I have asked the Minister of Aboriginal Relations to coordinate your submissions and bring them forward for our consideration.

There is some truly good work already happening throughout the province that reflects some of the objectives of the UN Declaration. For example, we are working hard to help return sacred ceremonial objects from across the world to Indigenous communities in Alberta where they belong. We prohibit discrimination in employment on the basis of race or ancestry. We are introducing mandatory education for all our students in the histories and cultures of Indigenous people, including residential schools. And, Alberta is also the only province to have established Metis governments and Metis lands.

These are just a few examples of things we are doing. But there is more we can, and will, do.

I look forward to seeing the results of your review and your ideas for implementation by February 1, 2016 so we can chart a path forward together with Indigenous people on this journey of reconciliation.

Sincerely,



Rachel Notley
Premier of Alberta

Métis Nation of Alberta

United Nations Declaration on the Rights of Indigenous People (UNDRIP) Implementation Analysis in Relation to the Recognition and Respect for Métis Rights in Alberta

In January 2016, the MNA submitted a report to the provincial government titled *Directives for the Implementation of the United Nations Declaration on the Rights of Indigenous People*. Drawing on legal expertise from our Lawyer Jason Madden of Pape Salter Teillet LLP, the report offers recommendations to advance Métis rights in Alberta.

The intent of the analysis that follows is to:

(1) Establish the parameters to determine the relevance, efficiency and effect of the Government of Alberta’s current approach to recognition and respect for Métis rights in consideration of Constitutional provision and the United Declaration of Rights of Indigenous People.

(2) Provide remedial directives to the Government of Alberta to ensure the rights, recognition and respect of Métis rights are consistent with the law.

UNDRIP	DOMESTIC LAW	ALBERTA’S APPROACH	REMEDIAL DIRECTIVE
Recognition and Respect of the Métis as an Indigenous People			
<p>The United Nations has recognized the Métis as one of Canada’s Indigenous peoples within the meaning of UNDRIP:</p> <p>“Over 1.4 million of Canada’s overall population of approximately 32.9 million (4.3 per cent) are indigenous, or in the terminology commonly used in Canada, aboriginal. Around half of these are registered or “status” Indians (First Nations), 30 per cent are Métis, 15 per cent are unregistered First Nations, and 4 per cent are Inuit.” (James Anaya, Report of the Special Rapporteur on Indigenous Issues: the situation of indigenous peoples in Canada (July 4, 2014) at para. 2)</p>	<p>“In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.” (Constitution Act, 1982, s. 35(2))</p> <p>“The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.” (R. v. Powley, [2003] 2 SCR 207 at para. 13)</p> <p>“This meant dealing with the indigenous peoples who were living in the western territories. On the prairies, these consisted mainly of two groups -- the First Nations, and the ... Métis.” (Manitoba Métis Federation Inc. v. Canada, [2013] 1 SCR 623 at para. 2)</p>	<p>Métis rights currently receive insufficient formal acknowledgment and recognition from the government of Alberta, including, a lack of concrete Metis-specific rights affirmation measures or policies, limiting language in MNA-Alberta Framework Agreement, etc.</p>	<p>The Government of Alberta and the MNA will ensure recognition and respect for Métis rights.</p>
<p>“States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.” (UNDRIP, art. 15(2))</p>	<p>“The constitutional amendments of 1982 [...] signal that the time has finally come for recognition of the Métis as a unique and distinct people.” (Alberta v. Cunningham, [2011] 2 SCR 670 at para. 70)</p>	<p>Alberta has various initiatives available for the recognition of First Nations’ rights and the enhancement of First Nations’ communities, including the First Nations consultation policy, the First Nations Development Grant Program, etc. Treatment of Métis by government of Alberta is not on par with its treatment of the provinces other indigenous people, First Nations.</p>	<p>The Government of Alberta will work with the MNA to guarantee that Métis benefit from equivalent recognition and support as First Nations.</p>

UNDRIP

DOMESTIC LAW

ALBERTA'S APPROACH

REMEDIAL DIRECTIVE

Recognition of the MNA as Authorized Representative of the Métis Nation in Alberta for Purposes of Section 35 Métis Rights and Consultations

"Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." (UNDRIP, art. 3)

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." (UNDRIP, art. 4)

Métis organizations incorporated under provincial legislation have been recognized as the appropriate groups for advancing Métis collective claims: "...the appellants advance a collective claim of the Métis people, based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. This collective claim merits allowing the body representing the collective Métis interest to come before the Court. We would grant the MMF standing." (Manitoba Métis Federation Inc. v. Canada, [2013] 1 SCR 623 at para. 44)

"Anyone becoming a member of the LMN should be deemed to know they were authorizing the LMN to deal on their behalf to pursue the objects of the LMN, including those set out in the preamble to its articles of association. This is sufficient authorization to entitle the LMN to bring the suit to enforce the duty to consult in the present case." (Labrador Métis v. Newfoundland, 2007 NLCA 75 at para. 47)

Presently, the MNA-Alberta Framework and the Alberta government's policies do not recognize the MNA's authorization by over 30,000 Métis in the province to individually and collectively represent them. This authorization is set out in the MNA Bylaws wherein individuals voluntarily mandate the MNA for the following:

"1.2 To stand as the political representative of all Métis in Alberta and to promote self-determination and self-government for Métis in Alberta and Canada;

"1.3 To promote, pursue and defend aboriginal, legal, constitutional, and other rights of Métis in Alberta and Canada;

"1.4 Re-establish land and resources bases;" (MNA By-laws)

Further, the MNA has been the representative of the Métis Nation in Alberta since 1928, has a decades long working relationship with the Alberta government and is the only Métis representative body in Alberta to received federal funding for Métis registration; yet, it is still diminished as a mere "association" and not recognized as a legitimate representative in relation to dealing with collectively-held Métis rights, interests and claims.

The Government of Alberta and the MNA will renegotiate the Framework Agreement to include full acknowledgment of the MNA's role and responsibility as the authorized representative of Métis Nation in Alberta for the purpose of Métis rights, interests and claims.

"Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." (UNDRIP, art. 18)

"Indigenous peoples have the right to determine the responsibilities of individuals to their communities." (UNDRIP, art. 35)

"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" (Behn v. Moulton Contracting Ltd., [2013] 2 SCR 227 at para. 30)

"...the Crown should respect the position of the aboriginal groups and engage with them at the level requested by the groups themselves." (Jack Woodward, Native Law, loose-leaf 2015-Rel. 7 (Toronto: Carswell, 1994) at 5§1580)

Recognition of the Regional Nature and Full Geographic Extent of Rights-Bearing Métis Communities in Alberta

Alberta's present approach does not extend recognition to the MNA, its Regions, and Locals as representatives of Alberta's rights-bearing Métis communities for the purposes of consultations.

The Government of Alberta and the MNA will negotiate an agreeable Métis consultation policy.

UNDRIP	DOMESTIC LAW	ALBERTA'S APPROACH	REMEDIAL DIRECTIVE
Recognition of the Regional Nature and Full Geographic Extent of Rights-Bearing Métis Communities in Alberta			
<p>"Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." (UNDRIP, art. 26 (1))</p> <p>"States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." (UNDRIP, art. 26 (3))</p>	<p>"I conclude that the historical rights bearing communities of the plains Métis are best considered as regional in nature, as opposed to settlement-based." (R. v. Hirsekorn, 2013 ABCA 242, para. 63)</p> <p>"The evidence has shown that an historical Métis community existed in the region of what is present day Edmonton and district. This group of North Saskatchewan Métis included the settlements of Fort Edmonton, St. Albert, Lac St. Anne, Victoria, Lac La Biche, and Rocky Mountain House. The Métis people in this region had a distinctive collective identity, lived together in the same geographical area and shared a common way of life." (R. v. Hirsekorn, 2010 ABPC 385, para. 115)</p> <p>"The Métis communities outside the Colony included Lac-la-Biche, Peace River, Saint-Albert and Slave Lake, which were well-established and dynamic" (Caron v. Alberta, 2015 SCC 56, para. 210)</p>	<p>Alberta recognizes Métis rights on a settlement-by-settlement basis, rather than on a regional basis. (Métis Harvesting Policy, p. 2)</p> <p>Alberta fails to recognize that the rights bearing Métis communities in the province include specific locations identified by trial judge in Hirsekorn: Edmonton, St. Albert, Victoria, Rocky Mountain House. (Métis Harvesting Policy, p. 2)</p> <p>While Alberta's current Métis Harvesting Policy states, "In the absence of a more definitive description of a community's historical harvesting area, Alberta presently considers a harvesting area to comprise the area within 160 kilometres of a community" (Métis Harvesting Policy, p. 2), there is presently no process in place by which Alberta and the MNA can collaborate to arrive at mutually acceptable description of the historical harvesting areas of Alberta's regional Métis Communities.</p>	<p>The Government of Alberta and the MNA will develop and engage in a mutually agreeable process of negotiation on Métis harvesting.</p> <p>The Government of Alberta and the MNA will develop a negotiation framework to achieve consensus on the identification of rights-bearing Métis communities and the harvesting areas/traditional territories of those communities.</p>
Recognition of the MNA's Role in Community Acceptance in the Identification of Métis Harvesters			
<p>"Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right." (UNDRIP, art. 9)</p> <p>"Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live." (UNDRIP, art. 33(1))</p>	<p>"In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance." (R. v. Powley, [2003] 2 SCR 207 at para. 30)</p> <p>"It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community." (R. v. Powley, [2003] 2 SCR 207 at para. 34)</p> <p>"...the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself." (Tsilhqot'in Nation v. BC, 2012 BCCA 285 at para. 149 rev'd in 2014 SCC 44 but not on this point)</p>	<p>Alberta's Métis harvesting policy provides no role for the MNA in the determination of whether an individual is a member of a contemporary Métis community. (Métis Harvesting Policy, p. 2)</p> <p>The MNA membership is consistent with Powley, standardized, and objectively verifiable.</p> <p>In contrast to the Métis Settlements, membership in the MNA requires evidence of historic Métis Nation ancestry, not just general Aboriginal ancestry.</p>	<p>The Government of Alberta will meaningfully recognize the role of the MNA and recognition of the significance of MNA's objectively verifiable membership registry in the process of determining Métis rights holders.</p>

UNDRIP	DOMESTIC LAW	ALBERTA'S APPROACH	REMEDIAL DIRECTIVE
<p>"Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures." (UNDRIP, art. 33(2))</p> <p>"Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration." (UNDRIP, art. 39)</p>	<p>"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." (R. v. Powley, [2003] 2 SCR 207 at para. 29)</p> <p>"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." (R. v. Powley, [2003] 2 SCR 207 at para. 49)</p>	<p>The MNA receives capacity funding to support its standardized and objectively verifiable membership registry from Canada, but not Alberta.</p>	<p>The Government of Alberta will recognize the MNA Registry as the system for Métis identification and verification of rights holders in the Province of Alberta and provide capacity to support it as such.</p>
Crown Consultation and Accommodation Obligations owing to Rights-Bearing Métis Communities			
<p>"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." (UNDRIP, art. 19)</p> <p>"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." (UNDRIP, art. 32(2))</p>	<p>"Logically, there is also, of course, a duty to consult rights-bearing Métis communities concerning government decisions that affect constitutional Métis rights." (Dwight Newman, Revisiting the Duty to Consult Aboriginal Peoples (Saskatoon: Purich, 2014) at 66)</p> <p>"Since s. 35 protects the rights of First Nations, Métis and Inuit peoples, the Crown's duty to consult and accommodate applies vis-à-vis all of these peoples." (Jack Woodward, Native Law, loose-leaf 2015-Rel. 7 (Toronto: Carswell, 1994) at 5§1500)</p>	<p>Alberta has no formal policy recognizing the need to consult with Métis, and provides industry with no guidance regarding how such consultations ought to be carried out.</p>	<p>The Government of Alberta and the MNA will develop a mutually agreeable provincial Métis consultation policy.</p>
<p>"Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration." (UNDRIP, art. 39)</p>	<p>"It must be born in mind that it is a significant challenge for aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation." (tt Gwet'in First Nation v. British Columbia 2007 BCSC 1700 at para. 1138 rev'd in 2014 SCC 44 but not on this point)</p>	<p>Alberta provides the MNA, its Regions, and Locals with no core capacity funding for consultations.</p>	<p>The Government of Alberta will engage the MNA in negotiations relative to a mutually acceptable capacity funding arrangement in support of Métis consultations.</p>

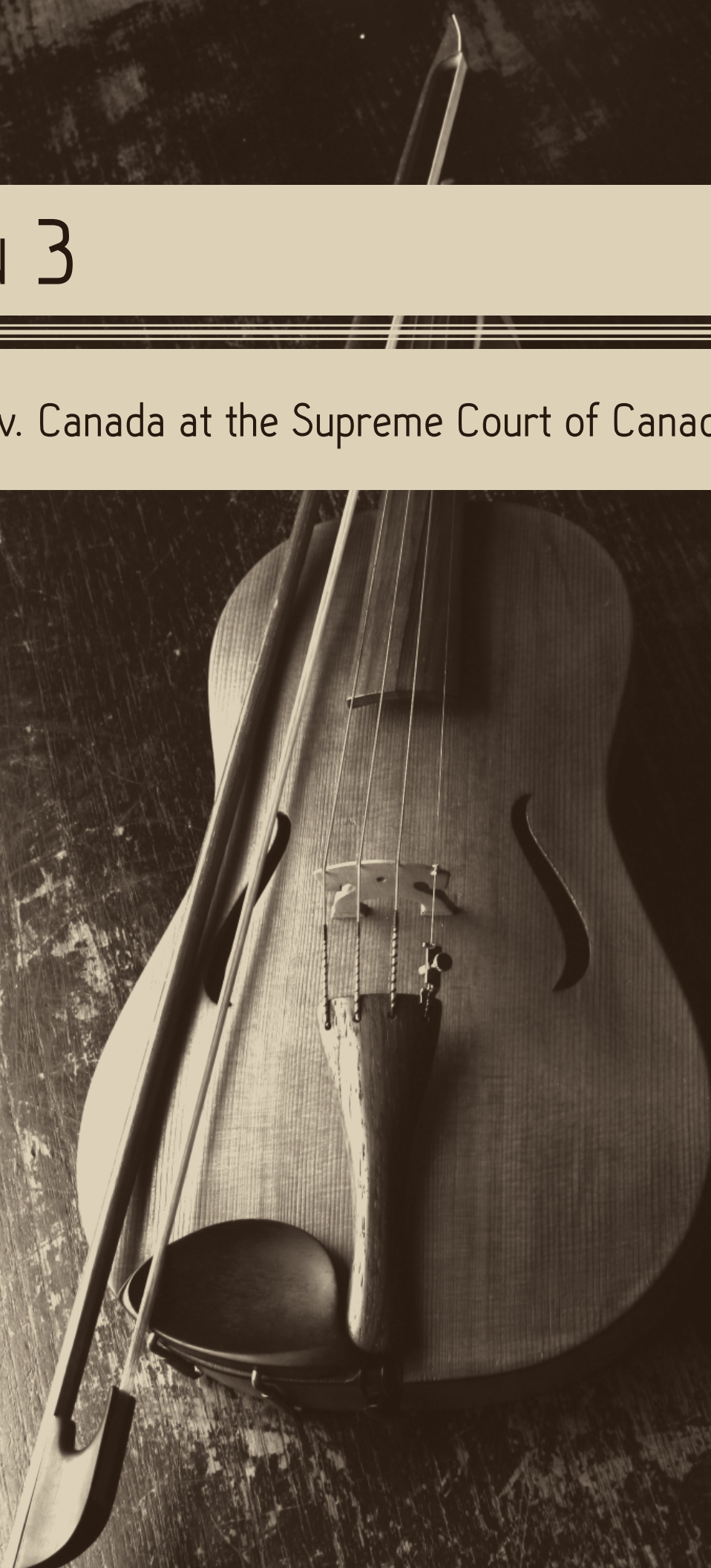
UNDRIP	DOMESTIC LAW	ALBERTA'S APPROACH	REMEDIAL DIRECTIVE
	<p>It is reasonable for Aboriginal groups to request funding to support of consultation processes. (See, for example, <i>Wabauskang First Nation v. Minister of Northern Development and Mines et al</i>, 2014 ONSC 4424 at para. 232; <i>Ka'A'Gee Tu First Nation v. Canada (Attorney General)</i>, 2012 FC 297, para. 112)</p>		
Negotiations to Address Métis Rights, Claims, and Interests and Achieve Meaningful Reconciliation			
<p>"States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process." (UNDRIP, art. 27)</p>	<p>"The honour of the Crown requires that these [Aboriginal] rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation." (<i>Haida Nation v. British Columbia</i>, [2004] 3 SCR 511 at para. 25)</p> <p>"...[T]he history of scrip speculation and devaluation is a sorry chapter in our nation's history..." (<i>R. v. Blais</i>, [2003] 2 SCR 236 at para. 34). The claims of the Métis Nation in Alberta in relation to the federal Crown's failure to implement scrip in a manner that fulfilled its underlying promise remain unresolved.</p> <p>Canada should develop a reconciliation process to support the exercise of Métis section 35(1) rights and to reconcile their interests. (Douglas Eyford, <i>A New Direction: Advancing Aboriginal and Treaty Rights</i> (April, 2015)</p> <p>"We will work with Métis people, as well as the provinces and territories, to establish a federal claims process that recognizes Métis self-government and resolves outstanding claims." (Federal Liberal Party Election Platform)</p>	<p>There is at present no process of negotiations to resolve the outstanding claims and interests of the Métis Nation in Alberta and to achieve appropriate and meaningful recognition of Métis self-government.</p>	<p>The Government of Alberta and the Métis Nation of Alberta will engage the Government of to resolve outstanding claims and appropriate and meaningful recognition of Métis self-government through an appropriate and relevant negotiation process.</p>
<p>"Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security."</p>	<p>"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." (<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i>, [2005] 3 SCR 388 at para. 1)</p>	<p>Métis in Alberta fall below non-Aboriginal Albertans in relation to a number of socio-economic indicators, including health, and education.</p>	<p>The Government of Alberta will ensure each Ministry formalizes Agreements with the MNA to improve socio-economic wellbeing.</p> <p>Actions to be taken to address the aforementioned socio-economic disparities are set out in more detail in Appendix B Remedial Directives- By Government of Alberta Ministry attached hereto.</p>

UNDRIP	DOMESTIC LAW	ALBERTA'S APPROACH	REMEDIAL DIRECTIVE
<p>“States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.” (UNDRIP, art. 21)</p> <p>“Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.” (UNDRIP, art. 23)</p> <p>“Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning...</p> <p>“States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.” (UNDRIP, art. 14)</p>	<p>“The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import.” (Manitoba Métis Federation Inc. v. Canada (Attorney General), [2013] 1 SCR 623 at p. 140)</p>		

UNDRIP	DOMESTIC LAW	ALBERTA'S APPROACH	REMEDIAL DIRECTIVE
Protection for Significant Métis Sites and Material Culture			
<p>"Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.</p> <p>"States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned." (UNDRIP, art. 12)</p>		<p>Alberta has legislation that enables the repatriation of First Nations' sacred ceremonial objects (First Nations Sacred Ceremonial Objects Repatriation Act, RSA, c F-14). Alberta has no similar legislation enabling the repatriation of sacred Métis objects.</p> <p>Alberta identifies "Aboriginal traditional use sites of an historic resource nature" generically, without indicating whether they are First Nations or Métis.</p> <p>Consultations regarding potential impacts on identified Aboriginal heritage resources are conducted according to the Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development. (Alberta Culture & Community Spirit, Listing of Historic Resources: Instructions for Use, p. 5)</p> <p>Alberta has no policy and provides no formal guidance regarding consultations with Métis concerning heritage resources</p>	<p>The Government of Alberta will negotiate appropriate legislation with the MNA to ensure repatriation of ceremonial sacred objects to Métis- as it does with First Nations.</p> <p>The Government of Alberta and MNA will negotiate a mutually agreeable policy to guide the identification of heritage sites of significance to the Métis and to guide consultations with Métis regarding heritage resources.</p>

SECTION 3

Daniels v. Canada at the Supreme Court of Canada



“Another Chapter in the Pursuit of Reconciliation and Redress...”

A Summary of *Daniels v. Canada* at the Supreme Court of Canada

About This Document

This is a summary of the Supreme Court of Canada’s decision in *Daniels v. Canada*, 2016 SCC 12 (“*Daniels*”). It has been prepared for the Métis National Council (“MNC”) and its Governing Members. It is not legal advice and should not be relied on as such. It does not necessarily represent the views of the MNC or its Governing Members.

Who Was Involved in the Case?

The representative plaintiffs were well-known Métis leader Harry Daniels (now deceased), Gabriel Daniels (Harry’s son), Leah Gardner (a non-status Indian from Ontario), Terry Joudrey (a non-status Mi’kmaq from Nova Scotia) and the Congress of Aboriginal Peoples (the “Plaintiffs”). The case was filed against the federal government as represented by the Minister of Indian Affairs and Northern Development (“Canada”).

At the Supreme Court of Canada, the MNC, Métis Settlements General Council and Gift Lake Métis Settlement intervened on behalf of the Métis Nation. Groups such as the Assembly of First Nations and Chiefs of Ontario amongst others intervened on behalf of First Nations and non-status Indians. Alberta and Saskatchewan also intervened.

What Did the Plaintiffs Ask For?

The Plaintiffs asked for three judicial declarations:

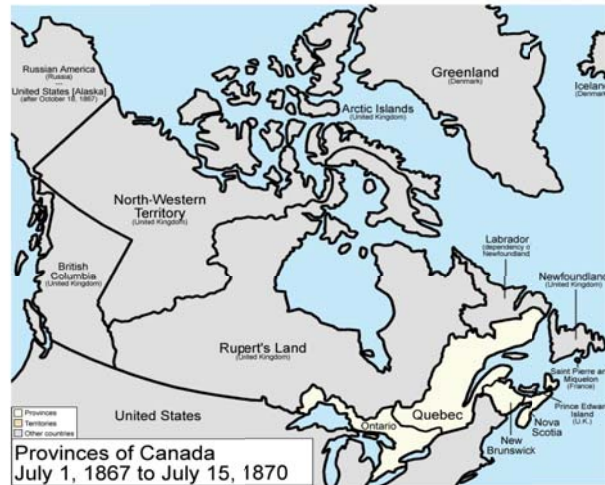
1. that Métis and non-status Indians are in s. 91(24) of the *Constitution Act, 1867*;
2. that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and
3. that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice.

A declaration is a common court remedy in Aboriginal claims cases. A court declares the law in relation to a dispute between government and Aboriginal peoples. The parties are then expected to change their behavior to be consistent with the law.

What the Supreme Court Said

What is Section 91(24) of the *Constitution Act, 1867*?

In 1867, when Canada was created—as a new country—various “jurisdictions” were divided up between Parliament and provincial legislatures. Parliament was assigned “exclusive Legislative Authority” for “Indians, and Land reserved for the Indians” through s. 91(24) of the *Constitution Act, 1867*. This jurisdiction was assigned to Canada to achieve “the broader goals of Confederation,” which included expansion into Rupert’s Land and the North-Western Territory as well as building a national railway to British Columbia (para. 25).



“The Métis Nation was ... crucial in ushering in western and northern Canada into Confederation and in increasing the wealth of the Canadian nation by opening up the prairies to agriculture and settlement. These developments could not have occurred without Métis intercession and legal presence.”

— *Daniels*, para. 16 (citing Professor John Borrows)

Section 91(24) provided Parliament, and, by extension, the federal government, the “authority over *all* Aboriginal peoples” in order to facilitate the “westward expansion of the Dominion” (para. 25). This expansion was advanced through Canada’s treaty making, agreements and alliances with the diverse Aboriginal populations it encountered. These “relationships” with Aboriginal groups allowed the federal government to “protect the railway from attack” and to smooth the way for settlement (para. 25).

The “Indians” in s. 91(24) included *all* of the Aboriginal peoples within Canada in 1867 as well as those to be encountered as the country expanded (para. 46). Notably, in the “western territories,” the Aboriginal peoples encountered included various Indian tribes, bands, etc. (*i.e.*, First Nations) as well as the Métis (*i.e.*, the Métis Nation) (para. 16; see also *Manitoba Metis Federation v. Canada*, para. 2). Both of these groups—First Nations and Metis—were considered “Indians” within s. 91(24) because they were indigenous to the territory and necessary “partners in Confederation” (para. 37).

In modern times, s. 91(24) continues to be about advancing Parliament’s “relationship with all of Canada’s Aboriginal peoples,” thereby making “reconciliation with *all* of Canada’s Aboriginal peoples is Parliament’s goal” (paras. 36-37). The Court notes, however, that s. 91(24)’s “relationship” function plays a “very different constitutional purpose” than s. 35 (paras. 37, 49) as explained further below.

Why Does Inclusion in Section 91(24) Matter to Métis and Non-Status Indians?

The Court held that uncertainty about whether Métis and non-status Indians are in s. 91(24) has left them in a “jurisdictional wasteland with significant and obvious disadvantaging consequences.” The Court upheld the Trial Judge’s findings that the “political football—buck passing” tactics of governments towards these groups had “produced a large population of collaterally damaged” people (para. 14). While inclusion in s. 91(24) doesn’t create a duty on to legislate, the granting of a declaration that these groups are included in s. 91(24) provides them with “certainty and accountability” about “where to turn for policy redress” and has an “undeniable salutary benefit” (paras. 15, 50).

“With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo.”

— *Daniels*, para. 15

Why Non-Status Indians Are Included in Section 91(24)

At the hearing of the appeal, Canada conceded that non-status Indians are in s. 91(24). The Court noted that Canada’s concession was not determinative, so answering the legal question still had practical utility. **As such, a declaration that non-status Indians are in s. 91(24) was issued (paras. 20, 50).** The Court also noted that since *all* Aboriginal peoples are in s. 91(24) (and non-status Indians are included within those peoples) any “definitional ambiguities” about who non-status Indians are did not preclude a judicial determination that they are in s. 91(24) as a starting point (para. 19) with specifics to be “decided on a case-by-basis in the future” (para. 47).

Why Métis Are Included in Section 91(24)

In order to achieve its expansionist goals, Canada needed to facilitate positive “relationships” with the large and diverse Aboriginal population it encountered. This included dealing with the Métis—as “Indians” under s. 91(24)—both prior to and post Confederation. **As such, the Court issued a declaration that the Métis are included in s. 91(24) (para. 50).** In order to support its conclusion, the Court noted:

- Métis were considered “Indians” for the purposes of pre-Confederation treaties such as the Robinson Treaties of 1850 (para. 24).
- Many post-Confederation statutes considered Métis to be “Indians” (para. 24), including an amendment to the *Indian Act* in 1894 to include “Halfbreeds” in liquor prohibitions (para. 27).
- Canada’s jurisdiction needed to be broad enough to include the Métis because they posed a real threat to the country’s “expansionist agenda” (paras. 25-26).
- The “Métis Nation was ... crucial in ushering western and northern Canada into Confederation ... These developments could not have occurred without Métis intercession and legal presence” (para. 26).

- Although applied haphazardly, the federal government's residential school policy encompassed Métis, including establishing a federally funded industrial school at Saint-Paul-des-Métis in Alberta (paras. 28-30).
- In the early 20th Century, the federal government continued to be willing to recognize Métis as "Indians" whenever it was convenient to do so, including, the issuance of Métis scrip and moving Métis in and out of treaties and the *Indian Act* (paras. 31-32).
- In 1980, a federal Cabinet document acknowledged that "Métis people ... are presently in the same legal position as other Indians who signed land cession treaties" and those Métis who received scrip are still "Indians" within the meaning of s. 91(24) (para. 33).

The Court held that the term "Indians" in s. 91(24) could be equated to the way we use the term "Aboriginal" today (*i.e.*, it includes all the Aboriginal peoples in s. 35). It also noted that it would be strange for the Métis to be excluded from s. 91(24), while all other Aboriginal peoples enumerated in s. 35 were included (para. 35).

The Court distinguished its decision in *R. v. Blais* where it held Métis were not included as "Indians" in Manitoba's *Natural Resources Transfer Agreement, 1930*. It noted that *Blais* was about whether Métis were included in a specific constitutional agreement, while this case was about jurisdiction in the Constitution (paras. 44-45).

"The [1982] constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, ... all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal"

Daniels, para. 37

Métis Inclusion as Section 91(24) "Indians" Does Not Compromise Métis Distinctiveness

Since the term "Indians" in s. 91(24) includes all of the Aboriginal peoples recognized in s. 35, the Court emphasized that Métis inclusion in s. 91(24) does not undermine Métis distinctiveness—as a unique Aboriginal people—in any way. The Court emphasized that "[t]here is no doubt that the Métis are a distinct people" and noted it has previously recognized Métis communities in both Alberta and Manitoba as a "culturally distinct Aboriginal people" (paras. 42-43). The Court also highlighted that the Inuit—who have their own history, language, culture and separate identities from "Indian tribes" or First Nations—are already recognized as "Indians" in s. 91(24) and their distinctiveness has not been compromised through this inclusion (paras. 39, 41).

Section 35 Rights and Definitional Issues Are Addressed Downstream from Jurisdiction

Since *Daniels* was not about whether Métis or non-status Indian communities possess Aboriginal rights or claims recognized by s. 35, the Court found "there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians" at this determination of jurisdiction stage. Essentially, all of these groups are included in s. 91(24) "by virtue of the fact that they are all Aboriginal peoples" (para. 46).

Determining whether “particular individuals or communities” are in s. 91(24) are “fact-driven question[s] to be decided on a case-by-case basis” (para. 47). At the jurisdiction stage, “community acceptance” is not required because the net is widely cast to include *all* Aboriginal peoples, including, “people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools” (paras. 46-49).

The Court, however, went on to highlight that Métis or non-status Indian inclusion in s. 91(24) is not the same as being recognized as a rights-bearing community or rights-holder for the purpose of s. 35 (para. 49). Section 91(24) serves “a very different constitutional purpose” than s. 35. Section 91(24) casts a wide net and deals with Parliament’s “relationships” with *all* Aboriginal peoples. Section 35, on the other hand, protects “historic community-held rights” and calls for the just settlement of rights and claims (paras. 34, 49, *Haida Nation v. BC*, paras. 20, 25). In effect, rights and definitional issues are answered *downstream* from jurisdiction. The visual below attempts to illustrate the interplay of ss. 91(24) and 35.



The Court reaffirmed that in the Métis context, the criteria in *R. v. Powley* must still be met to establish Métis rights (paras. 48-49). In the non-status Indian community context, *R. v. Van der Peet* likely applies or an individual must show they are a descendant/beneficiary of a treaty or a non-status member of a First Nation community.

Specifically, in relation to Métis rights, the *Powley* criteria for establishing a rights-bearing Métis community or identifying rights-holders (*i.e.*, self-identification, ancestral connection to the historic community and community acceptance) still applies (paras. 48-49). *Daniels* does not change these requirements. As the Court previously held,

It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. (*Powley*, para. 34)

This issue is particularly important for those Métis groups who rely on their registration systems for the identification of rights-holders and asserting s. 35 Métis rights for the purposes of Crown consultation, harvesting, *etc.* *Daniels* does not mean that anyone who claims to be “Métis” under s. 91(24) is now a s. 35 Métis rights-holder or could be “accepted” for such a purpose without still meeting the criteria set out in *Powley*.

Provincial Legislation Including Métis and Non-Status Indians Not Automatically Invalid

The Court held that provincial laws pertaining to Métis and non-status Indians are not inherently beyond the scope of provincial legislatures (para. 51). Provinces can pass laws in relation to provincial areas of jurisdiction, which affect or specifically deal with Métis or non-status Indians, as long as those laws do not impair the core of s. 91(24). The *Métis Settlements Act* (Alberta), *The Métis Act* (Saskatchewan) or *Métis Nation of Ontario Secretariat Act* (Ontario) are all examples of this type of permissible provincial law, wherein provinces have acted in their respective jurisdictional spheres.

The Crown is in a Fiduciary Relationship with Métis and Non-Status Indians

The Court reaffirmed based on *Delgamuukw v. BC* and *Manitoba Metis Federation Inc. v. Canada* that the Crown is in a fiduciary relationship with all Aboriginal peoples, including, Métis and non-status Indians. The Court did not issue a declaration on this issue because it would just be “restating settled law” (para. 53).

“The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature.”

— *Manitoba Métis Federation*,
para. 48

The Duty to Negotiate with Métis and Non-Status Indians

The Court reaffirmed based on *Haida Nation v. BC*, *Tsilhqot'in Nation v. BC* and *Powley* that “a context-specific duty to negotiate” exists “when Aboriginal rights are engaged.” This duty is not triggered by mere inclusion in s. 91(24); however, it applies where Métis or non-status Indian communities have credible or established s. 35 rights or claims. Again, the Court did not issue a declaration on this issue because to do so would have been “a restatement of the existing law” (para. 56).

This is a particularly significant development for Métis communities from Ontario westward whose s. 35 rights and/or claims have already been recognized by courts and/or provincial governments but who yet find that the federal government does not have any negotiation processes available to them. Further, they are excluded from Canada’s specific and comprehensive claims policies available to First Nations and the Inuit. This clear statement from the Court that there is a duty to negotiate (related to but distinct from the Crown’s duty to consult and accommodate) will be helpful to all Aboriginal peoples.

The Implications of *Daniels* for the Métis Nation

Nothing immediately changes for Métis based on the *Daniels* judgment. For example, Métis are not now registered as “status Indians” under the *Indian Act* or eligible to be registered as such. Various federal programs and services available to status Indians and Inuit are not now available to Métis (*i.e.*, non-insured health benefits, post-secondary education funding, etc.). Métis are not now eligible for tax exemptions available to some status Indians.

Going forward, however, it will be incumbent on Canada to move forward on several fronts with the authorized representatives of rights-bearing Métis communities. Given the Court's clarity in relation to jurisdiction, the fiduciary relationship and the duty to negotiate, the status quo is not an option.

For example, based on the Crown's duty to negotiate—where there are established or credible Métis rights and claims that implicate federal jurisdiction (*i.e.*, claims against the federal Crown, issues that go to the “core” of s. 91(24) such as Métis identification, self-government, *etc.*)—the ongoing exclusion of Métis from *all* federal negotiation processes cannot be sustained. Clearly, some type of federal negotiation and/or claims process for Métis must be established in order to meet the constitutional duty the Court reaffirmed. If not, rights-bearing Métis communities will likely turn to the courts again—this time for orders in relation to some type of negotiation processes being made available to them.

In addition, the policy rationales for Métis exclusion from a majority of federal programs and benefits (*i.e.*, non-insured health benefits, education supports, *etc.*) that are made available to other s. 91(24) “Indians” (*i.e.*, Inuit, status Indians, *etc.*) will likely need to be reviewed to assess if ongoing exclusion is justifiable. Notably, some of the arguments recently accepted by the Canadian Human Rights Tribunal with respect to the discrimination faced by First Nation communities in relation to child and family services have parallels to the situation faced by Métis communities. In particular, federal programs for First Nations and Inuit that deal with right-related issues will be particularly vulnerable to challenge since Métis exclusion could not be justified pursuant to s. 15(2) of the *Charter*.

It is also very likely that Tom Isaac's report (the federally appointed Ministerial Special Representative on Métis s. 35 rights) will inform what Canada does next. Mr. Isaac's report will likely be finalized and made publicly available in the next few months. For details visit: <https://www.aadnc-aandc.gc.ca/eng/1433442735272/1433442757318>.

About The Authors

This summary was prepared by Jason Madden, Nuri Frame, Zachary Davis and Megan Strachan of the law firm Pape Salter Teillet LLP. Additional information about the firm is available at www.pstlaw.ca.

Jason Madden, along with Clément Chartier, Q.C., Kathy Hodgson-Smith and Marc LeClair, were legal counsel for the MNC and intervened in *Daniels* at the Supreme Court of Canada.

April 27, 2016

SECTION 4

A high-angle, black and white photograph of a violin and its bow. The violin is positioned vertically, with the body facing downwards and the neck pointing upwards. The bow lies diagonally across the lower half of the violin. The instrument is set against a dark, heavily textured wooden background, possibly a table or floor, which shows signs of wear and grain. The lighting is dramatic, highlighting the curves of the violin and the texture of the wood.

Ministerial Special Representative on Section 35
Métis Rights Key Findings



MINISTERIAL SPECIAL REPRESENTATIVE ON SECTION 35 MÉTIS RIGHTS KEY FINDINGS

JULY 2016

Métis Section 35 Rights

- Prior to 1982, governments often denied that the Métis were a distinct Indigenous people with their own collectively-held rights. Métis inclusion in section 35 of the *Constitution Act, 1982* was meant to change the history of denial and neglect. Section 35 recognizes and affirms the existing aboriginal treaty rights of the Indian, Inuit and Métis people.
- In 2003, after 10 years of litigation, the Supreme Court of Canada recognized that the Métis community in the Sault Ste. Marie region of Ontario had a Métis right to hunt for food protected by section 35 in *R. v. Powley* (“*Powley*”). This was significant victory.
- *Powley* sets out the legal test all Métis communities must meet in order to establish section 35 rights.

The Ministerial Special Representative on Métis Section 35 Rights

- Ministerial Special Representatives (“MSRs”) are tasked with evaluating important policy issues; MSRs are not government employees and therefore are intended to provide independent recommendations to government.
- In June 2015, Thomas Isaac (a Calgary-based lawyer with expertise on Aboriginal legal issues that works largely for public governments and industry) was appointed as a MSR on section 35 Métis rights and the *Manitoba Metis Federation* (“MMF”) case. In August 2015, Mr. Isaac met with representatives of the MNA. Mr. Isaac’s final report was publicly released on July 21, 2016.¹

Summary of Recommendations

- The MSR report included 17 recommendations to the INAC Minister. Key themes in these recommendations are:
 - The need for the collaborative development and implementation of a ‘whole-of-government’ **Métis Section 35 Rights Framework** consistent with *Powley*, which would include processes to:
 - determine, recognize and respect Métis Section 35 Rights through negotiations;
 - resolve outstanding Métis claims and grievances against the Crown outside of litigation;
 - prioritize putting in place Crown-Métis consultation agreements.

¹ A copy of Mr. Isaac’s MSR report is available at: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford_newDirection-report_april2015_1427810490332_eng.pdf.



- A federal commitment to Métis governments from Ontario westward—including the Métis Nation of Alberta (“MNA”)—for **timely and permanent annual funding to advance government-to-government relationships**, including the ongoing support for democratic Métis self-government structures and the maintenance of objectively verifiable registries that identify Section 35 Métis Rights-Holders.
- Undertake **education initiatives and implement accountability measures for relevant federal employees** in relation to understanding and addressing Métis Section 35 Rights and building relationships with Métis governments;
- **Undertake a review and re-calibration of existing federal programs and services available to “Aboriginal peoples” to ensure Métis Section 35 Rights are considered** distinctly and equitably in relation to First Nations, non-status Indians and urban Aboriginal groups;
- Engage in **immediate negotiations with the MMF to implement the declaration in Supreme Court of Canada’s 2013 decision** and restore the honour the Crown.

Key Themes and Considerations

- **The “Way Forward” on Section 35 Métis Rights is with Rights-Bearing Métis Communities that Meet the *Powley* Test—Not Mixed Aboriginal Ancestry Individuals or Communities:**

“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 communities with their own unique culture, practices, traditions and language that makes Métis distinct Aboriginal peoples and distinct from their European and other Aboriginal ancestors. ... 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.” – (MSR Report, p. 6)
- **Reconciliation Demands that Métis Rights Be Determined, Recognized and Respected through Negotiations and Agreements between the Crown and Métis Communities—Platitudes and Symbolic Gestures Are Not Sufficient:**

“The lack of existing processes and structures to address Métis Section 35 rights claims and issues is apparent ... 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.” – (MSR Report, p. 29)
- **There Are Rights-Bearing Métis Communities from Ontario Westward as well as Outstanding Métis Claims Against the Crown that Must Be Addressed:**



“Some of the examples 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, the Treaty 3 [Halfbreed] 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 the Métis, among others. Addressing outstanding Métis claims is inextricably tied to a Section 35 Métis rights framework.” – (MSR Report, p. 30).

- **There is a Lack of Knowledge about Métis Section 35 Rights Across Both Levels of Government—Education on Métis Section 35 Rights is Essential to Advancing Reconciliation:**
“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.” – (MSR Report, p. 12)
- **Métis and Non-Status Indians Are Different People—Canada Should Not Continue to Lump Them Together:**
*“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 misunderstand or misinformation regarding the nature of Métis as a distinct Aboriginal peoples under Section 35.” – (MSR Report, p. 25)*
- **There is No Hierarchy of Rights amongst the Aboriginal Peoples included in Section 35—First Nations Rights do not have priority over Métis Rights:**
*“...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. ... There was a suggestion that there is some form of hierarchy of rights within Section 35, e.g. the rights of First Nations supersede the rights of Métis, even though there is **no** law supporting this proposition.” – (MSR Report, p. 12)*
- **Maintaining Credible and Objectively Verifiable Métis Registries is in the Public Interest—Canada Should Provide Permanent and Stable Funding for Métis Government Registries that Identify Rights-Holders:**



*“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.**” – (MSR Report, p. 18)*

- **Canada Must Review, Expand, Re-Calibrate or Create New Federal Initiatives that Deal with Métis Equitably—Ongoing Exclusionary Approaches and Pan-Aboriginal Initiatives Do Not Advance Reconciliation with the Métis:**

*“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 that 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.” – (MSR Report, p. 26)*

- **It is in the Public Interest for Canada to Support Democratic, Transparent and Credible Métis Governments that Represent Section 35 Métis Rights-Holders:**

*“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 the Métis have distinct democratic representation as Section 35 rights-bearing peoples.” – (MSR Report, p. 27)*

- **Canada Should Embrace Unique Forms of Self-Government for the Metis—It Should Not Be Bound by Existing Federal Approaches or Policies:**

*“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 by represent an opportunity for Canada to engage and not to be bound by past historical models of governance.**” – (MSR Report, p. 14)*



Important Issues and Findings Specific to the Métis Nation of Alberta

- **The MNA’s program and service delivery is “well-developed,” but the MNA needs more stable and predictable funding for its registry:**

“...MNA stated that, like other Governing Members, it has 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.” – (MSR Report, p. 23)

- **A provincial harvesting policy in Alberta based on mutual agreement is needed:**

“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 160km 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.” – (MSR Report, p. 24)

SECTION 5

Métis Harvesting in Alberta





Métis
Nation of
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March 18, 2016

Honourable Shannon Phillips
 Minister of Environment and Parks
 Legislature Office
 208 Legislature Building
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 Edmonton, AB, T5K 2B6

Re: Developing a “Way Forward” on Métis Harvesting in Alberta

Dear Minister Phillips:

I would like to thank you for meeting with me on February 18, 2016. Our conversation was, I feel, productive and a good starting point for the work that we have to do together. I look forward to collaborating with you in order to ensure both the continued sustainability of Alberta’s natural environment and the appropriate and meaningful recognition of the inherent and constitutionally protected rights of Alberta Métis.

As you know, the Métis Nation of Alberta (“MNA”) and the Government of Alberta (“GoA”) have a long, and, at various times, challenging history in dealing with the issue of Métis harvesting rights. It became apparent at our meeting, however, that both you and I wanted to find a mutually agreeable “way forward” on this file. The status quo is not an option. As such, I am following up with some suggestions on how we could potentially move forward—

together,

1. The MNA and GoA re-engage—at the officials level—in order to see if renewed progress can be made on Métis harvesting. In order to guide these discussions, mutually agreeable terms of reference or a memorandum of understanding under the MNA-Alberta Framework Agreement could be developed, including, reasonable capacity for the MNA to engage with your Ministry.
2. The GoA appoint a negotiator with a mandate to re-engage with the MNA on Métis harvesting issues with a view to achieving a mutually agreeable harvesting agreement or policy. These negotiations would consider recent developments in Métis harvesting rights case law as well as additional research and traditional land use studies that have been completed since all negotiations ended in 2007.
3. The GoA appoint an independent Ministerial Special Representative or a MLA Committee to look at this issue and provide a report with recommendations to the government on a potential way forward. Any such process would consider recent judicial developments with respect to Métis harvesting rights as well as receive submissions from the GoA, MNA and other stakeholders.

As I indicated at our meeting, the MNA is very interested in working with your Ministry on this matter of significant importance to Alberta Métis. The current state of affairs with respect to Métis harvesting in the province—more than any other issue—is an outstanding aggravation to our people. It must be addressed in order to truly build a renewed relationship between GoA and the MNA. It must also be addressed if the GoA is truly committed to respecting the *United Nations Declaration of the Rights of Indigenous Peoples* (“*UNDRIP*”). Related to this, I am attaching a document that assesses GoA’s current approach to Métis harvesting in relation to *UNDRIP*.

I am optimistic that through working—together—we can find a way forward on this file which is reflective of the positive relationship that the Métis Nation has been building with the new GoA. I look forward to hearing from you with respect to my suggestions for a “way forward” and would be pleased to discuss this issue with you further.

Yours very truly,



Audrey Poitras
President
Métis Nation of Alberta

encl. (1)

cc: Honourable Rachel Notely, Premier of Alberta
Honourable Richard Feehan, Minister of Indigenous Relations
Karen Collins, Co-Minister of Métis Rights and Accommodation
Bev New, Co-Minister of Métis Rights and Accommodation
Aaron Barner, Senior Executive Officer, Métis Nation of Alberta
Sara Parker, Director of Intergovernmental Affairs, Métis Nation of Alberta
Bruce Gladue, Director of Sustainable Development & Industry Relations, Métis Nation of Alberta



June 20, 2016

Honourable Shannon Phillips
Minister of Environment and Parks
Legislature Office
208 Legislature Building
10800 - 97 Avenue
Edmonton, AB, T5K 2B6

Re: Negotiations on Métis Harvesting in Alberta

Dear Minister Phillips: *Shannon*

I am writing to follow up on my letter of March 18, 2016. In that letter, I offered both an analysis of what the Métis Nation of Alberta ("MNA") understands to be the key legal and practical shortcomings of the Government of Alberta's current *Métis Harvesting Policy* and a number of suggestions for how we could move forward—together—to develop a new provincial policy that would reconcile the imperative of respecting Métis rights and the need to ensure the safe and sustainable harvest of Alberta's wildlife resources. We have yet to receive a response to that letter.

Since I wrote to you in March, the Supreme Court of Canada released its decision in *Daniels v. Canada*. In that case, among other things, the Court was asked to declare that the Métis have the right to be consulted and negotiated with respecting their rights and interests as Aboriginal people. In response, the Court wrote that

[56] ...*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, and *Powley* already recognize a context-specific duty to negotiate when Aboriginal rights are engaged.

As the Supreme Court of Canada pointed out, the context in which the Crown has a duty to negotiate regarding the rights claimed by Aboriginal people was articulated in *Haida*:

[25] The **potential rights** embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. **This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.** [Emphasis added.]

Clearly, based on Alberta's current *Métis Harvesting Policy* it already acknowledges that potential harvesting rights *qua* Métis exist throughout the province. However, as the MNA's previous critique emphasized the policy is not consistent with the direction from the Alberta

Court of Appeal in *R. v. Hirsekorn* in relation to the regional scope of rights-bearing Métis communities. Nor does the policy ensure that the Métis community has a role in ensuring that rights-holders are accepted by the modern day Métis community. This flawed policy calls out for renewed negotiations consistent with the current government's commitment to implement the principles from the United Nations Declaration on the Rights of Indigenous Peoples in partnership with Aboriginal peoples.

Indeed, in *Powley*, the Supreme Court of Canada referenced the Crown's explicit duty to negotiate with the Métis regarding their harvesting rights: "[i]n the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land."¹ We must work—together—based on the facts of history and the direction of the courts to negotiate these contours. This type of collaboration is what section 35 demand—not unilaterally imposed policies that frustrate the relationship and the exercise of section 35 rights.

Given the renewed emphasis that the Supreme Court of Canada placed in *Daniels* on the Crown's duty to negotiate with the Métis regarding their asserted Aboriginal rights, we now believe that the most appropriate way to bring recognition and clarity to Métis harvesting rights in Alberta would be, as I suggested in my letter of March 18, 2016, that "[t]he GoA appoint a negotiator with a mandate to re-engage with the MNA on Métis harvesting issues with a view to achieving a mutually agreeable harvesting agreement or policy." In keeping with the direction given in *Powley*, I reiterate my earlier suggestion that "[t]hese negotiations would consider recent developments in Métis harvesting rights case law as well as additional research and traditional land use studies that have been completed since all negotiations ended in 2007." Again, I offer this as just one suggestion on how we can move forward on this issue—together.

While the MNA remains open to pursuing other suggestions from Alberta on how to address outstanding disagreements in relation to Métis harvesting rights, I want to be clear that continued inaction on this issue of fundamental importance to Alberta Métis is not an option. As we have outlined in past submissions to the Alberta Government, we do not believe Alberta's current approach to Métis harvesting is consistent with existing jurisprudence from both the Supreme Court of Canada and the Alberta Court of Appeal. We do not want to have to turn back to the courts on these issues, however, the status quo is unacceptable. The MNA requires an understanding on whether we are going to move forward on these issues—together—prior to the MNA's upcoming Annual General Assembly, which will be held at the beginning of August 2016. If not, the MNA will be seeking a mandate from the Assembly to develop a legal strategy that will see us return to the courts on this issue.

¹ *R. v. Powley*, 2003 SCC 43 at para. 50.

Let me be very clear: it is not the MNA's desire to have to return to the courts on the issue of Métis harvesting rights in Alberta. Over the last few years, however, we have put forward a multitude of options to the Alberta Government on how we could make collaborative progress on this issue, including establishing a working group to attempt to arrive at common understandings on where there are rights-bearing Métis communities in Alberta, the appointment of a Ministerial Special Representative to look at this issue, tasking a MLA Committee to look at this issue again given development in the law, renewed MNA-Alberta negotiations, etc. We have not received a formal response to any of these proposals. So, if the Alberta Government is unwilling to negotiate on this issue, what other course of action does the MNA have other than to turn to the courts again to break the status quo?

I truly believe there must be a better way forward on the issue of Métis harvesting than having to turn back to the courts. It flies in the face of all the positive progress we are making on so many other fronts. I would also note that both the Ontario and Manitoba governments have negotiated harvesting agreements with Métis in those provinces. We can do the same here in Alberta, rather than the courts defining our relationship. In order to follow up on my letters and our previous discussion, I am requesting a meeting with you as soon as possible. I also think it would be helpful if Minister Feehan attended this meeting, since we have been making significant progress with his Ministry on some issues that implicate Métis harvesting rights (i.e., Crown consultation, the MNA's authorization to represent Métis rights-holders, etc.).

In order to arrange such a meeting, I have asked my Executive Assistant, Sonia Millman, to contact your office to assist in making the necessary meeting arrangements. She can also be reached at 780-455-2200. If you have any questions or suggestions prior to our meeting, please feel free to call me anytime. I look forward to working with you on this issue of fundamental importance to Alberta Métis.

Yours very truly,



Audrey Poitras
President
Métis Nation of Alberta

cc: Métis Nation of Alberta Provincial Council
Honourable Rachel Notley, Premier of Alberta
Honourable Richard Feehan, Minister of Indigenous Relations
Karen Collins, Co-Minister of Métis Rights and Accommodation
Bev New, Co-Minister of Métis Rights and Accommodation
Aaron Barner, Senior Executive Officer, Métis Nation of Alberta
Sara Parker, Director of Intergovernmental Affairs, Métis Nation of Alberta
Bruce Gladue, Director of Sustainable Development & Industry Relations, Métis Nation of Alberta



Critique of the Government of Alberta’s “Métis Harvesting in Alberta” Policy based on the *United Nations Declaration on the Rights of Indigenous Peoples*, the Crown’s Constitutional Duties and Section 35 of the *Constitution Act, 1982*.

This document, prepared by the Métis Nation of Alberta (“MNA”), provides a critique of the Government of Alberta’s (“GoA’s”) current policy on Métis harvesting (the “Policy”)¹ against the following: (1) the rights, interests and principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (“*UNDRIP*”); (2) the Crown’s constitutional duties owing to the Métis in Alberta, including, the honour of the Crown and the Crown’s duty to consult with Indigenous peoples; (3) the purpose of s. 35 of the *Constitution Act, 1982* and the Aboriginal rights of the Métis recognized and affirmed therein.

The Métis in Alberta and their Harvesting Rights

The Métis are a distinct Indigenous people that emerged in the “western territories” prior to Canada’s expansion westward.² This Métis people collectively refer to themselves and are referred to as the Métis Nation. The former “western territories,” including present-day Alberta, constitute the Métis Nation’s historic and contemporary homeland. Consistent with *UNDRIP*, the Métis Nation holds inherent rights to their lands and resources, as well as rights to self-government and self-determination. These rights, which inhere within all Indigenous peoples, are fundamental to the Métis Nation.

Pursuant to s. 35 of the *Constitution Act, 1982* the Métis have rights that are constitutionally protected based on the pre-existing customs, practices, and traditions that are integral to their distinctive culture. In *R. v. Powley*, the Supreme Court of Canada explained that Métis rights are “recognize[d] as part of the special Aboriginal relationship to the land”³ and are grounded on a “communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land.”⁴ Accordingly, Métis harvesting rights exist and may be exercised throughout the homeland of the Métis Nation, including, present day Alberta.

¹ Government of Alberta, *Métis Harvesting in Alberta* (Updated June 2010). A copy of the Policy is available at: <http://esrd.alberta.ca/fish-wildlife/fishing-hunting-trapping/documents/MetisHarvestingAlberta-Jun2010.pdf>.

² The Supreme Court of Canada has referred to the Métis as one of two peoples Indigenous to the western territories: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 2.

³ *R. v. Powley*, [2003] 2 S.C.R. 207, para. 50.

⁴ *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 5.



As the Alberta Court of Appeal put the matter in *Hirse Korn* “[n]o one disputes that hunting the buffalo on the plains, and hunting for food generally, was integral to the Métis culture.”⁵ There ought to be no dispute that the historic and contemporary rights-bearing Métis communities in Alberta have harvesting rights that are recognized and confirmed by s. 35 of the *Constitution Act, 1982*. What is needed in Alberta, and what the current Policy fails to deliver, is an administrative regime that offers appropriate recognition of these rights and that provides clarity consistent with *UNDRIP* and the constitution as to how, when, and where they can be exercised and by whom.

The Métis Nation of Alberta

Since 1928, the Métis Nation of Alberta (“MNA”) has been formalized as the collective voice of the Métis in Alberta with respect to the advancement and recognition Métis lands, rights and interests. As recognized by the courts, Aboriginal groups, including rights-bearing Métis communities, “can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights.”⁶ This is further confirmed by *UNDRIP*, which provides that “Indigenous peoples have the right to determine the responsibilities of individuals to their communities.”⁷

In keeping with the aforementioned legal principles, the Métis in Alberta have legally authorized the MNA to represent them for the purposes of asserting their collectively held Aboriginal rights. This is expressly set out in the MNA’s By-laws, which mandate the MNA as follows:

- 1.2 To stand as the political representative of all Métis in Alberta and to promote self-determination and self-government for Métis in Alberta and Canada;
- 1.3 To promote, pursue and defend aboriginal, legal, constitutional, and other rights of Métis in Alberta and Canada;
- 1.4 Re-establish land and resources bases;⁸

As the authorized representative institution of the Métis in Alberta, the MNA is “sustained by agreement among its members” and “[i]ts powers come largely from consent and implied contract.”⁹ Individual Métis rights-holders voluntarily mandate the MNA to represent their collective rights, interests, and claims. To date, over 35,000 Métis living in Alberta have willingly applied to the MNA for membership.

⁵ *R. v. Hirsekorn*, 2013 ABCA 242 at para. 73.

⁶ *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 30.

⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, art. 35.

⁸ Métis Nation of Alberta, *Bylaws of the Métis Nation of Alberta Association* (December 18, 2015), arts. 1.2 to 1.4.

⁹ *Métis Nation of Alberta v. Boucher*, 2009 ABCA 5 at paras. 7 & 10.



Through this consensual, transparent and objectively verifiable registration process, these Métis rights-holders agree to the MNA’s authority to represent their collectively-held rights interests and claims through the MNA’s governance structures at the local (i.e., Locals), regional (i.e., Regional Councils) and provincial (i.e., Provincial Council) levels working together—as the government of the Métis in Alberta.

In dealing with Aboriginal groups and developing policies that may affect their rights, the Crown, including the GoA, “should respect the position of the aboriginal groups and engage with them at the level requested by the groups themselves.”¹⁰ Again, this is confirmed by *UNDRIP*.¹¹ It follows from the forgoing that in developing a new provincial policy regarding Métis harvesting the GoA must engage with the MNA.

The Policy

The current Policy was adopted unilaterally by the GoA in 2007 and later amended without any discussions with the MNA in 2010. By these unilateral acts, the GoA replaced the Interim Métis Harvesting Agreement, which had been executed representatives of the GoA and the MNA and which had, since 2004, framed the exercise of Métis harvesting rights in the province.¹²

Based on existing jurisprudence on s. 35 rights and the Crown’s constitutional duties owing to Aboriginal peoples, this Policy is invalid and unenforceable to the extent that,

1. it was not developed in a manner that discharged the Crown’s duty to consult and accommodate;
2. the limits it imposes are not backed by a compelling and substantial objective; and,
3. it is inconsistent with the Crown’s fiduciary obligation to the Métis.¹³

As the GoA imposed the Policy on the Métis without any consultations and many of its limits on the exercise of harvesting rights are arbitrary, the GoA would seem to have a clear interest in seeking to develop, with the MNA’s collaboration, a new policy or agreement that will be both acceptable to both parties and consistent with *UNDRIP*, s. 35 of the *Constitution Act, 1982* as well as discharged the Crown’s constitutional obligations owing to the Métis in Alberta. It is our hope that the GoA and the MNA can again reach an agreement regarding the exercise of Métis rights.

¹⁰ Jack Woodward, *Native Law*, loose-leaf 2015-Rel. 7 (Toronto: Carswell, 1994) at 5§1580.

¹¹ *United Nations Declaration on the Rights of Indigenous Peoples*, art. 19.

¹² *R. v. Kelley*, 2007 ABQB 41 at paras. 85 & 86.

¹³ *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257 at para. 77.



We note that the pursuit of such an agreement would be consistent with *UNDRIP*, which provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹⁴

Importantly, the GoA has pledged to review its existing policies that “require changes based on the principles of the UN Declaration.”¹⁵ The MNA hopes this commitment will act as an impetus for a meaningful review of its Policy with the MNA. In addition, other provincial governments in Manitoba and Ontario have reached mutually agreeable harvesting agreements with Métis governments in those provinces. There is no reason the MNA and GoA cannot do the same if there is political will to do so.

Any future agreement between the GoA and the MNA regarding harvesting rights would need to address and resolve the many problematic features of the current Policy. These problems are enumerated and explained below. It is hoped that this enumeration can serve as a preliminary basis for discussions aimed at developing a new, mutually agreeable provincial Métis harvesting policy.

Identification of Métis Harvesters

The Policy refers to the three-part test set out by the Supreme Court of Canada in *Powley* for determining whether a person is a member of a contemporary rights-bearing Métis community:

1. self-identification as a member of a Métis community;
2. ancestral connection to a historic Métis community; and,
3. acceptance by a modern Métis community.¹⁶

In relation to the third element of this test, however, the Policy provides for no involvement or recognition of the practices of modern Métis communities in determining their own membership. Despite the fact that the Supreme Court of Canada in *Powley* wrote that “[m]embership in a Métis political organization may be relevant to the question of community acceptance,”¹⁷ the Policy does not include membership in the MNA as a relevant factor. In fact, it excludes any consideration of the MNA’s registration system, which is financially supported by the Government of Canada.

¹⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, art. 19.

¹⁵ Letter from Premier Rachel Notley to Provincial Cabinet Ministers (July 7, 2015).

¹⁶ *R. v. Powley*, [2003] 2 SCR 207, 2003 SCC 43 at paras. 31-33.

¹⁷ *R. v. Powley*, [2003] 2 SCR 207, 2003 SCC 43 at para. 33.



More importantly, the Policy does not recognize the MNA’s fundamental role in this process, as the authorized representative of modern day Métis communities in Alberta. Instead, a paternalistic approach has been adopted by the GoA, which completely excludes the Métis community and the authorized representative of Métis rights-holders—the MNA. This is an unacceptable omission, which creates a fundamental flaw in the Policy.

As previously noted above, the MNA has been the authorized representative of the Métis in Alberta in relation to their collective rights since 1928. At present the MNA has some 35,000 members, which by any measure amounts to the critical mass of Métis in the province. For nearly a century, membership in the MNA has been an important part of the Alberta Métis experience.

In 2003, the MNA General Assembly accepted, passed, and incorporated into its bylaws the definition of “Métis” used by the Métis National Council.¹⁸ This definition is now applied by the MNA in determining membership in a manner that is objective, verifiable, and consistent with the practices of other Métis governments across the country.

The MNA’s membership process is entirely consistent with *UNDRIP*, which provides that “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.”¹⁹ By setting out an ill-defined measure for determining acceptance in a contemporary Métis community, and by failing to take account of the important role of the MNA in this regard, the Policy falls far short of either recognized legal standards or best practices. The Policy must be amended to reflect both.

Identification of Métis Communities

There are two major problems with the manner in which the Policy identifies Métis communities:

1. it ignores numerous towns and villages across the province with significant historic and contemporary Métis populations;
2. it distorts and impoverishes the notion of a Métis community by framing it as a local settlement rather than a broad-based regional entity.

¹⁸ *Bylaws of the Métis Nation of Alberta Association*, art. 3.1: “Métis” means a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of historic Métis Nation Ancestry and who is accepted by the Métis Nation.

¹⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, art. 33 (1).



The Policy recognizes as historical and contemporary Métis communities the 8 Métis Settlements in addition to 17 towns across northern Alberta. The Policy’s list, however, omits numerous historic and contemporary centers of Métis population, many of which have already been recognized by the courts: Edmonton, Victoria Settlement, Rocky Mountain House,²⁰ and St. Albert,²¹ for example.

Just as importantly, the Policy gives no recognition to the importance of the MNA’s presence in a region—through its Locals and Regional Councils—in determining the existence of a Métis community. As the MNA has been the principle means by which the Métis in Alberta have organized themselves for almost a century, MNA presence cannot be ignored in determining the existence of rights-bearing Métis communities.

In addition, and more significantly, the Policy erroneously defines Métis communities as tantamount to settlements or towns. The Alberta Court of Appeal has explicitly rejected this approach:

I conclude that the historical rights bearing communities of the plains Métis are best considered as regional in nature, as opposed to settlement-based.²²

The Policy must be amended to reflect this judicial finding. Attempts to reduce historically nomadic and regional Aboriginal groups to localized settlements for contemporary purposes distort and unduly diminish their constitutionally protected rights.²³ By artificially carving contemporary, regional, rights-bearing Métis communities into distinct localities, the Policy undercuts the purpose and promise of s. 35 of the *Constitution Act, 1982*: “to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.”²⁴

Commercial Harvesting Rights

The Policy denies the right of Métis harvesters to sell the game and furbearing animals they hunt and trap other than as presently permitted by provincial legislation. In this respect, the Policy leaves no room for the Métis’ asserted trade and commercial rights.

²⁰ *R. v. Hirsekorn*, 2010 ABPC 385 at para. 115 aff’d 2013 ABCA 242.

²¹ *Caron v. Alberta*, 2015 SCC 56 at para. 210; *R. v. Hirsekorn*, 2010 ABPC 385 at para. 115 aff’d 2013 ABCA 242.

²² *R v Hirsekorn*, 2013 ABCA 242 at para. 63.

²³ *R v Hirsekorn*, 2013 ABCA 242 at para. 94; *Tsilhqot’in Nation v. BC*, 2012 BCCA 285 rev’d 2014 SCC 44 but not on this point.

²⁴ *R. v. Powley*, [2003] 2 SCR 207 at para. 13.



The Métis have their roots in the western fur trade.²⁵ The Métis in Alberta are descendants of early unions between Aboriginal women and European traders.²⁶ As a distinct Métis culture developed, the Métis took up trade as a key aspect of their way of life. Many Métis became independent traders, acting as middlemen between First Nations and Europeans.²⁷ Others ensured their subsistence and prosperity by trading resources they themselves hunted and gathered.²⁸ Either way, trade was essential to how the Métis chose to live, and it allowed Métis culture to develop and thrive. These practices continue through the modern day.²⁹

There is little doubt that trade and commerce are customs, practices, and traditions that are integral to the distinctive Métis culture. The Métis' claim to commercial and trade related rights is strong and well founded. Indeed, Alberta courts have acknowledged that *Powley* does not preclude such claims.³⁰ It is incumbent on the Crown to take these claims seriously and to adopt policies that reflect them.

Where Harvesting Can Take Place

The Policy provides that Métis harvesters may only hunt on unoccupied Crown land and on other land to which they have secured a right of access for hunting (e.g. the Policy prohibits hunting on privately-owned lands without the owners permission). The Policy in this respect is inconsistent with *Powley* in as much as *Powley* does not preclude Métis “rights to hunt on other than unoccupied Crown lands.”³¹ In fact, the constitutionally protected rights of Aboriginal people to access privately owned lands for the purposes of hunting persist so long as these lands are not put to a use “visibly incompatible” with hunting.³²

²⁵ *Alberta (Aboriginal Affairs) v. Cunningham*, 2011 SCC 37 at para. 5; *R v Hirsekorn*, 2013 ABCA 242 at paras. 24, 26 & 28.

²⁶ *Alberta (Aboriginal Affairs) v. Cunningham*, 2011 SCC 37 at para. 5.

²⁷ *R. v. Goodon*, 2008 MBPC 59 at para. 30.

²⁸ *R. v. Goodon*, 2008 MBPC 59 at para. 31, 33, & 71.

²⁹ The MNA notes that unlike the commercial rights of First Nations in Alberta, which were modified by the *Alberta Natural Resource Transfer Agreement (R. v. Horseman*, [1990] 1 SCR 901) the Métis were not subject to the *Alberta Natural Resource Transfer Agreement*, and their rights were not affected by it (*R. v. Blais*, 2003 SCC 44).

³⁰ *R. v. Kelley*, 2007 ABQB 41 at paras. 65.

³¹ *R. v. Kelley*, 2007 ABQB 41 at paras. 65.

³² *R. v. Badger*, [1996] 1 SCR 771 at para. 66.



The MNA notes in this regard that unlike First Nations in Alberta, the Aboriginal rights of the Métis were never recognized, converted, and modified by treaties or the *Natural Resources Transfer Agreement, 1930*,³³ and that the pre-existing customs, practices, and traditions of Métis communities continue to exist and be protected as Aboriginal rights.³⁴ Métis harvesting rights are not tempered by the “taking up” clauses found in historic treaties with First Nations. As such, Métis rights must be respected as they are, unmodified by legislation or agreements.

Even more troubling, the policy restricts the territory where Métis harvesters can hunt to within 160 kilometers of their home “communities.” The 160-kilometer limit is entirely arbitrary. It ignores the aforementioned regional character of rights-bearing Métis communities. It ignores “the territorial nature of the practices and traditions of a nomadic people,” which Alberta courts recognize the Métis to have been.³⁵ With no support in law, history, or the continuing distinctive cultural practices of the Métis, the 160-kilometer limit must be removed from the Policy.

Fortunately, the Policy itself recognizes the inadequacy of the 160-kilometer limit and stipulates that it will only be imposed “[i]n the absence of a more definitive description of a community’s historical harvesting area.”³⁶

Based on the context and factors set out above, the time has come for the GoA and the MNA to collaborate on developing a mutually agreeable process for defining both Métis communities and their harvesting areas. The MNA suggests that we should take advantage of this opportunity and use it to develop solutions to the other shortcomings with the Policy noted above.

³³ *R. v. Blais*, 2003 SCC 44.

³⁴ *R. v. Powley*, [2003] 2 SCR 207.

³⁵ *R v Hirsekorn*, 2013 ABCA 242 at paras. 95 & 96.

³⁶ Government of Alberta, *Métis Harvesting in Alberta* (July 2007 – Updated June 2010) at p. 3.

SECTION 6

Manitoba Métis Federation/Government of Canada
Memorandum of Understanding





Canada

**MEMORANDUM OF UNDERSTANDING ON ADVANCING RECONCILIATION
("MOU")**

BETWEEN:

**MANITOBA METIS FEDERATION INC.
as represented by its President
("MMF")**

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Indian Affairs and Northern Development
("Canada")**

(hereinafter referred to collectively as the "Parties" and individually as a "Party")

WHEREAS on April 15, 1981, the MMF commenced litigation against Canada in relation to the land grant provisions set out in the *Manitoba Act, 1870* for the purpose of securing a judicial declaration to assist it in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is now reflected in s. 35 of the *Constitution Act, 1982*;

AND WHEREAS on March 8, 2013, the Supreme Court of Canada released its decision in *Manitoba Metis Federation Inc. v. Canada (AG)* and held "[t]he unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import" and issued a declaration "[t]hat 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";

AND WHEREAS the Supreme Court of Canada recognized that the claim of the Manitoba Métis Community was "not a series of claims for individual relief" but a "collective claim for declaratory relief for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada" and went on to grant the MMF standing by concluding "[t]his collective claim merits allowing the body representing the collective Métis interest to come before the court";

AND WHEREAS Canada is committed to working, on a nation-to-nation basis, with the Métis Nation, through bilateral discussions and engagement with the MMF, in order to advance reconciliation and renew the relationship through cooperation, respect for Métis rights, and ending the status quo;

AND WHEREAS the MMF President and the Minister of Indian Affairs and Northern Development have met and agreed that their representatives will engage in a time-limited, exploratory discussion table with a view to identifying a mutually-acceptable path to advance reconciliation in a manner consistent with the Supreme Court of Canada's decision in *Manitoba Metis Federation Inc. v. Canada*;

NOW THEREFORE the Parties agree as follows:

1. The Parties will establish and participate in an exploratory discussion table.
2. The objective of the exploratory discussion table will be to develop a mutually-acceptable framework agreement to advance reconciliation in a manner consistent with the Supreme Court of Canada's decision in *Manitoba Metis Federation Inc. v. Canada*.
3. The Parties recognize the importance of having the Province of Manitoba's participation in a process to advance reconciliation, and will, when and where appropriate, encourage the Province of Manitoba to contribute to the exploratory discussion table's discussions as an active participant.
4. If the Parties are able to develop a mutually-acceptable framework agreement through the exploratory discussion table, the Minister of Indian Affairs and Northern Development will then take measures aimed at obtaining a formal negotiation mandate.
5. Unless the Parties otherwise agree, the exploratory discussion table will have at least one meeting every six weeks from the date this MOU comes into force, and, subject to paragraph 13, the exploratory discussion table's discussions will conclude by September 2016.
6. Each Party will determine who will represent it at the exploratory discussion table.
7. The Parties will jointly select a suitable time and place for each meeting.
8. The Parties recognize that the MMF requires reasonable capacity to participate in the exploratory discussion process contemplated under this MOU. The Parties will work to develop a mutually-acceptable workplan and budget to support the MMF's participation in the exploratory discussion table. Any workplan, budget and funding agreement shall be consistent with the policies of the Department of Indian Affairs and Northern Development.

9. Except for this paragraph 9 and paragraphs 10, 12 and 15, this MOU is not legally binding, is intended only as an expression of good will and political commitment, and does not create, amend, recognize or deny any legal or constitutional right or obligation on the part of either Party.

10. Whether or not disclosed to citizens of the MMF, to a third party or to the public,

- a. this MOU (other than paragraphs 9, 10, 12 and 15),
- b. all discussions of the exploratory discussion table, and
- c. all records, information and communications that disclose the content of discussions or the content of a Party's positions or views

will be without prejudice to the legal rights of, and to the positions which may be taken by, any Party in any legal proceeding, negotiation or otherwise. Except for the purpose of enforcing paragraph 9, 10, 12 and 15, the Parties will not seek admission of or voluntarily tender, in a court of law or in any proceeding before a tribunal or board, evidence respecting this MOU or respecting any item mentioned in (b) or (c) of this paragraph 10.

11. The Parties will discuss the possibility of establishing a joint communications approach in relation to this MOU, which may include details on how and when the Parties would jointly inform the public or the media of the fact of this MOU and its contents.

12. Unless the Parties agree otherwise, in advance and in writing,

- a. all discussions of the exploratory discussion table will be held in camera and remain confidential,
- b. a Party will not disclose any records, information or communications that reveal the content of discussions or the content of the other Party's positions or views, and
- c. during the term of the exploratory discussion table's discussions, a Party will not disclose any records, information or communications of the exploratory discussion table that reveal the content of the Party's own positions or views.

13. This MOU comes into force when signed and, subject to paragraph 14, will remain in effect until it is replaced by a subsequent agreement between the Parties.

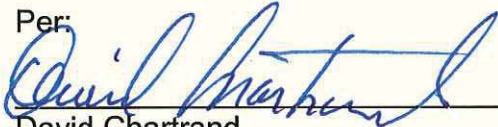
14. Either Party may terminate this MOU on 30 days' written notice to the other Party.

15. Unless the Parties otherwise agree in writing, the provisions of paragraphs 9, 10, 12 and 15 will survive the conclusion of the exploratory discussion table's discussions and any termination of this MOU.

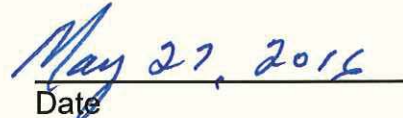
Signed and agreed to by the Parties on the dates set out below.

MANITOBA METIS FEDERATION INC.

Per:



David Chartrand
President
Manitoba Metis Federation



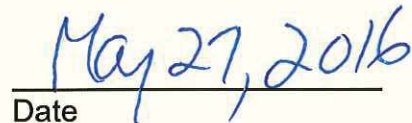
Date

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Per:



The Honourable Carolyn Bennett
Minister of Indian Affairs and Northern Development
Government of Canada



Date

Witness: 





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